

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: ICC-01/04-02/06  
Date: 4 December 2017

**TRIAL CHAMBER VI**

**Before:** Judge Robert Fremr, Presiding Judge  
Judge Kuniko Ozaki  
Judge Chang-ho Chung

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO  
IN THE CASE OF  
*THE PROSECUTOR v. BOSCO NTAGANDA***

**Public**

**Public redacted version of ‘Decision on Defence request for admission of prior recorded testimony of Witnesses D-0001, D-0013, D-0123, D-0134, D-0148, D-0150, D-0163, and D-0179 pursuant to Rule 68(2)(b)’**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Mr James Stewart  
Ms Nicole Samson

**Counsel for Bosco Ntaganda**

Mr Stéphane Bourgon  
Mr Christopher Gosnell

**Legal Representatives of Victims**

Ms Sarah Pellet  
Mr Dmytro Suprun

**Legal Representatives of Applicants**

**Unrepresented Applicants for  
Participation/Reparation**

**Unrepresented Victims**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**Trial Chamber VI** ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda* ('Ntaganda case'), having regard to Articles 64(2) and (9)(a), 67, and 69(2) and (4) of the Rome Statute ('Statute'), Rules 63(2) and 68(2)(b) of the Rules of Procedure and Evidence ('Rules'), and Regulation 24(5) of the Regulations of the Court, issues the following 'Decision on Defence request for admission of prior recorded testimony of Witnesses D-0001, D-0013, D-0123, D-0134, D-0148, D-0150, D-0163, and D-0179 pursuant to Rule 68(2)(b)'.

## **I. Procedural history**

1. On 16 October 2017, in line with the time limit set by the Chamber,<sup>1</sup> the defence team for Mr Ntaganda ('Defence') filed a request seeking the admission of the prior recorded testimony of, *inter alia*, Witnesses D-0001, D-0013, D-0123, D-0134, D-0148, D-0150, D-0163, and D-0179 under Rule 68(2)(b) ('Request').<sup>2</sup>
2. On 27 October 2017, the Defence filed an addendum to the Request, seeking the admission of associated documents relating to, *inter alia*, Witnesses D-0134, D-0150, and D-0179 ('Addendum').<sup>3</sup>
3. Also on 27 October 2017, after having been granted an extension of the page limit,<sup>4</sup> the Office of the Prosecutor ('Prosecution') responded to the Request, opposing it ('Response').<sup>5</sup>

<sup>1</sup> Email communication from the Chamber to the parties and the participants on 3 October 2017, at 14:22.

<sup>2</sup> Request to admit prior recorded testimony of eleven witnesses under Rule 68(2), ICC-01/04-02/06-2066-Conf, with Confidential Annexes. A Corrigendum was filed on 27 October 2017, ICC-01/04-02/06-2066-Conf-Corr and Conf-Anx1. The requests relating to Witnesses D-0207, D-0185 and D-0080 have been addressed separately. *See* Decision on Defence Requests to add D-0185, D-0207, and D-0243 to its List of Witnesses and for the admission of prior recorded testimony pursuant to Rule 68(2)(b), 6 November 2017, ICC-01/04-02/06-2099 ('Decision 2099') and Decision on Defence request for admission of the prior recorded testimony of Witness D-0080, 7 November 2017, ICC-01/04-02/06-2100-Conf (a public redacted version was filed on the same day as ICC-01/04-02/06-2100-Red).

<sup>3</sup> Addendum to "Request to admit prior recorded testimony of eleven witnesses under Rule 68(2)", 16 October 2017, ICC-01/04-02/06-2066-Conf, ICC-01/04-02/06-2083-Conf, with Confidential Annexes.

4. On 2 November 2017, the Defence sought leave to reply in relation to a number of issues arising from the Response ('Request for Leave to Reply').<sup>6</sup>
5. On 8 November 2017, in line with the Chamber's direction,<sup>7</sup> the Defence filed a reply in relation to three of the issues identified in the Request for Leave to Reply ('Reply').<sup>8</sup>
6. On 13 November 2017, the Registry filed declarations pursuant to Rule 68(2)(b)(iii) in relation to nine of the eleven witnesses covered by the Request.<sup>9</sup> On 15 November 2017, the Defence submitted confidential redacted versions of three of these declarations, originally filed as '*ex parte*'.<sup>10</sup>

## II. Submissions and Analysis

### *i. Preliminary issue: Request for Leave to Reply*

7. With the exception of the three issues specified in its email direction on the Request for Leave to Reply, for which leave to reply was granted, the Chamber did not consider that it would be assisted by further submissions on the other

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<sup>4</sup> Email communication from the Chamber to the parties and the participants on 24 October 2017, at 17:31, responding to email communication from the Prosecution to the Chamber on 24 October 2017, at 14:28.

<sup>5</sup> Prosecution response to the Defence "Request to admit prior recorded testimony of eleven witnesses under Rule 68 (2)", ICC-01/04-02/06-2066-Conf, ICC-01/04-02/06-2087-Conf.

<sup>6</sup> Request for leave to reply to the "Prosecution response to the Defence 'Request to admit prior recorded testimony of eleven witnesses under Rule 68(2)'", ICC-01/04-02/06-2066-Conf, ICC-01/04-02/06-2095-Conf.

<sup>7</sup> Email communication from the Chamber to the parties and the participants on 6 November 2017, at 12:16. Therein, the Chamber stated, 'Pursuant to Regulation 24(5) of the Regulations of the Court, the Chamber hereby grants the Request [for Leave to Reply] in part. The Defence is granted leave to reply to issues (d) and (e) in paragraph 9, and issue (a) in paragraph 21 of the Request [for Leave to Reply]. The Chamber does not consider that it would be assisted by further submissions on the other issues identified.'

<sup>8</sup> Corrected version of "Reply on behalf of Mr Ntaganda to the 'Prosecution response to the Defence 'Request to admit prior recorded testimony of eleven witnesses under Rule 68(2)'"', 8 November 2017, ICC-01/04-02/06-2103-Conf, ICC-01/04-02/06-2103-Conf-Corr and confidential Annex.

