

PARTIALLY DISSENTING OPINION OF JUDGE KUNIKO OZAKI

1. Trial Chamber I ('Trial Chamber') certified three issues for appeal as arising from the Impugned Decision: Mr Gbagbo's first ground of appeal and Mr Blé Goudé's first and second grounds of appeal, each as more particularly specified in the Judgment.¹ The Appeals Chamber has decided to additionally consider Mr Gbagbo's second ground of appeal. I concur with the decision to do so.
2. I also concur with the decision to reject Mr Blé Goudé's second ground of appeal. I note, though, that assessment of only formal indicia of reliability creates a relatively low bar. I therefore consider that notwithstanding whether or not a more thorough assessment is strictly required, such an assessment may be advisable, including from the perspective of ensuring the fair trial rights of the parties. As I have previously expressed,² the principle of judicial certainty militates in favour of ensuring that the evidence in a case before the Court is focussed and clearly delineated from as early in the proceedings as possible.
3. I relatedly note that certain underlying issues of potential relevance to the question of the timing and scope of any reliability assessment remain unaddressed. For example, the understanding of the term 'introduction', as used in Article 69(2) and Rule 68, may be a relevant consideration, in particular if it is considered to be synonymous with the concept of

¹ Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3) ", 1 November 2016, ICC-02/11-01/15-744 ('Judgment'), para. 8.

² *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the admission into evidence of materials contained in the prosecution's list of evidence, 23 November 2010, ICC-01/05-01/08-1028, para. 16.

‘admission’.³ Further, Rule 68(1) specifically references Article 69(4), which addresses a chamber’s power to rule on the relevance or admissibility of evidence taking into account, amongst other things, the probative value and any prejudice which may be caused. Those questions, going to the status of material introduced pursuant to Rule 68, and relatedly the timing of any probative value assessment, are not, however, directly before the Appeals Chamber at this time, and I reserve my views accordingly.

4. The purpose of this short opinion is to provide the reasons for my disagreement with the Majority’s decision to reject, in particular, Mr Blé Goudé first ground of appeal, that is , the issue of:

whether the Chamber erred by failing to apply the requirement that prior recorded testimony admitted under Rule 68(3) must not be prejudicial to the accused, by ignoring the guidance provided by the Appeals Chamber in *The Prosecutor v. Bemba*, which guidance does not provide for the criterion of “good trial management”, and introduced by paragraph 25 of the Impugned Decision.

5. At the outset, I note that I concur with the Majority’s finding that consideration of ‘good trial management’ in making a determination under Rule 68(3) is not in itself an error. Nonetheless, the concept of ‘good trial management’ is not overly well-defined. The Impugned Decision explained it only by reference to ‘considerations of expeditiousness and streamlining the presentation of evidence’.⁴ I do not dispute that ensuring the efficient presentation of evidence is an important function of a trial

³ *See in this regard* Resolution ICC-ASP/12/Res. 7 adopted at the 12th plenary meeting, on 27 November 2013. *See also* 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. 13.

⁴ Impugned Decision, ICC-02/11-01/15-573-Red, para. 25.

chamber, and consistent with its duty under Articles 64(2) and 67(1)(c) of the Statute. Rule 68(3) is a potentially useful tool in this regard.⁵

6. That definition is, however, in my view, a narrow understanding of what good trial management entails. Expeditionness must be achieved *in a manner consistent with the statutory framework* including, in particular, with the fairness and integrity of the proceedings.⁶ Indeed, Rule 68 itself explicitly emphasises, both directly in Rule 68(1) and by way of reference to Article 69(2) and (4), the requirement that its application not be prejudicial to or inconsistent with the rights of the accused.
7. As reaffirmed in the Judgment, Article 69(2) of the Statute gives effect to the principle of orality, 'making in-court personal testimony the rule'.⁷ Departures from that principle, including through the use of Rule 68, are subject to a cautious case-by-case assessment to ensure that the approach is not prejudicial to or inconsistent with the rights of the accused, or with the fairness of the trial more generally.⁸
8. In my view, such a framework should also result in the admission of prior recorded testimony under Rule 68 being considered exceptional, and, as such, requiring especially careful reasoning on the part of a Trial Chamber. As I have previously expressed,⁹ the primacy of the principle of

⁵ While I consider that Rule 68(3) was self-evidently intended to provide certain flexibility in relation to the presentation of evidence, in a manner which could contribute to the efficient conduct of proceedings, I note that I am not persuaded by the Majority's implication that the reasoning behind the 2013 amendment to *other aspects* of Rule 68 can necessarily be applied in a direct interpretation of Rule 68(3) (*see* Judgment, ICC-02/11-01/15-744, para. 60).

⁶ *See similarly* Judgment, ICC-02/11-01/15-744, para. 62.

⁷ Judgment, ICC-02/11-01/15-744, para. 65, citing to Bemba OA5 OA6 Judgment, ICC-01/05-01/08-1386, para. 76. *See also* Judgment, ICC-02/11-01/15-744, paras 65 and 69, citing to Bemba OA5 OA6 Judgment, ICC-01/05-01/08-1386, para. 78 (referring to the 'general requirement of in-court personal testimony').

⁸ Judgment, ICC-02/11-01/15-744, paras 65 and 69, citing to Bemba OA5 OA6 Judgment, ICC-01/05-01/08-1386, paras 78 and 81, respectively.

⁹ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the admission into evidence of materials contained in the prosecution's list of evidence, 23 November 2010, ICC-01/05-01/08-1028, para. 7. *See similarly* Bemba OA5 OA6 Judgment, ICC-01/05-01/08-1386, para. 76.

orality is founded on the importance which should be attached to direct observation and oversight on the part of a chamber of the giving of a witness's evidence, including from the perspective of evaluating the credibility of the account.

