

PARTIALLY DISSENTING OPINION OF JUDGE HENDERSON

1. I am in agreement with the decision to grant in part the 'Prosecution application to conditionally admit the prior recorded statements and related documents of P-0588, P-0589 and P-0590 under rule 68(2)(b) and the prior recorded statements and related documents of P-0169, P-0217, P-0230, P-0555, P-0573, P-0587, P-0112 and P-0344 under rule 68(3)' of 19 April 2016.¹

2. This partially dissenting opinion is with respect to the following: First, I disagree that a decision under rule 68 of the Rules can be limited to simply considering the prior recorded testimony as being merely 'submitted' instead of formally admitted in the sense of article 64(9)(a) and 69(4) of the Statute. Second, I disagree that it is appropriate to apply rule 68 of the Rules to (parts of) prior recorded testimony that are based on anonymous hearsay or the opinion of the witness. Third, I am of the view that the Chamber should adhere to the guidance provided by the Appeals Chamber regarding the application of rule 68(3) of the Rules. Fourth, I disagree with the meaning my colleagues give to the concept of 'issues that are materially in dispute'. Fifth, I disagree with my colleagues' interpretation of the notion of 'indicia of reliability'. Sixth, I do not think it is appropriate to apply rule 68 of the Rules to the prior recorded testimony of witnesses P-217 and P-230. Finally, I disagree that it is possible to admit documentary evidence on the basis of rule 68 of the Rules, without applying the proper admissibility test of article 69(4) of the Statute, simply because prior recorded testimony that is admitted under rule 68 of the Rules makes reference to such evidence.

¹ ICC-02/11-01/15-487-Conf (hereinafter, "First Rule 68 Application").

I. Rule 68 of the Rules relates to the admission of prior recorded testimony

3. Although the wording of rule 68 of the Rules is not particularly clear in this regard, there is little doubt that it gives Chambers the power to formally admit prior recorded testimony. Support for this view is found in the jurisprudence of all other trial chambers of this Court,² as well as the amended text of rule 68(1) of the Rules, which specifically mentions article 69(4) of the Statute. Such reference would be incongruous if the prior recorded testimony would not be formally admitted.³

²See, *inter alia*, Trial Chamber I, The Prosecutor v. Thomas Lubanga Dyilo, "Decision on the prosecution's application for the admission of the prior recorded statements of two witnesses", 15 January 2009, ICC-01/04-01/06-1603; Trial Chamber II, The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, "Corrigendum to the Decision on the Prosecution Motion for admission of prior recorded testimony of Witness P-02 and accompanying video excerpts", 27 August 2010, ICC-01/04-01/07-2289-Corr-Red; Trial Chamber II, The Prosecutor v. Germain Katanga, "Decision on Prosecutor's request to allow the introduction into evidence of the prior recorded testimony of P-166 and P-219", 3 September 2010, ICC-01/04-01/07-2362; Trial Chamber III, The Prosecutor v. Jean-Pierre Bemba Gombo, "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 20 November 2011, ICC-01/05-01/08-1022; Trial Chamber III, The Prosecutor v. Jean-Pierre Bemba Gombo, "Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011", 9 February 2012, ICC-01/05-01/08-2012-Red; Appeals Chamber, The Prosecutor v. Jean-Pierre Bemba Gombo, "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence'", 3 May 2011, ICC-01/05-01/08-1386; Trial Chamber V(a), The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, "Public Redacted Version of Corrigendum: Decision on Prosecution Request for Admission of Prior Recorded Testimony", 19 August 2015, ICC-01/09-01/11-1938-Corr-Red2; Appeals Chamber, William Samoei Ruto and Joshua Arap Sang, "Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled 'Decision on Prosecution Request for Admission of Prior Recorded Testimony'", 12 February 2016, ICC-01/09-01/11-2024, at para. 86; Trial Chamber VI, The Prosecutor v. Bosco Ntaganda, "Decision on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0010", 6 November 2015, ICC-01/4-02/06-988; Trial Chamber VII, The Prosecutor v. Jean-Pierre Bemba Gombo et al., "Corrigendum of public redacted version of Public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests", 12 November 2015, ICC-01/05-01/13-1478-Red-Corr.

