

PARTIALLY DISSENTING OPINION OF JUDGE KIMBERLY PROST

1. I am unable to join the Majority's decision to reject the Prosecution application¹ to introduce the prior recorded testimony of P-0130 under Rule 68(2)(b) of the Rules (the 'Majority Decision', the 'Request' and the 'Statement' respectively). I have the same view as the Majority as to the discretionary nature of this decision.² As to the requirements of the rule, with the exclusion of the identified limited references, I am satisfied that the Statement goes to proof of a matter other than the acts and conduct of the accused.³
2. Our point of departure relates primarily to the interpretation of the factors set out in Rule 68(2)(b)(i) of the Rules and their assessment with respect to the evidence of P-0130.
3. As a starting point, I disagree with the categorization of Rule 68 of the Rules as a deviation to the general principle of orality enshrined in Article 69(2) of the Statute.⁴ Article 69 in its entirety was drafted as a compromise between legal traditions and it is a cornerstone in establishing the hybrid nature of the Court's proceedings.⁵ In this context Article 69(2) of the Statute fully recognized that the requirement for in person testimony would be subject to variation as specified in the Rules of Procedure and Evidence.⁶ In that respect, I do not consider that introduction of prior recorded testimony in accordance with the Rules should be viewed as exceptional. To do so is to accord dominance to one legal tradition in contravention to the plain wording and intent of Article 69(2) of the Statute.

¹ Prosecution application under rule 68(2)(b) of the Rules to introduce into evidence MLI-OTP-P-0130's prior recorded testimony and associated material, 30 November 2021, ICC-01/12-01/18-2013-Conf-Exp.

² Majority Decision, para. 4.

³ Majority Decision, para. 6.

⁴ See Dissenting Opinion of Judge Kimberly Prost, 15 November 2021, ICC-01/12-01/18-1924-Anx (the 'P-0113 Dissent'), para. 8.

⁵ P-0113 Dissent, ICC-01/12-01/18-1924-Anx, para. 8.

⁶ See 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, para. 77 ('[...] under the second sentence of article 69 (2) of the Statute, a Chamber has the discretion to receive the testimony of a witness by means other than in-court personal testimony, as long as this does not violate the Statute and accords with the Rules of Procedure and Evidence. The most relevant provision in the Rules of Procedure and Evidence is rule 68 [...]').

4. Turning to the assessment of the factors of relevance to the discretionary decision, I note that the list set out in Rule 68 is not exhaustive nor does it represent conditions which must be met for introduction.⁷ To the contrary, the only ‘condition’ for introduction under Rule 68(2)(b) is that the testimony must go to matters other than the acts and conduct of the accused. I approach the assessment to be conducted with this in mind.
5. While I agree that P-0130’s prior recorded testimony covers important topics and touches on matters which are materially in dispute and not just background information, this is only one consideration which, if given undue weight, would significantly limit the use of Rule 68(2)(b). In my view, to the contrary, as relevance is also a pertinent consideration, this determination can weigh in favour of introduction.
6. One of the essential points of departure with the Majority relates to the assessment as to the cumulative and corroborative nature of P-0130’s evidence. Given the shared conclusion as to the broad nature and scope of this prior recorded testimony, with respect, I cannot agree with the Majority’s conclusion that ‘a not insignificant part of the Statement contains evidence of alleged abuses that are unique or not similar to other facts of the case’.⁸ This is especially the case noting that the relevant consideration is whether other testimony has been provided on ‘similar facts’ and that it is not required that the accounts accord in every detail.⁹ In my opinion, considering that the overwhelming majority of topics addressed in the Statement relate to matters on which the Chamber has heard multiple witnesses, the criteria of cumulative and corroborative nature in this instance

⁷ 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, para. 6 ([...] Importantly, while the Chamber shall take into consideration these factors in the determination of whether to allow the introduction of prior recorded testimony under Rule 68(2)(b) of the Rules, they are not mandatory pre-conditions for the applicability of Rule 68(2)(b) of the Rules but factors guiding the Chamber’s exercise of its discretion’).

⁸ Majority Decision, para. 10.

