Cour Pénale Internationale

International Criminal Court

DISSENTING OPINION OF

JUDGE LUZ DEL CARMEN IBÁÑEZ CARRANZA

I. KEY FINDINGS

1. The purpose of the procedure for receiving evidence at this Court is not only to determine the guilt or otherwise of the accused but also, in that process, to determine the (judicial) truth. Pursuant to article 69(3) of the Statute, the parties may submit all evidence relevant to the case, and, importantly, the judges of the Court have the authority to request, on their own motion, the submission of all evidence that judges themselves consider necessary for the determination of the truth. This is a judicial duty that the Statute has included as part of the judges' mandate. The determination of the truth implies a broader purpose in the interests of all parties and participants, including the accused and the victims, and additionally the international community.

2. Article 69(2) of the Statute allows that testimony be given *viva voce* and it equally allows for the introduction of recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to the measures of article 68 of the Statute and in accordance with the Rules of Procedure and Evidence, namely rule 68(2). This is another lawful form of introducing and eventually admitting testimony in the context of a hearing, in the trial proceedings, and under the principle of orality. For this reason, the introduction of testimony in this form, and its eventual admission after confrontation and discussion during the oral proceedings, does not amount to a deviation from the principle of orality, nor does it affect the rights of the accused nor the principle of equality of arms.

3. The right to cross-examine witnesses is a procedural fair trial right that, although internationally recognised, is not absolute; its application may be subject to procedural rules, especially when other human rights are at stake. While it is related to the principle of orality, which is broader, the right to cross-examine witnesses is rather an expression of the principle of confrontation. Along with the principles of orality and confrontation,

the principles of immediacy and publicity interact in safeguarding the integrity of the trial and the rights of all parties in the proceeding. Testimony received in forms other than *viva voce*, such as the forms indicated in article 69(2) of the Statute, equally comply with those principles because, in the context of the oral proceedings, the accused and all other parties and participants have the opportunity to discuss and make submissions on the introduction and eventual admission of this form of testimony. In addition to these submissions, the trial chamber will make a proper and holistic assessment of all evidence at the end of the proceedings.

4. The correct application of rule 68(2) of the Rules of Procedure and Evidence requires a twofold assessment. The first prong of this assessment is mandatory, as per paragraph 2(b) of the rule, and the second one is discretional, pursuant to subparagraph 2(b)(i). The first prong requires that the trial chamber determines whether the prior recorded testimony (or any part thereof) goes to proof of a matter other than the acts and conduct of the accused. Importantly, the acts and conduct of the accused are those described and confirmed in the charges, in light of the modes of liability for which the person is accused. Second, having made this mandatory assessment, if the testimony (or any part thereof) goes to proof of a matter other than the acts and conduct of the accused, the trial chamber may lawfully introduce and eventually admit it, as per the discretionary assessment under the factors of subparagraph (2)(b)(i) of rule 68, in keeping with the rights of the accused as well as the object and purpose of the proceedings under the Statute.

5. One of the most important factors of the discretionary assessment under rule 68(2)(b)(i) is the concept of the "interests of justice". It involves, *inter alia*, consideration of the determination of the truth, fairness and effectiveness of the proceedings, in keeping with the object and purpose of the Statute, respecting the rights of all parties and participants, and not only a consideration of judicial economy. A proper assessment of this factor favours the introduction of prior recorded testimony.

II. INTRODUCTION

6. In its judgment, the majority of the Appeals Chamber (hereinafter, the "Majority"), when assessing the first ground of the Prosecution's appeal, has found an error in the Trial Chamber's unclear reasoning in rejecting the introduction of the previously recorded testimony of witness P-0113.[1] Nevertheless, the Majority failed to consider that this error materially affected the Impugned Decision and rather rejected the first ground of appeal.[2] I respectfully disagree with this outcome. While I agree that the Trial Chamber erred, I consider that its lack of sufficient reasoning is an appealable error that materially affected the Impugned Decision. In my view, the matter should have been remanded for the Trial Chamber to make a reasoned decision.

7. Furthermore, regarding the second ground of the Prosecution's appeal, the Majority found that rule 68(2) of the Rules constitutes a limitation on the internationally recognised and fundamental fair trial right to confront witnesses,[3] and that "this Court is bound to interpret and apply rule 68 of the Rules – a subordinate norm to articles 67(1)(e) and 69(2) of the Statute – in a manner that is consistent with internationally recognised human rights norms".[4] It went on to say that "that rule 68 of the Rules must be treated as an exception to the principle of orality in article 69(2) of the Statute".[5] I am not in agreement with the Majority.

8. While I note that the accused's right to cross-examine a witness is internationally recognised, this particular fair trial right is not affected in this case. The introduction of prior recorded testimony is not an exception to cross-examination as such, as the prior recorded testimony is another type of evidence, subject to another set of rules in its assessment. I consider that rule 68(2) of the Rules is not an exception to the principle of orality but simply establishes the circumstances and requirements under which previously recorded testimony may be introduced. This provision must be read in light of article 69(2) and (3) of the Statute, bearing in mind that the purpose of producing and receiving evidence at this Court encompasses more than solely determining the

[1] Majority's Judgment, para. 62.
[2] Majority's Judgment, para. 64.
[3] Majority's Judgment, para. 78.
[4] Majority's Judgment, para. 79.
[5] Majority's Judgment, para. 80.

guilt of the accused. It also includes the determination of the truth. In this regard, rule 68(2) must be carefully applied by firstly assessing whether the previously recorded testimony goes to prove the acts and conduct of the accused, and secondly, whether it can be introduced as per the discretionary assessment of the chamber. As further elaborated below, the Trial Chamber erred in making this assessment. Accordingly, I would have granted the second ground of the Prosecution's appeal.

