

PARTLY DISSENTING OPINION OF JUDGE KUNIKO OZAKI

I. Introduction

1. This Partly Dissenting Opinion is in response to the Majority's '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)' ('Majority Decision'). In particular, while agreeing with the Majority's conclusion with respect to the other witnesses, I disagree with the conclusion that the admission of the statements of Witnesses D-0013, D-0148, and D-0150 is appropriate under Rule 68(2)(b) of the Rules of Procedure and Evidence ('Rules').

II. Witness D-0013

2. With respect to Witness D-0013, I fully agree with the Majority's conclusion that the witness's prior recorded testimony,¹ consisting of the [REDACTED], is relevant.² I also agree that, considering that [REDACTED], it bears sufficient indicia of reliability,³ and that, [REDACTED], the Chamber would make its own assessment of the witness's prior recorded testimony, including the weight to be given to his evidence.⁴ However, despite the fact that D-0013's evidence is in certain respects cumulative of the oral testimony of other witnesses who have appeared before the Chamber,⁵ I disagree with the Majority's conclusion that his testimony is appropriate for admission under Rule 68(2)(b) of the Rules.

¹ DRC-D18-0001-6178.

² Majority Decision, para. 24.

³ Majority Decision, para. 27.

⁴ Majority Decision, para. 27.

⁵ Majority Decision, para. 26.

3. In addition to the fact that, as noted by the Majority, D-0013's prior recorded testimony includes issues that are materially in dispute, such as the UPC/FPLC's approach to the recruitment and demobilisation of alleged child soldiers, which is particularly relevant to counts 14, 15, and 16, I am of the opinion that the witness's [REDACTED] at the relevant time, [REDACTED], and the fact that his prior recorded testimony discusses certain UPC/FPLC documents mainly related to the demobilisation of alleged child soldiers, [REDACTED], also militate in favour of having the witness appear for questioning before the Chamber. Therefore, I would have rejected the admission of his testimony under Rule 68(2)(b) of the Rules. Under these circumstances, it would have not been necessary to adjudicate upon the Defence's request for admission of three documents⁶ associated with D-0013's prior recorded testimony.

III. Witnesses D-0148 and D-0150

4. Considering that, as noted by the Majority, the statements of Witnesses D-0148⁷ and D-0150⁸ 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,⁹ I will also deal with them together.
5. I fully agree with the Majority that the prior recorded testimony of Witnesses D-0148 and D-0150 is relevant as it relates to the reliability of documents pertaining to the age of a Prosecution witness who testified as an alleged child soldier¹⁰ and that the two statements are signed by the relevant witnesses, are declared to have been given voluntarily, with the awareness that they may be used in legal proceedings before the Court and to accurately reflect the content

⁶ DRC-OTP-0037-0294, DRC-OTP-0014-0253, and DRC-OTP-0014-0194.

⁷ DRC-D18-0001-6141.

⁸ DRC-D18-0001-6146.

⁹ Majority Decision, para. 42.

¹⁰ Majority Decision, para. 51.

of the respective interviews, and were given in French, a language which the witnesses indicated that they understand.¹¹

6. However, with respect to Witness D-0148, having considered the content of the witness's evidence, I see some merit in the Prosecution's argument that the witness's statement does not necessarily preclude the possibility that someone other than the witness could have completed a certificate that she had partially filled out and signed in advance.¹² Furthermore, I also see some merit in the Prosecution's argument that the witness's assertion contained in the statement that she was never asked to provide a *certificat de naissance* retroactively would appear to contradict information previously provided to the Prosecution.¹³ For the foregoing reasons, and noting the impact that her evidence may have on the Chamber's assessment of P-0883's age, I consider that it would have been more appropriate to provide the Prosecution with an opportunity to cross-examine the witness, either by having her appear before the Chamber or by having her testify by way of deposition, so as to provide an opportunity for further clarification of the aforementioned matters, as well as more generally with respect to the witness's knowledge of and involvement in the procedure for the retroactive issuance of birth certificates. I would have therefore rejected the admission of D-0148's prior recorded testimony under Rule 68(2)(b) of the Rules. Under these circumstances, it would have not been necessary to adjudicate upon the Prosecution's request for admission of three paragraphs of a statement previously given by D-0148 to the Prosecution,¹⁴ tendered for the purposes of impeachment.

¹¹ Majority Decision, para. 41.

¹² See 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 ('Response'), para. 68.

¹³ See Response, ICC-01/04-02/06-2087-Conf, para. 71.

¹⁴ DRC-OTP-2097-0455, paras 14-16.

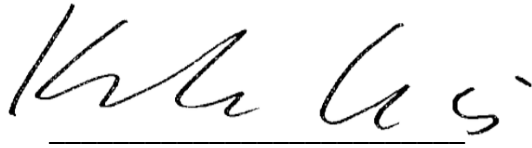
7. With respect to Witness D-0150, having considered the content of his statement, I am also of the opinion that, as noted by the Prosecution, it is unclear in which records he did not find the registration of the birth of the person with the name of Witness P-0883¹⁵ and that it would have been worth exploring with the witness the issue whether it was under any circumstances possible for someone to sign documents on his or his superior's behalf.¹⁶ Therefore, and noting the impact that his evidence may have on the Chamber's assessment of P-0883's age, I consider that it would have been more appropriate to provide the Prosecution with an opportunity to cross-examine the witness, either by having him appear before the Chamber or by having him testify by way of deposition. For the foregoing reasons, I would have also rejected the admission of Witness D-0150's prior recorded testimony under Rule 68(2)(b) of the Rules. Under these circumstances, it would not have been necessary to adjudicate upon the Defence's request for admission of two photographs¹⁷ associated with D-0150's witness statement.

¹⁵ See Response, ICC-01/04-02/06-2087-Conf, para. 76.

¹⁶ See Response, ICC-01/04-02/06-2087-Conf, paras 74-75.

¹⁷ DRC-D18-0001-5891 and DRC-D18-0001-5892.

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

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

Judge Kuniko Ozaki

Dated this 4 December 2017

At The Hague, The Netherlands