

PARTIALLY DISSENTING OPINION OF JUDGE CHANG-HO CHUNG

1. I join my colleagues in granting the Prosecution request ('Request')¹ in relation to P-0022 and P-0041 and admitting into evidence their prior recorded testimony pursuant to Rule 68(2)(c) of the Rules. However, I respectfully disagree with the Majority's decision to defer its ruling on the Prosecution request in relation to P-0103 and to invite the Prosecution to further substantiate its allegation that P-0103 is dead.
2. At the outset, I am of the view that the admission of prior recorded testimony into evidence, pursuant to Rule 68(2)(c) of the Rules, and other relevant provisions of the Statute and the Rules, wherever appropriate, is an important aspect of enhancing the expeditiousness of proceedings before the Chamber.²
3. As concerns the establishment of the death of P-0103, which is the source of my disagreement with the Majority, I recall that the Prosecution provides a statement of a person indicating she was P-0103's wife, attesting to his death,³ which the Defence submits was 'not given under oath' and obtained four and a half years after the alleged death and is therefore not sufficient to establish the unavailability of P-0103.⁴
4. As indicated in the Majority's decision, the statement provided by the Prosecution explains the causes and the circumstances of P-0103's death. In addition, the statement concerning P-0103 mentions that the hospital did not issue a death certificate, although it appears that this may have been possible to

¹ Prosecution's application under rule 68(2)(c) to admit the statements and related documents of deceased witnesses – P-22, P-41 and P-103, ICC-01/04-02/06-659, with confidential annexes 1-2, A1-A17, B1-B62, C1-C4 and D. The Documents are identified in Annex 1 to Request (ICC-01/04-02/06-659-Conf-Anx1).

² *See, in this regard*, Decision on the conduct of proceedings, 2 June 2015, ICC-01/04-02/06-619, paras 41 and 55.

³ Request, ICC-01/04-02/06-659, para. 6; and Annex C.1. to Request, ICC-01/04-02/06-659-Conf-AnxC1, paras 12-13.

⁴ Response on behalf of Mr Ntaganda to the "Prosecution's application under rule 68(2)(c) to admit the statements and related documents of deceased witnesses P-22, P-41 and P-103", ICC-01/04-02/06-736-Conf-Exp, paras 66 and 68.

obtain.⁵ The Majority therefore found it appropriate to ‘invite the Prosecution to further substantiate its allegation’ prior to rendering a decision as to whether or not P-103’s death had been sufficiently established.

5. Further substantiation of the Prosecution allegations with respect to P-0103 is, in my view, not necessary. Recalling that Rule 68(2)(c) requires only that the maker of prior recorded testimony has subsequently died, must be presumed dead, or is otherwise unavailable within the parameters set out in that provision, in the case at hand, I believe the statement provided voluntarily by P-0103’s stated wife, which she signed, and in which she declared is true to the best of her knowledge and recollection, is sufficient for this purpose. Therefore, notwithstanding the fact that a death certificate has not been provided, I am satisfied that P-0103 is unavailable to testify within the meaning of Rule 68(2)(c) of the Rules .
6. Having reached this conclusion, I shall proceed with the analysis of the remaining requirements under Rule 68(2)(c) of the Rules.
7. With respect of whether the necessity of measures under Article 56 of the Statute could have been anticipated, the Prosecution submits P-0103’s death was unexpected and sudden.⁶ The Defence made no specific submissions in this regard. Noting, in particular, the stage that the present case was in at the time and the information that has been provided which indicates P-0103 died after having spent one day in the hospital,⁷ I am satisfied that the necessity of measures under Article 56 could not reasonably have been anticipated.

⁵ Request, ICC-01/04-02/06-659, para. 6; and Annex C.1. to Request, ICC-01/04-02/06-659-Conf-AnxC1, paras 12-13. The Majority further observed that evidence of the spousal relationship between P-0103 and the signatory of the statement has not been provided by the Prosecution.

⁶ Request, ICC-01/04-02/06-659, paras 7-8 referring to Annex C.1. to Request, ICC-01/04-02/06-659-Conf-AnxC1, paras 12-13.

⁷ Annex C.1. to Request, ICC-01/04-02/06-659-Conf-AnxC1, para. 13.

8. Turning to the indicia of reliability of the documents sought to be admitted, I note that: i) P-0103's testimony was given in the presence of a qualified interpreter; ii) the statement he gave to the Prosecution was signed and stated to have been given voluntarily; iii) P-0103 declared on his honour and conscience that the information contained in his declaration is accurate; iv) his statement is internally coherent; and v) he admitted when not knowing certain information.⁸ In light of these factors, I am of the view that P-0103's prior recorded testimony bears sufficient indicia of reliability for the purposes of Rule 68(2)(c) of the Rules.

9. In assessing the Defence's argument that the probative value of P-0103's prior recorded testimony is significantly outweighed by its prejudicial effect,⁹ I note that P-0103 mainly testifies to the attack on the Banyali-Kilo *collectivité* and alleged massacre at the *Hôtel Paradiso*. In my view, and having considered P-0103's role in the Prosecution's case, it does not appear that his testimony goes to the acts and conduct of the accused or otherwise addresses matters so proximate to the accused as to require its exclusion. I also find that the *prima facie* probative value of the prior recorded testimony would outweigh any prejudicial effect to the accused caused by introduction.

10. Consequently, because in my view, all requirements of sub-rule (2)(c) of Rule 68 and Article 69(4) have been met with respect of P-0103, I would have granted the Request in its entirety and admitted into evidence P-0103's prior recorded testimony, together with the associated documents.

⁸ Annex C.2. to Request, ICC-01/04-02/06-659-Conf-AnxC2, paras 15 and 32-33.

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

A handwritten signature in black ink, consisting of three stylized Korean characters: '정' (Jeong), '창' (Chang), and '호' (Ho). The signature is written above a horizontal line.

Judge Chang-ho Chung

Dated this 20 November 2015

At The Hague, The Netherlands