<sup>9</sup> Registry Transmission of the Declarations made by nine Defence Witnesses, pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence, ICC-01/04-02/06-2111-Conf, with Confidential Annexes I, II, III, IV, VI and IX, and Confidential *ex parte* Annexes V, VII and VIII only available to the Defence and the Registry. In particular, the Registry transmitted the relevant documentation in relation to the prior recorded testimony of Witnesses D-0013, D-0123, D-0134, D-0148, D-0150, D-0163, D-0179, D-0185 and D-0207. No declaration related to Witness D-0001 was submitted.

<sup>10</sup> Submission of certified documents related to the "Request to admit prior recorded testimony of eleven witnesses under Rule 68(2)", ICC-01/04-02/06-2066-Conf, 15 November 2017 (notified on 16 November 2017), ICC-01/04-02/06-2113-Conf, with Confidential Annexes V, VII and VIII.

issues identified, and rejected the remainder of the Request for Leave to Reply on this basis ('Decision on Request for Leave to Reply').

*ii. Applicable law*

8. The Chamber incorporates by reference the applicable law in relation to Rule 68(2)(b) requests as previously set out by it.<sup>11</sup>

*iii. Case-by-case assessment of individual requests*

9. For its assessment of the individual requests and on the basis of the parties' submissions, the Chamber indicates at the outset that, unless otherwise specified below, it considers that the relevant prior recorded testimony<sup>12</sup> does not relate to the acts and conduct of the accused, and that its reliability is not contested. In these circumstances, the Chamber has assessed the individual requests in light of the remaining discretionary factors listed under Rule 68(2)(b)(i).

**Witness D-0001**

10. The Defence seeks the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of D-0001, [REDACTED].<sup>13</sup> In particular, it seeks the admission of: (i) his statement to the Defence taken in October 2017 ('2017 Statement');<sup>14</sup> and (ii) associated documents, including a statement to the Defence taken in 2014;<sup>15</sup> a statement to the Prosecution taken in 2009;<sup>16</sup> two

<sup>11</sup> Decision on admission of prior recorded testimony of Witness P-0773 under Rule 68, 2 December 2016, ICC-01/04-02/06-1667-Conf, paras 6-8. A public redacted version was issued on 27 February 2017 as Public redacted version of 'Decision on admission of prior recorded testimony of Witness P-0773 under Rule 68', 2 December 2016, ICC-01/04-02/06-1667-Conf, ICC-01/04-02/06-1667-Red.

<sup>12</sup> Noting that the Chamber considers the statements of the eight witnesses subject to the present decision to constitute 'prior recorded testimony' under Rule 68, for the purpose of the present decision, the terms 'prior recorded testimony' and 'statement' are used interchangeably.

<sup>13</sup> Request, ICC-01/04-02/06-2066-Conf-Corr, paras 10-18; Annex I and Annexes A to E.

<sup>14</sup> DRC-D18-0001-5893, ICC-01/04-02/06-2066-Conf-Corr, Annex I.

<sup>15</sup> DRC-D18-0001-6134, ICC-01/04-02/06-2066-Conf-Corr-Anx I, Annex E.

<sup>16</sup> DRC-D18-0001-5938, ICC-01/04-02/06-2066-Conf-Corr-Anx I, Annex C.

statements to the Prosecution taken in 2005 and 2006, respectively ('2005 and 2006 Statements');<sup>17</sup> and the witness's [REDACTED].<sup>18</sup>

11. The Defence submits that the witness's prior recorded testimony is appropriate for admission under Rule 68(2)(b), as: (i) the only references to the acts and conduct of the accused appear in the 2005 and 2006 Statements, and their purpose is not to prove or disprove the acts and conduct of the accused, but rather 'to show the extent and degree of the lies that were encouraged by the Prosecution intermediary'; (ii) the investigative techniques relied on by the Prosecution, in particular its reliance on intermediaries, constitute 'an important background and contextual issue'; (iii) [REDACTED]; (iv) D-0001's testimony is cumulative of testimonial and documentary evidence heard during the *Ntaganda* case; (v) its admission is in the interests of expeditiousness and efficiency, also considering that the witness has expressed his unwillingness to give testimony in person; and (vi) it possesses sufficient indicia of reliability.<sup>19</sup>
12. Finally, the Defence argues that the 'interests of the truth' are advanced by receiving 'information about the degree to which individuals in Ituri, whether driven by greed or other motives, are willing to lie or encourage lying in the context of providing evidence to the Prosecution against a well-known individual'. The fact that D-0001 describes [REDACTED] as part of a 'network' and that [REDACTED] procured other Prosecution witnesses is, according to the Defence, information that the Chamber should consider in evaluating other witnesses' answers about their contacts with witnesses.<sup>20</sup>
13. The Prosecution submits that D-0001's prior recorded testimony is not suitable for admission pursuant to Rule 68(2)(b), noting, *inter alia*, that: (i) the matters

<sup>17</sup> DRC-D18-0001-5897, DRC-D18-0001-5928 ('2005 and 2006 Statements'); ICC-01/04-02/06-2066-Conf-Corr-Anx I, Annexes A and B, respectively.

<sup>18</sup> DRC-D18-0001-5966, ICC-01/04-02/06-2066-Conf-Corr-Anx I, Annex D.

<sup>19</sup> Request, ICC-01/04-02/06-2066-Conf-Corr, paras 11-16.