³ It is noteworthy that this was also the view of the Working Group on Lessons Learnt of the Assembly of States Parties. See, Study Group on Governance, Working Group on Lessons Learnt, 'Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior

4. I am, of course, aware that this Chamber, by majority, has elected, as a general rule, to defer formal admissibility decisions until the end of the trial proceedings.⁴ However, I note that this decision made express provision to rule on admissibility and relevance sooner “when an intermediate ruling is required under the Statute or otherwise appropriate.”⁵ Since a decision under rule 68 of the Rules constitutes a formal exception to the principle of orality enshrined in article 69(2) of the Statute, it is, in my view, inappropriate to defer the decision on whether or not the prior recorded testimony will be formally admitted for the truth of its contents until the end of the trial. Such an approach would create unnecessary uncertainty for the parties. First, the calling party would not know whether it can rely on what is contained in the prior recorded testimony of a witness until it is too late for it to still call the witness. Second, the non-calling party would not know whether it should devote its limited time and resources to challenging the evidence, by way of cross-examination (in the case of rule 68(3) of the Rules) or otherwise (in the case of rule 68(2) of the Rules), until the end of the trial.
5. It is worth noting, in this regard, that Trial Chamber VII, which adopted a similar general approach to admissibility as the majority of this Chamber, nevertheless decided that it would rule on the admissibility of requests under rule 68 of the Rules immediately⁶ and has in fact done so in practice.⁷

Recorded Testimony), ICC-ASP/12/37/Add.1, at para. 13, which reads: “The WGLL understands that the term ‘introduction’ refers to the general admission of evidence in this context.”

⁴ “Decision on the submission and admission of evidence”, 29 January 2016, ICC-02/11-01/15-405

⁵ *Ibid.*, at page 10, First operative paragraph.

⁶ Trial Chamber VII, *Prosecutor v. Bemba et al.*, “Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf)”, 24 September 2015, ICC-01/05-01/13-1285, at para. 13.

II. Rule 68 of the Rules cannot be applied without having regard to the general rules of admissibility under article 69(4) of the Statute.

6. The starting point of my analysis is that prior recorded testimony should, to the extent possible, be treated in the same way as in-court testimony. Accordingly, if it is impermissible for a witness who is not an expert testifying in court to provide opinion evidence or to speculate,⁸ it follows that similar opinion or speculative evidence contained in a prior recorded statement admitted under rule 68 of the Rules, should in like manner be excluded. The application of rule 68 of the Rules should thus generally be limited to those parts of the prior recorded testimony that would have been permissible had the witness been examined by the calling party in court. I am therefore of the view that admission under rule 68 of the Rules is not necessarily an all-or-nothing decision and that it is possible to use the provision to admit only parts of a prior recorded testimony that are admissible.
7. Apart from excluding opinion and speculative testimony under rule 68, it is also of the greatest importance to only admit prior recorded testimony when the record of this testimony (be it a signed statement or a transcript) clearly indicates the source of the witnesses' knowledge of the facts they testify about.⁹ This is particularly important when the witness provides hearsay evidence.

⁷ See, for example, Trial Chamber VII, *Prosecutor v. Bemba et al.*, "Decision on Prosecution Rule 68(2) and (3) Requests", 12 November 2015, ICC-01/05-01/13-1478-Red.

⁸ I note, in this regard, that this Chamber has instructed parties to refrain from asking witnesses to speculate or provide opinion evidence. See, "Amended and Supplemented Directions of the Conduct of the Proceedings", ICC-02/11-01/15-498-AnxA, para. 23.

⁹ This requirement is also fully in line with this Chamber's Amended and Supplemented Directions of the Conduct of the Proceedings", ICC-02/11-01/15-498-AnxA, at para. 23, where the Chamber held that "[i]t is the responsibility of examining counsel to elicit the basis of the witness's knowledge for every relevant fact."