9. As further elaborated below, this appeal raises a question regarding the admissibility of evidence. It concerns a case where witness P-0113 could not testify in person before the Court because reasons detailed in the confidential version of the Prosecution's submissions before the Trial Chamber, which was available to the Defence. In this respect, the Prosecution sought to exclude nine paragraphs of P-0113's written statement, as well as one associated exhibit, which in its view go to the acts and conduct of Mr Al Hassan. The Defence opposed the Prosecution's request, and in its response averred that the proposed exclusions are not peripheral and discreet in nature but are inseparable from the rest of P-0113's statement. The Defence submitted that the remaining parts of witness P-0113's testimony, those which the Prosecution sought to introduce, also relate to Mr Al Hassan's alleged acts and conduct.

10. On appeal the Prosecutor raised two grounds alleging errors of law on the part of the Trial Chamber. I would have granted both of them. Below, this opinion will indicate those points on which the Majority and I were unable to agree. For each ground of appeal, this opinion shows the reasons why I would have found an error in the Impugned Decision. To do so, I assess the following issues in this opinion:

a. First issue: lack of clear and sufficient reasoning

b. Second issue: the purpose of the evidence in the Court's criminal proceedings

c. Third issue: the principle of orality

d. Fourth issue: error of law in the discretionary assessment of rule 68(2)(b)(i) of the Rules

III. FIRST GROUND OF APPEAL

11. Under the first ground of appeal, the Prosecution submits that the Trial Chamber erred in regarding "all testimony which did not go to prove the acts and conduct of the accused, but instead related to the acts and conduct of third parties […] as if it were evidence of the acts and conduct of the accused".[6] In this regard, the Prosecutor submits that the analysis should focus on the "ordinary meaning" of the phrase "acts and conduct of the accused" – that is, the "personal acts and omissions of the accused, which are described in the charges against him or her or which are otherwise relied upon to establish his or her criminal responsibility for the crimes charged".[7] The Prosecution also contends that the Trial Chamber committed a legal error when it confused the "Chamber's discretionary power (to admit prior recorded testimony in part) with the purely legal question of which parts of the prior recorded testimony (if any) actually went to the acts and conduct of the accused".[8]

A. First issue: lack of reasoning

12. The Majority found that "the Trial Chamber *did not clearly explain whether it had assessed the bulk of P-0113's statement with a view to determining whether certain paragraphs therein relate to proof of the acts and conduct of Mr Al Hassan*".[9] However, having found that the Trial Chamber erred, the Majority went on to hold that "even if the Trial Chamber had not erred as identified above, the outcome in the Impugned Decision would have been the same"; that is, that "the error does not materially affect the decision as a whole or, in particular, the conclusion reached by the Trial Chamber under rule 68(2)(b)(i) of the Rules".[10] For the reasons that follow, I am unable to agree with this outcome.

13. In my view, the lack of clear and sufficient reasoning of the Impugned Decision reveals that no proper assessment of the statement was made, as required by rule 68(2)(b) of the Rules, and, as such, this constitutes an error of law in this case. The Trial Chamber should have first excluded the nine paragraphs that the Prosecutor sought to exclude and, subsequently, it should have examined whether any of the remaining paragraphs go to prove the acts and conduct of the accused. Only after conducting this

[6] Appeal Brief, para. 8.
[7] Appeal Brief, para. 12.
[8] Appeal Brief, para. 21.
[9] Majority's Judgment, para. 62 (emphasis added).
[10] Majority's Judgment, para. 64.

assessment, would the Trial Chamber be entitled to proceed to consider the discretionary elements contained under rule 68(2)(b)(i) for the paragraphs that do not go to prove the acts and conduct of the accused. The Trial Chamber did not make this assessment or, at the very least, it did not provide clear and sufficient reasoning showing that it had made this assessment. The insufficient reasoning it provided does not clearly indicate whether or not it excluded the paragraphs that go to prove the acts and conduct of the accused. This error of law had a material impact on the decision and its outcome.

14. Article 69(2) of the Statute permits the introduction of testimony other than only *viva voce* testimony, if certain conditions are met. This provision reads as follows:

> The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

15. The related rule of the Rules of Procedure and Evidence (the "Rules") is rule 68, and in the case at hand, it is the second paragraph of this rule that contains the relevant provision under which the Prosecutor sought to introduce the prior recorded testimony of witness P-0113. This provision reads as follows:

> 2. If the witness who gave the previously recorded testimony is not present before the Trial Chamber, the Chamber may allow the introduction of that previously recorded testimony in any one of the following instances:
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> (a) Both the Prosecutor and the defence had the opportunity to examine the witness during the recording.
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> (b) The prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused. In such a case:
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> (i) In determining whether introduction of prior recorded testimony falling under sub-rule (b) may be allowed, the Chamber shall consider, inter alia, whether the prior recorded testimony in question:
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> - relates to issues that are not materially in dispute;
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> - is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts;
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> - relates to background information;

- is such that the interests of justice are best served by its introduction; and

- has sufficient indicia of reliability.

16. In this regard, I recall that the Appeals Chamber has previously held that a chamber has discretion in its decision on the admissibility 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.[11] More specifically, a chamber may allow the introduction of the prior recorded testimony of a witness pursuant to rule 68(2)(b) of the Rules when that testimony "goes to proof of a matter other than the acts and conduct of the accused". In my view, the assessment of rule 68(2) of the Rules – whether the previously recorded testimony goes to prove the acts and conduct of the accused – must be conducted solely in light of the charges as previously confirmed, rather than circumstances not directly related to the direct acts and conduct of the accused, including, *inter alia*, the contextual elements of the crimes and the acts of persons who are not relevant to the modes of liability of the charges as confirmed.

