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Original: **English** | No.**: ICC-01/12-01/18**
Date: **17 December 2021**

THE APPEALS CHAMBER

Before: **Judge Luz del Carmen Ibáñez Carranza, Presiding Judge**
Judge Piotr Hofmański
Judge Solomy Balungi Bossa
Judge Rosario Salvatore Aitala
Judge Gocha Lordkipanidze

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF
THE PROSECUTOR v.
AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG MAHMOUD

Public

Prosecution's Appeal against the "Decision on second Prosecution request for the introduction of P-0113's evidence pursuant to Rule 68(2)(b) of the Rules"

Source: **Office of the Prosecutor**

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Introduction

1. On 15 November 2021, by majority (Judge Prost, dissenting), Trial Chamber X declined to admit the prior recorded testimony of witness P-0113 under rule 68(2)(b) of the Rules.[1] According to the Majority, the "substance of the narrative" of P-0113's statement would be "distort[ed]" if those portions going to the acts and conduct of Mr Al Hassan were not to be admitted, and in any event the discretionary factors set out in rule 68(2)(b)(i) also "play[ed] against" admissibility.[2] Informing this view, the Majority "emphasise[d] that Rule 68(2)(b) is a deviation from the general principle of orality enshrined in Article 69(2) […] and that recourse to this provision requires the conduct of a cautious *and* stringent assessment" to preserve the rights of the accused.[3]

2. By contrast, Judge Prost considered that only a small proportion of P-0113's statement (ten paragraphs and two sentences out of 173 paragraphs) need be excluded as going to the acts and conduct of the accused, that the remainder "discusses a wide array of matters and events", and that the circumstances therefore favoured the admissibility of P-0113's statement in order to assist the Chamber in its search for the truth.[4] She did not consider that this was inconsistent with the rights of the accused[5] given the role of the Chamber—composed of professional judges—in "ultimately weigh[ing] and consider[ing] the probative value of the evidence presented."[6] In her view, rule 68(2)(b) should not be viewed as an "exceptional" procedure but "rather simply as a different form of evidence authorised under the legislative scheme",[7] which

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[1] ICC-01/12-01/18-1924 ("Decision"); ICC-01/12-01/18-1924-Anx ("Dissenting Opinion"). It is generally accepted that, absent an unforeseen change of circumstances, P-0113 is unlikely to testify *viva voce*. *See e.g.* Dissenting Opinion, para. 2 (noting that "the Prosecution has been unsuccessful in convincing P-0113 to testify").
[2] Decision, paras. 14-15. In particular, adopting a similar approach to its 'acts and conduct' analysis, the Majority considered that P-0113's evidence "touches on a significant range of materially disputed issues including a charged incident, the functioning of the various organs established by the armed groups including the Islamic police, as well as other alleged abuses": para. 16; *see also* para. 18 ("crucial and highly contested matters"). It took into account that P-0113's evidence is "not *entirely* corroborative or cumulative in nature": para. 17 (emphasis added). And it held that it was "untenable" to consider that "interests of justice are best served" by the introduction of P-0113's statement because "the Prosecution has failed to demonstrate that the case at hand is one where introduction of evidence pursuant to [rule 68(2)(b)] would contribute to judicial economy", notwithstanding the "relevance" of the "Chamber's truth seeking functions": para. 18. In the circumstances as a whole, the Majority concluded that admitting P-0113's evidence "would be prejudicial in a way which […] could not be mitigated during the Chamber's ultimate evaluation of evidence": para. 19.
[3] Decision, para. 18 (emphasis added).
[4] Dissenting Opinion, paras. 4-5, 11 ("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", which "are of paramount importance amongst the discretionary factors under Rule 68(2)(b) […] considering that the remainder of the factors can be duly taken into account by the Chamber during its eventual deliberation"), 12 ("the Chamber's responsibility in the search [for] the truth strongly militates in favour" of receiving P-0113's statement under rule 68(2)(b)).
[5] Dissenting Opinion, paras. 4-6.
[6] Dissenting Opinion, para. 7. *See also* paras. 9-11.
[7] Dissenting Opinion, para. 8. *See also* para. 7.

must remain "useful[]"[8] and should not be confined to "very technical matters or background information, contrary to the intention of the drafters of this provision."[9]

3. The Trial Chamber recognised its divided views on the law underlying its decision. As a consequence, it unanimously certified two issues for appeal, noting in particular that the "disagreement within the Majority and Minority opinions" concerning the relationship between article 69(2) and rule 68(2)(b) lies "at the very core of the Majority's conclusion that the discretionary factors to be considered under Rule 68(2)(b)(i) […] play against the introduction of P-0113's prior recorded testimony".[10] There can be no doubt, therefore, that the matters raised in this appeal materially affected the Decision.[11] The issues certified for appeal are:

> Whether the exclusion of evidence going to the "acts and conduct of the accused" in Rule 68(2)(b) means that any reference to such acts and conduct must not only be "peripheral and discrete" but also capable of being "detached from their context".
>
> Whether considering Rule 68(2)(b) as "a deviation from the general principle of orality" in Article 69(2) required an assessment which was not only cautious but "stringent"—in the sense that admissibility is "exceptional" and must be "further limited" by a broad reading of the criteria specified in the rule itself in order to protect the rights of the accused.[12]

Submissions

4. The Prosecution submits that the Majority erred in law, both in assessing the circumstances in which prior recorded testimony is to be considered as going to the "acts and conduct" of the accused (and therefore, must be excluded from admission under rule 68(2)(b)), and in considering that article 69(2) requires a chamber to fetter its discretion beyond the plain terms of rule 68(1) and (2)(b) itself. As the following paragraphs explain, the Appeals Chamber

[8] Dissenting Opinion, para. 4.
[9] Dissenting Opinion, para. 9.
[10] ICC-01/12-01/18-2034 ("Certification Decision"), para. 7.
[11] *See* Statute, art. 83(2).
[12] Certification Decision, para. 2. *See also* paras. 6-7. The Prosecution notes that, while the Chamber did not apparently reformulate the first issue as it had been proposed, it expressed a view as to its "contours"—specifically, that it understood "the core of the First Issues as pertaining to the manner in which the 'acts and conduct' requirement should be interpreted and applied, and in particular whether, in doing so, the Majority erred in finding that excluding the excerpts identified by the Prosecution from P-0113's prior recorded testimony would not suffice as they cannot be detached from their context." The Chamber declined to certify for appeal two other proposed issues.

should reverse these legal errors, and remand the matter back to the Trial Chamber for fresh determination.

