

PARTIALLY DISSENTING OPINION OF JUDGE HENDERSON

1. While I agree with my colleagues that leave should be refused in relation to the second and fourth issues, I am of the view that the Defence has raised valid issues that merit appellate attention at this stage in relation to the First, Third and Fifth Issues.

First Issue

2. In relation to the First Issue, I disagree with the majority when they say that the Impugned Decision did not create a presumption of accuracy. While this concept was indeed not expressly mentioned in the decision, the fact that the burden was put upon the Defence to demonstrate that there might have been problems with the accuracy of the statements clearly implies that the majority assumes that the statements are accurate until proven otherwise. This is a presumption in all but name and I am of the view that the question whether the Chamber was entitled to create such a presumption in the application of Rule 68 of the Rules of Procedure and Evidence is a question that should legitimately be brought before the Appeals Chamber.
3. Still in relation to the first issue, I wish to express my disagreement with the argument made by my colleagues in relation to Rule 111 of the Rules of Procedure and Evidence. Whereas it is true that this provision does not oblige the Prosecutor to make audio/video recordings of all witness interviews, this is beside the point when it comes to deciding whether prior recorded testimony is admissible under Rule 68. Indeed, Rule 111 applies to the recording of questioning in general whereas Rule 68 applies to the admission of prior recorded testimony in lieu of *viva voce* testimony. These provisions regulate completely different issues and there is thus no reason to think that the former could amend or supersede the

requirements of the latter. It is also worthwhile pointing out that, in the absence of recordings of the interviews, it will usually be impossible for the Defence to prove that the written statements are inaccurate or that they have not been read back to the witness entirely accurately in the witness' language. Accordingly, it is unfair, in my view, to blame the Defence for not having shown that there was a problem while at the same time denying them the most useful means to do so.

Third issue

4. In relation to the Third Issue, the majority criticises the Defence for not giving specific examples of where the Chamber has misapplied the concept of corroboration, but in doing so fail to acknowledge that the Impugned Decision itself does not explain how and to what extent the statements corroborate other evidence on the record. With respect, the majority's reasoning on this issue is a flawless example of the proverbial pot calling the kettle black.
5. I also fail to see how the fact that corroboration is only one factor in the Chamber's assessment under Rule 68(2)(b) somehow disqualifies an alleged legal error from appellate review. Even if it is only one of several criteria, it must be assumed to have influenced the Chamber's Impugned Decision and therefore its misapplication may have had an impact on the outcome.

Fifth issue

6. The majority's reasoning in relation to the Fifth Issue entirely fails to apply the criteria of article 82(1)(d) of the Statute. Instead, the majority now blames the Defence for not providing enough specifics about which topics the Defence intends to question P-0266 and P-0476 about. With respect, this reasoning should have been included, if at all, in the Impugned Decision and not in the decision on certification of leave to appeal. Whereas it may be appropriate to clarify an

impugned decision in a decision on leave to appeal, it is not permissible, in my view, to supplement or alter the reasoning thereof.

7. The majority entirely fails to address the real issue, i.e. whether it is fair and appropriate to admit prior recorded testimony under Rule 68(2)(b) when the opposing party indicates that it wants to question the witness in relation to points that are not covered in the statement. This raises a crucial issue of procedural fairness, namely whether the Prosecutor may satisfy its evidentiary needs by relying on partial information extracted from a witness in the absence of the Defence and transfer the burden to obtain any additional information from that witness entirely onto the Defence. In my view this is far from self-evident, especially in light of article 54(1)(a) of the Statute, and I would therefore have granted leave to appeal on this issue.

A handwritten signature in black ink, reading 'G Henderson', is written over a solid horizontal line. The signature is stylized, with a large 'G' and a long, sweeping horizontal stroke extending to the right.

Judge Geoffrey Henderson

Dated 12 September 2017

At The Hague, The Netherlands