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TRIAL CHAMBER III

Before: Judge Miatta Maria Samba

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF *THE PROSECUTOR v. PAUL GICHERU*

**Public
with confidential Annexes A - C**

Public redacted version of "Prosecution application under rule 68(3) to introduce the prior recorded testimony and associated material of Witnesses P-0613, P-0800 and P-0536" ICC-01/09-01/20-197-Conf, 22 October 2021

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) requests submission of the prior recorded testimonies of Witnesses P-0613, P-0800 and P-0536,¹ in accordance with rule 68(3) of the Rules of Procedure and Evidence² and the “Directions on the Conduct of the Proceedings.”³
2. The three individuals were Prosecution witnesses in the *Ruto and Sang* case⁴ who were corruptly influenced by the Accused and his associates to withdraw as witnesses in that case. The Prosecution seeks to formally submit the Witnesses’ prior recorded testimonies related to witness interference in their entirety, together with associated material referred to therein. All of these items are relevant to and probative of the charges in this case. The Witnesses will be asked to confirm the truth and accuracy of the contents of the items and that they have no objection to their introduction into evidence during their in-court testimony.⁵
3. The introduction into evidence of the Witnesses’ prior recorded testimony will considerably enhance the expeditiousness of the proceedings by reducing the length of their in-court testimony. Should this application be granted, the Prosecution intends to conduct a brief supplementary examination of the Witnesses, as provided for under rule 68(3) of the Rules, to elicit limited, focused *viva voce* evidence.
4. The introduction into evidence of the prior recorded testimonies and associated material will not be prejudicial to the rights of the Accused as the Defence will have the opportunity to examine the Witnesses in the course of these proceedings.

¹ “Witnesses”.

² “Rules”.

³ ICC-01/09-01/20-189.

⁴ ICC-01/09-01/11.

⁵ ICC-01/09-01/20-189, para. 31.

The Chamber will also retain its prerogative to pose questions to the Witnesses at any time.⁶

5. The Witnesses' prior recorded testimony and associated material are listed in the annexes attached to this application. In accordance with the Chamber's Directions on the Conduct of the Proceedings,⁷ the Prosecution also lists other material necessary to understand the Witnesses' prior recorded testimonies. The Prosecution does not seek to introduce such other material through Rule 68(3) at this time, but will rather seek the formal submission of the relevant documents during the testimony of the respective witnesses.
6. All prior recorded testimonies and associated material subject to this application have been disclosed to the Defence.

II. CONFIDENTIALITY

7. This filing and annexes A, B and C are classified as *Confidential* pursuant to regulation 23bis(2) of the Regulations of the Court, as they contain confidential information that relates to Prosecution witnesses and to OTP investigative methods. The Prosecution will file a public redacted version within five days.

III. SUBMISSIONS

A. Legal Framework

8. Rule 68(3) of the Rules provides that the Chamber may allow the introduction of the prior recorded testimony of a witness who is present before the Chamber where the individual does not object, and the Parties and Chamber have the opportunity to examine the witness.⁸

⁶ ICC-01/09-01/20-189, para. 23.

⁷ ICC-01/09-01/20-189.

⁸ *Bemba*, ICC-01/05-01/08-1386, para. 78. *See also Gbagbo & Ble Goude*, ICC-02/11-01/15-870, para. 7; *Ntaganda*, ICC-01/04-02/06-1640-Red, para. 7; *Ongwen*, ICC-02/04-01/15-621, para. 6.