5. It is, perhaps, an apt moment for the Appeals Chamber to consider more generally the extent to which rule 68(2)(b) should properly be regarded as an 'exceptional' means of adducing evidence, or a vital aspect of the Court's hybrid system of procedure. The Assembly of States Parties (ASP) adopted the amendments to rule 68 now in force "with a view to […] enhancing the efficiency and effectiveness of the Court",[13] and the ASP Working Group which recommended those amendments explained that they were "intended to reduce the length of ICC proceedings and to streamline evidence presentation" consistently with the practice of other international criminal tribunals.[14] The Independent Expert Review of the Court has again recently stressed that the proper application of rule 68 contributes "to the expedition of trial procedures".[15] The Appeals Chamber has recently acknowledged "the need to give effect to these aims".[16] Yet bringing these promised benefits to fruition depends on a common understanding of rule 68(2)(b), and confidence that it can be used consistently, lawfully, and fairly. The matters raised in this appeal may significantly contribute to that important goal.

A. First ground of appeal: the Majority erred in law when assessing if prior recorded testimony goes to the "acts and conduct" of the accused

6. On the face of the Decision, the Majority directed itself properly as to the correct definition of the term "acts and conduct of the accused" for the purpose of rule 68(2), by limiting it to the accused's *personal* acts and omissions.[17] Yet this notwithstanding, it went on to consider that:

> Although the Prosecution indeed identified key paragraphs going to the acts and conduct of Mr Al Hassan, the Majority is not satisfied that such references are peripheral and discrete or can be detached from their context in this instance. For the Majority, the paragraphs identified by the Prosecution are part of a longer section in which P-0113

[13] Res. ICC-ASP/12/Res.7, 27 November 2013, Preamble.
[14] Study Group on Governance, Working Group on Lessons Learnt, *Second Report of the Court to the Assembly of States Parties*, ICC-ASP/12/37/Add.1, 31 October 2013 ("WGLL Report"), Annex II.A (Recommendation on a proposal to amend rule 68), para. 8.
[15] Independent Expert Review of the International Criminal Court and the Rome Statute System, *Final Report*, 30 September 2020, para. 553. *See also* para. 474 (noting that in other respects the Court should seek to address "concerns" pertaining to its "efficiency in terms of the conduct and completion of its judicial proceedings").
[16] ICC-01/04-02/06-2666-Red A A2 ("*Ntaganda* Appeal Judgment"), para. 628. *See also* para. 627.
[17] Decision, para. 12 ("[t]he expression 'acts and conduct of the accused' within the meaning of [r]ule 68(2) […] should be interpreted as referring to the personal actions and omissions of the accused as opposed to the acts and conduct of other persons which could be attributed to the accused by reason of the mode of liability charged").

> 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. As such, they go to the very core of P-0113's evidence, as rightly pointed out by the Defence. The Majority is of the view that excluding the excerpts identified by the Prosecution, while retaining 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. The Majority therefore considers inapposite such a piecemeal approach to the witness's evidence […].[18]

7. Despite referring to the established test defining the concept of "acts and conduct" narrowly, the Majority thus conflated this question with a separate issue—the degree to which excerpts of a statement may be excluded while maintaining the intelligibility of the statement. By adopting a hybrid test of whether references to "acts and conduct" were "peripheral", "discrete", or could "be detached from their context", the Majority shifted the "acts and conduct" analysis from examining the attribution of the particular behaviour described in the testimony to a purposive assessment of the "core" of the testimony or its overall "narrative" in the context of the Prosecution's case. While the Chamber is entitled to determine whether it will receive prior recorded testimony in part, it should generally incline to doing so—it is much better placed to assess the relevance and probative value of prior recorded testimony received in part at the deliberations stage, when it has the benefit of all the evidence.

8. In other words, the Majority erred two- or potentially even three-fold. Incorrectly, it regarded all testimony which did not go the acts and conduct of the accused, but instead related to the acts and conduct of third parties (and from which an inference relevant to the criminal responsibility of the accused might be drawn), as if it were evidence of the acts and conduct of the accused. It confused the two steps of the analysis required by rule 68(2)(b), and thus introduced irrelevant considerations into the strictly legal question of the definition of evidence which goes to the acts and conduct of the accused. And, in doing so, it prejudged whether that part of the prior recorded testimony which did not go to the acts and conduct of the accused might or might not be relevant or of probative value at the end of the trial.

9. This approach went beyond the requirements of the Court's legal texts. Nor was it supported by the practice of this Court or of the *ad hoc* tribunals applying a very similar rule—which was, indeed, the inspiration for rule 68(2)(b). It limits the Chamber's power to determine

[18] Decision, para. 14.

the truth by unnecessarily preventing it from making use even of the contextual details in P-0113's evidence, and overlooks the safeguards which exist to ensure that the accused cannot be unfairly prejudiced even by such details. If adopted, it would tend to suggest that prior recorded testimony, which is relevant to the criminal responsibility of the accused in any way, cannot be received under rule 68(2)(b).

10. Judge Prost shared the same concerns. In her view, the Majority's approach will "significantly reduce the usefulness" of rule 68(2)(b), and is not necessary to serve the primary purpose of excluding reference to the acts and conduct of the accused—which is "to ensure, where necessary, the accused's right to confront and examine a person making direct allegations against him or her".[19] By contrast, "factual allegation[s] that could be indirectly interpreted as defining the acts and conduct of the accused need not be excluded."[20]

11. The following paragraphs illustrate the nature of the Majority's error by: setting out the established test to define the "acts and conduct of the accused"; showing the unsupported nature of the hybrid test adopted by the Majority, and; enumerating the safeguards which ensure that the accused is not unfairly prejudiced by the admissibility of prior recorded testimony going to the acts and conduct of persons other than the accused.

A.1. The established test: prior recorded testimony goes to the "acts and conduct" of the accused only if it directly relates to their own behaviour, material to the charges

12. In very similar terms to those ostensibly adopted by the Majority,[21] the *Ntaganda* and *Ongwen* Trial Chambers had previously explained that the term "'acts and conduct of the accused' should be given its ordinary meaning and refers to 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'."[22] The term "acts and conduct" does not have "a broader normative meaning, extend[ing] to the actions and omissions of others which are attributable to the accused under the modes of liability charged" in the case.[23]

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[19] Dissenting Opinion, para. 4.
[20] Dissenting Opinion, para. 4.
[21] Decision, para. 12.
[22] ICC-01/04-02/06-1733 ("*Ntaganda* P-0551 Rule 68 Decision"), para. 22; ICC-01/04-02/06-1667-Red ("*Ntaganda* P-0773 Rule 68 Decision"), para. 11; ICC-02/04-01/15-596-Red ("*Ongwen* Rule 68 Decision"), paras. 11-12. In the context of rule 68(2)(c), *see also* *Ntaganda* Appeal Judgment, para. 629.
[23] *Ongwen* Rule 68 Decision, para. 11. *See further* fn. 24 (further "emphasis[ing] that the expression 'acts and conduct' does not extend to conduct normatively attributable to the accused even when the accused is charged under [a]rticle 25(3)(a) of the Statute and the acts and conduct of others (*i.e.* alleged co-perpetrators and/or