<sup>20</sup> Request, ICC-01/04-02/06-2066-Conf-Corr, para. 17.

discussed by the witness in his 2005 and 2006 Statements 'squarely' relate to the accused's acts and conduct, and the Defence's effort to limit the Chamber's use of the statements or minimise their content is 'incorrect';<sup>21</sup> (ii) the Defence's characterisation of D-0001's [REDACTED] prior statements to the Prosecution as 'associated documents' to his 2017 Statement is inappropriate,<sup>22</sup> and, if the Chamber were to grant the Request, the [REDACTED]<sup>23</sup> should also be admitted for completeness, as should be all English versions [REDACTED];<sup>24</sup> (iii) it relates to issues that are materially in dispute in the *Ntaganda* case, as it includes serious allegations about a Prosecution intermediary; (iv) it is not of a cumulative or corroborative nature; and (v) it lacks probative value and requires cross-examination to address the witness's expected evidence and the new changes he seeks to make [REDACTED].<sup>25</sup> With regard to the last point, the Prosecution further submits that only now, long after [REDACTED], in which the witness had distanced himself from some of his prior statements, did D-0001 specifically recant all the information he had previously provided to the Prosecution that directly implicated the accused.<sup>26</sup>

14. In its Reply, the Defence submits, *inter alia*, that the relevance and probative value of information can only be assessed in relation to the fact or proposition sought to be proven and that the tendering party has not only the right but an obligation to define that fact or proposition. Referring to previous practice of this Chamber, the Defence argues that the Chamber is entitled to determine that information is admissible for one purpose, but not for another.<sup>27</sup> It further submits that evidence that a Prosecution intermediary has encouraged

<sup>21</sup> Response, ICC-01/04-02/06-2087-Conf, paras 17-19.

<sup>22</sup> Response, ICC-01/04-02/06-2087-Conf, para. 19.

<sup>23</sup> [REDACTED].

<sup>24</sup> Response, ICC-01/04-02/06-2087-Conf, footnote 25.

<sup>25</sup> Response, ICC-01/04-02/06-2087-Conf, paras 3 and 16-40.

<sup>26</sup> Response, ICC-01/04-02/06-2087-Conf, para. 34.

<sup>27</sup> Reply, ICC-01/04-02/06-2103-Conf-Corr, paras 1 and 4-11.

witnesses in this case to lie is not only ‘independently material, but highly important’, as shown by the fact that [REDACTED].<sup>28</sup>

15. At the outset, the Chamber recalls that the concept of ‘acts and conduct of the accused’ should be given its ordinary meaning and refers to the ‘personal actions 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’.<sup>29</sup>

16. The Chamber notes that the 2017 Statement consists of four pages in which the witness mainly: (i) confirms the veracity of [REDACTED] and of his 2014 Statement; (ii) indicates that the information concerning Mr Ntaganda recorded in the 2005 and 2006 Statements is not true; (iii) indicates that, for the purpose of his 2005 and 2006 Statements, he was induced to lie by Intermediary [REDACTED], who allegedly adopted a similar conduct with other witnesses; and (iv) provides clarifications in relation to certain passages of [REDACTED].<sup>30</sup>

17. The Chamber finds that portions of D-0001’s prior recorded testimony, in particular, the 2005 and 2006 Statements, relate to the acts and conduct of the accused, which would be a bar to their introduction pursuant to Rule 68(2)(b), notwithstanding that in his subsequent statements to the Prosecution and the Defence, as well as [REDACTED], the witness denies the veracity of part of the information originally provided, including his allegations against Mr Ntaganda.

18. The Chamber further considers that the prior recorded testimony is relevant to specific issues in dispute, noting that it relates to allegations of interference by a Prosecution intermediary who was, as conceded by the Prosecution, in contact

<sup>28</sup> Reply, ICC-01/04-02/06-2103-Conf-Corr, para. 10.

<sup>29</sup> Decision on admission of prior recorded testimony of Witness P-0773 under Rule 68, 2 December 2016, ICC-01/04-02/06-1667-Conf, para. 11. A public redacted version was filed on 27 February 2017, ICC-01/04-02/06-1667-Red.

<sup>30</sup> ICC-01/04-02/06-2066-Conf-Corr-AnxI.



with two witnesses who appeared in this case, namely [REDACTED], and who was allegedly part of a 'network' which may potentially have a broader impact on the evidence presented by the Prosecution.<sup>31</sup> As such, the Chamber does not consider that it relates to 'background and contextual' information, as asserted by the Defence. In light of the nature of D-0001's prior statements, and noting the Prosecution's submissions, in particular in relation to potential discrepancies between the different statements given by the witness in relation to the extent of the false information originally provided,<sup>32</sup> the Chamber considers that it would not be appropriate for D-0001's prior recorded testimony to be introduced without the opportunity for cross-examination.

19. As such, the Chamber considers that D-0001's prior recorded testimony is not appropriate for admission under Rule 68(2)(b).

#### **Witness D-0013**

20. At the outset, the Chamber notes that in the Rule 68(2)(b)(iii) declaration,<sup>33</sup> the witness made a limited number of amendments to his prior recorded testimony. The Chamber is of the view that these amendments do not amount to 'new information' within the meaning of Rule 68(2)(b)(ii), as they are merely rectifying information with regard to non-substantive matters, and will therefore consider them in assessing the prior recorded testimony itself.<sup>34</sup>

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<sup>31</sup> See Request, ICC-01/04-02/06-2066-Conf-Corr, paras 14 and 17.

<sup>32</sup> See Response, ICC-01/04-02/06-2087-Conf, paras 26-36.

<sup>33</sup> ICC-01/04-02/06-2111-Conf-AnxI.

<sup>34</sup> See also, in this sense, Decision on Prosecution Rule 68(2) and (3) Requests, 12 November 2015, ICC-01/05-01/13-1478-Red-Corr, paras 99-100, 107-108.