9. Rule 68(3) allows for more streamlined proceedings, while fully respecting the rights of the defence to a fair trial, as the witnesses whose prior recorded testimonies are tendered into evidence are asked to confirm their accuracy, and the defence has the opportunity to examine them in Court. In these circumstances, the Appeals Chamber has ruled that such testimony “cannot be considered to be exclusively written as it is not necessarily intended to replace oral testimony but, rather, complement it.”⁹
10. The main purpose of Rule 68(3) is to streamline the presentation of evidence and conduct the proceedings in a more effective and expeditious way.¹⁰ Trial Chamber VII noted in the *Bemba et al* case that the central motivation for introducing rule 68(3) testimony is to save time,¹¹ and concluded that the fact that in court-testimony can be considerably shortened by admitting prior recorded testimony is, in itself a sufficient reason for granting a rule 68(3) request, as long as its other mandatory requirements are met.¹² Likewise, the Appeals Chamber has further acknowledged that Trial Chambers can take good trial management into account in making decisions under rule 68(3).¹³ Accordingly, other Chambers have encouraged the use of rule 68(3) to enhance the expeditiousness of the proceedings.¹⁴
11. For the reasons explained in more detail in the following section, the Prosecution considers the prior recorded testimony of Witnesses P-0613, P-0800 and P-0536 to be appropriate for introduction into evidence under rule 68(3) of the Rules.
12. All associated material used during the Witnesses’ interviews are tendered into evidence as they form an integral part of their prior recorded testimonies.¹⁵ These

⁹ *Gbagbo & Ble Goude*, ICC-02/11-01/15-744, para. 79.

¹⁰ See *Gbagbo & Ble Goude*, ICC-02/11-01/15-744, para. 60 ; *Bemba et al.*, ICC-01/05-01/13-1478-Red-Corr, para 51.

¹¹ *Bemba et al.*, ICC-01/05-01/13-1478-Red-Corr para. 51.

¹² ICC-01/05-01/13-1478-Red-Corr , para. 48.

¹³ *Gbagbo & Ble Goude*, ICC-02/11-01/15-744, para 62.

¹⁴ *Ntaganda*, ICC-01/04-02/06-961, para 13. *Gbagbo & Ble Goude*, ICC-02/11-01/15-573, paras. 25, 42.

¹⁵ See *Yekatom & Ngaissona*, ICC-01/14-01/18-907-Red, para. 26.

items are also relevant to fully comprehend the Witnesses' accounts, as the Witnesses explain them and provide clarifications when necessary. The submission of this material is supported by Trial Chamber VI's finding in *Ntaganda* that "exhibits associated with a previously recorded testimony are admissible if the witness uses or explains them in the prior recorded testimony, and particularly when these are necessary to read and understand the prior recorded testimony being introduced."¹⁶

13. In the interest of completeness, and in accordance with the Chamber's instruction,¹⁷ the Prosecution lists additional material necessary to understand the Witnesses' prior recorded testimonies. As noted, the Prosecution will seek the formal submission of these items when the Witnesses appear to testify in court.
14. The introduction of the prior recorded testimonies and associated material will not prejudice the rights of the Accused. The fact that some of the prior recorded testimonies relate to core issues materially in dispute in this case does not preclude their introduction pursuant to rule 68(3) since the Defence will have the opportunity to question the Witnesses on these issues.¹⁸ All the prior recorded testimony and associated material have been disclosed to the Defence.¹⁹
15. If this application is granted, the Prosecution intends to conduct a brief supplementary examination of the Witnesses, as provided for under rule 68(3) of the Rules, to elicit limited, focused *viva voce* evidence after they have confirmed the accuracy of the previously recorded testimony.

¹⁶ *Ntaganda*, ICC-01/04-02/06-T-105-Red-ENG ET, p.93, l.24 - p.94, l.7. See also, *Ntaganda* ICC-01/04-02/06-1205, para.7; ICC-01/04-02/06-1029, para.23, 35; *Ruto & Sang*, ICC-01/09-01/11-1938-Corr-Red2, para. 33.

¹⁷ ICC-01/09-01/20-189, para. 30.

¹⁸ See *Yekatom & Ngaissona*, ICC-01/14-01/18-907-Red, para. 24.

¹⁹ Note that the Defence has access to most items included in this rule 68(3) application since the confirmation of charges proceedings. All items subject to this application have been disclosed to the Defence by the filing date of this application.