8. I am fully aware that there is no general exclusionary rule against hearsay, nor would I advocate introducing such an indiscriminate rule. However, in the same manner that hearsay should not be systematically excluded from the Chamber's consideration, it does not follow it should be systematically admitted. Indeed, rule 68 of the Rules does not permit the Chamber to circumvent the requirements of article 69(4) of the Statute, which lays down the general admissibility test before this Court. Article 69(4) provides:

The Court may rule on the relevance and admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness [...]

9. This provision when properly construed requires the Chamber, when determining admissibility, to first consider whether the evidence has any probative value. Provided that the evidence has some probative value, the chamber ought to admit provided that the prejudicial effect does not outweigh its probative value. This assessment is particularly important in the context of rule 68 of the Rules, which makes major inroads into the general principle of orality that is enshrined in article 69(2) of the Statute and which makes personal testimony the rule.¹⁰ As the Appeals Chamber stressed, the importance of the principle of orality is directly related to the accused's right under article

¹⁰ According to the Appeals Chamber, "in-court personal testimony [is] the rule". See Appeals Chamber, *Prosecutor v. Bemba*, "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence'", 3 May 2011, ICC-01/05-01/08-1386, para. 76. This position was recently reaffirmed in Appeals Chamber, *Prosecutor v. Ruto and Sang*, "Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled 'Decision on Prosecution Request for Admission of Prior Recorded Testimony'", 12 February 2016, ICC-01/09-01/11-2024, para. 84.

67(1)(e) of the Statute to cross-examine witnesses as well as to the overall fairness of the proceedings.¹¹ The potential for prejudicing the accused's rights by admitting prior recorded testimony of dubious probative value is thus considerable.

10. As I have already stated elsewhere, I am of the view that this Chamber must exercise the greatest care to prevent the receipt of anonymous hearsay, as there is no rational basis upon which the Chamber can evaluate the probative value of this evidence.¹² It follows that the Court should be even more vigilant to prevent such evidence from being admitted under rule 68 of the Rules, especially (but not only) when the witness will not be available for cross-examination, as is the case with rule 68(2)(b), (c) and (d) of the Rules. Accordingly, I would not allow anonymous hearsay to be admitted under rule 68 of the Rules, unless there are truly exceptional circumstances that may justify it.
11. However, the fact that hearsay is not anonymous does not *ipso facto* imbue the evidence with greater reliability. Indeed, simply knowing the name or identity of a witness's source does not automatically provide the Chamber with greater insight about the trustworthiness of this source.
12. It is worth stressing, in this regard, that trustworthiness (and therefore probative value) can never be presumed but must be established on the basis of evidence. Article 66(2) of the Statute clearly provides that the onus of proof

¹¹ *Prosecutor v. Ruto and Sang*, "Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled 'Decision on Prosecution Request for Admission of Prior Recorded Testimony'", 12 February 2016, ICC-01/09-01/11-2024, para. 93.

¹² See my separate opinion to the "Decision on the Prosecutor's Application to protect the confidentiality of the sources of P-0369", 21 March 2016, ICC-02/11-01/15-466-Conf-Anx,

rests on the Prosecutor. This burden includes the obligation to establish the trustworthiness of the evidence proffered in support of the charges.

13. Therefore, if the Chamber were to allow the admission of hearsay evidence under rule 68(3) of the Rules, without any information as to the reliability of the source, the Chamber would be imposing the onus of rebutting the trustworthiness of the evidence on the Defence, which is expressly prohibited by article 67(1)(i) of the Statute. Indeed, if the Chamber were to admit prior recorded testimony that is based on (quasi-)anonymous hearsay evidence,¹³ it would fall onto the Defence to elicit information about the trustworthiness of the source from the witness during cross-examination. Not only would such an approach sacrifice much of the very efficiency that justifies reliance on rule 68(3) of the Rules, it would also effectively shift the burden on the defence, forcing them to take the risk of establishing the trustworthiness of incriminating evidence. This is clearly antithetical to the principle that the accused has no obligation to assist the Prosecutor in any way to meet her burden of proof.
14. It is no answer to suggest that trustworthiness and probative value can best be assessed at the end of the case, when all the evidence is in, and that the Defence is under no obligation to test the trustworthiness of the Prosecutor's evidence because it can rely on the Chamber's professionalism.¹⁴ First, no responsible defence counsel should be expected to ever take the risk of not challenging (quasi-)anonymous hearsay evidence against their client in the hope that the

¹³ i.e. evidence for which there is little or no information about the trustworthiness of the source.