13. This narrow interpretation of "acts and conduct" is consistent with the jurisprudence of the *ad hoc* tribunals, which served as the inspiration for rule 68(2) in its amended form.[24] For example, the IRMCT Appeals Chamber in *Ngirabatware* rejected "the Trial Chamber's [broad] interpretation of matters going to proof of 'the acts and conduct of the accused'", which it held to be "inconsistent with the clear distinction in the jurisprudence between the acts and conduct of the accused, as charged in the indictment, and the acts and conduct of others."[25]

14. Likewise, in *Galić*, the ICTY Appeals Chamber held that a broad interpretation of acts and conduct, in which the acts and conduct of "co-perpetrators and/or subordinates" are treated as part of the acts and conduct of the accused, would effectively "denude" the ICTY's counterpart to rule 68(2)(b) "of any real utility".[26] It would "confuse[] the present clear distinction […] between (a) the acts and conduct of those who commit the crimes for which the indictment alleges that the accessed is individually responsible, and (b) the acts and conduct of the accused as charged in the indictment which establish his responsibility for the acts and conduct of those others."[27] Only the latter are excluded from admission into evidence under rule 68(2)(b) or the analogous rule at the ICTY (rule 92*bis*).[28] Based on similar reasoning, in subsequent cases, the ICTY Appeals Chamber upheld the use of prior recorded testimony "to establish the context of the crimes"—including the acts of direct perpetrators—which it did not consider as "the acts and conduct of the Appellant".[29]

15. Significantly for this appeal, the *Galić* judgment illustrates that the "acts and conduct" assessment can sometimes be delicately poised. On the one hand, it is clear that evidence which

individuals 'through' whom a crime is committed) are normatively attributed to the accused as if they were his or her own. Conversely the question does not even arise with respect to the modes of criminal responsibility envisaged in [a]rticles 25(3)(b), (c) or (d), or [a]rticle 28 of the Statute, as in these cases the acts and conduct of direct perpetrators are plainly not to be seen, not even normatively, as acts and conduct of the accused. In other words, any basis to extend the meaning of 'acts and conduct of the accused' to the direct perpetrators is in these situations manifestly absent regardless of the interpretation given to such concept").

[24] *See e.g.* WGLL Report, Annex II.A (Recommendation on a proposal to amend rule 68), para. 4, and Appendix. *See also* *Ongwen* Rule 68 Decision, para. 11 (fn. 24).

[25] ICTR, *Ngirabatware v. the Prosecutor*, MICT-12-29-A, Judgment, 18 December 2014, para. 103.

[26] ICTY, *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal concerning Rule 92*bis*(C), 7 June 2002 ("*Galić* Interlocutory Appeal Judgment"), paras. 8-9.

[27] *Galić* Interlocutory Appeal Judgment, para. 9.

[28] *Galić* Interlocutory Appeal Judgment, para. 9. *See also* *Prosecutor v. Milošević*, IT-02-54-T, Decision on Prosecution's Request to have Written Statements Admitted under Rule 92*bis*, 21 March 2002, para. 22 ("The phrase 'acts and conduct of the accused […] is a plain expression and should be given its ordinary meaning: deeds and behaviour of the accused. It should not be extended by fanciful interpretation. No mention is made of acts and conduct by alleged co-perpetrators, subordinates or, indeed, of anybody else. Had the rule been intended to extend to acts and conduct of alleged co-perpetrators or subordinates it would have said so"). The *Milošević* Trial Chamber goes on to reason similarly to *Galić* concerning the potential need for cross-examination in certain circumstances, but stresses that this is not relevant to the 'acts and conduct' assessment: *see further below* para. 18.

[29] ICTY, *Prosecutor v. Stakić*, IT-97-24-A, Judgment, 22 March 2006, paras. 200-202.

directly shows that the accused performed certain acts or omissions relevant to establishing their responsibility for the charged crimes, including showing their *mens rea*, is to be considered as "acts and conduct" evidence which cannot be received under provisions such as rule 68(2)(b).[30] This Court has followed the same approach—for example, in *CAR Article 70*, when declining to admit prior recorded testimony concerning a money transfer, even though the witness did not know who made the money transfer, because the Prosecution intended to prove by other means that it had been made by the accused.[31]

16. Yet on the other hand, evidence which tends to show that persons *other than the accused* performed certain acts or omissions, or behaved in a certain way, is admissible—even if this behaviour forms a basis from which a chamber may infer the criminal responsibility of the accused. This is presumably what Judge Prost meant when she referred to factual allegations "that could be indirectly interpreted as defining the acts and conduct of the accused".[32] Thus, the *Galić* Appeals Chamber held that:

> The 'conduct' of an accused person necessarily includes his relevant state of mind, so that a written statement which goes to proof of any act or conduct *of the accused* upon which the prosecution relies to establish that state of mind is not admissible under Rule 92*bis*. In order to establish that state of mind, however, the prosecution may rely upon the acts and conduct of *others* which have been proved by Rule 92*bis* statements. An easy example would be proof […] of the knowledge by the accused that his acts fitted into a pattern of widespread or systematic attacks directed against a civilian population. Such knowledge may be inferred from evidence of such a pattern of attacks (proved by

[30] *See e.g.* *Galić* Interlocutory Appeal Judgment, paras. 10-11. *See also* *Prosecutor v. Hadžić*, IT-04-75-T, Decision on Prosecution Omnibus Motion for Admission of Evidence pursuant to Rule 92*bis* and Prosecution Motion to Admit GH-139's Evidence pursuant to Rule 92*bis*, 24 January 2013 ("*Hadžić* Rule 92*bis* Decision"), para. 15; *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on Prosecution's Third Motion for Admission of Statements and Transcripts of Evidence in Lieu of *Viva Voce* Testimony pursuant to Rule 92*bis* (Witnesses for Sarajevo Municipality), 15 October 2009 ("*Karadžić* Sarajevo Rule 92*bis* Decision"), para. 5; *Prosecutor v. Lukić and Lukić*, IT-98-32/1-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92*bis*, 22 August 2008 ("*Lukić* Rule 92*bis* Decision"), para. 17.

[31] ICC-01/05-01/13-1430 ("*CAR Article 70* P-242 Rule 68 Decision Decision"), para. 8. *See also* *Ongwen* Rule 68 Decision, para. 13 (noting that, "in certain circumstances, the party's intended purpose in relying on a prior recorded testimony may be of relevance to the determination of whether such testimony goes to proof of the accused's acts and conduct or not"). The Prosecution notes that the Majority paraphrased this dictum in a rather more restrictive way than previously stated, and its view that it was necessary to forecast the 'primary purpose' of the admission of the prior recorded testimony may have contributed to its errors: Decision, para. 12 ("the Majority further note that even if the accused is not specifically named in the prior recorded testimony, the said testimony must be considered as going to the 'acts and conduct of the accused' if the Prosecution intends to rely on the relevant parts of the prior recorded testimony primarily for the purpose of establishing acts and conduct of the accused"). *See further below* para. 17.

[32] Dissenting Opinion, para. 4.