16. In accordance with the Chamber's Directions on the Conduct of the Proceedings,²⁰ Annexes A, B and C to this application contain the lists of the relevant material, per witness. For ease of reference, this list has been divided into the following sub-categories of information: I. prior recorded testimony the Prosecution seeks to introduce under rule 68(3); II. associated material the Prosecution seeks to introduce under rule 68(3); and III. material necessary to understand the witness' prior recorded testimony.
17. The Prosecution does not seek to introduce the prior recorded evidence of the witnesses pertaining to the *Ruto and Sang* case, which is largely irrelevant to these proceedings, but asks that the Chamber takes judicial notice²¹ of the fact that all three testified as Prosecution witnesses in that case.²²

B. The prior recorded testimony of Witnesses P-0613, P-0800 and P-0536 fulfil the requirements of Rule 68(3) and should be introduced into evidence

a) Witness P-0613's prior recorded testimony²³

18. The Prosecution seeks to submit into evidence P-0613's prior recorded testimony and associated material listed in Annex A to this application. P-0613's prior recorded testimony comprises 11 witness statements made during the course of the Prosecutions ongoing investigations into witness interference in the *Ruto and Sang* case. The associated material consists of 36 items that were used and explained by the witness in her interviews and relate to information and events discussed in the statements. P-0613's prior recorded testimony and associated

²⁰ ICC-01/09-01/20-189.

²¹ See *Bemba et al.*, ICC-01/05-01/13-1249, para. 6 ; ICC-01/05-01/13-1473

²² **P-0613:** ICC-01/09-01/20-T-013-CONF-Red-ENG, ICC-01/09-01/20-T-014-CONF-Red-ENG, ICC-01/09-01/20-T-015-CONF-Red-ENG; **P-0800:** ICC-01/09-01/20-T-018-CONF-Red-ENG, ICC-01/09-01/20-T-019-CONF-Red-ENG, ICC-01/09-01/20-T-020-CONF-Red-ENG, ICC-01/09-01/20-T-026-CONF-ENG, ICC-01/09-01/20-T-027-CONF-ENG, ICC-01/09-01/20-T-028-CONF-ENG, ICC-01/09-01/20-T-029-CONF-ENG, ICC-01/09-01/20-T-030-CONF-ENG; **P-0536:** ICC-01/09-01/20-T-007-CONF-ENG, ICC-01/09-01/20-T-008-CONF-Red-ENG, ICC-01/09-01/20-T-009-CONF-ENG, ICC-01/09-01/20-T-010-CONF-ENG, ICC-01/09-01/20-T-011-CONF-ENG, ICC-01/09-01/20-T-012-CONF-ENG.

²³ [REDACTED].

material are submitted for their truth, as they are relevant to the charges of this case, particularly counts 2, 3, 4 and 5.²⁴

19. P-0613's statements of 15 May and 20 June 2013²⁵ describe conversations with [REDACTED] in which, among other things, he told P-0613 that RUTO had instructed GICHERU to bribe Prosecution witnesses to withdraw from the *Ruto & Sang* case, that [REDACTED] was taking Prosecution witnesses to GICHERU to prepare affidavits for their withdrawal and that [REDACTED] asked [REDACTED] to [REDACTED] of P-0613 to GICHERU. In her statement of 22 June 2013,²⁶ P-0613 explains SMS messages she received from an unknown number and phone conversations with [REDACTED]
[REDACTED]
20. In her statement documented between the 17 and 22 July 2013,²⁷ P-0613 addresses several [REDACTED] conversations she had with [REDACTED]. [REDACTED] told her that GICHERU had instructed him to go to [REDACTED] with a secured phone so that GICHERU could speak to her and, in a subsequent conversation, he tells P-0613 the amount of money GICHERU paid to a number of Prosecution witnesses, including P-0516 and P-0397. P-0613 also describes her [REDACTED] conversation with [REDACTED], in which he states that he benefitted from 'leaving the program' and that P-0613 should speak to P-0800 who had all the relevant information for her.
21. P-0613's statement documented between 24 July and 7 August 2013²⁸ provides information about multiple [REDACTED] conversations she had with [REDACTED] P-0800 and [REDACTED]. P-0613 explains that [REDACTED] called her from Kampala and suggested to meet her, but he failed to arrive. This statement also provides information related to P-0800's interference.