¹⁴ Hearing of 6 June 2016, ICC-02/11-01/15-T-47, during which the Presiding Judge reminded the parties that "the Chamber is composed by professional judges who are well capable to distinguish direct from hearsay, corroboration from not corroboration, anonymous from non-anonymous sources, and to give to this the right value."

Chamber could not reasonably attribute any level of evidentiary weight to such evidence. Second, if it is left until the end of the trial to assess probative value in light of all other evidence (on the assumption that some of it might be corroborated or contradicted by other evidence), the Defence might have to recall certain witnesses to question them about the identity and trustworthiness of their sources.

15. In short, I am of the view that the Court may admit prior recorded testimony that is based on hearsay only if sufficient information is available about the source so as to permit the Chamber to form an educated view as to its trustworthiness. Any parts of a prior recorded testimony containing factual propositions about which the Chamber does not have adequate information as to the trustworthiness of the source should therefore not be admitted under rule 68 of the Rules, for the straightforward reason that it falls foul of the requirements of article 69(4) of the Statute.

III. The Chamber should follow the guidance provided by the Appeals Chamber in regard of the application of rule 68(3) of the Rules.

16. I have noted with unease that my colleagues appear to have completely disregarded the guidance provided by the Appeals Chamber with regard to the application of rule 68(3) of the Rules. In the *Bemba* case, the Appeals Chamber took a principled position with regard to rule 68 of the Rules and made it very clear that article 69(2) of the Statute makes “in-court personal testimony the rule” for the very good reason that this allows the Chamber to hear “directly from the witness and is able to observe his or her demeanour

and composure, and is able to seek clarification on aspects of the witness' testimony that may be unclear so that it may be accurately recorded."¹⁵

17. The Appeals Chamber was clear that exceptions to the principle of live testimony should be assessed cautiously and suggested that Trial Chambers consider the following three factors: (i) whether the evidence relates to issues that are not materially in dispute; (ii) whether that evidence is not central to core issues in the case, but only provides relevant background information; and (iii) whether the evidence is corroborative of other evidence.¹⁶
18. My colleagues now propose an entirely different criterion for the application of rule 68(3) of the Rules. Indeed, their approach is to decide "on the basis of the criterion of good trial management, which includes considerations of expeditiousness and streamlining the presentation of evidence. This criterion will be applied on a case-by-case basis, taking into consideration the importance of the evidence for the case, the volume and detail of the evidence, among other factors."¹⁷
19. With respect, I cannot agree. Rule 68 requires careful and appropriate application as it constitutes an exception to the principle of orality. It is not merely a trial management tool to be used to expedite the proceedings or to

¹⁵ Appeals Chamber, *Prosecutor v. Bemba*, "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence'", 3 May 2011, ICC-01/05-01/08-2011, at para. 76.

¹⁶ *Ibid.*, at para. 78. Whereas it is true that the Appeals Chamber rendered its decision before Rule 68 was amended by the Assembly of States Parties, it is significant that the text of the old rule 68(b) and the new rule 68(3) is identical. Trial Chamber VII seems to have adopted a similar view, when it also applied the Appeals Chamber's criteria in relation to rule 68(3) of the Rules. See Trial Chamber VII, *Prosecutor v. Bemba et al.*, "Decision on Prosecution Rule 68(2) and (3) Requests", 12 November 2015, ICC-01/05-01/13-1478-Red., para. 50.

