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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

**Decision on the Prosecution's Request to Admit Prior Recorded Testimony
under Rule 68(3)**

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

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TRIAL CHAMBER III of the International Criminal Court, in the case of *The Prosecutor v. Paul Gicheru*, having regard to Articles 64, 67-69, and 74 of the Rome Statute (the ‘Statute’) and Rule 68 of the Rules of Procedure and Evidence (the ‘Rules’), issues this Decision on the Prosecution’s Request to Admit Prior Recorded Testimony under Rule 68(3).

I. PROCEDURAL HISTORY

1. On 10 September 2021, the Office of the Prosecutor (the ‘Prosecution’) informed the Chamber that it intended to seek the introduction of the prior recorded testimony of P-0536, P-0613, and P-0800 pursuant to Rule 68(3) of the Rules.¹
2. On 30 September 2021, the Chamber imposed a deadline for the Prosecution to make all Rule 68 related requests by 22 October 2021.²
3. On 22 October 2021, the Prosecution submitted two requests under Rule 68(3).
 - a. The First Request pertains to a written statement prepared by P-0730 as well as to 69 ‘Associated Exhibits’.³
 - b. The Second Request pertains to the prior recorded testimony of P-0613, P-0800, and P-0536 as well as ‘Associated Materials’ that were used during the interviews of these witnesses.⁴

¹ [Prosecution’s submissions on issues for the First Status Conference](#), 10 September 2021, ICC-01/09-01/20-171-Conf, paras. 14, 17 and 18. A public redacted version was filed on 14 September 2021

² [Decision Setting the Commencement Date of the Trial and Related Deadlines](#), 30 September 2021, ICC-01/09-01/20-185.

³ [Prosecution application under rule 68\(3\) to introduce the prior recorded testimony of Witness P-0730](#), 22 October 2021, ICC-01/09-01/20-194-Conf (the ‘First Request’) with confidential annex A, ICC-01/09-01/20-194-Conf-AnxA, . A public redacted version of the First Request was filed on 27 October 2021.

⁴ [Prosecution application under rule 68\(3\) to introduce the prior recorded testimony and associated material of Witnesses P-0613, P-0800 and P-0536](#), 22 October 2021, ICC-01/09-01/20-197-Conf (the ‘Second Request’) with confidential annexes A-C, ICC-01/09-01/20-197-Conf-AnxA, with confidential annex A, ICC-01/09-01/20-197-Conf-AnxB and with confidential annex A, ICC-01/09-01/20-197-Conf-AnxC. A public redacted version of the Second Request was filed on 27 October 2021.

4. On 4 November 2021, the Defence responded to the First Request⁵ and to the Second Request.⁶

II. ANALYSIS

A. Applicable Law

5. The Chamber notes that pursuant to Rule 68(3) of the Rules, the prior recorded testimony of a witness may be introduced by the Chamber provided that: (1) the witness is present before the Chamber; (2) the witness does not object to the introduction of his or her prior recorded testimony; and (3) both parties and the Chamber have the opportunity to examine the witness. The Chamber sees no need to elaborate on these requirements for the purpose of this decision and instead refers to the applicable law on Rule 68(3) of the Rules as set out by Trial Chamber V in *Yekatom and Ngaïssona* and the case law referred therein.⁷

B. First Request

6. In the First Request, the Prosecution asks for permission to introduce a signed affidavit prepared unilaterally by P-0730 under Rule 68(3) of the Rules. The statement is accompanied by 69 documents (the ‘Associated Exhibits’), which the Prosecution also wants to introduce under this provision as associated documents.

1. *Whether P-0730’s statement qualifies as prior recorded testimony pursuant to Rule 68 of the Rules*

7. According to the Prosecution, P-0730’s statement⁸ is “a written document that P-0730 prepared in April 2015 at the end of the investigation into article 70 offences”.⁹

⁵ Response to Prosecution application under Rule 68(3) to introduce the prior recorded testimony of Witness P-0730, 4 November 2021, ICC-01/09-01/20-208-Conf (the ‘First Response’). A public-redacted version was filed on 5 November 2021.