17. In the case at hand, the question that follows, and which the Trial Chamber should have addressed, with clear reasons, is whether the statement of witness P-0113, having excluded the paragraphs that the Prosecution requested to be excluded, refer to the acts and conduct of the accused in this case. However, in the Impugned Decision, the Trial Chamber refrained from properly conducting this assessment noting that the paragraphs identified by the Prosecution could not be separated from the whole statement. Referring to the paragraphs concerning the acts and conduct of the accused, the Trial Chamber indicated that it was "not satisfied that such references are peripheral and discrete or can be detached from their context in this instance".[12] The Trial Chamber found that the paragraphs identified by the Prosecution were "part of a longer section in which P-0113 provides evidence regarding key aspects of the narrative concerning the criminal responsibility of the accused, such as the role of the Islamic police and the interactions in between the various groups".[13] These paragraphs, according to the Trial Chamber, "go to the very core of P-0113's evidence".[14] Finally, the Trial Chamber determined that "excluding the excerpts identified by the Prosecution, while retaining

[11] Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the Appeals against the Decision on the Admission of Evidence, 3 May 2011, ICC-01/05-01/08-1386 (OA5 OA6), para. 77.
[12] Impugned Decision, para. 14.
[13] Impugned Decision, para. 14.
[14] Impugned Decision, para. 14.

the remainder – most notably paragraphs immediately prior and after the identified excerpts – would distort the substance of the narrative of P-0113's evidence, taken as a whole".[15] It concluded that it considered "inapposite such a piecemeal approach to the witness's evidence under Rule 68(2)(b) of the Rules".[16]

18. Having said this, the Trial Chamber went on to note that "[i]n any case, and contrary to the arguments of the Prosecution, the Majority finds that the discretionary factors to be considered under Rule 68(2)(b)(i) of the Rules also play against the introduction of P-0113's prior recorded testimony under this provision".[17] The Trial Chamber proceeded to make the assessment required under rule 68(2)(b)(i) of the Rules,[18] but it remained unclear whether the Trial Chamber was conducting an assessment of the whole statement, as it had refused to exclude the paragraphs the Prosecution has sought to exclude. Accordingly, the Trial Chamber did not conduct a thorough analysis of the remaining paragraphs after excluding those paragraphs referred to by the Prosecution to see that they did not go to proof of a matter other than the acts and conduct of the accused, as required by the rule.

19. In my view, had the Trial Chamber made the required assessment, it would have provided a decision, with clear reasons, and as required by rule 68(2)(b) of the Rules, as to the question of whether the statement of witness P-0113, without the paragraphs that the Prosecution sought to exclude, referred to the acts and conduct of the accused. However, the Trial Chamber did not address the Prosecution submission that only the sections of the testimony it sought to exclude related to the acts and conduct of the accused.[19] It thus made no decision as to whether the remaining paragraphs of the

[15] Impugned Decision, para. 14.
[16] Impugned Decision, para. 14.
[17] Impugned Decision, para. 15.
[18] Impugned Decision, paras 16-19.
[19] Judge Prost's Dissent to Impugned Decision, para. 4, *referring to* Judge Prost's Partial Dissent to Third Decision, para. 4: "It does not appear to me that the remaining parts of P-0113's prior recorded testimony go to prove the acts and conduct of the accused or otherwise address matters so proximate to the accused so as to require their exclusion", *referring 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, paras 11-12; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on admission of prior recorded testimony of Witness P-0773 under Rule 68, 2 December 2016, ICC-01/04-02/06-1667-Conf (public redacted version filed on 27 February 2017 (ICC-01/04-02/06-1667-Red)), para. 11.

witness statement do not address the direct acts and conduct for which the accused has been charged.

20. In this regard, the Trial Chamber failed to provide sufficient and clear reasoning in its decision materially impacting the outcome as there is no basis to review the correctness of its merits on appeal. As the Majority observed "the Trial Chamber *did not clearly explain whether it had assessed the bulk of P-0113's statement with a view to determining whether certain paragraphs therein relate to proof of the acts and conduct of Mr Al Hassan*".[20] However, although the Majority found no material effect in this error, I recall that, in *Lubanga* OA5, the Appeals Chamber considered that lack of sufficient reasoning materially affects the impugned decision because "it cannot be established, on the basis of the reasoning that was provided, how the Pre-Trial Chamber reached its decision".[21] Similarly, in *Lubanga* OA6, having found that the impugned decision lacked sufficient reasoning, the Appeals Chamber remanded the matter for the Pre-Trial Chamber to "consider the matter anew and provide sufficient reasons for its decision".[22] I consider that, in the case at hand, the Trial Chamber's failure to provide sufficient reasoning materially affected the impugned decision and the matter should have been remanded to the Trial Chamber for it to assess the question it did not assess — whether the remainder of the statement of witness P-0113 addressed the acts and conduct of the accused — and in order for the Trial Chamber to provide sufficient reasons for its decision.

21. In any event, even if, for the sake of argument, having found that the Impugned Decision lacked sufficient reasoning, it were necessary to demonstrate how such decision "would (as opposed to 'could' or 'might') have been substantially different" had the Trial Chamber not erred,[23] I consider that the Trial Chamber would have found that the remainder of the testimony does not refer to the acts and conduct of Mr Al

[20] Majority's Judgment, para. 62 (emphasis added).
[21] Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006, ICC-01/04-01/06-773, para. 53.
[22] Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 82", 14 December 2006, ICC-01/04-01/06-774, para. 65.
[23] Appeals Chamber, *The Prosecutor v. Mathieu Ngudjolo Chui*, Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled "Judgment pursuant to article 74 of the Statute", 7 April 2015, ICC-01/04-02/12-271-Corr, para. 285.

Hassan. The Prosecutor sought to exclude any express mention of Mr Al Hassan and, considering the modes of liability charged in this case, I find it difficult to conclude that any mention of contextual elements or acts of persons other than Mr Al Hassan in the remainder of the statement would relate to the acts and conduct of accused. The modes of liability for the charges confirmed in this case are direct commission of torture and cruel and inhumane treatment under articles 8(2)(c)(ii) and (ii), and 7(1)(f) and (k), under article 25(3)(a), and accessorial liability, under article 25(3)(c) and (d):