Rule 92*bis* statements) that he *must* have known that his own acts (proved by oral evidence) fitted into that pattern.[33]

17. In other words, to the extent that the Majority considered that P-0113's evidence concerning the activities of the Islamic Police must therefore go to the acts and conduct of Mr Al Hassan,[34] this was a considerable oversimplification. If P-0113's evidence went to his or her knowledge of *Mr Al Hassan's* acts and conduct, then indeed it was inadmissible for the purpose of rule 68(2)(b). But if it went to P-0113's knowledge of the acts and conduct of *other* persons such as members of the Islamic Police—even if their conduct permitted inferences as to Mr Al Hassan's criminal responsibility—then it was admissible. The sparse reasoning of the Majority suggests that it fell into error in this regard. This, too, appears to have been the understanding of Judge Prost.

18. Out of candour, it should be acknowledged that the *Galić* Appeals Chamber further contemplated the possibility that, in certain circumstances, the events described by a witness could not be properly assessed as the "acts and conduct of the accused" and yet still be so "pivotal" to the Prosecution case or "proximate" to the accused that a chamber may properly exercise its discretion not to receive the evidence without cross-examination.[35] But—as was expressly emphasised in *Galić*—"the rejection of the written statement in any of these situations is *not* based upon any identification of that [third party]'s acts or conduct with the acts or conduct of the accused."[36] At this Court, such questions may potentially (but not necessarily[37]) fall to be considered within the context of a chamber's discretion to receive prior recorded testimony in accord with the factors in rule 68(2)(b)(i)[38]—but in any event they do not justify misapplication of the definition of "acts and conduct of the accused".

19. Indeed, there is some suggestion that the Majority may have taken a similar approach, insofar as it later remarked—this time as part of its discretionary assessment under rule 68(2)(b)(i)—that "certain parts at the core of P-0113's prior recorded testimony *are proximate to the acts and conduct of the accused*, particularly keeping in mind the mode of liability under

[33] *See e.g.* *Galić* Interlocutory Appeal Judgment, para. 11 (emphasis supplied).
[34] *See* Decision, para. 14.
[35] *See e.g.* *Galić* Interlocutory Appeal Judgment, paras. 13, 15. *See also* *Hadžić* Rule 92*bis* Decision, para. 18; *Karadžić* Sarajevo Rule 92*bis* Decision, para. 8; *Lukić* Rule 92*bis* Decision, para. 19.
[36] *Galić* Interlocutory Appeal Judgment, para. 15 (emphasis added).
[37] *See below* para. 29.
[38] For example, rule 68(2)(b)(i) contemplates that the Chamber will take into account among other factors the interests of justice, whether or not the prior recorded testimony "relates to background information" or "to issues that are not materially in dispute".

which Mr Al Hassan is charged".[39] This illustrates the Majority's confusion as to the acts and conduct of the accused, since it now seems to suggest (in apparent contradiction to its previous statement[40]) that it did *not* regard the core of the prior recorded testimony as *going to* the acts and conduct of Mr Al Hassan but only as being *proximate* to them. Nor does this observation establish that the error in the Decision is harmless. This is because the Majority's error necessarily tainted its assessment of what was proximate to the acts and conduct of the accused (since it apparently failed to apply this legal concept correctly), and in any event the Majority had erroneously fettered its discretion under rule 68(1) and (2)(b), as further explained below.[41]

A.2. The hybrid test: confusing the definition of "acts and conduct of the accused" with the question whether prior recorded testimony may appropriately be admitted in part

20. The Majority not only purported to accept the established test defining the "acts and conduct of the accused"[42] but also acknowledged 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 [r]ule 68(2)(b)", and that "partial introduction of prior recorded testimony" is possible.[43] Strictly speaking, this is a separate legal question. Once a chamber has established as a matter of law which, if any, passages of prior recorded testimony go to the acts and conduct of the accused, it then exercises its discretion under rule 68(1) and (2)(b)(i) to decide whether to admit the remainder of that testimony into evidence.

21. The Majority's analysis collapsed these separate questions together, leading to a confusion of 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.[44] For example, it "emphasise[d] that whether excluding certain paragraphs from a prior recorded testimony would suffice to conform with the requirement that it 'goes to proof of a matter other than the acts and conduct of the accused' must be assessed on a case-by-case basis, taking into account the particulars of the case as well as the prior recorded testimony in question."[45] This is incorrect. The definition of "acts and conduct of the accused" is a strictly legal question, which is settled, and which does not vary from case to case. The facts in a given case either meet this standard or they do not. What is

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[39] Decision, para. 16 (emphasis added). *See also* para. 18 ("crucial and highly contested matters").
[40] *See* Decision, para. 14.
[41] *See below* paras. 31-47. *See also above* fn. 37 (notwithstanding the approach in *Galić*, and with reference to para. 29 below, the 'sole or decisive' rule may further make it unnecessary to require cross-examination of prior recorded testimony which does not go to the acts and conduct of the accused, but is proximate to them).
[42] *See above* paras. 6, 21.
[43] Decision, para. 13. *See also* Dissenting Opinion, para. 3.
[44] *See also below* paras. 31-47 (the Majority, in any event, wrongly fettered its discretion).
[45] Decision, para. 13.

case-sensitive, rather, is the Chamber's exercise of discretion under rule 68(2)(b)(i)—in other words, whether it is appropriate to receive any remaining part of the prior recorded testimony which does not go to the acts and conduct of the accused. But to conflate the two is to put the cart before the horse, and to introduce discretion into a pure matter of law.

22. The basis for the Majority's confusion in this respect seemed to be a single decision of the *Ongwen* Trial Chamber.[46] In *Ongwen*, using terminology echoed by the Majority, the Trial Chamber had stated that prior recorded testimony cannot be submitted "piecemeal", and that in principle—aside from "peripheral discrete references to the accused", or their acts and conduct—the Chamber should consider the application of rule 68(2)(b) on the basis "of the whole testimony and, in turn, the whole testimony would be introduced under that provision."[47] The *Ongwen* Trial Chamber provided no reference to authority or extended reasoning to support this conclusion. Nor is it supported by the broader practice of the Court. While chambers may have declined to receive prior recorded testimony where passages going to the acts and conduct of the accused simply cannot be severed from the remainder,[48] chambers have also received prior recorded testimony in part, excluded inadmissible passages.[49] This was also the practice of tribunals such as the ICTY.