21. The Defence seeks the admission pursuant to Rule 68(2)(b) of the prior recorded testimony of Witness D-0013, consisting of the witness's [REDACTED] and three associated documents.<sup>35</sup>
22. The Defence submits that D-0013's [REDACTED]: (i) goes to matters other than the acts and conduct of the accused in this case and is being tendered not 'for specific details [REDACTED]', but rather for its description of broader contextual matters, including the issuance of certain demobilisation orders on certain dates, the continued existence of the *Comité de Paix* after the creation of the UPC, and the history and purpose of the UPC as a whole; (ii) is of cumulative and corroborative nature; and (iii) its admission pursuant to Rule 68(2)(b) is in the interests of justice.<sup>36</sup>
23. The Prosecution contends that D-0013's prior recorded testimony fails to satisfy the requirements set out in Rule 68(2)(b), as: (i) it relates to issues that are materially in dispute; (ii) it is not of a cumulative or corroborative nature; and (iii) its admission would prejudice the Prosecution 'by depriving it of the possibility to test the evidence of a witness [REDACTED] to provide information about numerous relevant issues'.<sup>37</sup>
24. The Chamber notes that Witness D-0013 was [REDACTED].<sup>38</sup> His prior recorded testimony is relevant as it concerns, *inter alia*, the political context leading to the creation of the UPC, its structure, functioning and policies in 2002/2003, including the UPC's approach to demobilisation of child soldiers, and the [REDACTED].<sup>39</sup>

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<sup>35</sup> Request, ICC-01/04-02/06-2066-Conf-Corr, paras 19-24; Annex II, including DRC-D18-0001-6178 [REDACTED], DRC-OTP-0037-0294, DRC-OTP-0014-0253, and DRC-OTP-0014-0194.

<sup>36</sup> Request, ICC-01/04-02/06-2066-Conf-Corr, paras 21-24.

<sup>37</sup> Response, ICC-01/04-02/06-2087-Conf, paras 41-48.

<sup>38</sup> ICC-01/04-02/06-1881-Conf-AnxB, pages 11-12.

<sup>39</sup> Request, ICC-01/04-02/06-2066-Conf-Corr, paras 19-22; and ICC-01/04-02/06-1881-Conf-AnxB, pages 11-12; DRC-D18-0001-6178.

25. The Chamber also notes the Defence's submissions that Witness D-0013's testimony is tendered for a specific purpose, which was accepted by the Chamber in certain instances, and that portions of the witness's prior recorded testimony – which the Chamber observes are not further identified in the Request - could be excluded.<sup>40</sup> In the present circumstances, the Chamber finds it more appropriate to assess the entirety [REDACTED] and will therefore consider D-0013's statement as a whole.
26. The Majority considers that while the witness's prior recorded testimony addresses issues which are materially in dispute, such as the UPC/FPLC's approach to demobilisation, the witness's testimony is in certain respects cumulative of the oral testimony of other witnesses who have appeared before the Chamber.
27. Further, in conducting its assessment of the reliability of D-0013's prior recorded testimony, the Chamber has taken into consideration, *inter alia*, the fact that [REDACTED]. Accordingly, the Chamber is of the view that the prior recorded testimony bears sufficient indicia of reliability, as required under Rule 68(2)(b) of the Rules. Further in this respect, [REDACTED],<sup>41</sup> the Chamber emphasises that it will make its own assessment of the witness's prior recorded testimony, including the weight to be given to his evidence. As for the associated items, the Majority notes that the three documents sought to be admitted have all been presented to D-0013 and were recognised and discussed by him during [REDACTED]. As such, the Majority finds that they are eligible for admission under Rule 68(2)(b) of the Rules as associated documents, together with D-0013's prior testimony.

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<sup>40</sup> Reply, ICC-01/04-02/06-2103-Conf, paras 12-14.

<sup>41</sup> [REDACTED].

28. In light of the above, the Majority finds that the witness's prior recorded testimony is relevant, *prima facie* reliable, and appropriate for admission under Rule 68(2)(b).

### **Witness D-0123**

29. The Defence contends that Witness D-0123's statement<sup>42</sup> concerns 'very specific and limited issues', namely the legal validity of an attestation<sup>43</sup> admitted into evidence through Witness P-0894 in support of the latter's claims about certain family relations.<sup>44</sup> The Defence further argues that requiring Witness D-0123 to testify in respect of such a specific issue would not be in the interest of expeditiousness or the efficient management of resources.<sup>45</sup>
30. According to the Prosecution, Witness D-0123's statement should not be admitted pursuant to Rule 68(2)(b) or any other rule since it is 'irrelevant'.<sup>46</sup> In this regard, the Prosecution notes that: (i) the statement's sole purpose is to contest the legal validity of an administrative document attached to Witness P-0894's victim application form;<sup>47</sup> (ii) the document at issue was admitted by the Defence for impeachment purposes, rather than in support of Witness P-0894's claim about certain family relations;<sup>48</sup> (iii) even if Witness D-0123's assertions as to the validity of the document were correct, this would have no impact on Witness P-0894's credibility;<sup>49</sup> (iv) the Defence has already put the information provided by Witness D-0123 as to the validity of the document to Witness P-0894 and is therefore precluded from adducing evidence to prove its

<sup>42</sup> DRC-D18-0001-6137, Annex III to the Request.

<sup>43</sup> DRC-OTP-2090-0099, at page 0103.

<sup>44</sup> Request, ICC-01/04-02/06-2066-Conf-Corr, para. 25.

<sup>45</sup> Request, ICC-01/04-02/06-2066-Conf-Corr, para. 26.

<sup>46</sup> Response, ICC-01/04-02/06-2087-Conf, para. 49.

<sup>47</sup> Response, ICC-01/04-02/06-2087-Conf, para. 50.

<sup>48</sup> Response, ICC-01/04-02/06-2087-Conf, para. 51.