¹⁷ Majority Decision, para. 25.

streamline the testimony. I am alive to the fact that the Assembly of States Parties amended rule 68 of the Rules to a large extent for the purpose of giving Chambers more discretion to introduce transcripts or previously recorded reliable testimony in certain circumstances, in order to expedite proceedings.¹⁸ However, it is equally plain from reading the *travaux* of the amendment, that States Parties were concerned that prior recorded testimony would only be introduced when this could be done without unduly prejudicing principles of fairness and the rights of the accused.¹⁹ It is thus wrong to view the amendments to rule 68 of the Rules simply as a trial management tool that overrides the principle of orality in order to shorten the trial, without making a careful proportionality assessment of how this may impact the fairness of the trial and the rights of the accused.²⁰

¹⁸ Assembly of States Parties, “Report of the Working Group on Amendments”, 24 October 2013, ICC-ASP-12/44, para. 8.

¹⁹ For this reason, some delegations insisted that the elements and discussion surrounding the proposed text of Rule 68 should be understood as being part of the *travaux*. Assembly of States Parties, “Report of the Working Group on Amendments”, 24 October 2013, ICC-ASP-12/44, para. 10

²⁰ See also Trial Chamber VII, *Prosecutor v. Bemba et al.*, “Decision on Prosecution Rule 68(2) and (3) Requests”, 12 November 2015, ICC-01/05-01/13-1478-Red., ICC-01/05-01/13-1478-Red-Corr, para. 51 (“The Chamber will assess if the central motivation for admittance via Rule 68(3) of the Rules – the saving of time and the expeditious conduct of the proceedings – is served while fully respecting the rights of the defence to a fair trial. For this purpose, it will conduct a case-by-case assessment for each of the statements provided by the four witnesses, taking into consideration all the relevant circumstances of the taking of the statements and the content of the testimony and being mindful of the jurisprudence of the Appeals Chamber as laid out in the previous paragraph.”); TC VI, Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0931, 21 September 2015, ICC-01/04-02/06-845, para. 6.

IV. The circumvention of the criterion that prior recorded testimony should not relate to ‘issues that are materially in dispute’ by focusing on the notion of ‘system of evidence’

20. Rule 68(2)(b) states unequivocally that, in deciding whether or not to admit prior recorded testimony, the Chamber must take into consideration whether the testimony “relates to issues that are not materially in dispute”. As noted above, the Appeals Chamber has also made this a consideration under rule 68(3) of the Rules. I agree with my colleagues that, with the exception of the testimony of witness P-0590, all the prior recorded testimonies which the Prosecutor wishes us to admit under rule 68 of the Rules somehow touch upon core issues of the case that are strenuously contested by the parties.
21. Despite this, my colleagues appear to take the view that the fact that a witness’ evidence does in fact pertain to facts that are materially in dispute can somehow be disregarded or given minor weight on account of the “relative importance of the witness within the system of evidence that has been and is expected to be presented to the Chamber.”²¹
22. My colleagues seem to justify this approach by making a qualitative distinction between witnesses who have “insider or quality knowledge of the planning and overall conduct of the FDS operation during the events”, on the one hand, and witnesses who, “while not individually of great importance, together with other evidence [...] form a web of evidence which will allow the Chamber to appreciate how the events unfolded on the ground”, on the

²¹ Paragraph 38 of the Majority Decision

other.²² I respectfully disagree with this approach, which is unsupported by either the text of the rule or the court's jurisprudence thereon. In particular, I have difficulty with this approach because it seems to suggest that when there is a 'web' of evidence in relation to a particular important issue, it does not really matter so much how good or bad the individual pieces of evidence are. However, as the 18th Century philosopher Thomas Reid already taught:

*A system of this kind resembles a chain, of which some links are abundantly strong, others very weak. The strength of the chain is determined by that of the weakest links; for if they give way, the whole falls to pieces, and the weight, supported by it, falls to the ground.*²³

23. The witnesses whose testimony the Prosecutor wants to introduce under rule 68 of the Rules all testify about different events and there is no overlap between their testimonies. Their testimony is therefore the only piece of evidence in support of the factual propositions contained in their statements. Each testimony thus constitutes a link in the proverbial chain (or a thread in the majority's web), the strength of which must be thoroughly examined.