> 859. Étant donné que le Procureur n'a pas démontré que M. Al Hassan a apporté une contribution essentielle à la commission des crimes – ce qui est déjà suffisant pour rejeter sa responsablité sous l'angle de l'article 25-3-a en tant que co-auteur direct ou indirect –, et que le Procureur n'a pas démontré non plus que M. Al Hassan exerçait un contrôle sur l'organisation, il n'est pas nécessaire d'examiner les éléments subjectifs de la coaction directe ou indirecte.
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> 860. Par conséquent, la Chambre écarte la responsabilité de M. Al Hassan comme auteur principal, à l'exception de la flagellation qu'il a lui-même infligée aux hommes aux environs du 2012 directement. La Chambre considère en revanche que la contribution de M. Al Hassan était celle d'un complice. À cet égard, comme démontré ci-dessous, la Chambre considère qu'à l'exception des faits criminels retenus en vertu de l'article 25-3-c, l'article 25-3-d permet une meilleure appréciation du rôle joué par M. Al Hassan lors des évènements survenus à Tombouctou et dans sa région entre le 1er avril 2012 et le 28 janvier 2013.
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> …
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> La Chambre estime qu'il existe des motifs substantiels de croire que M. Al Hassan est pénalement responsable en vertu de l'article 25-3-d du Statut tel que décrit aux paragraphes 954-1010 pour le crime contre l'humanité de torture prévu à l'article 7-1-f, tel que décrit aux paragraphes 264-355, vis-à-vis des victimes suivantes :- Les hommes flagellés aux environs du 2012, tel que décrit aux paragraphes 279-280, 350 ; la responsabilité pénale de M. Al Hassan pour cet incident est également retenue en vertu de l'article 25-3-a en qualité d'auteur direct, tel que décrit au paragraphe.[24]

22. Although the Prosecutor requested under regulation 55 that the mode of liability of co-perpetration be considered, the Trial Chamber found that "[f]or the moment, the Chamber will defer to PTC I's findings and declines to provide notice of the possible re-characterisation sought," and that it made that finding "without prejudice to provide

[24] *See* Pre-Trial Chamber I, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 8 November 2019, ICC-01/12-01/18-461-Conf-Corr, paras 848-860.

notice at a later point in time, either proprio motu or following a request, should it consider it to be appropriate to do so at the relevant time".[25]

23. Accordingly, I am unable to see how that exercise, in the circumstances of this case, where the mode of liability of co-perpetration was not confirmed and was not included under regulation 55 of the Regulations, would go to the proof of the acts and conduct of Mr Al Hassan.

B. Second issue: the purpose of the evidence in the Court's criminal proceedings

24. The Majority rejected the arguments of the Prosecutor that, due to further safeguards in the Statute, there is no risk of unfairness in allowing the introduction of statements under rule 68(2)(b)(i) of the Rules, because, in the Majority's view, that "is not in dispute, and the Trial Chamber made no pronouncement on this in the Impugned Decision".[26] For the reasons that follow, I am unable to agree with the Majority.

25. In contrast, I note, in this regard, that rule 68(2) indicates that the Trial Chamber "may allow the introduction" of previously recorded testimony. In my view, this introduction is without prejudice to the final assessment of the evidence that the Trial Chamber shall holistically make at the end of the trial proceedings. In this regard, I recall that, under article 74(2) of the Statute, the decision of the Trial Chamber on the guilt of the accused "shall be based on its evaluation of the evidence and the entire proceedings" and such decision "may only" be based "on evidence submitted and discussed before it at the trial".

26. At the outset, I note that, in principle, all relevant evidence should be examined by the trial chamber hearing the evidence of the case. This is based on the relevant provisions of the Court's legal framework: First, article 69(3) of the Statute, first sentence, allows the parties to "submit evidence *relevant to the case*, in accordance with article 64" (emphasis added). The second sentence, applicable where a chamber calls evidence *proprio motu*, states that "the Court shall have the authority to request the

[25] *See* Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on application for notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court, 25 June 2021, ICC-01/12-01/18-1211-Red, paras 125-126.
[26] Majority's Judgment, para. 66.

submission of *all evidence that it considers necessary for the determination of the truth*" (emphasis added). Furthermore, article 69(4) provides that "[t]he Court may rule on the relevance or 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, in accordance with the Rules of Procedure and Evidence". Finally, rule 63(2) of the Rules gives the chamber the authority to "assess freely *all evidence* submitted" (emphasis added).[27]

27. In my view, the norms in the foregoing provisions must be read in a systematic way. In particular, in light of article 69(3) of the Statute, which provides that the parties may submit all relevant evidence to the case, and, importantly, the judges have the authority to request, on their own motion, the submission of all evidence that judges themselves consider necessary for the determination of the truth. Certainly, the objective of trials at this Court are guided by a unique set of rules influenced mainly by the two most well-known legal traditions, civil and common law, resulting in a hybrid system rich with procedural resources wherein the search for and determination of the truth is essential.[28] The purpose of the procedure for receiving evidence at this Court is not only to determine the guilt or otherwise of the accused but also, in that process, to find the (judicial) truth. Although determining the guilt or otherwise of the accused is part of the determination of the truth, determining the judicial truth encompasses a broader purpose concerning the interest of the parties, the victims and the international community. Accordingly, receiving evidence at this Court serves both objectives. Similarly, considering that the determination of the truth is not only a right of the victims but is also in the interest of the parties, primarily the accused, and the international community, determining the truth is in the interests of justice. As such, determining the truth is first and foremost in the interest of justice. It is therefore a crucial duty of judges, and one of the essential objectives of the proceedings at this Court, especially in its trials, to determine the truth on the basis of all the available and relevant evidence.

[27] It is noted that after a chamber has found that evidence is admissible, a chamber must still assess the weight to assign to that evidence.
[28] *See* Judge Prost's Dissent to Impugned Decision, para. 7.

28. For this reason, all available and relevant evidence can be submitted for the Court to later determine its probative value.[29] At an early stage of the submission of evidence, the assessment cannot be unduly stringent, but there should rather be a presumption for admissibility. When rejected, judges ought to objectively provide clear and sufficient reasons, including why the evidence would not eventually serve the aforementioned objective of determining the truth. In light of the judicial duty and objective in proceedings at this Court to determine the truth, in some procedures —such as that established in rule 68(2) of the Rules— the admissibility assessment ought to be done with a view to favouring admissibility rather than excluding evidence that might be important for the determination of the truth.