²⁴ ICC-01/09-01/20-153-Conf.

²⁵ KEN-OTP-0102-0178 and KEN-OTP-0106-0910.

²⁶ KEN-OTP-0106-0922.

²⁷ KEN-OTP-0111-0162.

²⁸ KEN-OTP-0111-0557.

22. P-0613's statement of 18 September 2013 provides details of several phone conversations she had with P-0495. In one of them P-0495 told her that he had been offered 2.5 million Ksh to withdraw as a witness and that [REDACTED] and a government official were ready to offer P-0613 a job. In this statement she also describes the content of a [REDACTED] meeting with P-0495 in which he informed P-0613 that GICHERU was the person in charge of handing out the money to the witnesses that accepted to withdraw. Additionally, P-0613's statement of 16 November 2013²⁹ describes a phone conversation with P-0800 in which he told her that he had accepted 2.5 million Ksh to recant his testimony and offered P-0613 payment to withdraw as a witness and return to [REDACTED].
23. In her statement of 15 January 2014, P-0613 addresses two conversations with P-0604 in which he tells P-0613 that [REDACTED] and [REDACTED] instructed him to take P-0613 back to [REDACTED].
24. In her recent re-interview documented between 4 and 7 October 2021,³⁰ P-0613 responds to allegations levelled against her by corrupted witnesses in the *Ruto and Sang* case, and provides further clarification regarding various [REDACTED] conversations. Finally, in a brief supplementary statement on 8 October 2021³¹, P-0613 responds to questions regarding her knowledge of P-0341 and a missed call received on her mobile phone from a number attributed to him.

The material is probative and reliable and its introduction does not prejudice the Accused

25. The material that the Prosecution seeks to introduce pursuant to rule 68(3) of the Rules is probative and reliable. Witness P-0613 provided her witness statement voluntarily and in accordance with the requisite formalities of rule 111 of the

²⁹ KEN-OTP-0118-0137.

³⁰ KEN-OTP-0160-0609.

³¹ KEN-OTP-0160-0625.

Rules. She will be asked to confirm the accuracy of her prior recorded testimony when she appears before the Chamber. In her statements, P-0613 explains in detail her relation to the items submitted as associated material, particularly the SMS messages and phone calls made and received on her mobile phone.

26. The Prosecution also lists, as associated material relevant to understand P-0613's prior recorded testimony, [REDACTED] referred to therein. This material corroborates the prior recorded testimony of the witness in many material respects.
27. Furthermore, P-0613's prior recorded testimony is internally consistent and corroborated by, inter alia, the evidence of witnesses P-0516 and P-0800, and by the contemporaneous [REDACTED] conversations with members and associates of the Common Plan.³²
28. During the proceedings, P-0613 will be asked to confirm whether she consents to the submission of her material, in accordance with rule 68(3) of the Rules and the Defence and the Chamber will have the opportunity to question her about the contents thereof. Therefore, the introduction of Witness P-0613's prior recorded testimony and its associated material under rule 68(3) of the Rules is not prejudicial to or inconsistent with the rights of the Accused.

The introduction of the material will contribute to more effective and expeditious proceedings

29. In its submissions for the First Status Conference, the Prosecution provided a preliminary estimate that, if the prior recorded testimony is not introduced through rule 68(3), it would require six (6) hours for direct examination of P-0613.³³ Upon further review of the evidence, the Prosecution considers that this estimate

³² See confirmation of charges decision, ICC-01/09-01/20-153-Conf, para 181.

³³ ICC-01/09-01/20-171-Conf, para. 13.

was optimistic. If the Prosecution is required to lead the witness regarding all of the relevant events, meetings and conversations that transpired over a period of spanning from May to November 2013, and considering the likely necessity to [REDACTED] [REDACTED] for clarifications and to request the witness to refresh her memory from the contemporaneous statements, her direct testimony would most likely take up to nine (9) hours.

