

Public redacted version of

‘PARTIALLY DISSENTING OPINION OF JUDGE KIMBERLY PROST’

1. I join my colleagues in granting the Prosecution’s applications under Rule 68(2)(b) of the Rules in relation to P-0555, P-0172, P-0915, as well as P-0204 and P-0630. However, I respectfully disagree with the Majority’s decision to dismiss the Prosecution’s application in relation to P-0113 (the ‘P-0113 Request’).¹
2. I agree with the Majority that ‘the decision of whether to introduce a prior recorded testimony pursuant to Rule 68(2)(b) of the Rules is a discretionary one, and the entire purpose of this provision is to identify situations where it is not necessary to examine witnesses, while preserving a fair and expeditious trial.’² In my view, the remedy sought in the P-0113 Request is one such case. As explained below, I would therefore have authorised the introduction into evidence of parts of the prior recorded testimony of P-0113, together with the associated material.
3. I recall that the Chamber may only allow the introduction of the prior recorded testimony of a witness pursuant to Rule 68(2)(b) when that prior recorded testimony ‘goes to proof of a matter other than the acts and conduct of the accused’. In this respect, I note that the Prosecution sought to exclude nine paragraphs of P-0113’s statement, as well as one associated exhibit, which in its view go to acts and conduct of Mr Al Hassan.³ The Defence opposed the P-0113 Request⁴ and, in its response, averred that the proposed exclusions are not peripheral and discreet in nature but inseparable from the rest of P-0113’s statement.⁵ For the Defence, the Chamber’s determination under Rule 68(2)(b) should consider the whole of P-0113’s testimony.⁶

¹ Prosecution application under rule 68(2)(b) to introduce MLI-OTP-P-0113’s statement and associated material into evidence, 16 December 2020, ICC-01/12-01/18-1207-Conf.

² Majority decision, para. 5.

³ P-0113 Request, ICC-01/12-01/18-1207-Conf, paras 6, 20-28; and ICC-01/12-01/18-1207-Conf-AnxA, p. 2. The paragraphs concerned are paras 58, 81, 83, 91, 93, 100, 103, 143, 145.

⁴ Defence response to ‘Prosecution application under rule 68(2)(b) to introduce MLI-OTP-P-0113’s statement and associated material into evidence’, 18 January 2021 notified on 19 January 2021, ICC-01/12-01/18-1252-Conf (the ‘Response’).

⁵ Response, ICC-01/12-01/18-1252-Conf, paras 7-10.

⁶ Response, ICC-01/12-01/18-1252-Conf, para. 8, referring to Decision on Prosecution’s requests to introduce prior recorded testimonies under Rule 68(3) of the Rules, 21 October, ICC-01/12-01/18-987-Red, para. 13; and

I also note that the Defence submitted that remaining parts of P-0113's prior recorded testimony, those which the Prosecution sought to be introduced, also relate to Mr Al Hassan's alleged acts and conduct.⁷

4. I agree with the approach suggested in the P-0113 Request. I find it appropriate, and necessary in this case in order to comply with the requirements of Rule 68(2)(b) and avoid prejudice to the accused, to consider only certain parts of P-0113's statement for admission. I also believe that the Defence rightly identified two additional paragraphs containing information which ought to also be excluded from submission under Rule 68(2)(b) of the Rules because they go to proof of the acts and conduct of Mr Al Hassan (being referred to as 'the *Commissaire*').⁸ However with respect to paragraph 105, I would only exclude the last two sentences.⁹ The other sentences in that paragraph do not refer to acts or conduct on the part of the *Commissaire* – only the structure and activities of the Police. This includes the statement that the *Commissaire* was the head of the police – a matter related to structure only. To the extent it could be interpreted as defining acts and conduct, the Chamber would have in mind when analysing the evidence the absence of cross-examination with respect to it. It does not appear to me that the remaining parts of P-0113's prior recorded testimony go to the acts and conduct of the accused or otherwise address matters so proximate to the accused so as to require their exclusion.¹⁰
5. I recall that partial introduction of prior recorded testimony under Rule 68(2)(b) was a possibility already foreseen in the Chamber's Directions on the conduct of proceedings.¹¹ In this respect, the situation is quite distinct from that applicable to

Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, ICC-02/04-01/15-596-Red (the '*Ongwen* Rule 68(2)(b) Decision'), para. 13.

⁷ Response, ICC-01/12-01/18-1252-Conf, paras 7-10.