29. The introduction of previously recorded testimony, without making a determination as to its probative value at the moment of its admission, is not a deviation from the right to cross-examine witnesses, but is rather the fulfilment of express norms of the Statute regarding the introduction of this type of evidence by forms other than *viva voce* testimony. It is my view that the first sentence of article 69(2) of the Statute, read in light of the content of the provision in its entirety, does not exactly provide for the so-called "exceptions" to oral testimony. Rather, this provision sets out other forms for receiving this type of evidence in court in circumstances where protective measures

[29] In this regard, I recall that in *Bemba et al.* (A-A5), the Appeals Chamber considered that "a trial chamber, upon the submission of an item of evidence by a party, has discretion to either: (i) rule on the relevance and/or admissibility of such item of evidence as a pre-condition for recognising it as "submitted" within the meaning of article 74 (2) of the Statute, and assess its weight at the end of the proceedings as part of its holistic assessment of all evidence submitted; or (ii) recognise the submission of such item of evidence without a prior ruling on its relevance and/or admissibility and consider its relevance and probative value as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused" (Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018, ICC-01/05-01/13-2275-Red, para. 598). The Appeals Chamber went on to find: "Any item of submitted evidence that is not excluded at trial must therefore be presumed to be considered by a trial chamber not to be inadmissible under any applicable exclusionary rule. For this reason, both the procedure for the submission of evidence at trial and the status of each piece of evidence as "submitted" within the meaning of article 74 (2) of the Statute must be clear. This is a fundamental guarantee for the rights of the parties at trial as well as for the purpose of any subsequent appellate review" (Appeals Chamber. *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018, ICC-01/05-01/13-2275-Red, para. 599).

to witnesses and victims are required, according to article 68 of the Statute, and eventually to other procedures established in the Rules, namely, rule 68 of the Rules.

30. This is apparent following an analysis of the language in both the French and Spanish versions of article 69(2), which are equally authentic to the English version, under article 128 of the Statute. Certainly, as required by article 33(3) of the *Vienna Convention on the Law of Treaties*, the provisions in each authentic text of a treaty are presumed to have the same meaning.[30] This has been understood as an interpretative requirement that "every effort should be made to find a common meaning for the texts before preferring one to another".[31]

31. In this regard, I note that the French version of the first sentence of article 69(2) does not provide for any exception but rather it indicates: "*Les témoins sont entendus en personne lors d'une audience,* sous réserve *des mesures prévues à l'article 68 ou dans le Règlement de procédure et de preuve*". This rather indicates the measures *subject to* which testimony could be introduced in court, namely, protective measures under article 68 and other procedures established under the Rules. As for the Spanish version of article 69(2) of the Statute, it reads "*La prueba testimonial deberá rendirse en persona en el juicio, salvo cuando se apliquen las medidas establecidas en el artículo 68 o en las Reglas de Procedimiento y Prueba*". It does not establish an exception to testimonial evidence *per se*, but it rather qualifies the way in which evidence may be introduced in court pursuant to protective measures applicable to witnesses and victims under article 68 of the Statute, and eventually other procedures established under the Rules.

32. Moreover, the first sentence of article 69(2) of the Statute cannot be read in isolation, but it must be read in its entire context. I would emphasise that, to make a contextual interpretation under article 31 of the Vienna Convention on the Law of Treaties, the place of a word within a sentence, a sentence within a paragraph, a paragraph within an article, and so forth, defines the context in which a provision is to

[30] Article 33(3) of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 United Nations Treaty Series 18232: "The terms of the treaty are presumed to have the same meaning in each authentic text."
[31] United Nations, *Yearbook of the International Law Commission*, Volume II, 1966, A/CN.4/SER.A/1966/Add.1, p. 225, para. 7.

be interpreted.[32] Each provision must be read in the context of the whole treaty and no phrase can be detached from its function in the sentence, paragraph, article or from its context.[33] I would thus observe that the second sentence of article 69(2) provides that testimony at this court can be provided *viva voce*, namely oral testimony, or in the form of prior recorded testimony, including through audio-visual means, or the introduction of documents or written transcripts subject to the Statute's legal framework. This clear language of the second sentence of article 69(2) reinforces the idea that at this Court there are various ways to receive testimony, and that *viva voce* testimony is not the only way to do so. Such different ways to receive testimony are legally established and equally valid, provided that they are not contrary to the rights of the accused.

33. This is supported by the drafting history of the provision. I recall that under article 32 of the Vienna Convention on the Law of Treaties, the *travaux préparatoires* of a treaty are supplementary means of interpretation to which regard may be had.[34] In this regard, the reference to the "Rules of Procedure and Evidence" in article 69(2) of the Statute was included by the drafters to promote "the greatest possible access to evidence of probative value consistent with the rights of the accused".[35] This confirms my view

[32] O. Dörr, "Article 31. General rule of interpretation", in O. Dörr, et al. (ed), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012), p. 521 at para. 45: "The entire text of the treaty is to be taken into account as 'context', including title, preamble and annexes … and any protocol to it, and the systematic position of the phrase in question within that ensemble. Interpretative value can be found in the position of a particular word in a group of words or in a sentence, of a particular phrase or sentence within a paragraph, of a paragraph within an article or within a whole set of provisions, of an article within or in relation to the whole structure of scheme of the treaty".

[33] *See* PCIJ, *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, "Advisory opinion No. 2", p. 23 ("[I]t is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense".).

[34] *See* Article 32 of the of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 United Nations Treaty Series 18232: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31". *See also* Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018, ICC-01/05-01/13-2275-Red, para 679: "The Appeals Chamber recalls that the *travaux préparatoires* of a treaty are only supplementary means of interpretation, to which resource may only be had to confirm an interpretation or if the interpretation leaves the meaning ambiguous or obscure or leads to a manifestly absurd or unreasonable result".

[35] D. Piragoff and P. Clarke, "Article 69 Evidence", in K. Ambos (ed) *Rome Statute of the International Criminal Court: Article-By-Article Commentary* (Beck *et al.*, 4th ed., 2022), p. 2053.

that the article provides for various and equally legal and valid forms to introduce testimony at this Court.

