

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/20
Date: 13 December 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 ‘Addendum to the ‘Prosecution’s request for the introduction of the prior recorded testimony of Witness P-0495 pursuant to rule 68(2)(d)’ (ICC-01/09-01/20-196-Conf), dated 22 October 2021,’ 10 December 2021, ICC-01/09-01/20-243-Conf

Source: Counsel for Paul Gicheru

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

The Office of the Prosecutor
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 Mr. Anton Steynberg

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
 (Participation/Reparation)**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
 Defence**

States' Representatives

Other

REGISTRY

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
 Section**

Other

Mr. Paul Gicheru, through his Counsel (“the Defence”), hereby responds to the Office of the Prosecutor’s (“OTP”) Addendum to its request for the introduction of the prior recorded testimony of Witness P-0495 pursuant to Rule 68(2)(d).¹ This Response is filed confidentially pursuant to Regulation 23bis(2) of the Regulations of the Court since it responds to a filing bearing the same classification level.

1. The OTP offers no justification for acting untimely by waiting until [REDACTED] contacting P-0495.²
2. The OTP offers no justification for not [REDACTED].³
3. The OTP offers no justification for not securing P-0495’s voluntary attendance by offering him a statement of limited use, [REDACTED].⁴
4. The OTP offers no justification as to why it cannot request Trial Chamber III to request Kenya to issue a summons.⁵
5. The OTP offers no justification for bypassing the requirement in Rule 68(2)(d)(i) that P-0495 “*fail[] to attend as a witness*” or “*fail[] to give evidence*” in the *Gicheru* trial.⁶
6. The OTP offers no justification for resorting to speculative claims that P-0495’s unwillingness to recant his trial testimony “is still materially influenced” by interference, despite his agreement to meet with the OTP and provision of updated contact information.⁷
7. The OTP offers no justification for Trial Chamber III to grant its request to introduce P-0495’s prior recorded testimony through Rule 68(2)(d): even if applicable to Article 70 cases,⁸ Rule 68(2)(d) does not permit the OTP to simply speculate that an available witness is hostile and avoid calling him or her before introducing prior recorded testimony.⁹

¹ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-237](#), Addendum to the “Prosecution’s request for the introduction of the prior recorded testimony of Witness P-0495 pursuant to rule 68(2)(d)” (ICC-01/09-01/20-196-Conf), dated 22 October 2021, 2 December 2021 (“OTP Addendum”).

² [REDACTED].

³ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-196-Conf](#), Prosecution’s request for the introduction of the prior recorded testimony of Witness P-0495 pursuant to rule 68(2)(d), 22 October 2021, para. 31.

⁴ [OTP Addendum](#), para. 5; [REDACTED]; [REDACTED].

⁵ [OTP Addendum](#), para. 6; *Prosecutor v. Ruto and Sang*, [ICC-01/09-01/11-1274-Corr2](#), Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014 (“*Ruto and Sang* Summons Decision”).

⁶ [OTP Addendum](#), paras. 5, 6.

⁷ [OTP Addendum](#), para. 7.

⁸ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-230](#), Response to Prosecution’s request for the introduction of the prior recorded testimony of Witness P-0495 pursuant to Rule 68(2)(d), 22 November 2021 (“Defence Response”), paras. 13-5.

⁹ [Ruto and Sang Summons Decision](#), para. 187.

8. The OTP offers no justification as to why Trial Chamber III should depart from the sound evidentiary approach adopted by the *Ruto and Sang* Trial Chamber, when, unpersuaded by the Defence claims that summoning potentially hostile witnesses was unnecessary, it found: (a) “there is no known wisdom that hostile witnesses are incapable of testifying to the truth under oath;” and (b) the possibility that a witness “may not aid the case of the calling side ... is not without value in the search for the truth, especially in the light of the provisions of article 54.”¹⁰
9. The OTP offers no justification for requesting Trial Chamber III to reward it for its lack of diligence by allowing it to rely on an available witness’s prior recorded testimony at the expense of Mr. Gicheru’s statutorily guaranteed right of confrontation.¹¹
10. The OTP offers no justification for requesting Trial Chamber III to risk turning the trial proceedings into a sham imitation of the truth-seeking process – a pretense trial devoid of subjecting accusatory witnesses of questionable repute and evidence to confrontation, thus inescapably saddling Mr. Gicheru, who is presumed innocent, with the impermissible onus of having to rebut P-0495’s untested claims of having corruptly influenced him.¹²

WHEREFORE, considering the OTP’s lack of diligence, its attempt to calculatedly deny Mr. Gicheru’s fundamental fair trial rights, and its invitation to have the trial proceedings reduced to a charade by inveigling Trial Chamber III to put its thumb on the scale and admit P-0495’s prior recorded testimony despite P-0495’s availability, [REDACTED],¹³ and likelihood of testifying if summonsed, Trial Chamber III should, in the interests of justice and fairness of the proceedings, **DENY** the OTP’s request for the introduction of the prior recorded testimony of Witness P-0495 pursuant to Rule 68(2)(d).

Respectfully submitted, 13 December 2021,
In The Hague, the Netherlands.



Michael G. Karnavas
Counsel for Mr. Paul Gicheru

¹⁰ [Ruto and Sang Summons Decision](#), para. 187.

¹¹ [Rome Statute](#), Art. 67(1)(e).

¹² [Defence Response](#), paras. 13-5.

¹³ [REDACTED].