

**Cour
Pénale
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**International
Criminal
Court**

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No.: ICC-01/09-01/20
Date: 5 November 2021

TRIAL CHAMBER III (ARTICLE 70)

Before: Judge Miatta Maria Samba

SITUATION IN THE REPUBLIC OF KENYA

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

Public

Public redacted version of “Response to Prosecution application under Rule 68(3) to introduce the prior recorded and associated material of Witnesses P-0613, P-0800, and P-0536,” 4 November 2021, ICC-01/09-01/20-209-Conf

Source: Counsel for Paul Gicheru

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

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Mr. Paul Gicheru, through his Counsel (“the Defence”), hereby responds to the Office of the Prosecution’s (“OTP”) application under Rule 68(3) to introduce the prior recorded testimony of Witnesses P-0613, P-0800, and P-0536.¹ While the Defence defers to the Trial Chamber’s discretion on whether to admit the prior recorded testimonies of these witnesses, it must be provided adequate time and facilities to meaningfully confront them should this evidence be admitted. Additionally, the Defence requests that the Trial Chamber not make any rulings on the admissibility [REDACTED]² until such time as the Defence brings its appropriate challenges under Article 69(7). This Response is filed confidentially pursuant to Regulation 23bis(2) as it relates to submissions classified as confidential.

I. RESPONSE

1. If the Trial Chamber finds that the prior recorded testimonies and associated exhibits of P-0613, P-0800, and P-0536 are suitable for admission under Rule 68(3), it must provide the Defence adequate time and facilities to meaningfully confront these witnesses.³ Failure to do so would, beyond doubt, result in asymmetrical treatment, enuring benefits to the OTP at the expense of Mr. Gicheru’s fair trial rights to confrontation and equality of arms.
2. Where Trial Chambers have admitted prior recorded testimony under Rule 68(3), they have emphasized that the Defence must be granted sufficient time to question the witness and should not be constrained by the amount of time used by the OTP.⁴ This is necessary to ensuring that Mr. Gicheru has an opportunity to “raise meaningful and effective grounds of defence which are tailored to [his] case” and that he is on equal footing with the OTP.⁵ In

¹ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-197](#), Prosecution application under Rule 68(3) to introduce the prior recorded and associated material of Witnesses P-0613, P-0800, and P-0536, 22 October 2021 (“OTP Application for P-0613, P-0800, and P-0536”).

² *OTP Application for P-0613, P-0800, and P-0536*, para. 13.

³ *Rome Statute*, Art. 67(1)(e). The right to a fair trial must be “practical and effective.” *Prosecutor v. Bemba*, [ICC-01/05-01/08-75](#), Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure, 25 August 2008, para. 14. See also *Prosecutor v. Ongwen*, [ICC-02/04-01/15-621](#), Decision on Prosecution’s Application to Introduce Prior Recorded Testimony and Related Documents Pursuant to Rule 68(3) of the Rules, 5 December 2016 (“*Ongwen* Rule 68(3) Decision”), paras. 10, 32 (holding, *inter alia*, that the Defence must have a *full* opportunity to examine the witness in question and should not be constrained by the time used by the OTP in its examination); *Prosecutor v. Gbagbo and Blé Goudé*, [ICC-02/11-01/15-573-Red](#), Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3), 9 June 2016 (“*Gbagbo and Blé Goudé* TC Decision on Rules 68(2)(b) and 68(3)”), paras. 38, 41; *Prosecutor v. Yekatom and Ngaïssona*, [ICC-01/14-01/18-907](#), Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1962, P-0925, P-2193, P-2926, P-2927, P-1577 and P-0287, and the Ngaïssona Defence Motion to Limit the Scope of P-2926’s Evidence, 1 April 2021 (*Yekatom* Rule 68(3) Decision), para. 24.

⁴ *Gbagbo and Blé Goudé* TC Decision on Rules 68(2)(b) and 68(3), para. 41. *Yekatom* Rule 68(3) Decision, para. 24; *Ongwen* Rule 68(3) Decision, para. 32.

⁵ *Prosecutor v. Katanga*, [ICC-01/04-01/07-3436](#), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 1572 (“*Katanga* Judgment”); *Prosecutor v. Lubanga*, [ICC-01/04-01/06-1091](#), Decision on defence’s request to obtain simultaneous French transcripts, 14 December 2007, para. 18.

other words, Mr. Gicheru must have “a reasonable opportunity to present [his] case under conditions which do not clearly disadvantage [him] vis-à-vis [his] adversary.”⁶

3. The OTP claims that its preliminary time estimates for P-0613, P-0800, and P-0536 were “optimistic,” and that considering the “likely necessity [REDACTED] for clarifications and to request the witnesses to refresh their memories from the contemporaneous statements,” it would need 9 hours to examine P-0613, 9 hours to examine P-0800, and 6 hours to examine P-0536.⁷ While the OTP’s revised time estimations are alluring yard sticks for the time necessary for the Defence to examine these witnesses,⁸ it should not be limited to these estimates in an arbitrary fashion. Rather, the time afforded for confrontation should be based on whether the information being elicited and the information to which the witness is confronted is relevant and non-repetitive to the proceedings.
4. Suffice it to say, admitting prior recorded testimony under Rule 68(3), which among other things, goes to the acts and conduct of Mr. Gicheru, while simultaneously denying Mr. Gicheru sufficient time to confront P-0613, P-0800, and P-0536, is hardly conducive in ensuring his equal footing with the OTP and full enjoyment of all fair trial rights.
5. Lastly, the OTP claims that “[i]n the interests of completeness, and in accordance with the Chamber’s instruction,” it “lists additional material necessary to understand the Witnesses’ prior recorded testimonies” but will not seek formal submission of these items until the witnesses appear in court.⁹ These “additional” materials primarily include [REDACTED].¹⁰ As noted in the Defence’s response to the OTP’s Rule 68(3) application for P-0730,¹¹ the legality of these investigative techniques and the admissibility of their results under Article 69(7) is a legal issue that is materially in dispute, and must, and assuredly will, be fully litigated by the Defence before the deadline of its submissions. As such, the Trial Chamber should not make any rulings on the admissibility of these additional materials until such time as the Defence makes its appropriate challenges to this evidence under Article 69(7).

WHEREFORE, the Defence requests Trial Chamber III to **PROVIDE** the Defence sufficient time to examine P-0613, P-0800, and P-0536 should it decide to admit their prior recorded

⁶ [Katanga Judgment](#), para. 1572.

⁷ [OTP Application for P-0613, P-0800, and P-0536](#), paras. 29, 42, 52.

⁸ [OTP Application for P-0613, P-0800, and P-0536](#), paras. 29, 42, 52.

⁹ [OTP Application for P-0613, P-0800, and P-0536](#), para. 13.

¹⁰ [ICC-01/09-01/20-197-Conf-AnxA](#), Section III; [ICC-01/09-01/20-197-Conf-AnxB](#), Section III; [ICC-01/09-01/20-197-Conf-AnxC](#), Section III.

¹¹ *Prosecutor v. Gicheru*, Response to Prosecution application under Rule 68(3) to introduce the prior recorded testimony of Witness P-0730, filed 4 November 2021, para. 10.

testimonies and associated exhibits under Rule 68(3) and **DEFER** its ruling on the admissibility of [REDACTED] until the Defence brings its motion under Article 69(7).

Respectfully submitted, 5 November 2021,
In The Hague, the Netherlands.



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