23. The Prosecution submits that, while chambers must necessarily be vested with discretion whether to receive prior recorded testimony in part, the interests of justice—and especially the truth determining function of the Court—will usually favour doing so all other factors being equal.[50] This is because a chamber is much better placed to assess the relevance and probative value of prior recorded testimony, even if received in part, at the deliberations stage with the benefit of all the evidence.[51] The risk of prejudice in such circumstances is minimal, as explained further below.[52]

24. In any event, the *Ongwen* dictum was misapplied by the Majority for the purpose of defining the "acts and conduct of the accused". The consequences are obvious. Rather than looking with specificity at whether the particular events or behaviour described by P-0113

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[46] *See e.g.* Decision, paras. 13 (text accompanying fn. 16), 14 (fn. 19: citing *Ongwen* Rule 68 Decision).
[47] *Ongwen* Rule 68 Decision, para. 13.
[48] *See e.g.* ICC-02/11-01/15-950-Red ("*Gbagbo* Consolidated Rule 68 Decision"), paras. 71-72 (noting that the inadmissible passages are "inseparable" from the remainder).
[49] *See e.g.* ICC-01/04-02/06-1730-Red ("*Ntaganda* P-0020 *et al.* Rule 68 Decision"), paras. 7, 9.
[50] *See* ICC RPE, rule 68(2)(b)(i).
[51] The Chamber's familiarity with this approach, and willingness to apply it, is also illustrated by its adoption of the 'submission' system for receiving evidence : *see below* para. 28. The Prosecution understands that this may come to be recommended as standard practice for the Court.
[52] *See below* paras. 26-29.

amount to the acts or conduct of Mr Al Hassan or of other persons, the Majority instead focused on the fact that the "narrative" or "core" of P-0113's testimony implicated "the criminal responsibility of the accused, such as the role of the Islamic police and the interactions in between the various groups."[53] Of itself, this amounted to a legal error because the implications for Mr Al Hassan's criminal responsibility are not relevant for determining whether testimony goes to his acts and conduct—the question, simply, is whether P-0113's testimony went to the acts and conduct of Mr Al Hassan himself or the acts and conduct of a third party.[54] The Majority then seemed to compound this error by treating testimony which is contextually relevant to passages going to the acts and conduct of the accused (*i.e.*, coming immediately before or after such passages) as if it, too, must be considered as going to the acts and conduct of the accused.[55] In requiring that any passage going to the acts and conduct of the accused must be capable of being "detached from [its] context",[56] the Majority set an unrealistic and essentially subjective standard which is inconsistent with the legal, objective nature of the established 'acts and conduct' test.

A.3. Professional judges can weigh prior recorded testimony from which inferences relevant to the criminal responsibility of the accused might be drawn, without unfair prejudice

25. The apparent concern of the Majority that seemed to motivate its error of law was, in any event, also unfounded. There is simply no need to take a broader approach to the definition of the "acts and conduct of the accused" in order to avoid unfair prejudice to the accused.

26. The principal risk of any unfair prejudice arising from rule 68(2)(b) is the infringement of "the accused's right[] to examine the witnesses testifying against him",[57] under article 67(1)(e) of the Statute. As Judge Prost noted, "[t]he 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".[58] Other chambers have drawn similar conclusions.[59]

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[53] Decision, para. 14.
[54] *See above* paras. 16-17.
[55] Decision, para. 14 ("excluding the excerpts identified by the Prosecution, while retaining 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").
[56] Decision, para. 14.
[57] Decision, para. 18.
[58] Dissenting Opinion, para. 4.
[59] *See e.g.* *Ongwen* Rule 68 Decision, para. 12 ("the Chamber understands the limitation of [r]ule 68(2)(b) […] to have the purpose of ensuring the accused's right to confront and examine in court a person making direct allegations against him or her"); ICC-01/14-01/18-685 ("*Yekatom and Ngaïssona* Rule 68 Guidance Decision"), paras. 30-31.

27. Yet reading article 67(1)(e) consistently with internationally recognised human rights, under article 21(3), makes clear that there are more than adequate safeguards to ensure that rule 68(2)(b) poses no particular risk of unfairness if prior recorded testimony going to the acts and conduct of persons other than the accused is admitted, even if it permits inferences as to the accused's criminal responsibility.

28. Like Judge Prost,[60] the *Ongwen* Trial Chamber has observed that, if prior recorded testimony is received under rule 68(2)(b), "full consideration of the standard evidentiary criteria […], in particular in terms of its relevance and probative value, will be deferred to the Chamber's eventual deliberation of its judgment".[61] This assessment will be carried out "on the basis of any argument that the participants may wish to bring in this respect at trial",[62] and so it may well be the case that the Chamber will decide that certain evidence is more prejudicial than probative (at least in the absence of cross-examination) and simply not rely upon it.[63] A chamber accustomed to the 'submission' system for adducing documentary evidence—such as the Trial Chamber in this case—may be particularly comfortable with this kind of assessment. It is also implicit in rule 68(2)(c) and (d)—which *permit* the admissibility of certain kinds of prior recorded testimony that *do* go to the acts and conduct of the accused—that professional judges are both alert to such dangers and able to address them appropriately. Furthermore, the accused has a direct right of appeal under article 81 to ensure that the Chamber's assessment in the trial judgment is lawful and reasonable.

29. In any event, rule 68(2)(b) statements are subject to the rule that convictions may not rest, solely or in a decisive manner, on the evidence of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or trial. This has recently been affirmed by the Appeals Chamber of this Court, by majority,[64] and is consistent with the practice of the Appeals Chambers of the IRMCT[65] and the ICTY,[66] as well as other

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[60] Dissenting Opinion, para. 4 ("the Chamber would have in mind, when analysing the evidence, the absence of cross-examination with respect to it").
[61] *Ongwen* Rule 68 Decision, para. 7.
[62] *Ongwen* Rule 68 Decision, para. 23.
[63] *See also e.g. Ongwen* Rule 68 Decision, para. 13 ("the presence of a limited reference to the accused in a prior recorded testimony does not entail, in and of itself, that the testimony cannot be introduced under Rule 68(2)(b) […] Any such reference would in any case not be considered by the Chamber to establish the acts and conduct of the accused for the purposes of its final judgment"). This statement must be understood in the context of this chamber's apparent preference to receive prior recorded testimony in its entirety: *see above* para. 22.
[64] *Ntaganda* Appeal Judgment, paras. 629-630. Judge Eboe-Osuji dissented from this analysis: *see* ICC-01/04-02/06-2666-Anx5-Corr, paras. 4-12.
[65] *See e.g.* IRMCT, *Prosecutor v. Karadžić*, MICT-13-55-A, Judgment, 20 March 2019 ("*Karadžić* Appeal Judgment"), para. 449 (adopting the approach of the ICTY, as expressed in *Prlić* and *Popović*).
[66] *See e.g.* ICTY, *Prosecutor v. Prlić et al*, IT-04-74-A, Judgment, 29 November 2017 ("*Prlić* Appeal Judgment"), Vol. I, para. 137; *Prosecutor v. Popović et al*, IT-05-88-A, Judgment, 30 January 2015 ("*Popović* Appeal

international trials.[67] It gives effect to article 67(1)(e) of the Statute, read with article 21(3).[68] And the corollary is true. To the extent that a finding is not indispensable for conviction, then a chamber may in law rely solely on evidence received under rule 68(2)(b),[69] without offending the right to examine the witnesses against them as it is established under international human rights law.