⁸ The paragraphs concerned are paras 68 and 105. Accordingly, the Defence submissions regarding the uncorroborated nature of P-0113's statement that [REDACTED] (Response, ICC-01/12-01/18-1252-Conf, para. 16, referring to paragraph 105 of P-0113's statement) need not be discussed further.

⁹ It read : '[REDACTED]'.

¹⁰ I am of the opinion that the expression 'acts and conduct of the accused' should be narrowly construed, as to do otherwise will significantly reduce the usefulness of the provision. I believe this view is supported by the jurisprudence of the Court (see *Ongwen* Rule 68(2)(b) Decision, ICC-02/04-01/15-596-Red, paras 11-12; and Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Public redacted version of 'Decision on admission of prior recorded testimony of Witness P-0773 under Rule 68', 2 December 2016, ICC-01/04-02/06-1667-Conf, 27 February 2017, ICC-01/04-02/06-1667-Red, para. 11).

¹¹ ICC-01/12-01/18-789-AnxA, para. 79 ('In accordance with Rule 68(2) of the Rules, the parties may file applications for the admission, in whole *or in part*, of the previously recorded testimony of witnesses' [emphasis added].)

prior recorded testimonies introduced under Rule 68(3). In those circumstances, as the witness will be available for cross-examination, it will be rare that it is necessary to introduce excerpts as opposed to the whole of the statement. Consistent with the opinion of other Chambers,¹² I find that it is to be anticipated that portions of a prior recorded testimony introduced under Rule 68(2)(b) may have to be set aside to ensure compliance with the requirement regarding exclusion of evidence which relates to the acts and conduct of the accused. The distinction between the different approaches is fully justified to ensure, where necessary, the accused's right to confront and examine in court a person making direct allegations against him or her.

6. Accordingly, I would have set aside the nine paragraphs which are not sought to be tendered by the Prosecution, as well as paragraph 68 and the last two sentences of paragraph 105, to ensure that the material introduced 'goes to proof of a matter other than the acts and conduct of the accused'. Having found that the requirement under Rule 68(2)(b) is satisfied, I would have proceeded with the evaluation of the factors listed under sub-paragraph (i) of this same provision.
7. I should emphasise at the outset that I believe all relevant factors should be considered equally in the Chamber's exercise of its discretion. Materiality of the evidence should not be determinative in and of itself, as it is one of many factors. In particular, I believe equal weight should be given to the interests of justice, which in this case includes the Chamber's truth seeking role. Further, the appropriate application of Rule 68(2)(b) of the Rules must be assessed in light of the hybrid nature of the process envisaged under the Rome Statute and the Rules of Procedure and Evidence and taking into account the ability of the Chamber to ultimately weigh and consider the probative value of the evidence presented. In the context of this hybrid system, and where the evaluation of the relevant factors supports the introduction of a prior recorded testimony, the absence of cross-examination is something that should be considered in the Chamber's ultimate assessment of the evidence and should accordingly not be given undue emphasis in the balancing of the factors under Rule 68(2)(b)(i).

¹² This was also the approach adopted in the decision of TC IX referred to by the Defence (*Ongwen* Rule 68(2)(b) Decision, ICC-02/04-01/15-596-Red, *see* paras 60, 105, 216).

8. I note that the Defence argued that P-0113's evidence pertains to live and important issues in the case.¹³ In this regard, I acknowledge that indeed parts of his statement relate to matters which are of high significance for the Chamber's eventual determination of the charges. However, it should be kept in mind that, as noted above, the fact that the prior recorded testimony of a witness relates to issues that are materially in dispute is one of many factors to be taken into consideration in the Chamber's assessment. It does not automatically bar the introduction of the relevant material under Rule 68(2)(b) of the Rules. Again, it should be stressed that the Chamber will fully take into account the absence of cross-examination in assessing this evidence, in particular for matters that are materially in dispute.
9. Turning to the question as to whether or not the evidence is of a cumulative or corroborative nature, I find that the evidence of P-0113 raises many topics already covered in the evidence of P-0114.¹⁴ It is also the case concerning the expected evidence of P-0150.¹⁵ As to the excerpts identified by the Defence which, in its view, are not corroborated or are disputed by other sources,¹⁶ I have duly considered them in the discretionary exercise under Rule 68(2)(b)(i), as well as the mandatory evaluation of the relevant factors, but I believe that the discrete excerpts where P-0113's statement may lack of corroboration – or even be contradictory to other evidence to be adduced or on the record – do not render his prior recorded testimony unsuitable for admission under Rule 68(2)(b). In this regard, I recall once again that probative value, as well as weight, if any, of the evidence will be duly assessed and attributed during the Chamber's eventual deliberation for its judgment. Importantly, in this respect, I recall once again that the Chamber's assessment of the evidence shall take into account the absence of an opportunity for the Defence to cross-examine the witness on these issues.