<sup>49</sup> Response, ICC-01/04-02/06-2087-Conf, para. 51.

suggestion;<sup>50</sup> and (v) Witness D-0123's statement does not relate to any other matter that is relevant to the proceedings and has no connection to the knowledge, reliability or credibility of Witness P-0894.<sup>51</sup>

31. The Chamber notes that Witness D-0123's statement does not go to the acts and conduct of the accused, and is relevant to the extent that it challenges the legal value of a document concerning Witness P-0894's family relations, appended to his application form, discussed and admitted for the purpose of impeachment in the context of Witness P-0894's cross-examination.<sup>52</sup> It further provides that Witness D-0123 knows the individuals identified in the document as P-0894's brothers, but has no knowledge concerning their family relations. The Chamber also notes that, when questioned by the Defence in relation to this document, Witness P-0894 provided, *inter alia*, answers regarding the document's alleged lack of validity. Indeed, the witness confirmed the Defence's suggestions that the information therein is based on the information provided by him and that he obtained this document to ensure that the two individuals indicated as being his brothers be included therein.<sup>53</sup>
32. Further, the Chamber notes that the statement is signed by the witness, is declared to have been given voluntarily, with an awareness it may be used in legal proceedings before the Court, and to accurately reflect the content of the interview, and was given in French, a language which the witness indicated that he understands.
33. In light of the foregoing and given the limited scope of the statement and the fact that it relates to a very specific and confined issue and is relevant to assess

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<sup>50</sup> Response, ICC-01/04-02/06-2087-Conf, para. 52.

<sup>51</sup> Response, ICC-01/04-02/06-2087-Conf, para. 54.

<sup>52</sup> Transcript of hearing on 17 June 2016, ICC-01/04-02/06-T-104-CONF-ENG ET, page 32, line 19 to page 34, line 12 and transcript of hearing on 17 June 2016, ICC-01/04-02/06-T-104-Red -ENG WT, page 72, line 19 to page 73, line 12.

<sup>53</sup> ICC-01/04-02/06-T-104-CONF-ENG ET, page 34, lines 5-12.

the reliability of a document concerning Witness P-0894's family relations, the Chamber finds that it is appropriate for admission under Rule 68(2)(b).

#### **Witness D-0134**

34. As a preliminary matter, the Chamber notes that in the relevant Rule 68(2)(b)(iii) declaration,<sup>54</sup> the witness provided a clarification regarding the order of his names as appearing in his statement. The Chamber is of the view that this clarification does not amount to 'new information' within the meaning of Rule 68(2)(b)(ii), and will therefore consider it in assessing the witness's prior recorded testimony itself.
35. The Defence submits that Witness D-0134's prior recorded testimony<sup>55</sup> is suitable for admission pursuant to Rule 68(2)(b),<sup>56</sup> on the basis that it: (i) is limited to comments about an excerpt of the baptismal record of the [REDACTED] Parish,<sup>57</sup> a document used and admitted into evidence during the cross-examination of Witness P-0888;<sup>58</sup> (ii) is relevant to the background and credibility of a Prosecution witness, namely to demonstrate that Witness P-0888, who testified as an alleged child soldier, lied about his age and date of birth;<sup>59</sup> and (iii) concerns a limited issue that 'cannot reasonably be materially disputed'.<sup>60</sup> In these circumstances, the Defence submits that requiring the witness to testify would not be in the interest of expeditiousness or the efficient use of Court resources.<sup>61</sup> Relatedly, noting that the relevant excerpt was admitted during the testimony of Witness P-0888 for the purpose of

<sup>54</sup> ICC-01/04-02/06-2111-Conf-AnxIII.

<sup>55</sup> DRC-D18-0001-5822, Annex IV to the Request.

<sup>56</sup> Request, ICC-01/04-02/06-2066-Conf-Corr, para. 30.

<sup>57</sup> DRC-D18-0001-1464.

<sup>58</sup> Request, ICC-01/04-02/06-2066-Conf-Corr, para. 27.

<sup>59</sup> Request, ICC-01/04-02/06-2066-Conf-Corr, para. 28.

<sup>60</sup> Request, ICC-01/04-02/06-2066-Conf-Corr, para. 29.

<sup>61</sup> Request, ICC-01/04-02/06-2066-Conf-Corr, para. 29.

impeachment, the Defence requests its admission into evidence for the truth of its content.<sup>62</sup>

36. According to the Prosecution, D-0134's prior recorded testimony does not satisfy the requirements of Rule 68(2)(b), on the basis that: (i) it directly relates to Witness P-0888's age, an issue that is materially in dispute;<sup>63</sup> (ii) no other witness has given or will give oral testimony that relates to the authenticity of Witness P-0888's baptismal record;<sup>64</sup> and (iii) introduction under Rule 68(2)(b) is prejudicial to the Prosecution's duty to establish the truth by depriving it of the opportunity to test evidence that relates to the testimony of a Prosecution witness who was called as a former UPC/FPLC child soldier.<sup>65</sup> The Prosecution further argues that recourse to Rule 68(3) would be more appropriate, since it would afford the Prosecution the opportunity to explore, through cross-examination, the authenticity of the baptismal record on the basis of the original document, the circumstances in which the photographs of the relevant entries in the baptismal record were obtained, and the credibility of Witness D-0134, which is challenged by the Prosecution.<sup>66</sup> Finally, the Prosecution notes that, even if the information in Witness P-0888's baptismal record were correct, it would not demonstrate that the witness lied about his age since he did not deny the possibility that the date contained in the baptismal record may be accurate.<sup>67</sup>

37. The Chamber notes that Witness D-0134's prior recorded testimony does not go to the acts and conduct of the accused, and is limited to confirming the authenticity of a baptismal record of the [REDACTED] Parish, which contains an entry which is of relevance to establishing Witness P-0888's age and has been admitted into evidence for impeachment purposes in the context of P-0888's

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<sup>62</sup> Addendum, ICC-01/04-02/06-2083-Conf, paras 2 and 3.

<sup>63</sup> Response, ICC-01/04-02/06-2087-Conf, para. 55.

<sup>64</sup> Response, ICC-01/04-02/06-2087-Conf, para. 55.

<sup>65</sup> Response, ICC-01/04-02/06-2087-Conf, para. 56.

<sup>66</sup> Response, ICC-01/04-02/06-2087-Conf, paras 57-60.