A.4. The Majority's finding should be reversed

30. Given the clear error of law, the Appeals Chamber should reverse the Majority's finding that P-0113's prior recorded testimony must be treated as if it went to the acts and conduct of the accused in its entirety, and remand the matter back to the Trial Chamber for a new determination. Not only did this materially affect the Decision insofar as it constituted reason to reject the admissibility of P-0113's testimony outright, but it also distorted the Majority's discretionary assessment by causing it to misapprehend the true extent of P-0113's testimony that it might properly treat as admissible in determining the truth. While not emphasised in the Decision, the Chamber as a whole—including the Majority—has subsequently affirmed that this did form part of its assessment.[70]

Judgment"), paras. 96, 1222, 1226; *Prosecutor v. Đorđević*, IT-05-87/1-A, Judgment, 27 January 2014 ("*Đorđević* Appeal Judgment"), para. 807. *See also* *Prosecutor v. Lukić and Lukić*, IT-98-32/1-A, Judgment, 4 December 2012 ("*Lukić* Appeal Judgment"), para. 570; *Prosecutor v. Haradinaj et al*, IT-04-84-A, Judgment, 19 July 2010 ("*Haradinaj* Appeal Judgment"), para. 101; *Prosecutor v. Haraqija and Morina*, IT-04-84-R77.4-A, Judgment, 23 July 2009 ("*Haraqija* Appeal Judgment"), para. 64; *Prosecutor v. Blagojević and Jokić*, IT-02-60-A, Judgment, 9 May 2007, paras. 315-318; *Prosecutor v. Martić*, IT-95-11-AR73.2, Decision on Appeal against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006, para. 20; *Galić* Interlocutory Appeal Judgment, para. 12 (fn. 34).

[67] *See e.g.* ECCC, *Case 002/02 (NUON Chea and KHIEU Samphan)*, 002/19-09-2007/ECCC/TC, Judgment, 16 November 2018, para. 71 (noting the "limited probative value" of statements of deceased or otherwise unavailable persons "and that a conviction may not be based solely or decisively thereupon").

[68] *Ntaganda* Appeal Judgment, para. 629. *See further e.g.* *Karadžić* Appeal Judgment, para. 458; ICTY, *Prosecutor v. Prlić et al*, IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007 ("*Prlić* Interlocutory Appeal Judgment"), paras. 53 (citing the jurisprudence of the European Court of Human Rights for the proposition that "[u]nacceptable infringements of the rights of the defence […] occur when a conviction is based solely, or in a decisive manner, on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial"), 58-59. *See also* *Prlić* Appeal Judgment, Vol. I, para. 137; *Popović* Appeal Judgment, para. 96; *Haraqija* Appeal Judgment, para. 61; *Prlić* Interlocutory Appeal Judgment, para. 59.

[69] *See e.g.* *Popović* Appeal Judgment, para. 1264.

[70] *See* Certification Decision, para. 11 ("the Impugned Decision did not conclude that the interests of justice criterion pertains 'only residually to the truth-seeking functions'. Rather, the Majority merely emphasised that the truth seeking functions of the Chamber cannot serve as the sole and overarching justification for introducing evidence that is otherwise prejudicial to the accused").

B. Second ground of appeal: the Majority erred in law when considering that article 69(2) requires a chamber to fetter its discretion beyond the plain terms of rule 68(1) and (2)(b) itself

31. In any event, and notwithstanding the Majority's error in determining the extent to which the prior recorded testimony of P-0113 goes to the acts and conduct of Mr Al Hassan, the Majority also erred in finding that the discretionary factors in rule 68(2)(b)(i) "play against" the admission of the statement in whole or in part. As the Chamber has subsequently affirmed,[71] integral to this conclusion was the Majority's view that article 69(2)—and the right of the accused under article 67(1)(e), which underlies it—requires the conduct of a "stringent" assessment under rule 68(2)(b), such that it may only exceptionally admit prior recorded testimony under rule 68(2)(b).[72]

32. Properly understood, the Prosecution submits that this reasoning of the Majority caused it to fetter its discretion beyond the plain terms of rule 68(1) and 2(b). This *a priori* assumption tainted all of the Majority's reasoning concerning its discretion under rule 68(2)(b). It was not required by any provision of the Statute, and was legally erroneous. Indeed, the Majority provided only minimal legal reasoning in support of this conclusion, beyond referring to the judgments of the Appeals Chamber in *Bemba* and *Ruto and Sang*, and one decision of the Trial Chamber in *Yekatom and Ngaïssona*.[73] These do not support the Majority's approach, as the following paragraphs explain.

33. To the contrary, while the Court has frequently described rule 68 as an "exception" to article 69(2),[74] this is not properly understood to mean that the Statute imposes a duty to apply rule 68 more restrictively than its plain terms may allow. In other words, while rule 68 may technically be an exception to the default rule in article 69(2), nothing says that it must be applied 'exceptionally' or restrictively.

34. Somewhat similarly, Judge Prost noted that the principle of orality for witness testimony in article 69(2) is specifically subject to article 68 and any provision of the Rules. "This balance properly reflects the multitude of legal systems which allow for evidence to be adduced other

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[71] *See* Certification Decision, para. 7.
[72] Decision, para. 18.
[73] Decision, para. 18 (fn. 29, citing ICC-01/09-01/11-2024 OA10 ("*Ruto and Sang* Rule 68 Appeal Judgment"), paras. 84-85; ICC-01/05-01/08-1386 OA5 OA6 ("*Bemba* Admissibility Appeal Judgment"), para. 78; *Yekatom and Ngaïssona* Rule 68 Guidance Decision, paras. 30, 32.
[74] *See e.g. Ruto and Sang* Rule 68 Appeal Judgment, para. 84; ICC-01/05-01/13-2275-Red ("*CAR Article 70* Appeal Judgment"), para. 305; ICC-02/04-01/15-1322-Red ("*Ongwen* Defence Witnesses Rule 68(2)(b) Decision"), para. 4.

than through in person testimony" and consequently the admission of evidence through rule 68(2)(b) should not be "viewed as exceptional but rather simply as a different form of evidence authorised under the legislative scheme of this hybrid system."[75] In this context, rule 68 itself "sets out criteria designed to safeguard" the rights of the accused. It is therefore not appropriate for the chamber to direct itself to conduct a "stringent assessment" beyond the plain terms of rule 68(1) and (2)(b). This is particularly so, given the ability of the professional judges of the Chamber to "fully take into account the absence of cross-examination in ultimately assessing the evidence".[76] Any alternative reading would confine the utility of rule 68(2)(b) "to very technical matters or background information, contrary to the intention of the drafters of this provision."[77] It would therefore circumvent the purpose for which rule 68(2)(b) was designed, namely to expedite and streamline the proceedings.