9. I concur with my colleagues that no one factor is, as a matter of principle, determinative in making the assessment of prejudice.¹⁰ A trial chamber requires broad discretion to consider all such factors as may be relevant, which, as the Judgment notes, could 'vary per case and per witness'.¹¹
10. A distinction is also appropriate in this regard between Rule 68(2) and (3), noting that in the latter case the witness will be present before the chamber and both the parties and the Judges will have the opportunity to examine the witness.¹² As noted in the Judgment, it is clear that a 'greater discretion' is accorded in respect of the assessment under Rule 68(3).¹³
11. Notwithstanding such greater discretion, it is nonetheless incumbent upon a trial chamber to ensure that it not only conducts the cautious prejudice assessment required, but that this assessment is adequately captured in the reasoning provided.¹⁴ In relation to the Impugned Decision, I am not persuaded that this has been the case. The Majority notes that, in the Impugned Decision, the Trial Chamber 'specifically referred' to the legal requirements applicable to Rule 68(3), including the requirement that the introduction of prior recorded testimony not be prejudicial to or

¹⁰ Judgment, ICC-02/11-01/15-744, para. 69.

¹¹ Judgment, ICC-02/11-01/15-744, para. 69.

¹² *See similarly* Judgment, ICC-02/11-01/15-744, paras 69 and 79.

¹³ Judgment, ICC-02/11-01/15-744, para. 68.

¹⁴ *See similarly* Judgment, ICC-02/11-01/15-744, para. 69 (noting the requirement that the assessment be 'sufficiently reasoned and explained').

inconsistent with the rights of the accused.¹⁵ Merely recalling such requirements does not, however, constitute their reasoned application.

12. The Trial Chamber appears to have made its prejudice assessment in relation to the statements of ten witnesses in essentially one paragraph.¹⁶ That paragraph commences by noting that the statements in question address facts which are central to the case and are materially in dispute. In light of such conclusions, the already cautious assessment required becomes even more imperative. Yet, those findings - which, in my view, should have militated against introduction of the statements under Rule 68 – appear to then have been overridden on the basis of one somewhat ambiguous factor, being the ‘relative importance of the witnesses within the system of evidence which has been and is expected to be presented’.¹⁷ Such an assessment is not only vulnerable to unprincipled application, but is also not amenable to meaningful interlocutory review.

13. It is of note in this regard that the Trial Chamber appears to be refraining from making admissibility or relevance determinations throughout the trial primarily on the basis that doing so at this stage would be premature given the Chamber’s partial knowledge of the evidence in the case.¹⁸ Yet, the Trial Chamber is simultaneously, for the purposes of Rule 68, making assessments as to the ‘importance’ of certain pieces of evidence within a perceived ‘system of evidence’ in a manner which, in my view, significantly impacts case presentation, and potentially the fairness of the proceedings.

¹⁵ Judgment, ICC-02/11-01/15-744, para. 63.

¹⁶ Impugned Decision, ICC-02/11-01/15-573-Red, para. 38.

¹⁷ Impugned Decision, ICC-02/11-01/15-573-Red, para. 38.

¹⁸ *See, for example*, Decision concerning the Prosecutor’s submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016, 9 December 2016, ICC-02/11-01/15-773, para. 35.

14. I relatedly consider that the Judgment should have provided additional guidance on the parameters within which the assessment of prejudice should take place. Indeed, the only factor which the Judgment explicitly identifies as forming a mandatory part of this assessment is the aforementioned ambiguous criteria of the “importance” of each witness statement in light of the charges and the evidence already presented or intended to be presented before it.¹⁹ In my view, confining the guidance provided to such an equivocal statement risks overly lax, and, as noted above, potentially unprincipled, application in practice.
15. While the Judgment also emphasises that ‘extra vigilan[ce]’²⁰ will be required where the statements in question relate to issues that are materially in dispute, are central to core issues of the case or are uncorroborated, a general invocation of that nature does not, in my view, adequately protect the rights at stake. Indeed, noting that consideration of these factors has been held by the Majority not to be a requirement but rather that they are ‘factors that may be considered’,²¹ it appears open to a trial chamber to potentially not consider these factors at all, and therefore remain unaware of the fact that such extra vigilance ought to be applied. In my view, the clear, albeit non-exhaustive and non-mandatory, criteria identified in the Bemba OA5 OA6 Judgment should not be lightly displaced.
16. While I acknowledge the difficulties inherent in providing specific guidance on a discretionary matter which is subject to so many variables, the Appeals Chamber should, in formulating its guidance, have particular regard to the ease by which such guidance can be understood and applied.

¹⁹ Judgment, ICC-02/11-01/15-744, para. 71 (to be conducted as part of the Chamber’s ‘individual assessment of the evidence sought to be introduced’).

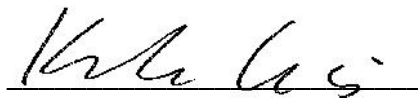
²⁰ Judgment, ICC-02/11-01/15-744, para. 69.

²¹ Judgment, ICC-02/11-01/15-744, para. 2.

In my view, the Judgment may have the inadvertent effect of lessening the degree of clarity in respect of the prejudice assessment required under Rule 68(3), both for parties and trial chambers.

17. For the reasons expressed above I would have upheld Mr Blé Goudé's first ground of appeal and remanded the matter to the Trial Chamber for further consideration.

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

A handwritten signature in black ink, appearing to read 'K. Ozaki', is written over a horizontal line.

Judge Kuniko Ozaki

Dated 16 December 2016

At The Hague, the Netherlands