34. It is important to recall that, according to article 31(2) of the Vienna Convention of the Law of Treaties, the object and purpose of the Statute can be found in its Preamble; that is, "to put an end to impunity' and that the crimes under the Statute 'must not go unpunished".[36] In this context, the "truth" extends beyond the determination of the criminal responsibility of the accused to a more comprehensive truth-seeking function of the trial judge. Judges have a legal duty to determine the truth, not just for the accused but also for the victims and the international community. Underlying this function is the principle that it is not possible to fight impunity if the truth remains hidden. In my view, victims are at the centre of the *corpus iuris*. Where there are competing rights, judges must make a balanced decision. This differs from the operation of the *ad hoc* tribunals – there was no obligation of the trial judge to determine the truth like that which exists in the Rome Statute.

35. In light of the foregoing, I find that there was an error of law that materially affected the Impugned Decision. Accordingly, I would have granted the first ground of the Prosecution's appeal.

IV. SECOND GROUND OF APPEAL

36. Regarding the second ground of appeal, the Prosecution submits that the Trial Chamber improperly took the view that the principle of orality in article 69(2) and the right of the accused to confront a witness in article 67(1)(e) of the Statute require a "stringent" assessment of the requirements for the introduction of prior recorded testimony under rule 68(2)(b) of the Rules.[37] The Prosecution notes that the Court has described rule 68 of the Rules as an "exception" to the principle of orality, but argues that the Trial Chamber nonetheless erred in fettering its discretion beyond the plain terms of rule 68(1) and (2)(b) of the Rules.[38]

[36] Preamble of the Statute.
[37] Appeal Brief, para. 31.
[38] Appeal Brief, paras 32-33.

A. Third issue: the principle of orality

37. The Majority found that rule 68(2) of the Rules "constitutes a limitation on the right to confront a witness as described above, substantially restricting an internationally recognised and fundamental fair trial right".[39] In the view of the Majority, "if not applied with due care, rule 68 of the Rules may create tension with the right to confront a witness and the broader principle of equality of arms".[40] They further held that "this Court is bound to interpret and apply rule 68 of the Rules – a subordinate norm to articles 67(1)(e) and 69(2) of the Statute – in a manner that is consistent with internationally recognised human rights norms".[41] It went on to say that "that rule 68 of the Rules must be treated as an exception to the principle of orality in article 69(2) of the Statute".[42] I disagree for the following reasons.

38. While I note that the accused's right to cross-examine a witness is internationally recognised, this particular fair trial right is not affected in this case. The introduction of prior recorded testimony is not an exception to cross-examination, as such, as the prior recorded testimony is another type of evidence. For the same reason, the principle of equality of arms is not affected here. In any event, the right to cross-examine witnesses cannot be equated with the principle of orality, but rather, it is simply one of the expressions of that principle.

39. The right to confront a witness giving testimony against him or her is provided for in article 67(1)(e) of the Statute.[43] This is an expression of the principle of confrontation, which is one aspect of the broader principle of orality. It is also a fair trial right internationally recognised under article 14(3)(e) of the International Covenant on Civil and Political Rights (hereinafter: "ICCPR").[44]

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[39] Majority's Judgment, para. 78.
[40] Majority's Judgment, para. 78.
[41] Majority's Judgment, para. 79.
[42] Majority's Judgment, para. 80.
[43] This provision states, in pertinent part: "In the determination of any charge, the accused shall be entitled […] to the following minimum guarantees, in full equality:
(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her […]".
[44] United Nations, General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, 999 United Nations Treaty Series 14668 (hereinafter: "ICCPR"), article 14(3)(e).

40. That notwithstanding, in applying and interpreting the applicable law in the hierarchy of article 21(1) of the Statute consistently with this internationally recognised human right, pursuant to article 21(3) of the Statute, it is to be recalled that article 14(3)(e) of the ICCPR does not provide an unlimited right but it may be subject, *inter alia*, to rules of admissibility of evidence and judicial assessment.[45] This is also recognised by the Majority.[46] At this Court, article 69(2) of the Statute provides for two scenarios in which evidence from a witness can be received other than *viva voce* testimony, thereby —in my view— limiting the possibility to cross-examine witnesses: whenever testimony is provided (i) under the measures set forth in article 68 to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, or (ii) by means of video or audio technology, as well as the introduction of documents or written transcripts. Furthermore, to the extent that it is not an absolute right, the Inter-American Court of Human Rights has held that the right must be carefully weighed against other rights at stake in the proceedings.[47]

41. It is important to make clear that the principle of orality does not only correspond to the right of an accused to cross-examine a witness. The principle of orality refers to one of the essential features or characteristics of a fair trial: it must be (i) oral, (ii) public, (iii) in person and before judges, and (iv) allowing for the Defence to challenge evidence and confront the arguments presented against him or her, in the context of such an oral hearing before the judges. These are the principles of (i) orality, (ii) publicity, (iii) immediacy, and (iv) confrontation. All of them interact together in order to have a fair trial not only for the accused but for all the parties.[48] In my opinion, the Trial Chamber has confused the right to cross-examine witnesses with the broader meaning of the principle of orality.

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[45] Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), section V.
[46] *See* Majority's Judgment, para. 78.
[47] According to the jurisprudence of the Inter-American Court of Human Rights, when rights are in apparent conflict, judges must analyse: (i) the level of harm to one of the rights at stake, determining whether the level of this harm was serious, intermediate or moderate; (ii) the importance of ensuring the contrary right, and (iii) whether ensuring the latter justifies restricting the former. *See* ICtHR, *Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica*, 'Judgment', 8 November 2012, Serie C, no 257, para. 274. *See also* ICtHR, *Usón Ramírez v. Venezuela*, 'Judgment', 20 November 2009, Serie C, no 207, paras 79-80. *See also* ICtHR, *Kimel v. Argentina*, 'Judgment', 2 May 2008, Serie C, no 177, para. 84.
[48] Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza, 10 September 2021, ICC-01/04-02/06-2708-Anx (A4 A5), para. 14, *annexed to* Decision on various procedural issues against the decision of Trial Chamber VI of 8 March 2021 entitled "Reparations Order".