V. Indicia of reliability cannot be merely formal

24. In the context of rule 68(2)(b) of the Rules, the Chamber was obliged to consider whether the prior recorded testimony of Witness P-0590 had "sufficient indicia of reliability". My colleagues appear to have adopted a rather formalistic approach in this regard. Indeed, their analysis seems to have limited itself to a finding that the prior recorded testimony "was taken by the

²² Paragraph 38 of the Majority Decision

²³ Thomas Reid, *Essays on the Intellectual Powers of Man*, 1785

Office of the Prosecutor pursuant to Rule 111 of the Rules and under all applicable guarantees, including Article 54(1) of the Statute”.²⁴

25. With respect, these elements can, at best, be an indication that the *record* of the prior recorded testimony is accurate and faithful to what the witness said. However, I fail to see how this helps in establishing whether or not the actual *content* of the prior recorded testimony is *prima facie* reliable.
26. There can be little disagreement, at least in my view, about the fact that rule 68(2)(i) of the Rules requires the Chamber to make at least a preliminary assessment of the reliability of the content of the testimony. This is apparent from the text of the provision itself, but also from the reference to article 69(4) of the Statute in rule 68(1).
27. I do not propose to outline a set of criteria for the evaluation of the reliability of prior recorded testimony. Reliability can depend on a multiplicity of factors, which in my view are better left open to recognition than excluded by a narrow definition. Notwithstanding this, I would say that there are some central indicia of reliability which must be considered in every case: First, the witness’ competence to testify about the facts must be ascertained. If the witness was not in a position to accurately observe and/or understand the information she is testifying about, this would obviously militate against admitting the prior recorded testimony. Second, the Chamber has to be able to form an opinion about the witness’ credibility. This evaluation may cover a broad range of issues, including potential bias on the part of the witness, his or her (in)sincerity, but also the possibility of honest mistake. Third, the reliability of

²⁴ Majority Decision, para. 22.

any proposition contained in prior recorded testimony must be assessed in light of whether it coheres with other available evidence as well as with the Chamber's own understanding of the general context and circumstances of the case.

28. In order not to be misunderstood, I am not advocating that the Chamber make a full-fledged reliability assessment at the Rule 68 stage. This should be reserved for the end of the trial. However, I do think that, before admitting a prior recorded testimony under Rule 68, the Chamber must first be satisfied that sufficient information is available about the above-mentioned reliability indicators so as to allow the Chamber to make an informed decision about the weight of the evidence when the time comes. Moreover, the Chamber should already make a preliminary assessment of whether it could ever see itself relying on the prior recorded testimony, based on a *prima facie* assessment of the indicia of reliability. If this is not the case, one might be forgiven for wondering what the point is of admitting the prior recorded testimony at all.

VI. It is not appropriate to apply rule 68(3) of the Rules to the prior recorded testimony of witnesses P-217 and P-230.

29. My colleagues are prepared to accept the prior recorded testimony of ten of the eleven witnesses that formed the object of the Prosecutor's request. I agree that it is, in principle, possible to apply rule 68(3) of the Rules to the prior recorded testimony of witnesses P-0112, P-0169, P-0344, P-0555, P-0573, P-0587, P-0588, and P-0589. Yet, as I have already explained, I would only be prepared to accept those parts of their testimony that relate to their own first-hand observation or that are based on sources about which the Chamber has sufficient information to form an opinion as to their trustworthiness,

30. However, I do not think that it is appropriate to apply rule 68(3) of the Rules to the prior recorded testimony of P-0217 and P-0230. The testimony of both these witnesses covers a rather wide range of issues and topics that are central to this case, which relate to issues that are materially in dispute and that go far beyond what they may have personally experienced during the march on the RTI of 16 December 2010. Moreover, both P-0217 and P-0230 [REDACTED]. Under these circumstances, I think it preferable to hear their testimony entirely *viva voce* before this Chamber.

