PARTIALLY DISSENTING OPINION OF JUDGE HENDERSON

1. I am in agreement with the decision to grant in part the 'Prosecution application to conditionally admit the prior recorded statements and related documents in relation to Witnesses P-0106, P-0107, P-0117 and P-0578 under rule 68(3)' of 26 July 2016.[1] In particular, I agree with my colleagues that it is possible to admit the prior recorded testimony of P-0578 under rule 68(3) of the Rules.

2. Unfortunately, I am unable to support the decision to admit the prior recorded testimony of P-0106, P-0107, and P-0117.

3. The statements of P-0106 and P-0107 clearly pertain to issues that are materially in dispute and which are central to the case. Moreover, a large portion of the statements is based upon what may amount to anonymous hearsay. As I have stated in my partially dissenting opinion of 13 June 2016,[2] I am of the view that these are highly relevant considerations in deciding whether or not to allow the admission of prior recorded testimony under rule 68(3) of the Rules.

4. The statement of P-0117 effectively consists of two parts. The first part essentially relates her personal experiences during the march on the RTI of 16 December 2010. The second part consists almost entirely out of hearsay evidence. For that reason, I do not think it is appropriate to admit it pursuant to apply rule 68(3) of the Rules. The probative value of this part of her evidence is simply too limited to be admissible pursuant to article 69(4) of the Statute

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[1] ICC-02/11-01/15-636-Conf.
[2] ICC-02/11-01/15-573-Conf-Anx.

5. Regarding the first part of P-0117's prior recorded testimony, it contains a number of allegations which implicate one of the accused. Under those circumstances, I believe it is appropriate to hear the testimony from the witness in person. It is also significant to note that the Prosecutor envisages only a two hour gain in terms of reduced examination-in-chief.[3] Such a small advantage cannot justify the curtailment of the principle of orality that is enshrined in article 69(2) of the Statute.

6. I would also like to express my disagreement with my colleagues' view that making use of rule 68 of the Rules "cannot come into conflict with the Statute because the latter instrument explicitly states in Article 69(2) that witnesses shall give testimony in person, except, *inter alia*, to the extent provided for in the Rules."[4] With respect, I do not think it is correct to state that, because there are possible exceptions to a principle, the principle ceases to exist. The Majority's approach amounts to saying that there is no legal difference between in person testimony and the admission of prior recorded testimony. I do not subscribe to such a view, as I think there is great value in hearing incriminating evidence from the witness him or herself under oath and in front of the accused, the judges and the public. A feature of these proceedings has been the emergence of inconsistencies between the oral evidence of the witness when examined and what they may have said in their statement to the investigators. Exploring such inconsistencies is a legitimate approach in assessing the credibility of such witnesses.

7. Similarly, as I already pointed out earlier, I do not adhere to the view that, because rule 68(3) of the Rules provides for the right to cross-examine

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[3] Annex 2 of the Prosecution's application, ICC-02/11-01/15-636-Conf-Anx2, p. 5.
[4] ICC-02/11/01/15-722-Conf, para. 18.

witnesses, there is *ipso facto* no serious risk of negatively affecting the rights of the accused.[5] The right to examine witnesses is enshrined in article 67(1)(e) of the Statute and the fact that rule 68(3) of the Rules restates this right does not compensate for the fact that the witness does not provide his or her incriminating testimony under oath in the presence of the accused and the judges.

Judge Geoffrey Henderson

Dated 13 October 2016

At The Hague, The Netherlands

[5] This is at least how I read paragraphs 5 and 15 of the Majority's opinion.