⁶ 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 (the ‘Second Response’). A public-redacted version was filed on 5 November 2021.

⁷ See Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, [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, ICC-01/14-01/18-907-Red, paras 8-16.

⁸ KEN-OTP-0159-0884.

⁹ First Request, para. 12.

The statement describes the conduct of the investigation and discusses the circumstances of collection of several documents. The statement was originally prepared at the instructions of Trial Chamber V(A) in case ICC-01/09-01/11 (the ‘*Ruto and Sang* case’)¹⁰ and annexed to an application pursuant to Rule 68 of the Rules in that case. However, the purpose of the statement was merely to support the factual allegations made in that application and the Prosecution did not request the statement as such to be admitted. Nevertheless, the Prosecution argues that the statement should be considered a prior recorded testimony as contemplated in Rule 68(3) of the Rules.¹¹ The Prosecution points out, in this regard, that P-0730’s statement is a “formal statement made in connection with the investigation” that was collected by the Prosecution “for judicial purposes” and that the witness authored, signed and dated it.¹²

8. The Defence contests the qualification of P-0730’s statement as prior recorded testimony. The main legal argument for this position appears to be that the statement does not comply with the formal requirements of Rule 111 of the Rules. In particular, the Defence points out that P-0730’s statement is not a record of formal statements in relation to questioning, that it is not signed by anyone other than the witness and that it is predominantly based on hearsay and other ‘evidential products’.¹³

9. The Chamber rejects the Defence’s narrow interpretation of the scope of application of Rule 68 of the Rules. It is worth pointing out, in this regard, that the main authority invoked by the Defence in support of its restrictive view does not actually support it. Indeed, the legal issue addressed by Trial Chamber V(A) in *Ruto and Sang* was whether the scope of application of Rule 68 of the Rules *extended to include* statements collected by the Prosecution pursuant to Rules 111 or 112 of the Rules.¹⁴ Trial Chamber V(A)’s decision concluded that it did but that this in no way limited the applicability of Rule 68 to statements taken under Rules 111 or 112 of the Rules.

¹⁰ Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Decision No. 4 on the Conduct of Proceedings \(Evidence and Solemn Declarations in Support of Applications\)](#), 20 May 2014, ICC-01/09-01/11-1312.

¹¹ First Request, para. 13.

¹² First Request, para. 15.

¹³ First Response, para. 6.

¹⁴ Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Decision on Prosecution Request for Admission of Prior Recorded Testimony](#), 19 August 2015, ICC-01/09-01/11-1938-Conf-Corr, paras 28-33.

10. The Chamber further observes that other chambers have also interpreted the scope of application of Rule 68 of the Rules broadly. For example, Trial Chamber II expressed the view that unilaterally prepared affidavits may qualify as prior recorded testimony “if the person making it clearly had the intention of making factual assertions for the purpose of future or ongoing legal proceedings.”¹⁵ This appears to be clearly the case here.

11. The Chamber also points out that if, as the Defence claims, P-0730’s statement were not to qualify as prior recorded testimony pursuant to Rule 68 of the Rules, this would not lead to the conclusion that the Prosecution would have to call P-0730 to testify *viva voce*. On the contrary, if the statement did not qualify under Rule 68 of the Rules, it would be possible for the Prosecution to simply submit it via a bar table motion, in which case the Defence would have no possibility to cross-examine the witness at all.

2. Whether it is prejudicial to allow the introduction of P-0730’s statement via Rule 68(3) of the Rules

12. According to the Defence, it would be highly prejudicial to introduce P-0730’s statement into evidence. It makes this claim on the basis that (1) the statement discusses at length virtually the entirety of the Prosecution’s case, (2) the statement is based largely on hearsay and (3) the statement goes to Mr Gicheru’s acts and conduct.¹⁶ The Defence further points out that the statement discusses certain aspects of the Prosecution’s investigative practices, the legality of which is disputed by the Defence.¹⁷

13. The Prosecution, on the other hand, argues that no prejudice would result from the introduction of P-0730’s statement, since this would expedite the proceedings and because the witness will be fully available for cross-examination and questioning by the Chamber.¹⁸

14. The Chamber does not consider that the Defence would suffer undue prejudice because of the introduction of P-0730’s statement through Rule 68(3) of the Rules.