42. As such, the principle of orality is one of the conditions for the accused's right to a fair trial. In the case of *viva voce* testimony, this principle is complied with when the Defence cross-examines witnesses in the context of a hearing. In the case of introduction of previously recorded testimony, by means of video or audio technology, documents or written transcripts, this principle is complied with when the parties make submissions about admissibility, relevance, probative value, etc. in the context of an oral and public hearing, in the presence of the accused and before the judges, in a process where the debate among the parties is allowed to happen.

43. Cross-examination is an expression of the principle of confrontation, which is a principle applicable to all parties in the proceedings, and the rights of fair trial. Nevertheless, the principle of confrontation is not limited to the cross-examination of a witness. On the contrary, whenever there is testimony introduced under other forms legally provided in the Statute, such as prior recorded testimony, the principle of confrontation and the right to contest evidence are respected when the parties, in the context of a hearing, make submissions to contest this evidence and discuss its validity, relevance and probative value. This puts in practice the principle of confrontation and the right to contest evidence, which are also the basis of cross-examination.

44. All these ways to contest evidence represent strict compliance with the principle of orality. Therefore, it is not necessarily the case that testimony that is not *viva voce* is against the principle of orality or the rights of the accused, because the principle of confrontation and the right of the accused to contest evidence are equally applicable to testimony that is not orally produced but rather submitted, in the context of a hearing, under other forms that are equally valid and provided for under the Statute.

45. In conclusion, the right to cross-examine witnesses is but one of the expressions of the principles of orality and confrontation. In the case of previously recorded testimony, these principles are complied with through forms other than the cross-examination of witnesses. Its introduction is without prejudice to the probative value to be assigned at the end of the proceedings when the Trial Chamber holistically makes an assessment of the entirety of the evidence. In this regard, I find that the Trial Chamber erred in considering that the principle of orality is at stake when the Defence is unable to cross-examine witnesses. Because of the nature of previously recorded testimony, the principles of orality and confrontation must be complied with by

receiving and discussing submissions, namely, on the relevance, reliability and probative value of this type of evidence, produced in the context of oral proceedings. Otherwise, rule 68(2) of the Rules would be rendered ineffective and nugatory.

B. Fourth issue: error of law in the discretionary assessment of rule 68(2)(b)(i) of the Rules

46. Finally, the Majority determined that it can find no indication in the Prosecution submissions that the Trial Chamber abused its discretion in applying rule 68(2)(b) of the Rules.[49] I am unable to agree with this conclusion for the following reasons.

47. In my view, rule 68(2)(b)(i) of the Rules requires a chamber to consider the interests of justice, which favours the admission of prior recorded testimony. However, the Trial Chamber erred when unduly limiting this concept, equating it with judicial economy, and, having done so, it applied its discretion under an erroneous understanding of the law. This amounts to an error of law.

48. I recall that a trial chamber can proceed with its discretionary assessment under subparagraph (b)(i) of rule 68(2) of the Rules only after having correctly made the first assessment under paragraph (b) of the rule. In this regard, one of the most relevant factors to be considered in the exercise of discretion under rule 68(2)(b)(i) of the Rules is that a chamber must admit prior recorded testimony where the interests of justice favour doing so. The provision reads as follows:

> (i) In determining whether introduction of prior recorded testimony falling under sub-rule (b) may be allowed, the Chamber shall consider, inter alia, whether the prior recorded testimony in question:
>
> - relates to issues that are not materially in dispute;
>
> - is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts;
>
> - relates to background information;
>
> - is such that the interests of justice are best served by its introduction; and
>
> - has sufficient indicia of reliability.

49. In the Impugned Decision, the Trial Chamber made the following findings:

[49] Majority's Judgment, para. 85.

> within the context of Rule 68(2)(b) of the Rules, 'interests of justice' are better served by the introduction in writing of a prior recorded testimony when such introduction would, inter alia, safeguard the expeditiousness of the proceedings, streamline the presentation of evidence, focus live testimony on those topics of greatest relevance to the proceedings, minimise cumulative in-court testimony, save resources of the institution which may rather be utilised for other purposes and/or avoid witnesses having to travel in order to appear in court. However, the Prosecution has failed to demonstrate that the case at hand is one where introduction of evidence pursuant to this provision would contribute to judicial economy. Further, while the Chamber's truth seeking functions are of course of relevance, the fact that a witness is unwilling to testify before the Court cannot in itself be sufficient to shift the balance in favour of introducing under Rule 68(2)(b) of the Rules a prior recorded testimony which contains evidence which is uncorroborated, and which goes to crucial and highly contested matters. In this regard, the Majority emphasises that Rule 68(2)(b) of the Rules is a deviation from the general principle of orality enshrined in Article 69(2) of the Statute, in line with the accused's rights to examine the witnesses testifying against him, and that recourse to this provision requires the conduct of a cautious and stringent assessment, notably to ensure that the introduction of written testimony is not prejudicial to or inconsistent with the rights of the accused.[50]

50. Contrary to the Trial Chamber's understanding, the concept of the "interest of justice" is not limited to judicial economy or the efficiency of the proceedings. Commentators suggest that this concept corresponds to "the common interest of (i) society, (ii) victims and (iii) individuals investigated for crimes that they have not committed to know the truth".[51] The interests of justice in this context is multi-faceted, and covers more than merely the procedural interest in trial management and judicial economy.[52] It involves, *inter alia*, consideration of the determination of the truth, fairness and effectiveness of the proceedings, in keeping with the object and purpose of the Statute, respecting the rights of all parties and participants, and not only a consideration of judicial economy. This term, used in rule 68(2)(b)(i) of the Rules,[53]

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[50] Impugned Decision, para. 18.
[51] D. Donat-Cattin in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2008), p. 1690.
[52] *See* Judge Prost's Dissent to Impugned Decision, para. 11: "Finally, I wish to emphasise that I see no error in the Prosecution's reliance on the interests of justice. Contrary to the position of the Majority I do not consider that efficiency of the proceedings is the sole or central consideration under this criteria. Rather, and in light of the Chamber's truth finding responsibility, I consider having all relevant evidence before it when ultimately assessing all the evidence as being an equally, if not more significant component, of the interests of justice in the context of Rule 68(2)(b) of the Rules. Moreover, such considerations of the interests of justice are of paramount importance amongst the discretionary factors under Rule 68(2)(b) of the Rules, considering that the remainder of the factors can be duly taken into account by the Chamber during its eventual deliberation for the judgment".
[53] *See also* article 53(1)(c) and (2)(c), in which the term "interests of justice" appears in the context of the negative exercise of prosecutorial discretion.

and read in light of article 69(3) of the Statute and the truth-seeking responsibility of the Trial Chamber, places importance on having all relevant evidence before it when ultimately determining guilt or otherwise.[54] In this regard, the inquiry into and determination of the truth are among the main objectives in the administration of justice at this Court.

