

Corrigendum of

PARTLY DISSENTING OPINION OF JUDGE HENDERSON

1. I agree in part with the Chamber's decision to conditionally admit the prior recorded statements and related documents of various witnesses under Rule 68 and the Prosecution's application for the introduction of documentary evidence relating to witnesses P-0087 and P-0088. In particular, I am in agreement with the decision to reject the application to introduce the prior recorded statements of witnesses P-0087, P-0088, P-0164, P-0184, P-0185, P-0226, P-0239 and P-0316. I also agree that the statements of P-0426, P-0594 and P-0380 can be admitted under Rule 68(2)(b). Finally, I am in agreement with admitting the statements of P-0237, P-0362, P-0521, as well as the second statement by P-0172 pursuant to Rule 68(3). This partly dissenting opinion is with respect to the remaining statements that are the subject of the Prosecution's consolidated applications.

Requests under Rule 68(2)(b)

2. The Appeals Chamber has recently indicated that expeditiousness and the streamlining of the presentation of evidence are important factors in considering an application to introduce prior recorded statements pursuant to Rule 68 of the Rules of Procedure and Evidence ('Rules').¹ While the efficient conduct of trial proceedings is indeed essential to good trial management, this flexible objective cannot be pursued in a manner that is prejudicial to the rights of the accused. The prior recorded testimony of a witness can only be introduced pursuant to Rule 68(2)(b) of the Rules when

¹ "Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", 1 November 2016, [ICC-02/11-01/15-733 OA8](#)

it “goes to proof of a matter other than the acts and conduct of the accused.” Provided that this condition is satisfied, the Chamber is required to consider, *inter alia*, whether the prior recorded testimony in question: (i) relates to issues that are not materially in dispute, (ii) is of a cumulative or corroborative nature, (iii) relates to background information, (iv) is such that the interests of justice are best served by its introduction and (v) has sufficient indicia of reliability. A careful assessment of each statement is required in order to ensure that there are no countervailing factors such that the improper introduction of any individual statement, or of the statements as a whole, would violate the accused’s fair trial right to examine witnesses.

3. Contrary to the Majority’s assessment, in my view, several of the statements sought to be introduced by the Prosecution fail to satisfy the criteria of Rule 68(2)(b). My opinion in this respect should be considered complementary to my previous reasons for disagreement with the Majority’s general approach towards the admission of prior recorded testimony.²
4. First, I take issue with the artificial distinction drawn by the Majority between the evidence dealing with the so-called crime base, i.e. evidence about the actual crimes on the ground on the one hand, and evidence which directly implicates the acts and conduct of the accused on the other. While the *evidentiary* question as to whether or not a certain person was killed may be distinguishable in some cases from the *evidentiary* question of whether or not the accused bears criminal responsibility for the killing, from a *legal* point of view the two are closely linked. Indeed, if the actual murder cannot be proved beyond reasonable doubt, the evidentiary question of whether the accused is criminally responsible for it simply does not arise. This is why

² [ICC-02/11-01/15-573-Anx](#); [ICC-02/11-01/15-629-Anx](#)

the first criterion of Rule 68(2)(b)(i), relating to whether the issue is materially in dispute or not, is so important. The proper application of this rule ensures that the accused does not suffer any prejudice due to the removal of their prerogative to contest the evidence related to the crime base as well as the evidence that bears on the question of criminal responsibility.

5. Secondly, and related to the Majority's formalistic interpretation of the scope of matters that relate to the "acts and conduct of the accused", I disagree with the Majority's narrow understanding of what issues can be considered to be materially disputed. The Document Containing the Charges, the Prosecution's Pre-Trial Brief, and the Opening Statements of the Prosecution and Defence Teams, all contain widely divergent accounts of the context of the pre- and post-election violence that forms the basis of the charges against the accused. Several of the statements sought to be introduced under Rule 68(2)(b) relate to this deeply contested issue. For instance, in order to evaluate the evidence concerning the contextual elements of crimes against humanity, the Chamber must not only determine the civilian status of the deceased, but also the circumstances in which such persons were killed. In the context of this dispute, it is insufficient to identify the deaths simpliciter and to approach the issue by way of a numerical exercise.
6. Thirdly, I remain unpersuaded by the Majority's approach to the assessment of the indicia for reliability for the admission of statements under Rule 68(2)(b). For example, I continue to find the Majority's treatment of (anonymous) hearsay deeply troubling. It may well be that the mere fact of admitting a prior recorded statement under Rule 68 does not prejudice the Chamber's ultimate assessment of the evidentiary weight that should be attributed to the testimony. Nevertheless, the indiscriminate introduction of such evidence on the record may create prejudice, as it not only clutters the

evidential record with a vast amount of information of uncertain quality, it also inevitably places a burden on the accused, who are obliged to respond to this material.