30. However, should the prior recorded testimony be introduced, the Prosecution assesses that it could focus on the most important events and conversations, as detailed below, and that direct testimony could be significantly shortened to 4.5 hours

The Prosecution requests limited supplementary examination

31. Should P-0613's prior testimony and associated material be introduced into evidence, the Prosecution requests leave to conduct a streamlined supplementary examination in accordance with rule 68(3) of the Rules and the prior jurisprudence of this Court.³⁴
32. The Prosecution would first elicit, *viva voce*, further details in relation to certain issues, in particular: (a) the circumstances surrounding the [REDACTED] [REDACTED] (b) clarifications of certain phone calls described in her prior recorded testimony; (c) her meeting with P-0495 [REDACTED] [REDACTED] and (d) allegations made by summonsed witnesses in the *Ruto and Sang* case.

³⁴ *Lubanga*, ICC-01/04-01/06-1603, para.25 ; ICC-01/04-01/06-T-205-Red3, p.19, l.11 et seq; *Katanga & Ngudjolo Chui*, ICC-01/04-01/07-2233-Corr, para.16-17; *Ntaganda*, ICC-01/04-02/06-T-110-Red2-ENG, p.34, l.8-13 ; *Gbabgo & Ble Goude*, ICC-02/11-01/15-498-AnxA, para. 40.

*b) Witness P-0800's prior recorded testimony*³⁵

33. The Prosecution seeks to submit into evidence P-0800's prior recorded testimony and associated material, listed in Annex B to this application. P-0800's prior recorded testimony comprises five written statements and the transcripts of three interviews conducted pursuant to article 55(2) of the Rome Statute. The associated material consists of 24 items that were used during his interviews. P-0800's prior recorded testimony and associated material are submitted for the truth of their content as they are relevant to the charges of this case, particularly counts 3, 4 and 5.³⁶

34. P-0800's statements of 6 and 30 May 2013³⁷ contain information provided by [REDACTED] and [REDACTED] about the existence of a common plan to corruptly interfere with Prosecution witnesses in the *Ruto and Sang* case. Particularly, the 30 May 2013 statement describes a conversation with [REDACTED] in which he tells P-0800 that he accepted a bribe of 1,5 million Ksh to withdraw as an ICC witness and invites P-0800 to do the same. P-0800's statements of 11 June and 12 July 2013³⁸ describe subsequent phone conversations with [REDACTED] that P-0800 [REDACTED] [REDACTED] Lastly, P-0800's statement of 21 July 2013³⁹ provides details of a [REDACTED] meeting with [REDACTED] in [REDACTED] where [REDACTED] offered P-0800 a bribe to withdraw as a Prosecution witness and return to [REDACTED], and to convince P-0613 to do the same. [REDACTED] further explains that the money is coming from GICHERU, who is looking for witnesses in Kenya and that he has to come back to report to him.

³⁵ [REDACTED].

³⁶ ICC-01/09-01/20-153-Conf.

³⁷ KEN-OTP-0102-0205 and KEN-OTP-0103-2473.

³⁸ KEN-OTP-0106-0388 and KEN-OTP-0109-0002.

³⁹ KEN-OTP-0111-0140.

35. Furthermore, the Prosecution seeks to introduce into evidence the transcripts of P-0800 article 55(2) interviews. In the first interview, conducted in March 2014⁴⁰, P-0800 describes, among other things, how he met GICHERU in a hotel in [REDACTED] where GICHERU offered him between 1,500,000 to 2,000,000 Ksh to withdraw as a Prosecution witness and relocate P-0495. P-0800 states that GICHERU provided him with funds to travel to meet P-0495 and convince him to meet GICHERU. P-0800 also describes a meeting in [REDACTED] where GICHERU offered a bribe to P-0495 and asked P-0495 to contact P-0613 on his behalf. Additionally, P-0800 explains that he signed two affidavits – one of them withdrawing as a Prosecution witness – at GICHERU’s request.
36. In his second article 55(2) interview, conducted in September 2014,⁴¹ P-0800 describes a phone conversation with P-0495 in which he tells P-0800 that a group of lawyers lead by GICHERU instructed him what to say in his testimony in the *Ruto and Sang* case.
37. Lastly, in his re-interview held in July 2021,⁴² P-0800 is asked to make clarifications regarding his previous statements, [REDACTED] conversations and contacts with individuals associated with GICHERU. P-0800 describes that he met with [REDACTED] on two consecutive days in July 2013 when he [REDACTED] meet P-0800 in [REDACTED]. P-0800 explains that, even though the Prosecution was not aware of the first meeting at the time, he [REDACTED]. Moreover, P-0800 addresses two phone