<sup>67</sup> Response, ICC-01/04-02/06-2087-Conf, para. 61.

cross-examination.<sup>68</sup> The Chamber further notes that, when questioned on the basis of the document, Witness P-0888 did not deny its authenticity or the accuracy of the information pertaining to him, and clarified that his statements concerning his date of birth are based on the information he received from his mother.<sup>69</sup> While relevant in relation to Witness P-0888's age, an issue that is in dispute, the Chamber notes that the statement is limited to the specific issue pertaining to the authenticity of the relevant baptismal record. Further, absent any indication that Witness D-0134 is the author, or in possession, of the record, the Chamber is unconvinced by the Prosecution's argument that the need for it to inspect the original record 'provides added reason to call D-0134 to testify and not to admit the baptismal record for the truth of its content'.<sup>70</sup>

38. In these circumstances, noting further that the statement is signed by the witness, is declared to have been given voluntarily, with an awareness it may be used in legal proceedings before the Court, and to accurately reflect the content of the interview, and was given in French, a language which the witness indicates that he understands, the Chamber is of the view that the admission of Witness D-0134's prior recorded testimony through Rule 68(2)(b) is appropriate.
39. Furthermore, with reference to the Defence request for the admission of the excerpt of the baptismal record<sup>71</sup> for the truth of its content, the Chamber notes that the item was shown to D-0134 for the purpose of his statement, and, without taking any position as to the evidentiary weight which will be ultimately attached to the item, the Chamber finds it appropriate to also admit

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<sup>68</sup> Transcript of hearing on 21 June 2016, ICC-01/04-02/06-T-106, page 86, lines 4-16.

<sup>69</sup> Transcript of hearing on 21 June 2016, ICC-01/04-02/06-T-106, page 69, line 25 to page 70, line 7.

<sup>70</sup> Response, ICC-01/04-02/06-2087-Conf, para. 60.

<sup>71</sup> DRC-D18-0001-1464.



the item as an associated document, without any restriction, so as to contextualise Witness D-0134's prior recorded testimony.<sup>72</sup>

### **Witnesses D-0148, D-0150, and D-0163**

40. As a preliminary matter, the Chamber notes that in Witness D-0148's Rule 68(2)(b)(iii) declaration,<sup>73</sup> the witness provides a clarification regarding the spelling of her name as appearing in her statement, and in Witness D-0150's Rule 68(2)(b)(iii) declaration,<sup>74</sup> the witness provides a clarification regarding his place of birth and residence. The Chamber is of the view that these clarifications do not amount to 'new information' within the meaning of Rule 68(2)(b)(ii), and will therefore consider them in its assessment of the prior recorded testimony of the two witnesses, respectively.
41. The Chamber further observes that the three statements are signed by the relevant witnesses, are declared to have been given voluntarily, with the awareness they may be used in legal proceedings before the Court, and to accurately reflect the content of the respective interviews, and were given in French, a language which the witnesses indicate that they understand.
42. The Chamber notes that the statements of Witnesses D-0148, D-0150, and D-0163 do not go to the acts and conduct of the accused, and are similar to the extent that they are alleged by the Defence to have an impact on documents pertaining to Witness P-0883, notably concerning her age. The Chamber will therefore address them together.
43. In relation to Witness D-0148, the Defence argues that her statement<sup>75</sup> is 'limited to commenting on the deficiencies' apparent in a birth certificate admitted

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<sup>72</sup> Addendum, ICC-01/04-02/06-2083-Conf, paras 2 and 3.

<sup>73</sup> ICC-01/04-02/06-2111-Conf-AnxIV.

<sup>74</sup> ICC-01/04-02/06-2111-Conf-AnxV.

<sup>75</sup> DRC-D18-0001-6141, Annex V to the Request.

through Witness P-0883,<sup>76</sup> suggesting that the document is a forgery, and that calling Witness D-0148 to testify in person ‘in respect of such a specific affirmation is not proportionate to the limited scope of her testimony, would not be expeditious, and would not be an efficient use of court resources’.<sup>77</sup>

44. With regard to Witness D-0150, the Defence submits that his prior recorded testimony<sup>78</sup> addresses the authenticity of a document admitted through Witness P-0883.<sup>79</sup> In particular, his prior recorded testimony addresses: (i) a discussion of the functioning of the office that purportedly issued the document; (ii) the fact that the witness does not recognise the writing on the document as being either his own or that of his superior who were both on duty on the purported date of the document’s issuance; and (iii) his statement that the Civil Registry contains no record of the birth of Witness P-0883.<sup>80</sup> Relatedly, the Defence requests the admission of the two photographs of the Civil Registry,<sup>81</sup> referred to in Witness D-0150’s statement, as associated documents, on the basis that they are necessary to understand his testimony.<sup>82</sup>
45. Concerning Witness D-0163, the Defence submits that his prior recorded testimony<sup>83</sup> concerns, *inter alia*, the procedure for issuing birth certificates by officers of the Civil Registry, and provides general information about the basis of information appearing on electoral cards.<sup>84</sup> Noting that the Prosecution has extensively relied on such documents as part of its case, the Defence argues that Witness D-0163 provides relevant background information for assessing the weight that can be afforded to such documents, and that substantial testimonial

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<sup>76</sup> DRC-OTP-2094-0656.

<sup>77</sup> Request, ICC-01/04-02/06-2066-Conf-Corr, paras 31-33.

<sup>78</sup> DRC-D18-0001-6146, Annex VI to the Request.

<sup>79</sup> DRC-OTP-2094-0655.

<sup>80</sup> Request, ICC-01/04-02/06-2066-Conf-Corr, paras 34-37.

<sup>81</sup> DRC-D18-0001-5891 and DRC-D18-0001-5892.

<sup>82</sup> Addendum, ICC-01/04-02/06-2083-Conf, para. 4.

<sup>83</sup> DRC-D18-0001-6159, Annex VII to the Request.