VII. It is not possible to admit documentary evidence solely on the basis of rule 68 of the Rules

31. The majority takes the view that any documents referred to by a witness in a prior recorded testimony is to be considered as submitted.²⁵ I understand this to mean, in accordance with the majority's Decision on the submission and admission of evidence,²⁶ that the Chamber has not taken a formal position on whether or not such documents are admitted into evidence or not. Leaving aside whether or not it is appropriate to postpone ruling on admissibility in the context of bar table motions, I have a fundamental problem with my colleagues' willingness to admit any form of documentary evidence under rule 68 of the Rules, regardless of whether it is produced by the witness to whose statement the evidence is attached.
32. I want to state clearly that I do not consider it legally possible to admit documentary evidence into the trial record through an application under rule 68 of the Rules. To be clear, I agree with my colleagues that it may be

²⁵ Majority Decision, para. 9.

²⁶ "Decision on the submission and admission of evidence", 29 January 2016, ICC-02/11-01/15-405

necessary and appropriate to consider documents referred to in prior recorded testimony in order to better understand the prior recorded testimony. However, the document itself can only be relied upon for the truth of its content, after the Chamber has first ruled on its admissibility in accordance with the admissibility test of article 69(4) of the Statute. This presupposes that the Chamber has been given all the necessary information that is required for the introduction of documentary evidence, in accordance with paragraph 44 of the Chamber's amended and supplemented directions on the conduct of the proceedings.²⁷

33. In some instances, it may well be that the prior recorded testimony will provide all this information and the Chamber may then consider ruling on the admissibility of annexed documentary evidence. This will often be the case when the annexed documentary evidence has been produced by the witness him- or herself. However, if this is not the case, the proffering party must provide information indicating the item's relevance, its probative value (including authenticity), as well as the date on which it was disclosed to the other parties. This can be done under a separate heading in the Rule 68 application, or in a distinct filing that is filed separately. Whatever the timing or the format, the Chamber must be provided with this information and rule 68 of the Rules makes no exception to this.

34. It is therefore misleading to say, as my colleagues do, that the procedure under rule 68 of the Rules is more stringent than the procedure to submit evidence over the bar table.²⁸ The criteria under rule 68 of the Rules differ from those

²⁷ "Decision adopting amended and supplemented directions on the conduct of the proceedings", 4 May 2016, ICC-02/11-01/15-498-AnxA

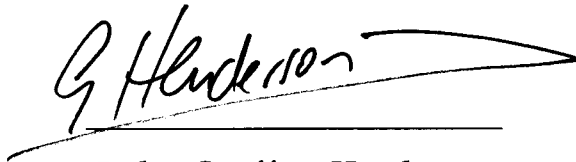
²⁸ Majority Decision, para. 9.

contained in article 69(4) of the Statute, as they apply to a different issue. Rule 68 of the Rules deals with the question whether an exception can be made to the principle of orality, whereas article 69(4) of the Statute deals with the issue of whether the trial record should contain evidence of no probative value or, indeed, evidence that may be prejudicial to the fairness of the trial proceedings or the fair evaluation of the testimony of a witness.

VIII. Concluding remarks

35. In conclusion, I am not opposed to applying rule 68 of the Rules, where this can be done in accordance with the statutory and procedural framework of the Court and its jurisprudence and with full respect for the rights of the accused and the principle of fair and open justice. I would therefore only allow prior recorded testimony when it relates to the witness' own direct observations or when it is based upon trustworthy sources. This requires that the Chamber properly evaluate the prior recorded testimony paragraph by paragraph and apply Rule 68 only to such portions that are admissible evidence. However, even if these conditions are met, it must still be considered whether it would be appropriate to admit prior recorded testimony in light of the significance of its content. In this regard, I adhere to the view that, if the testimony involved does not satisfy the criteria set out by the Appeals Chamber, it is more appropriate to hear their evidence *viva voce*.

36. Finally, I wish to make it abundantly clear that I do not delight in writing separately. Rather, I would have much preferred to be in agreement with the majority. In this decision, the underlying basis of my dissent is the chamber's insufficiently reasoned failure to follow what in my view is the provisions of the court's own statutory framework and the consistent jurisprudence that has developed.



Judge Geoffrey Henderson

Dated 13 June 2016

At The Hague, The Netherlands