⁴⁰ KEN-OTP-0135-0041, KEN-OTP-0135-0054 KEN-OTP-0135-0074, KEN-OTP-0135-0094, KEN-OTP-0135-0096, KEN-OTP-0135-0099, KEN-OTP-0135-0103, KEN-OTP-0135-0113, KEN-OTP-0135-0139, KEN-OTP-0135-0155, KEN-OTP-0135-0179 KEN-OTP-0135-0200, KEN-OTP-0135-0213, KEN-OTP-0135-0220, KEN-OTP-0135-0509, KEN-OTP-0135-0560

⁴¹ KEN-OTP-0144-0260, KEN-OTP-0144-0272, KEN-OTP-0144-0297, KEN-OTP-0144-0307, KEN-OTP-0144-0322, KEN-OTP-0144-0333, KEN-OTP-0144-0349.

⁴² KEN-OTP-0160-0280, KEN-OTP-0160-0290, KEN-OTP-0160-0308, KEN-OTP-0160-0332, KEN-OTP-0160-0338, KEN-OTP-0160-0354, KEN-OTP-0160-0374, KEN-OTP-0160-0382, KEN-OTP-0160-0400, KEN-OTP-0160-0423, KEN-OTP-0160-0432, KEN-OTP-0160-0448, KEN-OTP-0160-0468, KEN-OTP-0160-0489, KEN-OTP-0160-0506, KEN-OTP-0160-0529, KEN-OTP-0160-0555, KEN-OTP-0160-0582.

conversation he had with P-0495 when he (P-0495) travelled to meet P-0613 and convince her to accept the offer to withdraw as a witness.

The material is probative and reliable and its introduction does not prejudice the Accused

38. The material that the Prosecution seeks to introduce pursuant to rule 68(3) of the Rules is probative and reliable. Witness P-0800 provided his statements voluntarily and in accordance with the requisite formalities of rules 111 and 112 of the Rules. He will be asked to confirm the accuracy of his prior recorded testimony when he appears before the Chamber. As regards the associated material, P-0800 clearly describes the items collected and used during his interviews, particularly the SMS messages and phone calls made and received on his mobile phone.
39. The Prosecution also lists, as associated material relevant to understand P-0800's interviews, [REDACTED]
[REDACTED] This material corroborates the prior recorded testimony of the witness in many material respects.
40. Furthermore, P-0800 prior recorded testimony is consistent with his testimony in the *Ruto & Sang* case⁴³ about witnesses interference and is corroborated by other evidence, including the testimony of P-0613 and – partially⁴⁴ – P-0495.
41. During the proceedings P-0800 will be asked to confirm whether he consents to the submission of his material, in accordance with rule 68(3) of the Rules and the Defence and the Chamber will have the opportunity to question him about the contents thereof. Therefore, the introduction of Witness P-0800's prior recorded

⁴³ See **P-0800**: ICC-01/09-01/20-T-018-CONF-Red-ENG, ICC-01/09-01/20-T-019-CONF-Red-ENG, ICC-01/09-01/20-T-020-CONF-Red-ENG, ICC-01/09-01/20-T-026-CONF-ENG, ICC-01/09-01/20-T-027-CONF-ENG, ICC-01/09-01/20-T-028-CONF-ENG, ICC-01/09-01/20-T-029-CONF-ENG, ICC-01/09-01/20-T-030-CONF-ENG.