51. Thus, taking into account the concept of "interests of justice" in its broader extent, and considering its meaning in the context of the object and purpose of the Statute, I consider that it is in the interests of justice to allow the introduction of this form of evidence because it would favour the interests of the parties and the international community. In my view, rule 68(2)(b) of the Rules favours the introduction of prior recorded testimony.

52. The error of the Trial Chamber was that, during its assessment of the factors provided in rule 68(2)(b)(i), it did not indicate whether it had already excluded the paragraphs that the Prosecution sought to exclude and any further paragraphs going to the acts and conduct of the accused in light of the charges as confirmed. In addition to this lack of clear and sufficient reasoning, which was addressed above under the fist ground of appeal, the Trial Chamber erred when making the assessment of the factors identified in rule 68(2)(b)(i). In particular, when assessing the interests of justice, the Trial Chamber wrongly equated the concept of "interests of justice" with that of judicial economy. In failing to follow this approach, the Trial Chamber erred in law when making its discretionary assessment.

53. In light of the foregoing, I would have granted the second ground of appeal.

V. CONCLUSION

54. The Trial Chamber's failure to provide sufficient and clear reasoning reveals that there was no proper assessment under rule 68(2)(b) and this amounts to an error of law. This insufficient and unclear reasoning materially affected the impugned decision and the matter should have been remanded for the Trial Chamber to assess the question it did not assess — whether the remainder of the statement of witness P-0113 addressed the acts and conduct of the accused — and provide sufficient reasons for its decision.

[54] *See also* in this sense, Judge Prost's Dissent to Impugned Decision, para. 11.

55. Regarding the first ground of appeal, the Trial Chamber did not clearly state whether it excluded from the prior recorded testimony of witness P-0113 the nine paragraphs that the Prosecution sought to exclude, nor did it clearly reason whether, and if so why, it considered that the remaining paragraphs did not go to proof of matters other than the acts and conduct of the accused. This lack of reasoning in the mandatory assessment that the Trial Chamber should have made materially affected the Impugned Decision and, accordingly, I would have granted the first ground of appeal.

56. With regard to the second ground of appeal, it is noted that the accused's right to cross-examine a witness is an internationally recognised human right but it is not absolute. Its application may be regulated by procedural rules, especially when other human rights are at stake. In this case, this particular fair trial right is not affected. The introduction of prior recorded testimony is not an exception to cross-examination as such, as the prior recorded testimony is another type of evidence subject to another set of rules in its assessment. For the same reason, the principle of equality of arms is not affected here.

57. The principle of orality cannot be confused with the right of cross-examination. The former is broader. The right of cross-examination is rather an expression of the principle of confrontation. Along with the principles of immediacy and publicity, the principles of orality and confrontation are safeguards of a fair trial. In the case of *viva voce* testimony, these principles are complied with when the Defence cross-examines witnesses. In the case of previously recorded testimony, by means of video or audio technology, as well as documents or written transcripts, the principles are complied with when the parties make submissions about admissibility, relevance, probative value, etc., in the context of an oral and public hearing, in the presence of the accused and before the judges, in a process where the debate among the parties is allowed to happen.

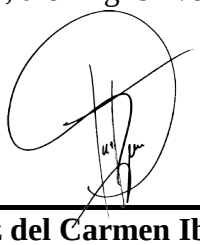
58. The factors of the discretionary assessment under subparagraph (b)(i) of rule 68(2) of the Rules can only be evaluated after correctly making the first assessment under paragraph (b) of the rule. One of the most important factors of the discretionary assessment of subparagraph (b)(i) is the concept of the "interests of justice". While the Trial Chamber incorrectly restricted this factor to a consideration of judicial economy, the concept of "interests of justice" is broader. It involves, *inter alia*, consideration of

the determination of the truth, fairness and effectiveness of the proceedings, in keeping with the object and purpose of the Statute, respecting the rights of all parties and participants. A proper assessment of this factor favours the introduction of prior recorded testimony. In failing to follow this approach, the Trial Chamber erred in law when making its discretionary assessment. Therefore, I would have granted the second ground of appeal.

59. In sum, in failing to make, or clearly and sufficiently reason, its twofold assessment under paragraph (b) and sub-paragraph (b)(ii) of rule 68(2) of the Rules, the Trial Chamber misapplied rule 68(2)(b) of the Rules. The Trial Chamber should have first excluded the nine paragraphs that the Prosecutor sought to exclude and, subsequently, it should have examined whether any of the remaining paragraphs go to prove the acts and conduct of the accused. Only after conducting this assessment, was the Trial Chamber entitled to consider the discretionary elements contained under rule 68(2)(b)(i) for the paragraphs that do not go to prove the acts and conduct of the accused. The Trial Chamber did not make this assessment or, at the very least, it did not provide clear and sufficient reasoning showing that it had made this assessment. The insufficient reasoning it provided does not clearly indicate whether or not it excluded the paragraphs that go to prove the acts and conduct of the accused. This error of law had a material impact on the decision and its outcome.

60. In light of the foregoing, I would have granted both grounds of appeal and remanded the matter for the Trial Chamber to correctly make the assessment under rule 68(2)(b) of the Rules, with clear and sufficient reasons.

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



Judge Luz del Carmen Ibañez Carranza

Dated this 13th day of May 2022

At The Hague, The Netherlands