¹⁵ Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Decision on the Prosecutor’s Bar Table Motions](#), 17 December 2010, ICC-01/04-01/07-2635, para. 49.

¹⁶ First Response, para. 9.

¹⁷ First Response, para. 10.

¹⁸ First Request, paras 6 and 27.

Contrary to what the Defence suggests, P-0730's statement does not provide much probative evidence about Mr Gicheru's alleged acts and conduct. As the Prosecution points out, P-0730's statement is primarily useful to assist the Chamber in better understanding the circumstances that led to the investigation in this case and how it was conducted.¹⁹ The statement also provides some background information about some of the Associated Exhibits which the Prosecution wishes to introduce.²⁰ Accordingly, the Chamber does not expect to rely on P-0730's statement as evidence of the alleged criminal conduct of Mr Gicheru.

15. Moreover, the Defence will have adequate time to examine P-0730 as the Chamber will not impose arbitrary limitations on the time afforded to the Defence to confront the witness.

3. *The 69 Associated Exhibits*

16. In addition to P-0730's statement, the Prosecution also wishes to introduce 69 so-called Associated Exhibits listed in Annex A of the First Request. With the exception of the 11 solemn declarations (discussed in subsection 4 below), it is true that P-0730's statement makes reference to all these items and that they facilitate the understanding of the statement. The Defence has not alleged and the Chamber cannot discern any prejudice that would ensue from the introduction of these 58 Associated Exhibits. Accordingly, in line with the prevailing jurisprudence,²¹ the Chamber sees no reason to deny the introduction of these items together with P-0730's statement.

¹⁹ First Request, para. 17.

²⁰ First Request, paras 19 and 21.

²¹ Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Public Redacted version of Decision on Prosecution Request for Admission of Prior Recorded Testimony](#), 19 August 2015, ICC-01/09-01/11-1938-Corr-Red2, para. 33; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, [Decision on the Prosecution application under Rule 68\(2\)\(c\) of the Rules for admission of prior recorded testimony of Witness P-0103](#), 11 March 2016, ICC-01/04-02/06-1205, para. 7; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68\(2\)\(b\) and 68\(3\)](#), 9 June 2016, ICC-02/11-01/15-573-Red, para. 9; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, [Decision on Defence Request Pursuant to Rule 68\(2\)\(c\) of the Rules of Procedure and Evidence](#), 19 June 2018, ICC-02/04-01/15-1288, para. 10.

4. *Whether the solemn declarations of other witnesses in support of P-0730's statement can be introduced as associated materials*

17. As part of the 69 Associated Exhibits, the Prosecution asks the Chamber to authorise the introduction into evidence of 11 solemn declarations in support of P-0730's statement. Despite the fact that the Defence did not specifically object to this, the Chamber rejects the introduction of these 11 documents. Although the solemn declarations are very short and contain relatively little information, they are virtually indistinguishable in terms of format and conception from P-0730's statement. Significantly, they all contain factual allegations which their authors have prepared for the purpose of being used in legal proceedings before the Court and are signed under penalty of perjury.²² Accordingly, they qualify as prior recorded testimony and can therefore only be introduced via a separate application pursuant to Rule 68 of the Rules and not as associated materials of P-0730's statement.

5. *Supplemental examination*

18. The Prosecution has requested permission to examine P-0730 for a maximum of 90 minutes for the purpose of clarifying certain portions of his statement, to address the issue of one party consent recordings as an investigative tool, 'emerging lines of defence', and to identify and explain further documentary evidence that was produced in the course of the investigation.²³

19. The Chamber assumes that under 'emerging lines of defence', the Prosecution refers to its obligation to investigate incriminating and exonerating circumstances equally.²⁴ It considers it indeed useful to receive more information on this point and also approves of the other topics enumerated in the First Request. Accordingly, the Chamber will grant the Prosecution a maximum of 90 minutes to examine P-0730.

²² Article 70(1)(b) of the Statute.