¹³ Response, ICC-01/12-01/18-1252-Conf, paras 11-13.

¹⁴ I refer to the Chamber's Rule 68(3) Decision allowing the introduction of the prior recorded statement of P-0114 (Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 26 January 2021, ICC-01/12-01/18-1267-Conf, paras 12-15) as well as his in-court testimony, including the Defence cross-examination of P-0114 (transcript of hearing on 15 February 2021, ICC-01/12-01/18-T-060-CONF-ENG ET).

¹⁵ See Witnesses Summaries, 14 April 2020, notified on 15 April 2020, ICC-01/12-01/18-740-Conf-AnxB, pp. 573-643.

¹⁶ Response, ICC-01/12-01/18-1252-Conf, paras 14-17.

10. I am also of the view that P-0113's prior recorded testimony bears sufficient indicia of reliability. In this regard, I find that P-0113's statement contains all the formal requirements that can be expected for such a document¹⁷ and that it is not so manifestly unbelievable or incoherent so as to make it unsuitable for introduction under Rule 68(2)(b). I should also note that I find no basis in the Defence's argument that P-0113's prior recorded testimony fails to demonstrate sufficient indicia of reliability because it contains a sentence that suggests a form of bias which cannot be tested by means other than a cross-examination.¹⁸ I consider that the sentence identified by the Defence, which is contained in an associated exhibit and reports his account during a meeting with an investigator, falls short of impacting my assessment as to whether or not the prior recorded testimony has 'sufficient indicia of reliability'. Moreover, in line with the approach adopted for the submission of evidence, I also do not find it necessary, as requested by the Defence,¹⁹ to require that the Prosecution demonstrates further specificity and probative value for each of the associated items sought to be introduced together with the prior recorded testimony of P-0113.
11. Finally, I note that important to the reasoning of the Majority is their view that it is preferable to introduce the prior recorded testimony of P-0113 pursuant to Rule 68(3) allowing for cross-examination. I fully share that opinion and would also strongly favour the use of Rule 68(3). Where our views depart however is whether there is a realistic prospect of obtaining the evidence of this witness *vive voce* or through 68(3). Given the Prosecution's extensive use of protective measures in this case, it is evident that in discussing possible testimony with this witness, the Prosecution would have already exhaustively canvassed use of such measures to no avail. Evidently it is also in the Prosecution interest to adduce the totality of the statement via Rule 68(3). Nonetheless, the P-0113 Request makes it clear that this witness is not prepared to testify orally [REDACTED].²⁰ In light of this, I can see no basis to further pursue the possibility of oral testimony and, given my conclusions with respect to Rule 68(2)(b), it would be counter-productive to do so. In these circumstances, it is my view the

¹⁷ See Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, 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-02/11-01/15-744 OA8, para. 104.

¹⁸ Response, ICC-01/12-01/18-1252-Conf, para. 21.

¹⁹ Response, ICC-01/12-01/18-1252-Conf, para. 24.

²⁰ P-0113 Request, ICC-01/12-01/18-1207-Conf, paras 7, 17.

Majority's decision to reject the application under Rule 68(2)(b) effectively prevents the Chamber from receiving any of the evidence of P-0113.

12. In these circumstances, and as requested by the Prosecution,²¹ I believe that the Chamber must also consider its responsibility in the search for the truth, i.e. to have relevant evidence before it. This is clearly the purpose for the discretion accorded to the Chamber under Rule 68(2)(b) of the Rules. Moreover, I share the Prosecution conclusion that the important justification which the witness has provided for his refusal to testify further supports that the introduction of the evidence under Rule 68(2) (b) is in the interests of justice.
13. Having weighed all the relevant factors listed under Rule 68(2)(b)(i), I am of the opinion that it is unnecessary to require the examination of P-0113. As discussed above, I find that introduction of P-0113's material is fully compliant with the requirements of Rule 68(2)(b) and would not have been prejudicial to or inconsistent with the rights of the accused. I therefore disagree with the Majority's conclusion on the P-0113 Request and would have authorised the Prosecution to introduce into evidence the witness' prior recorded testimony and associated material pursuant to Rule 68(2)(b) of the Rules, with the exception noted above at paragraph 6.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to read 'K. Prost', is written over a horizontal line.

Judge Kimberly Prost

Dated this Friday, 26 March 2021
At The Hague, The Netherlands

²¹ P-0113 Request, ICC-01/12-01/18-1207-Conf, paras 41-42.