⁴⁴ See CC-01/09-01/20-125-Conf-AnxA-Corr3, paras. 220-223. The Prosecution argued that P-0495 was not fully frank with investigators about the extent of his involvement with the witness interference scheme, and only admitted what he had to.

testimony and its associated material under rule 68(3) of the Rules is not prejudicial to or inconsistent with the rights of the Accused.

The introduction of the material will contribute to more effective and expeditious proceedings

42. In its submissions for the First Status Conference, the Prosecution provided a preliminary estimate that, if the prior recorded testimony is not introduced through rule 68(3), it would require six (6) hours for direct examination of P-0800.⁴⁵ Like P-0613, upon further review of the evidence, the Prosecution considers that this estimate was optimistic. If the Prosecution is required to lead the witness regarding all of the relevant events, meetings and conversations that transpired over a period of spanning from May 2013 to March 2014, and considering the likely necessity to [REDACTED] for clarifications and to request the witness to refresh his memory from the contemporaneous statements, his direct testimony would also most likely take up to nine (9) hours.
43. However, should the prior recorded testimony be introduced, the Prosecution assesses that it could focus on the most important events and conversations, as detailed below, and that direct testimony could be significantly shortened to 4.5 hours.

The Prosecution requests limited supplementary examination

44. Should Witness P-0800's prior testimony and associated material be introduced into evidence, the Prosecution requests leave to conduct a streamlined supplementary examination in accordance with rule 68(3) of the Rules and the prior jurisprudence of this Court.⁴⁶

⁴⁵ ICC-01/09-01/20-171-Conf, para 13.

⁴⁶ *Lubanga*, ICC-01/04-01/06-1603, para.25 ; ICC-01/04-01/06-T-205-Red3, p.19, l.11 et seq; *Katanga & Ngudjolo Chui*, ICC-01/04-01/07-2233-Corr, para.16-17; *Ntaganda*, ICC-01/04-02/06-T-110-Red2-ENG, p.34, l.8-13 ; *Gbabgo & Ble Goude*, ICC-02/11-01/15-498-AnxA, para. 40.

45. The Prosecution would seek to elicit, *viva voce*, further details in relation to certain issues, in particular: (a) the circumstances surrounding the phone conversations [REDACTED]; (b) his meeting with [REDACTED] on 20 and 21 July 2013 in [REDACTED]; (c) P-0800's meetings with GICHERU; (d) a phone conversation with P-0495 about recruiting P-0613; (e) a phone call in which P-0495 told P-0800 he had been coached by lawyers led by GICHERU on what to testify in the *Ruto and Sang* case; and (f) allegations made by summonsed witnesses in the *Ruto and Sang* case.

c) Witness P-0536's prior recorded testimony

46. The Prosecution seeks to submit into evidence P-0536's prior recorded testimony and associated material listed in Annex C to this application. P-0536's prior recorded testimony comprises 4 statements. The associated material consists of 28 items that were used and explained during her interviews. P-0536's prior recorded testimony and associated material are submitted for their truth, as they are relevant to the charges of this case, particularly counts 4 and 6.⁴⁷

47. P-0800's statements of 31 May 2013 and 23 July 2013⁴⁸ provide information about attempts made by [REDACTED] to contact her. P-0536 describes several phone conversations with [REDACTED]. In her statement of 26 July 2013,⁴⁹ P-0536 explains that [REDACTED] told her that the ICC case was going to collapse and offered her and her husband relocation and 1.4 million Ksh to withdraw from the case. Finally in her 8 November 2013 statement,⁵⁰ P-0536 describes several phone conversations and SMS messages received from [REDACTED]. In one of these conversations, P-0536 asks how she could trust the lawyer who was offering the money, to which [REDACTED] replied that GICHERU

⁴⁷ ICC-01/09-01/20-153-Conf.

⁴⁸ KEN-OTP-0103-2693 and KEN-OTP-0111-0188.

⁴⁹ KEN-OTP-0111-0201.