<sup>84</sup> Request, ICC-01/04-02/06-2066-Conf-Corr, para. 38.

evidence has already been heard on the lack of verification of information appearing on documents issued by various organs of government in the Democratic Republic of the Congo ('DRC').<sup>85</sup>

46. The Prosecution submits that the prior recorded testimony of the three witnesses is not suitable for admission pursuant to Rule 68(2)(b), on the basis that it could have an impact on the Chamber's assessment of Witness P-0883's age, which, rather than being of background relevance to the case, is an issue that is materially in dispute, since Witness P-0883 was called to testify as a former UPC/FPLC child soldier, and because no other witness has given or will give oral testimony of similar facts.<sup>86</sup> The Prosecution further argues that, in line with a previous decision by the Chamber in relation to witness evidence of comparable nature,<sup>87</sup> admission pursuant to Rule 68(3) would be appropriate. In this respect, the Prosecution contends that cross-examination would be necessary to test the veracity of 'serious allegations of "forgery"' made by the Defence on the basis of the prior recorded testimony of Witnesses D-0148 and D-0150. It further argues that, noting that the statements of all three witnesses contain broad assertions as to the manner in which various documents attesting to persons' identities are prepared, it would be necessary to test their credibility and question them about the limits of their knowledge and the practical application of rules and procedures in the DRC.<sup>88</sup>

47. In relation to Witness D-0148, in particular, the Prosecution further highlights certain issues relating to the pertinence of her statement with respect to the Defence's allegations concerning Witness P-0883's birth certificate, as well as alleged contradictions with the statement Witness D-0148 had previously

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<sup>85</sup> Request, ICC-01/04-02/06-2066-Conf-Corr, para. 39.

<sup>86</sup> Response, ICC-01/04-02/06-2087-Conf, para. 62.

<sup>87</sup> The Prosecution refers to the Chamber's Decision on Prosecution application under Rule 68(2)(b) and Regulation 35 for admission of prior recorded testimony of Witness P-0551, 19 January 2017, ICC-01/04-06-1733.

<sup>88</sup> Response, ICC-01/04-02/06-2087-Conf, paras 63-66.

provided to the Prosecution,<sup>89</sup> and requests that it be allowed to question the witness in relation to these issues.<sup>90</sup> Finally, the Prosecution requests that, should the Chamber admit Witness D-0148's testimony under Rule 68(2)(b), it also admit, for the purpose of impeachment, the relevant paragraphs of the statement given to the Prosecution.<sup>91</sup>

48. Concerning D-0150, the Prosecution argues that it needs to challenge the witness's stated rule that his superior always signs the relevant documents himself, and further notes that, when indicating that he did not find any record with the name of Witness P-0883 in his records, he did not specify which records he was referring to.<sup>92</sup> The Prosecution further opposes admission of the two photographs sought to be admitted by the Defence as associated documents 'before the Prosecution is provided an opportunity to inspect the full register to which they relate'.<sup>93</sup>
49. In respect of Witness D-0163's statement, the Prosecution argues that it is also potentially relevant to the testimony of other Prosecution witnesses, which adds to the need of cross-examination.<sup>94</sup>
50. The Chamber notes that Witness D-0148's statement is limited to commenting on Witness P-0883's birth certificate, stating that: (i) while bearing the witness's signature, the certificate appears to have been completed by another person; (ii) the document differs from the usual documents in not being numbered and lacking certain information and is indicated to have been signed on a date when the witness was ten years old; and (iii) the witness was never requested to certify a birth retroactively. Witness D-0150's statement is limited to explaining

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<sup>89</sup> DRC-OTP-2097-0455, at pages 0457-0458, paras 14-16.

<sup>90</sup> Response, ICC-01/04-02/06-2087-Conf, paras 69-72.

<sup>91</sup> Response, ICC-01/04-02/06-2087-Conf, para. 73.

<sup>92</sup> Response, ICC-01/04-02/06-2087-Conf, paras 74-77.

<sup>93</sup> Response, ICC-01/04-02/06-2087-Conf, para. 77.

<sup>94</sup> Response, ICC-01/04-02/06-2087-Conf, para. 78.

the procedure for registering births and the creation of the related certifications, and to commenting on P-0883's *attestation de naissance*, challenging the authenticity of the witness's and the witness's superior's signature, and declaring that the witness could not find any registration corresponding to the birth of P-0883. Witness D-0163 also testifies to the procedure for registering births and the creation of the related certifications, and corroborates D-0150's statement that *attestations de naissance* are delivered without further documentation or verification.

51. Concerning Witnesses D-0148 and D-0150, the Chamber notes that they specifically comment on - and challenge the reliability of - Witness P-0883's birth certificate and *attestation de naissance*, respectively. The Chamber considers that the prior recorded testimony of these two witnesses is relevant, noting that it relates to the age of Witness P-0883, who testified as an alleged child soldier. However, in light of the limited scope of their testimony, and noting in this respect that the reliability of the prior recorded testimony can be challenged by alternative means to cross-examination, the Majority finds that the interests of justice are best served by their introduction under Rule 68(2)(b).
52. In view of the above, the Majority finds that the admission of Witnesses D-0148 and D-0150's prior-recorded testimony under Rule 68(2)(b) is appropriate. In this context, noting that the purpose of the admission into evidence of the two photographs is limited to showing the alleged signatures of Witness D-0150 and his superior, and to corroborate Witness D-0150's statement that they differ from the signatures appearing on Witness P-0883's *attestation de naissance*, the Majority finds that they are relevant to contextualise Witness D-0150's statement and are therefore appropriate for admission as associated documents. For the same reasons, and emphasising that this admission is without prejudice to the weight to be attached to the documents, the Majority considers it appropriate to admit the photographs without prior inspection of the full

register by the Prosecution. Finally, and in order to better assess D-0148's evidence, the Majority considers it appropriate to admit the relevant paragraphs of the statement given by Witness D-0148 to the Prosecution.