²³ First Request, paras 5, 28-29.

²⁴ Article 54(1)(a) of the Statute.

C. Second Request

20. In the Second Request, the Prosecution asks the Chamber to allow the introduction of the prior recorded testimonies of P-0613, P-0800, and P-0536 (the ‘Statements’). Together with the Statements, the Prosecution wishes to introduce 36 items of Associated Materials for P-0613, 24 items of Associated Materials for P-0800, and 28 items of Associated Materials for P-0536. The Prosecution further lists a number of Additional Materials, which it claims are necessary to understand the Statements, but which the Prosecution does not seek to introduce on the basis of Rule 68(3) of the Rules. Instead, the Prosecution intends to submit the Additional Materials when the relevant witnesses testify.²⁵

1. *Whether it is prejudicial to allow the introduction of the Statements via Rule 68(3) of the Rules.*

21. According to the Prosecution, the introduction of the Statements via Rule 68(3) of the Rules will not prejudice the rights of the Defence, even though it recognises that some of the evidence relates directly to the acts and conduct of the accused.²⁶

22. The Defence does not raise any fundamental objection to the introduction of the Statements pursuant to Rule 68(3) of the Rules but stresses that it should be provided with adequate time and facilities to meaningfully confront the witnesses.²⁷

23. The Chamber equally does not consider the Defence would suffer undue prejudice by the introduction of the Statements pursuant to Rule 68(3) of the Rules. The Chamber understands from the Prosecution’s submissions that it still intends to elicit the most important events described in the Statements during oral testimony.²⁸ In other words, the witnesses will testify *viva voce* about the most incriminating parts of their evidence. To that extent, the orality principle will be fully respected. Moreover, the Defence will be provided adequate time to examine P-0613, P-0800 and P-0536 and the Chamber will not impose arbitrary limitations on the time afforded to the Defence to confront the witnesses. The Chamber is cognisant of the volume of materials for

²⁵ Second Request, paras 5 and 13.

²⁶ Second Request, para. 14.

²⁷ Second Response, paras 1-4.

²⁸ Second Request, paras 30-32, 43-45, 53-55.

some of the witnesses and will take this into consideration when allocating the necessary time. In order to facilitate scheduling, the Defence is requested to provide the Chamber with an estimate of how much time it believes it will need for each of the three witnesses in the Defence Trial Brief.

2. The Associated Materials

24. As noted above, the Prosecution seeks to introduce a number of exhibits as Associated Materials to the Statements. The Chamber sees no reason to disallow this, with the exception of KEN-OTP-0109-0017 and related transcripts/translations.²⁹ As far as the Chamber can ascertain from P-0800's statement,³⁰ this recording also falls into the category of items, the admissibility of which the Defence has announced it will contest. Under these circumstances, the Chamber considers it better to defer ruling on the introduction of these materials until it has been fully briefed on the matter (see below).

3. The Additional Materials

25. As noted, the Prosecution appended a list of 'Additional Materials' to the Statements, which the Prosecution declares are necessary to understand the Statements. Moreover, the Prosecution appears to be relying on the Additional Materials as corroborating the content of the Statements.³¹ Nevertheless, the Prosecution expressed no wish to have these items submitted together with the Statements. Instead, the Prosecution announced its intention to seek their formal submission only when the witnesses appear to testify in court.³²

26. For its part, the Defence has made it clear that it contests the admissibility of the Additional Materials on the basis that they were collected in violation of Article 69(7) of the Statute.³³ The Defence therefore asked the Chamber not to make any rulings on the admissibility of the Additional Materials "until such time as the Defence makes its appropriate challenges to this evidence under Article 69(7)."³⁴

²⁹ KEN-OTP-0109-0013 and KEN-OTP-0109-0015.

³⁰ KEN-OTP-0109-0002.

³¹ Second Request, paras 26, 39, 49.

³² Second Request, para. 13.

³³ First Response, para. 10; Second Response, para. 5.

³⁴ Second Response, para. 5.