⁵⁰ KEN-OTP-0118-0011.

was a Kikuyu and that he was trustworthy. [REDACTED] further explained that ‘they’ did not want to expose GICHERU and that he (GICHERU) “is the one who is working and settling all these issues”.

The material is probative and reliable and its introduction does not prejudice the Accused

48. The material that the Prosecution seeks to introduce pursuant to rule 68(3) of the Rules is probative and reliable. Witness P-0536 provided her statements voluntarily and in accordance with the requisite formalities of rule 111 of the Rules. She will be asked to confirm the accuracy of her prior recorded testimony when she appears before the Chamber. As regards the associated material, P-0536 clearly describes the items collected and used during her interviews, particularly the SMS messages and phone calls made and received on her mobile phone.
49. The Prosecution also lists, as material relevant to understand P-0536’s prior recorded testimony, [REDACTED]
[REDACTED]. This material corroborates the prior recorded testimony of the witness in many material respects.
50. Furthermore, P-0536 prior recorded testimony is reliable, consistent and is corroborated by other evidence, including the testimony of P-0800.
51. During the proceedings P-0536 will be asked to confirm whether she consents to the submission of her material, in accordance with rule 68(3) of the Rules and the Defence and the Chamber will have the opportunity to question her about the contents thereof. Therefore, the introduction of Witness P-0536’s prior recorded testimony and its associated material under rule 68(3) of the Rules is not prejudicial to or inconsistent with the rights of the Accused.

The introduction of the material will contribute to more effective and expeditious proceedings

52. In its submissions for the First Status Conference, the Prosecution provided a preliminary estimate that, if the prior recorded testimony is not introduced through rule 68(3), it would require four and a half (4.5) hours for direct examination of P-0536.⁵¹ Upon further review of the evidence, the Prosecution considers that this estimate was also optimistic. If the Prosecution is required to lead the witness regarding all of the relevant events, meetings and conversations that transpired over a period of spanning from May to November 2013, and considering the likely necessity to [REDACTED] for clarifications and to request the witness to refresh her memory from the contemporaneous statements, her direct testimony would most likely take up to six (6) hours.

53. However, should the prior recorded testimony be introduced, the Prosecution assesses that it could focus on the most important events and conversations, as detailed below, and that direct testimony could be significantly shortened to two and a half (2.5) hours.

The Prosecution requests limited supplementary examination

54. Should Witness P-0536's prior testimony and associated material be introduced into evidence, the Prosecution requests leave to conduct a streamlined supplementary examination in accordance with rule 68(3) of the Rules and the prior jurisprudence of this Court.⁵²

⁵¹ ICC-01/09-01/20-171-Conf, para 13.

⁵² *Lubanga*, ICC-01/04-01/06-1603, para.25 ; ICC-01/04-01/06-T-205-Red3, p.19, l.11 et seq; *Katanga & Ngudjolo Chui*, ICC-01/04-01/07-2233-Corr, para.16-17; *Ntaganda*, ICC-01/04-02/06-T-110-Red2-ENG, p.34, l.8-13 ; *Gbabgo & Ble Goude*, ICC-02/11-01/15-498-AnxA, para. 40.

55. The Prosecution would elicit, *viva voce*, further details in relation to certain issues, in particular: (a) the circumstances surrounding the [REDACTED] [REDACTED] (b) clarifications of certain phone calls she describes with [REDACTED].

IV. CONCLUSION AND RELIEF SOUGHT

56. For the foregoing reasons, the Prosecution requests the Chamber to deem formally submitted the prior recorded testimony of P-0613, P-0800 and P-0536 together with their associated material as set out in Annex A, B and C, (Parts I and II) subject to the fulfilment of the further conditions of rule 68(3). Should the Chamber do so, the Prosecution seeks leave to conduct a limited examination-in-chief of these witness as indicated above.

57. Finally, the Prosecution requests that the Chamber takes judicial notice of the fact that P-0613, P-0800 and P-0536 testified as Prosecution witnesses in the *Ruto and Sang* case.



James Stewart, Deputy Prosecutor

Dated this 27th day of October 2021
At The Hague, The Netherlands