7. My concern in this regard is only heightened by the way in which the Majority applies the notion of corroboration. Under the Majority's analysis, where two statements deal with roughly the same topic, this qualifies as corroboration.³ This overly broad definition of corroboration, which is unsupported by the court's own jurisprudence, is likely to result in prejudice to the accused. To illustrate, in the context of this application, several witness statements aim to identify the 3 March 2011 victims and also purport to give unique details about the circumstances of their deaths. However, a statement giving details about the death of one particular victim during the women's march does not corroborate a statement by another witness concerning the death of a different person who died in that incident, unless they were both killed by the same explosion.
8. Another concern relates to the manner in which the statements were recorded. The Gbagbo Defence have raised concerns regarding the absence of 'control' over the investigators in their taking of the witness statements. The Majority dismiss this concern by placing the burden on the Defence to demonstrate wrongdoing or negligence on the part of the investigators and conclude that, in the absence of such evidence, the Defence concerns are speculative and without merit. In my respectful view, this approach is misconceived and probably violates article 67(1)(i) of the Statute.

³ See, e.g. para. 38 of the Majority Decision.

9. The underlying rationale for Rule 68 is to expedite the trial proceedings while providing important safeguards for the rights of the accused. Following the plain meaning of the rule, where the Defence have the opportunity to examine the witness during the recording of the statement, the rights of the accused are sufficiently protected and there is no bar to the introduction of prior recorded testimony even if it relates to the acts and conduct of the accused. However, if no opportunity was provided to the Defence to examine the witnesses while the prior statements were being recorded and the statement refers to contested evidence and/or the acts and conduct of the accused, an important safeguard has been breached. It cannot simply be assumed that the statement contains a reliable record of the testimony, let alone that the witness was asked all pertinent questions.

10. Finally, I would adopt a less formalistic approach in relation to witnesses who may possess relevant information that is not contained in their prior recorded testimony. The non-calling party may wish to examine witnesses, not only to refute the evidence put forward by the calling party, but also to adduce further evidence in respect of an issue in the case. The Majority Decision unfairly prevents the Defence from both challenging the evidence and from adducing additional details through these witnesses that may be more favourable to the accused and which could assist the Chamber in its fact finding function. The Majority's restrictive approach is of questionable efficiency. In my view it is not efficient to require the Defence to incur the additional expense and logistical burden of interviewing and effectively seeking the recall of such a witness, instead of having the witness appear once and assist the Court with all the relevant information in his possession.

11. Turning now to the specific applications under Rule 68(2)(b), I agree with my colleagues that the statements of witnesses P-0426 and P-0594 can be

admitted under Rule 68(2)(b). I also agree to admit the statements of P-0129, P-0476, P-0479, and P-0543 under this rule, provided that parts of the statements were excluded or the statements were admitted for a limited purpose. Regarding the statement of P-0129, it would have been appropriate to admit the statement of this witness if paragraph 25 were to be excluded. Similarly, I would admit P-0476's statement under Rule 68(2)(b) without paragraph 2. The statement of witness P-0479 is more problematic. My preferred approach would have been to reject the request under Rule 68(2)(b) and to admit the statement under Rule 68(3) instead. However, as an alternative I would have been prepared to admit only that part of P-0479's statement that deals with [REDACTED] [REDACTED] (i.e., paragraphs 21-49). The remainder of the statement, which is in any event based primarily on hearsay, could easily have been excluded without causing undue prejudice to either the Prosecution or the Defence. A similar approach could have been adopted regarding witness P-0543's statement, which is essentially useful for authenticating [REDACTED]

12. In my assessment, the statement of P-0380 adds so little to the case that I wonder whether it should be admitted at all. As regards the request of the Defence for Mr Gbagbo to question the witness in relation to the working method of the Prosecution's investigators, the statement does not provide any indication that he has any knowledge of this matter. I can therefore acquiesce in my colleagues' decision to admit the statement on the basis of Rule 68(2)(b).

13. In my respectful view, it is inappropriate to admit the statements of witnesses P-0294 and P-0360 under Rule 68(2)(b). Both mention activities of pro-Ouattara fighters around the time of the Abobo shelling, which is

directly relevant to the case for the Defence. Considering that this part of their testimony is fairly significant and is a key aspect of the respective defence for both accused, it is wholly inappropriate to deny the Defence an opportunity to question these witnesses. I would therefore have preferred to reject the requests altogether, but at a minimum, would have authorised the introduction of their statements under Rule 68(3).