B.1. Article 69(2) does not circumscribe rule 68(1) and (2)(b) beyond the rule's own terms

35. Article 69(2) provides materially that "[t]he testimony of a witness at trial shall be given in person, *except to the extent provided by the measures set forth* in […] the Rules". It also requires that measures "shall not be prejudicial to or inconsistent with the rights of the accused"—but this is, in any event, also confirmed for the purpose of rule 68(2)(b) by rule 68(1) itself, which again states that admission of prior recorded testimony under this rule "would not be prejudicial to or inconsistent with the rights of the accused". Accordingly, article 69(2) does not serve to modify the manner in which chambers exercise their discretion under rule 68. The *Yekatom and Ngaïssona* Trial Chamber put the matter well when it said that:

> Rule 68 […] represents one of the statutory exceptions to the rule of orality and publicity. This means that this way of introducing prior recorded testimony is *per se* generally considered compatible with the rights of the accused. Moreover, [r]ule 68 […] is widely acknowledged as a useful tool to expedite and streamline the proceedings and its use therefore encouraged. Nonetheless, it must be noted that [r]ule 68 […] itself requires that its application is not "prejudicial to or inconsistent with the right of the accused".[78]

36. This is entirely consistent with the reasoning of the Appeals Chamber in *Bemba*, which stressed that in "receiving into evidence any prior recorded witness testimony a Chamber must

[75] Dissenting Opinion, para. 8.
[76] Dissenting Opinion, para. 9. *See also above* paras. 28-29.
[77] Dissenting Opinion, para. 9.
[78] *Yekatom and Ngaïssona* Rule 68 Guidance Decision, paras. 26-27.

ensure that doing so is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally."[79] The *Gbagbo* Appeals Chamber has noted that it is the conditions of rule 68 which are "strict";[80] the "overriding factor" of article 69(2)—that the Chamber must not prejudice or act inconsistently with the rights of the accused—is already contained in rule 68(1). While article 69(2) may set out a "principle" of orality, this "cannot be reduced to a purely mathematical calculation of the percentage of witnesses providing their entire evidence orally"—with the consequences, that while this principle "must always be borne in mind", it adds little to the Chamber's exercise of discretion whether to receive a particular witness' prior recorded testimony under rule 68(2)(b).[81]

37. In *Galić*, the ICTY Appeals Chamber made a similar point. While not styled entirely like article 69(2),[82] ICTY Rule 89(F) provides that "[a] Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form." The Appeals Chamber held that the analogous provision to rule 68(2)(b)—ICTY Rule 92*bis*—is "[f]ar from […] an 'exception' to Rule 89" but rather "identifies a particular situation in which, once the provisions of Rule 92*bis* are satisfied, and where the material has probative value […], it is in principle in the interests of justice within the meaning of Rule 89(F) to admit the evidence in written form."[83] This does not detract from the ultimately discretionary nature of the assessment at the ICTY whether to receive prior recorded testimony in circumstances similar to rule 68(2)(b), nor the overriding duty to safeguard the rights of the accused and secure a fair and expeditious trial, but underlines that chambers should not hesitate to exercise their discretion when warranted.

38. Treating prior recorded testimony, meeting the requirements of rule 68, as 'exceptional' or inherently more dangerous than oral testimony is also difficult to reconcile with the hybrid nature of international criminal procedural law. While it is true that the common law has traditionally regarded evidence not provided in court with some degree of scepticism, this has somewhat diminished over the years.[84] Conversely, the civil law tradition has been more amenable to a wide variety of evidence, provided it meets the requirements of relevance and

[79] *Bemba* Admissibility Appeal Judgment, para. 78. *See also* ICC-02/11-01/15-744 OA8 ("*Gbagbo* Rule 68 Appeal Judgment"), paras. 65.
[80] *Gbagbo* Rule 68 Appeal Judgment, para. 77.
[81] *Gbagbo* Rule 68 Appeal Judgment, para. 78. *See also* *Yekatom and Ngaïssona* Rule 68 Guidance Decision, paras. 30, 32.
[82] *See* WGLL Report, Annex II.A (Recommendation on a proposal to amend rule 68), para. 4 (including also fn. 4).
[83] *Galić* Interlocutory Appeal Judgment, para. 12.
[84] *See e.g.* F. Gaynor, 'Admissibility of documentary evidence,' in G. Sluiter et al. (eds.), *International Criminal Procedure: Principles and Rules* (Oxford: OUP, 2013) ("Gaynor"), p. 1072.

legality.[85] It is thus no coincidence that international human rights law—which includes the wisdom of both traditions—has settled on the 'sole or decisive' rule as the principal safeguard of the right to confrontation reflected in article 67(1)(e) of the Statute.[86] That being so, there is no reason why the practice of the Court should reflect a more restrictive attitude than either the Court's own legal texts or general principles of law would support.

B.2. The Appeals Chamber has stressed that caution is required in the Chamber's exercise of discretion, but has not imposed any stricter standard than that contained in rule 68(1) itself

39. The Majority relied primarily on the decisions of the Appeals Chamber in *Bemba* and *Ruto and Sang* to support its assumption that it must be not only "cautious" but also "stringent" in the exercise of its discretion under rule 68(2)(b). This was misplaced. In *Bemba*, the Appeals Chamber stated merely that a "cautious assessment" is appropriate in ensuring compliance with the obligation reflected in article 69(2) and rule 68(1).[87] In *Ruto and Sang*, the Appeals Chamber simply repeated this assertion, without further elaboration.[88] While it refers to "stringency", again this characterises the requirements of rule 68 itself, and does not suggest further restrictions as a consequence of departing from the principle of orality in article 69(2).[89]

40. Likewise, in applying rule 68(2)(b), various chambers have stated that they enjoy "a certain degree of discretion in [deciding] whether to introduce prior recorded testimony pursuant to [r]ule 68(2)(b) […], when the relevant requirements are met".[90] However, none has suggested that anything in article 69(2) requires them to fetter the discretion allowed under rule 68 itself. For example, the *Gbagbo* Trial Chamber noted that a Chamber should not "automatically allow the introduction of the prior recorded testimony, but must determine whether this is appropriate in the particular circumstances", having regard to the factors in rule 68(2)(b)(i) and rule 68(1).[91] The *Ongwen* Trial Chamber observed that "[t]he crucial question

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[85] *See e.g.* Gaynor, p. 1073. *See also* C. M. Rohan, 'Rules governing the presentation of testimonial evidence,' in K. A. A. Khan, C. Buisman, and C. Gosnell (eds.), *Principles of Evidence in International Criminal Justice* (Oxford: OUP, 2010) ("Rohan"), pp. 523-524. *But see also* Statute, art. 54(1)(a).
[86] *See above* para. 29.
[87] *Bemba* Admissibility Appeal Judgment, para. 78.
[88] *Ruto and Sang* Rule 68 Appeal Judgment, para. 85.
[89] *Ruto and Sang* Rule 68 Appeal Judgment, para. 85 ("where the specific circumstances of a case fall within the parameters set out in [r]ule 68 […], the legal requirements of that provision must be observed for the prior recorded testimony to be admissible. If those requirements are not met, recourse to article 69(2) and (4) of the Statute is not permissible given that such a course of action would render *rule 68* […] meaningless and would enable the party seeking the introduction of the evidence to avoid the stringency of *the latter provision*", emphasis added).
[90] *Ntaganda* P-0773 Rule 68 Decision, para. 8. *See further* *Ongwen* Rule 68 Decision, para. 6; ICC-01/05-01/13-1478-Red-Corr ("*CAR Article 70* Rule 68 Decision"), para. 95; *Ongwen* Defence Witnesses Rule 68(2)(b) Decision, para. 8 (continuing: "If the mere fulfilment of the requirements were to suffice, the Chamber would not be accorded a discretionary power but be obliged to allow the introduction").
[91] ICC-02/11-01/15-573-Red ("*Gbagbo* Rule 68 Decision"), para. 10.