27. The Chamber considers that the ambiguity about the status of the Additional Materials needs to be resolved as soon as possible. The positions of the parties are clear: the Prosecution intends to ask for their submission and the Defence will challenge their admissibility under Article 69(7) of the Statute.³⁵ What is missing are the parties' arguments on the merits. There is no benefit in letting this matter linger until the start of the trial. Accordingly, the Chamber instructs the Defence to make its submissions as to why the Additional Materials and other similar items pertaining to recordings related to other witnesses are inadmissible no later than 15 December 2021. If the Defence is of the view that it needs additional information that is material to the preparation of the admissibility challenge, it shall inform the Prosecution under Rule 77 of the Rules. The Prosecution is hereby instructed to cooperate with the Defence in a diligent manner. If there is disagreement as to whether certain information is material to the preparation of the admissibility challenge, the Parties shall seek recourse to the Chamber as soon as possible. The Prosecution may respond to the admissibility challenge no later than 14 January 2022.

4. Supplemental examination

28. As with P-0730, the Prosecution still intends to examine the three witnesses, even if their prior recorded testimony is submitted into the case record. As noted, the goal of the supplemental examination is to elicit more information on the most important events described in the Statements.³⁶ In the case of P-0613 and P-0800, the Prosecution asks for 4.5 hours in order to elicit clarification and further details in relation to a number of key topics of their testimony.³⁷ For P-0536, the Prosecution wishes to be accorded 2.5 hours.³⁸

29. The Defence did not oppose these estimates per se but emphasised that it should not be restricted to the same amounts for cross-examination.

30. Seeing the position of the three witnesses in relation to the charges, the Chamber considers it beneficial to hear from them in direct evidence on the most important aspects of their evidence. As the Chamber has already noted, it will not impose arbitrary

³⁵ First Response, para. 10; Second Response, para. 5.

³⁶ Second Request, paras 30-32, 43-45, 53-55.

³⁷ Second Request, paras 30, 43.

³⁸ Second Request, paras 53.

limitations on the time afforded to the Defence to confront the witnesses.³⁹ In light of this, the Chamber approves the Prosecution's request for supplemental examination.

5. *Request for judicial notice*

31. The Prosecution has also asked the Chamber to take judicial notice of the fact that P-0613, P-0800, and P-0536 testified as Prosecution witnesses in the *Ruto and Sang* case.⁴⁰

32. The Chamber observes that the fact of the witnesses' appearance in the *Ruto and Sang* case is a matter of public record. When information is uncontroversial and easily verifiable by anyone with access to a relevant and reliable public record (*in casu* the transcripts of the hearings in which the witnesses testified), it is permissible for the Chamber to take judicial notice thereof.⁴¹ This clearly applies to ICC court records.⁴² Accordingly, the Chamber takes judicial notice of the fact that P-0613, P-0800, and P-0536 testified before Trial Chamber V(A) in the *Ruto and Sang* case.

³⁹ See above, para. 23.

⁴⁰ Second Request, para. 17.

⁴¹ Trial Chamber III, *Prosecutor v. Jean-Pierre Bemba Gombo*, [Public Redacted version of "Third Decision on the prosecution and defence requests for the admission of evidence"](#), ICC-01/05-01/08-2864 of 6 November 2013, 23 June 2016, ICC-01/05-01/08-2864-Red, para. 122; Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Decision on Mr Bemba's "Request for Judicial Notice"](#), 17 May 2017, ICC-01/05-01/13-2159, para. 8.

⁴² Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Decision on 'Defence Request for Judicial Notice'](#), 13 April 2016, ICC-01/05-01/13-1805, para. 3.

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the First Request, with the exception of items 59-69 of Annex A;

GRANTS the Second Request with exception of KEN-OTP-0109-0013, KEN-OTP-0109-0015, and KEN-OTP-0109-0017;

INSTRUCTS the Defence to make any submissions on the admissibility of the Additional Materials and other similar items no later than Wednesday 15 December 2021; and

FIXES the time limit for the Prosecution to respond to the admissibility challenge at no later than Friday 14 January 2022.

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



Judge Miatta Maria Samba

Dated 16 November 2021

At The Hague, The Netherlands