14. I am not in agreement with introducing the prior recorded statements of witnesses P-0573, P-0266, and P-0471 under Rule 68(2)(b). Upon consideration of their statements, I am of the opinion that these should be admitted under Rule 68(3) instead. P-0573 was [REDACTED]. His evidence relates to the [REDACTED] during the period of the post-election violence, including 16 December 2010. P-0573 testifies that on this day, [REDACTED]. [REDACTED] P-0573 further testifies that, following consultation with his colleagues, he decided [REDACTED]. [REDACTED] In contrast to this evidence, Witness P-0547, who was called by the Prosecution, testified that he was told [REDACTED] that Mr Gbagbo had said that the victims should not be given [REDACTED] and that they should be left to die. In light of this and related allegations made by this and other witnesses, and considering the Prosecution's earlier application to have this witness testify pursuant to Rule 68(3), it would be in the interests of justice for this witness to be called and to be examined as the Defence for Blé Goudé have requested.

15. Regarding P-0266, this witness worked as a [REDACTED]. His evidence relates to [REDACTED] and to the roadblocks manned by the RDR at Abobo in early March 2011. He also testifies as to the [REDACTED].

[REDACTED] after the period of the post-election violence. P-0471, who used to work at the [REDACTED]

[REDACTED] without however providing a date. Yet, his prior statement also contains evidence confirming a [REDACTED]

[REDACTED] He also testifies that one of the documents shown to him during his prior statement is not correct and the Defence for Charles Blé Goudé has requested leave to question the Witness as to what else he considered incorrect. Accordingly, it is more appropriate, in my view, for this witness to be available to the Defence for cross-examination.

16. Regarding witness P-0489's statement, its introduction ought either to have been rejected altogether or, in the alternative, admitted under Rule 68(3) instead of Rule 68(2)(b). Much of her testimony is based upon hearsay and/or opinion evidence and it is not possible to edit or isolate those parts of her testimony dealing with her own personal observations. If any weight is to be given to her evidence, justice is better served by allowing for her examination by the non-calling party. Having the witness's responses would provide the Chamber with a sounder basis upon which to evaluate her evidence.

Rule 68(3) Statements

17. I agree with my colleagues that the prior recorded testimonies of the following witnesses can be admitted into the record on the basis of Rule 68(3): P-0237, P-0362, and P-0521. I would also accept that P-0172's

second statement⁴ be admitted under this rule. I would further agree to the introduction of those sections of P-0381's statement dealing with the archives of CEMA⁵. Finally, P-0054's statement could be introduced under Rule 68(3) but only insofar as it relates to the communication network of the *Garde Républicaine*.⁶

18. Regarding the remaining statements, I am unable to agree. My colleagues appear to be of the view that, since Rule 68(3) imposes no formal conditions – other than the presence and consent of the witness – on the admission of prior recorded testimony, there is no limit to the type of statements that can be admitted under this provision.⁷ However, Rule 68(3) must be interpreted in light of Rule 68(1), which expressly prohibits the introduction of prior recorded testimony if this would be prejudicial to or inconsistent with the rights of the accused. In my respectful view, the majority appear to pay insufficient attention to the requirement that any admission under Rule 68 must respect the rights of the accused,⁸ and approach this requirement on the basis that the trial is automatically fair by virtue of the fact that the Defence has the opportunity to question the witnesses.⁹ With respect, this is a highly emaciated conception of a fair trial.

19. As the Appeals Chamber has consistently held, there should be equality of arms between the prosecution and the defence.¹⁰ Thus, the prosecution

⁴ CIV-OTP-0081-0436

⁵ CIV-OTP-0049-2818, paras 18-28 and 51-66.

⁶ CIV-OTP-0007-0283, paras. 25-58.

⁷ Majority Decision, paras 76-80.

⁸ Majority decision, para. 9

⁹ Indeed, in paragraph 76, the Majority Decision essentially brushes aside any fairness concerns on the basis that, because the witness appears and can be examined by the Defence, "there is a low risk of interfering with the fair trial rights of the accused."

¹⁰ See, e.g., *Prosecutor v. Lubanga*, "Decision on the Prosecutor's 'Application for Leave to Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur'", 12 September 2006, [ICC-01/04-01/06-424](#), para. 7; *Prosecutor v. Katanga*, "Judgment on the appeal of the Prosecutor against the

should not derive an unfair advantage from the fact that it has more legal powers and resources at its disposal than the defence. One of the ways in which this principle is given effect to is through the imposition of certain conditions on the collection and presentation of evidence by the prosecution. A combined reading of articles 54(1)(a) and 66(2) of the Rome Statute makes clear that the responsibility to present the Chamber with a full and balanced overview of the available evidence rests upon the Prosecutor. It is incumbent upon the Chamber to enforce this obligation. If not, it would be all too easy for a prosecutor with vastly superior resources to overwhelm the defence by submitting large volumes of evidence that the latter cannot meaningfully contest with limited time and resources.

