

DISSENTING OPINION OF JUDGE KIMBERLY PROST

1. I am unable to join the Majority's decision to reject the Prosecution's second application to introduce P-0113's prior recorded testimony under Rule 68(2)(b) of the Rules (the 'Second Request').¹ For the reasons further outlined below, I remain of the view that the Chamber can and should have authorised the introduction of P-0113's evidence pursuant to Rule 68(2)(b) of the Rules.²

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.' I also note that Rule 68 of the Rules was amended in 2013 in light of the need to develop more flexible and efficient procedures allowing for the introduction of prior recorded testimony, given the difficulty in compelling witnesses to appear before the Court.³ In my view, the case at hand, where the Prosecution has been unsuccessful in convincing P-0113 to testify before the Court, is precisely a situation envisaged by the drafters when adopting Rule 68(2)(b) of the Rules in its current form.⁴

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'. I am in agreement with the Majority that partial introduction of prior recorded testimony under Rule 68(2)(b) of the Rules is permissible and that the presence of limited references to the acts and conduct of the accused in a prior recorded testimony does not *per se* bar its introduction under Rule 68(2)(b) of the Rules.

¹ 17 September 2021, ICC-01/12-01/18-1727-Conf.

² I expressed my position on this issue for the first time on 26 March 2021 in the context of my partially dissenting opinion annexed to the Third Decision on the introduction of prior recorded testimonies pursuant to Rule 68(2)(b) of the Rules, ICC-01/12-01/18-1402-Anx-Red (the 'First Dissenting Opinion').

³ Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties, 31 October 2013, ICC-ASP/12/37/Add.1, Annex II.A, para. 6.

⁴ See First Dissenting Opinion, ICC-01/12-01/18-1402-Anx-Red, para. 12.

4. However, I reiterate 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.⁵ The primary purpose of excluding references to acts and conduct of the accused is to ensure, where necessary, the accused’s right to confront and examine a person making direct allegations against him or her and as such, I consider that any other factual allegation that could be indirectly interpreted as defining the acts and conduct of the accused need not be excluded.⁶ Given that the Chamber would have in mind, when analysing the evidence, the absence of cross-examination with respect to it, I consider that there would be no undue prejudice to the accused.⁷ Accordingly, and as set out in my First Dissenting Opinion, I am of the opinion that only the ten paragraphs and two sentences identified by the Prosecution in the Second Request go to the acts and conduct of the accused and could be excluded so as to permit the introduction of the evidence pursuant to Rule 68(2)(b) of the Rules.⁸
5. I also respectfully disagree with the Majority that excluding these limited references would distort the narrative of P-0113’s evidence. I reiterate that the paragraphs which ought to be excluded are ten paragraphs and two sentences out of 173 paragraphs. Considering that, as acknowledged by the Majority, P-0113’s prior recorded testimony discusses a wide array of matters and events, the exclusion of the aforementioned limited references would not render the rest of the evidence disjointed but would rather assist the Chamber in the determination of the truth.
6. Turning to the factors listed under Rule 68(2)(b)(i) of the Rules, for the reasons set out in the First Dissenting Opinion, I find that introduction of P-0113’s prior recorded testimony is fully compliant with the requirements of this provision and would not have been prejudicial to or inconsistent with the rights of the accused.⁹

⁵ First Dissenting Opinion, ICC-01/12-01/18-1402-Anx-Red, para. 4 (n.10).

⁶ First Dissenting Opinion, ICC-01/12-01/18-1402-Anx-Red, paras 4-5.

⁷ First Dissenting Opinion, ICC-01/12-01/18-1402-Anx-Red, para. 4. *See also* Decision on the introduction into evidence of P-0570’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, 13 July 2021, ICC-01/12-01/18-1588-Conf, para. 29.

⁸ First Dissenting Opinion, ICC-01/12-01/18-1402-Anx-Red, para. 4.

⁹ First Dissenting Opinion, ICC-01/12-01/18-1402-Anx-Red, paras 8-13.

7. In particular, I reiterate that 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 Statute and the Rules and taking into account the ability of the Chamber to ultimately weigh and consider the probative value of the evidence presented.¹⁰
8. In this regard, I respectfully disagree with the Majority that Rule 68(2)(b) must be interpreted as a deviation from the general principle of orality enshrined in the Statute. While the principle of orality, as enshrined in some legal traditions, is referenced in Article 69(2) of the Statute, it is specifically made subject to Article 68 of the Statute and to provisions in the Rules of Procedure and Evidence. This balance properly reflects the multitude of legal systems which allow for evidence to be adduced other than through in person testimony. As a result, I do not consider that Rule 68(2)(b) of the Rules should be viewed as exceptional but rather simply as a different form of evidence authorised under the legislative scheme of this hybrid system.
9. On a related point, I also must disagree, with respect, with the Majority view that resort to Rule 68(2)(b) requires the conduct of a cautious and stringent assessment to ensure the protection of the rights of the accused. In my view, the Rule itself sets out criteria designed to safeguard those rights, in particular the exclusion of statements which go to the acts and conduct of the accused, such that its application need not be further limited as proposed by the Majority. Finally, given that, in the context of this hybrid system, the Chamber of professional judges can fully take into account the absence of cross-examination in ultimately assessing the evidence, the discretionary factors listed under Rule 68(2)(b)(i) of the Rules should not be given an overly broad meaning. To do otherwise would confine the application of Rule 68(2)(b) of the Rules to very technical matters or background information, contrary to the intention of the drafters of this provision.
10. Against this background, I regret that I am unable to agree with the Majority's conclusion that P-0113's prior recorded testimony touches upon a significant

¹⁰ First Dissenting Opinion, ICC-01/12-01/18-1402-Anx-Red, para. 7.

range of materially disputed issues.¹¹ Similarly, as I have previously indicated, the presence of 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) of the Rules.¹² The probative value, as well as weight, if any, of the evidence would be duly assessed and attributed during the Chamber's eventual deliberation for its judgment, taking into account the absence of an opportunity for the Defence to cross-examine the witness on these issues.

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.
12. Accordingly, and noting that in my view introduction of P-0113's material is fully compliant with the requirements of Rule 68(2)(b) of the Rules, I am of the opinion that the Chamber's responsibility in the search of the truth strongly militates in favour of authorising the introduction of P-0113's prior recorded testimony. I therefore disagree with the Majority's conclusion on the Second Request and, as already indicated in my prior dissenting opinion, I would have authorised the Prosecution to introduce into evidence P-0113's prior recorded testimony and

¹¹ I acknowledge that P-0113's prior recorded testimony does touch upon a charged incident, which could be classified as a materially disputed issue. However, I repeat that this can be duly taken into account by the Chamber in its ultimate assessment of evidence and accordingly does not in and of itself militate against the introduction of the testimony pursuant to Rule 68(2)(b) of the Rules.

¹² First Dissenting Opinion, ICC-01/12-01/18-1402-Anx-Red, para. 9.

associated material pursuant to Rule 68(2)(b) of the Rules, with the exception of discrete references to the acts and conduct of the accused.

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

A handwritten signature in black ink, appearing to read 'K. Prost', is centered on the page. The signature is written in a cursive, flowing style.

Judge Kimberly Prost

Dated this Monday, 15 November 2021

At The Hague, The Netherlands