under consideration is whether a testimony which was previously recorded may, in light of its content and significance to the case, be introduced without the need that the provided information be 'tested' through oral examination of the witness at trial."[92]

B.3. Chambers may freely exercise their discretion under rule 68(1) and (2)(b)

41. It follows from this analysis that chambers are free to exercise their discretion to receive evidence under rule 68(2)(b), provided this remains consistent with rule 68(1)—namely, that it does not prejudice the rights of the accused. To the extent that the Majority considered the mere fact that receiving evidence under rule 68(2)(b) represented a "deviation from the general principle of orality", and consequently that this required heightened scrutiny, this logic was circular and erroneous.[93]

42. Indeed, there is no broader reason in principle why rule 68(2)(b) must be applied particularly restrictively in order to preserve the rights of the accused. For example, the International Bar Association (IBA) noted that the provision equivalent to rule 68(2)(b) at the ICTY/ICTR (rule 92*bis*) "often assisted in reducing the amount of live witness testimony on less controversial issues" such as "undisputed facts".[94] It is notable that, whereas the IBA urged that the use of rules 68(2)(c) and (d) should be "exceptional"[95]—and even then only for evidence which actually does go to the acts and conduct of the accused—it made no such assertion for rule 68(2)(b).

43. While some commentators have cautioned that even 'crime base' evidence—that is, evidence which usually does not go directly to the acts and conduct of the accused—"might be crucial to an ultimate finding of guilt",[96] this overlooks the applicable safeguards. First, as rule 68(2)(b)(i) expressly notes, evidence admitted under rule 68(2)(b) may often (although not necessarily) be "cumulative or corroborative" in nature, "in that other witnesses will give or have given […] testimony of similar facts".[97] Second, while very unlikely to be feasible in this

[92] *Ongwen* Rule 68 Decision, para. 7. *See also* para. 20 (considering that all the rule 68(2)(b)(i) factors serve "the same consideration, namely to identify situations in which the prior recorded testimony provided by a witness is—also in light of its relative importance in the system of evidence expected to be presented at trial—of such nature that it is unnecessary that the witness be called to testify live, and examination by the parties may rather be dispensed of without prejudicing the rights of the accused"); *Ongwen* Defence Witnesses Rule 68(2)(b) Decision, para. 4.
[93] Decision, para. 18.
[94] International Bar Association, IBA ICC Programme Legal Opinion, *Rule 68 Amendment Proposal*, 12 November 2013 ("IBA *Rule 68 Amendment Proposal*"), p. 2.
[95] IBA *Rule 68 Amendment Proposal*, p. 4.
[96] Y. McDermott, *Fairness in International Criminal Trials* (Oxford: OUP, 2016), p. 91.
[97] ICC RPE, rule 68(2)(b)(i) (second bullet point).

case, chambers will usually be able to exercise their discretion to hear the evidence of a witness with the benefit of cross-examination under rule 68(3), rather than rule 68(2)(b), if they consider necessary.[98] Third, the 'sole or decisive' rule ensures that if such evidence does turn out to be crucial, it will not be relied upon at the conclusion of the trial unless it is properly corroborated.[99] And, fourth, even if it is corroborated, a chamber has discretion not to give weight to evidence at the conclusion of the trial if its probative value is outweighed by the prejudice caused.[100]

44. Furthermore, the judicious use of rule 68 may be valuable in furthering the fair and expeditious conduct of proceedings. For example, as the Appeals Chamber has noted, the accused is entitled to an expeditious trial, guaranteed by articles 64(2) and 67(1)(c), and therefore it is "not surprising to conclude that expeditiousness is a factor relevant to the implementation of rule 68(3)".[101] This same reasoning applies no less to rule 68(2)(b). Indeed, chambers have used this power *proprio motu* in appropriate circumstances to receive the evidence of a witness, even over the objection of the calling party.[102]

45. In this context, there is simply no reason—or justification—in law for a chamber to fetter its discretion when considering whether to receive prior recorded testimony (not going to the acts and conduct of the accused) into evidence under rule 68(2)(b)(i). Within the plain terms of rule 68(1), this discretion is already subject to the overriding duty not to prejudice or act inconsistently with the rights of the accused, . It also supplemented by the Trial Chamber's powers to freely evaluate the evidence at the end of trial, with direct recourse to the Appeals Chamber under article 81 once a judgment is issued. Reference to the "principle of orality" is not a proper basis for further restricting the Chamber's discretion, as the plain terms of article 69(2) make clear.

46. Accordingly, while the reasoning of the Majority is ambiguous, and further clouded by its error in determining which parts of P-0113's testimony went to the acts and conduct of Mr Al Hassan, the tenor of the reasoning in the Decision illustrates its undue hesitancy in this case. Judge Prost was in no doubt that her understanding of the applicable law differed from that of her colleagues, and this led to their different conclusions on the merits. Laudably, the Majority

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[98] *See e.g.* *Gbagbo* Rule 68 Decision, para. 18 (concluding that witnesses should appear for cross-examination pursuant to rule 68(3), rather than admit their testimony under rule 68(2)(b)); *Ntaganda* P-0773 Rule 68 Decision, paras. 19, 24.
[99] *See above* para. 29.
[100] *See above* para. 28.
[101] *Gbagbo* Rule 68 Appeal Judgment, paras. 59-62.
[102] *Ongwen* Defence Witnesses Rule 68(2)(b) Decision, paras. 21-22, 25. *See also* *Ongwen* Rule 68 Decision, para. 7 (fn. 18).

also acknowledged this in certifying this issue for appeal. Consequently, guidance from the Appeals Chamber on this issue is important in ensuring that this case proceeds on the proper legal basis, as well as further clarifying the practice of the Court as a whole.

B.4. The Majority's finding should be reversed

47. Given the Majority's error of law, the Appeals Chamber should reverse the Majority's finding that the discretionary factors weighed against the admissibility of P-0113's prior recorded testimony, and remand the matter back to the Trial Chamber for a new determination. If it had not erred by considering that article 69(2) required it to fetter its discretion beyond the plain terms of rule 68(1) and (2)(b), the Majority would have conducted its analysis in a materially different way.

Conclusion

48. For all the reasons above, the Appeals Chamber should reverse the Decision, and remand the matter back to the Trial Chamber for fresh determination.

Karim A. A. Khan QC
Prosecutor

Dated this 17th day of December 2021
At The Hague, The Netherlands