20. When witnesses appear in person, the Chamber can control the way in which the testimony is presented by controlling the manner in which the prosecution conducts its examination. However, when the testimony is introduced in written form, this important safeguard disappears. This is why it is crucial that the Chamber is vigilant in the application of Rule 68(3).
21. There is a fundamental difference between giving sworn testimony in a formal courtroom setting in the presence of the accused and making incriminating allegations in response to questions by investigators for one of the parties. The Majority treats statements taken by members of the Prosecution as a neutral reflection of the entirety of the witnesses' relevant knowledge. However, one does not have to presuppose conscious bias or

decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements'', 13 May 2008, [ICC-01/04-01/07-475](#), para. 73; *Prosecutor v. Banda & Jerbo*, "Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor", 28 August 2013, [ICC-02/05-03/09-501](#), para. 34.

bad faith on the part of Prosecution investigators to be concerned about important details being lost in the process of drawing up written statements. Indeed, if our experience with witnesses who have appeared before us in this case so far is a reliable indicator, statements rarely reflect the ‘whole story’ as highly significant elements or nuances are routinely missing. Relying on such partial accounts is fraught with problems, especially if the purpose of the proceedings is to establish the truth.

22. It is no answer to say that the Defence have an opportunity to challenge the contents of statements admitted under Rule 68(3). As Article 67(1)(i) makes plain, the imposition of *any* onus of rebuttal on the accused is forbidden. Unfortunately, the Majority’s approach essentially allows the Prosecutor to submit large volumes of potentially incomplete or selective written testimonial evidence and leaves it entirely to the Defence to make sure that the Chamber receives a complete evidentiary picture. In other words, not only is the Defence in a position of unequal arms, it is expected to remedy the resulting imbalance as well.

23. Apart from serious potential for violating fundamental fairness standards, the Majority’s approach also belies its avowed drive for efficiency. By allowing statements into evidence that are bound to raise many concerns on the part of the Defence, the Majority Decision has made lengthy cross-examinations almost inevitable. Indeed, the Chamber would be derelict in its duty to rely solely on evidence whose trustworthiness has been thoroughly tested if it were to deny the Defence as much time as it needed to question these witnesses.

24. Based on these criteria and the underlying considerations, I dissent in relation to the admission of the prior recorded testimony of the following witnesses:

25. As to the statement of Witness P-0172 (first statement). P-0172 was politically active. The statement contains information on the situation on the ground in Abobo during the crisis, including Camp Commando. This is a crucial and controversial issue that goes to the heart of the charges. Moreover, the witness gives evidence on the RTI march as well as on the women's march, two highly contested incidents.

26. Much of what Witness P-0105's says in his statement is hearsay and deals with events that are at the heart of two of the charged incidents. She also gives information about the security situation in Abobo, including the use of roadblocks and the role of local youths – both highly contested issues in the case. Some of the information contained in the statement also lacks specificity.

27. Witness P-0293 gives evidence about two of the charged incidents and claims to have observed firing from a 'tank' during the women's march. Moreover, the statement contains much hearsay of uncertain origin.

28. Witness P-0297's cannot be admitted under Rule 68(3) because it is almost entirely based on hearsay, with the exception of the passage dealing with the funeral of the witness's [REDACTED] which is mostly irrelevant. In fact, I question whether this witness can provide sufficiently probative information to warrant his appearance in this case at all.

29. P-0363 claims to have direct knowledge about two of the charged incidents.

He also gives evidence about the general security situation in Abobo during

the crisis, a highly contested issue in this case, especially as it relates to the presence and activities of pro-Gbagbo as well as pro-Ouattara forces. I would reject P-0364's statement for similar reasons. Moreover, this statement is rife with hearsay and speculation.

30. The statements of witnesses P-0407, P-0554, P-0567 and P-0568 all contain accounts of crimes that were allegedly committed against the witnesses personally or against close relatives. In addition, they also contain considerable hearsay evidence about other events. Moreover, three of the four witnesses have expressly stated they wish to see either one or both of the accused convicted for the crimes committed against them, even though none of them allege that the accused were personally involved in those crimes. While this is not objectionable per se, it may raise the issue of bias. The evaluation of the evidence of such witnesses is best achieved by hearing *viva voce* evidence, where, *inter alia*, witness demeanour can be taken into account. Under these circumstances, it is not appropriate, in my view, to admit their prior recorded testimony under Rule 68(3).

A handwritten signature in black ink, reading "G. Henderson", is written over a solid black horizontal line.

Judge Geoffrey Henderson

Dated 20 June 2017 (corrigendum filed on 23 June 2017)

At The Hague, The Netherlands