53. With respect to D-0163's statement, the Chamber considers that it is relevant, as it addresses the reliability of the different forms of birth certification. While noting, as submitted by the Prosecution, that it relates to the testimony of Witness P-0883 and that of other Prosecution witnesses, the Chamber also observes that it is of limited scope, and mainly relates to background information, in relation to which the Chamber has already received evidence. In light of this, the Chamber considers that the interests of justice are best served by its introduction under Rule 68(2)(b). Accordingly, the Chamber finds that the admission of Witness D-0163's prior-recorded testimony under Rule 68(2)(b) is appropriate.

#### **Witness D-0179**

54. As a preliminary matter, the Chamber notes that in his Rule 68(2)(b)(iii) declaration,<sup>95</sup> the witness provides a clarification regarding his telephone number. The Chamber is of the view that this clarification does not amount to 'new information' within the meaning of Rule 68(2)(b)(ii), and will therefore consider it when assessing the prior recorded testimony itself.
55. The Defence submits that Witness D-0179's prior recorded testimony<sup>96</sup> is suitable for admission under Rule 68(2)(b) on the basis that, *inter alia*: (i) it concerns the age and appearance of his child, who appears on a photograph that has been admitted as an exhibit in this case,<sup>97</sup> describes his child as being 16 years old while still in primary school, and, as such, is relevant to the reliability

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<sup>95</sup> ICC-01/04-02/06-2111-Conf-AnxVII.

<sup>96</sup> DRC-D18-0001-3350, Annex VIII to the Request.

<sup>97</sup> DRC-D18-0001-1322.

of two of the main criteria advanced by the Prosecution for determining the age of children, that is, physical appearance and level of education attained;<sup>98</sup> and (ii) it is limited in scope and cumulative of other evidence. Relatedly, the Defence seeks the admission of a photograph, referred to by the witness in his statement, and in which the witness identifies his child.<sup>99</sup>

56. The Prosecution opposes the admission of D-0179's prior recorded testimony on the basis that it is 'irrelevant'<sup>100</sup> and further lacks sufficient indicia of reliability.<sup>101</sup>

57. The Chamber notes that Witness D-0179's prior recorded testimony does not go to the acts and conduct of the accused, and relates to the age and level of education of D-0179's son, who appears on a photograph<sup>102</sup> which was used by the Defence during its cross-examination of Witnesses P-0046 and P-0014, and admitted into evidence.<sup>103</sup> The Chamber further observes that, when asked to estimate the age of the individual appearing on the photograph, the relevant witnesses did not challenge the Defence's assertion that he was 16 years old,<sup>104</sup> and further recalls its reservations as to the relevance of such exercise.<sup>105</sup> Under these circumstances, the Chamber considers that the proposed testimony is not sufficiently relevant to matters for determination by the Chamber, and that therefore its admission into evidence would not be appropriate. Under these circumstances, the Chamber also rejects the Defence's request for admission of the document shown to the witness in the context of his statement.

<sup>98</sup> Request, ICC-01/04-02/06-2066-Conf-Corr, para. 42.

<sup>99</sup> Addendum, ICC-01/04-02/06-2083-Conf and confidential Annex A.

<sup>100</sup> Response, ICC-01/04-02/06-2087-Conf, paras 79 and 80-83.

<sup>101</sup> Response, ICC-01/04-02/06-2087-Conf, paras 79 and 84.

<sup>102</sup> DRC-D18-0001-1322.

<sup>103</sup> Transcript of hearing on 23 September 2016, ICC-01/04-02-06-T-138-Red-ENG WT, page 89, lines 11-13.

<sup>104</sup> Transcript of hearing on 16 September 2016, ICC-01/04-02-06-T-103-Red-ENG WT, page 24, lines 20-25 and Transcript of hearing on 23 September 2016, ICC-01/04-02-06-T-138-Red -ENG WT, page 88, lines 4-15.

<sup>105</sup> Decision 2099, para. 24.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**GRANTS** the Request in relation to Witnesses D-0123; D-0134; and D-0163;

**BY MAJORITY, Judge Ozaki dissenting, GRANTS** the Request in relation to Witnesses D-0013; D-0148; and D-0150;

**REJECTS** the Request in relation to Witnesses D-0001 and D-0179;

**ADMITS INTO EVIDENCE** the following items:

DRC-D18-0001-6178, including the English version of the document

DRC-OTP-0037-0294

DRC-OTP-0014-0253

DRC-OTP-0014-0194

DRC-D18-0001-6137

DRC-D18-0001-5822

DRC-D18-0001-1464

DRC-D18-0001-6141

DRC-OTP-2097-0455, paragraphs 14-16

DRC-D18-0001-6146

DRC-D18-0001-5891

DRC-D18-0001-5892

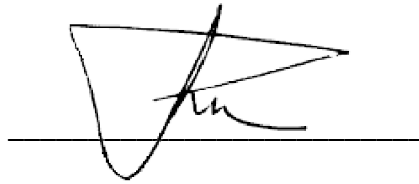
DRC-D18-0001-6159;

**DIRECTS** the Registry to modify the metadata of the exhibits admitted pursuant to the present decision, including by indicating their status as evidence admitted, as well as noting that they have been admitted by way of the present decision; and

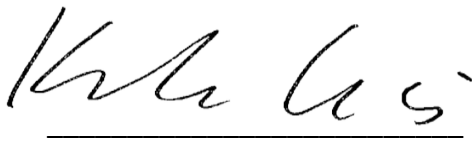
**PLACES** on the record the Decision on Request for Leave to Reply.



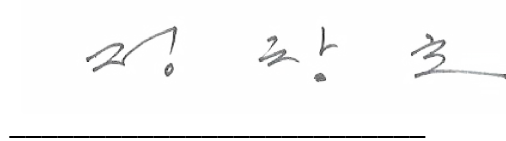
Done in both English and French, the English version being authoritative.

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**Judge Robert Fremr, Presiding Judge**

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**Judge Kuniko Ozaki**

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**Judge Chang-ho Chung**

Dated this 4 December 2017

At The Hague, The Netherlands