⁹ Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Public redacted version of Decision on Prosecution application for admission of prior recorded testimony of Witness P-0039 under Rule 68(2)(b), 12 January 2017, ICC-01/04-02/06-1715-Red, para. 14.

weighs heavily in favour of introduction of the Statement under Rule 68(2)(b).¹⁰ To adduce this evidence *viva voce* would have been highly repetitive and contrary to judicial efficiency which is an important component of the interests of justice factor. I consider that the Request is fully in line with the Chamber's recent instruction for the parties to streamline their case.¹¹ With respect to the very limited instances of unique evidence and the absence of cross-examination, this is a matter which in my view is best addressed by the Chamber ultimately in its judgment deliberations when assessing the probative value of the evidence.¹² This approach is also consistent with the submission system of evidence which the Chamber has adopted for the proceedings.¹³ Such an assessment will also need to bear in mind the Appellate jurisprudence that 'prior recorded testimony must not form the sole or decisive basis for the conviction for a particular crime as such'.¹⁴ In this respect I depart from the Majority in their determination that the absence of cross-examination with respect to discrete and limited portions of the Statement would disproportionately and unfairly impact Defence rights.

7. Another significant point of disagreement arises from the Majority's finding that the Statement in this instance does not reflect the basis of knowledge of the witness for important factual allegations. With respect, I do not find support in the Statement for this factual finding. In my view, P-0130's prior recorded testimony is replete with references to the basis of knowledge for the facts described with the witness making careful distinctions between what he heard, what he saw and the sources of his information.¹⁵ Moreover, to the extent that there are some factual assertions where the basis of knowledge is unclear, this is a matter which should be taken into account in assessing the weight of the

¹⁰ This includes the role of the Islamic police in enforcing rules, its relationship with other organs of the groups, and alleged instances of abuses committed during the relevant time period which the Majority specifically refers to. See Majority Decision, para. 9.

¹¹ Fifth decision on matters related to the conduct of proceedings: presentation of evidence by the LRVs and Defence, 22 September 2021, ICC-01/12-01/18-1756, para. 22.

¹² Similarly see P-0113 Dissent, ICC-01/12-01/18-1924-Anx, para. 10.

¹³ ICC-01/12-01/18-789-AnxA, paras 27-34.

¹⁴ Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, Public redacted version of Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', 30 March 2021, ICC-01/04-02/06-2666-Red, paras 16, 629-630.

¹⁵ See for example paragraphs 33, 35- 36 and 41 of the Statement on the arrival of the armed groups; paragraph 50 on his knowledge of the leaders of the armed groups; paragraphs 65 and 76 explaining his basis of knowledge as to the floggings; paragraph 91 on how he learned about the cases of arrest and detention; and paragraph 100 clearly explaining how he acquired information from some victims.

Statement and its probative value and not to determine if the evidence can be introduced under Rule 68(2)(b). On this point, with respect, I consider the finding and its consequences for the Majority inconsistent with the approach which the Chamber has adopted throughout the proceedings in relation to other prior recorded testimony received under Rule 68 and with respect to documentary evidence submitted through witnesses and bar table motions.

8. Finally, I disagree with Majority's position on the weight that must be accorded to the witness's hesitation, preference or subjective fear to appear in court in the Chamber's Rule 68(2)(b) assessment.¹⁶ Whether the witness is 'available', in the sense that it does not fulfil the mandatory requirement under Rule 68(2)(c)(i) of the Rules, is not a pertinent criteria for determining whether a prior recorded testimony should be introduced under Rule 68(2)(b) of the Rules. Neither does this mean that the Chamber must turn a blind eye to the *effective* unavailability of the witness due to other reasons, including his or her subjective fear or hesitation, when exercising its discretion under Rule 68(2)(b) of the Rules. It is further incumbent on the Chamber to duly take note of any security concerns and avoid compelling a witness to testify to the detriment of his own security, particularly in light of the Chamber's Article 68 obligations. In this particular instance, it is evident from the persistent unwillingness of P-0130 to testify¹⁷ that, should the Request be rejected, the Chamber will be deprived of an opportunity to receive P-0130's evidence. I note in this regard that the Prosecution has duly considered requesting the issuance of a summons but concluded that such an option would also not assist in securing P-0130's evidence.¹⁸ In light of the Chamber's truth finding responsibility, having all relevant evidence before it when ultimately assessing all the evidence is a significant component of the interests of justice in the context of Rule 68(2)(b) of the Rules.¹⁹ Accordingly, I consider that P-0130's unwillingness to testify is a factor militating in favour of, rather than against, the introduction of his evidence pursuant to Rule 68(2)(b) of the Rules.

¹⁶ Majority Decision, para. 12.

¹⁷ See MLI-OTP-0082-0325-R01 at 0327-0328.

¹⁸ Request, ICC-01/12-01/18-2013-Conf-Exp, para. 8.

¹⁹ P-0113 Dissent, ICC-01/12-01/18-1924-Anx, para. 11.

9. For these reasons, I would have granted the Request and allowed the introduction of the Statement, together with its associated exhibits, pursuant to Rule 68(2)(b) of the Rules.

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 Monday, 21 February 2022

At The Hague, The Netherlands