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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

Lesser Redacted Version of “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, ICC-01/09-01/20-230-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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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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Section****Other**

Mr. Paul Gicheru, through his Counsel (“the Defence”), hereby responds to the Office of the Prosecution’s (“OTP”) request for the introduction of the prior recorded testimony of Witness P-0495 pursuant to Rule 68(2)(d).¹ The Trial Chamber should deny the application because: (a) Rule 68(2)(d) does not apply to Article 70 cases; and even if it does, (b) the requirements of Rule 68(2)(d) are not met because the OTP (i) did not make all reasonable efforts to secure P-0495’s attendance; (ii) fails to show that P-0495 was influenced not to attend the *Gicheru* trial; and (iii) the interests of justice are not served by introducing P-0495’s Article 55(2) suspect interview because it was taken in contravention of his right to assistance of Counsel. This Response is filed confidentially pursuant to Regulation 23bis(2) of the Regulations since it responds to a filing bearing the same classification level.

I. BACKGROUND

- On 13 September 2013, [REDACTED], OTP investigators intercepted P-0495 and interviewed him as a suspect pursuant to Article 55(2) of the Rome Statute.² The transcript begins with the right to assistance of counsel being explained to P-0495 in the following dialogue:

[00:00:01. Start of Transcript]

Interviewer 1: [...] that I want to use you to assist us in our investigation. Do you understand that?

Interviewee: Yes.

Interviewer 1: Alright, and you’re happy to do that?

Interviewee: I have no problem.

Interviewer 1: OK.

Interviewer: Say that just again about the lawyer.

Interviewer 1: Ah listen, I’m going to explain your rights to a lawyer, if you want one present. But you also have the opportunity to waive that right. OK? But I’m going to go more into detail.

Interviewee: I don’t understand about the lawyer.

Interviewer 1: OK. We have to give you, when anybody is questioned by us, we have to give you the opportunity to have a lawyer present if you wish. Now you can say no I don’t want a lawyer present, I’m happy to take part in the interview. Or you can say oh yes I want a lawyer being present during the interview. OK? What I’m saying to you is that’s your choice. But I want you to assist us in our investigation. OK? You can waiver your rights to a lawyer, I have a document for that, or you can have a lawyer present. OK? But what I’m saying is I

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

² [OTP Application for P-0495](#), paras. 7-8; [KEN-OTP-0130-0540-R01](#).

would like you now to come with us and put the allegations to you so that I can get you to assist us. You know exactly what I'm talking about, OK. You understand what I'm talking about. You know the evidence we have.

Interviewee: Yes.

Interviewer 1: Then you will understand why I need your assistance. OK? Do you understand what I'm saying?

Interviewee: So even though I don't have a lawyer around, I don't know which lawyer should I take [...]

Interviewer 1: Alright.

Interviewer 2: If you feel you need one.

Interviewee: Pardon?

Interviewer 2: If you feel that you need one.

Interviewer 1: It's a matter for yourself. You either have one or you don't have to have one. You don't have to have a lawyer present, we're giving you the option of whether you want one present or not. But our position is here we need your assistance and we need it [...]

Interviewer 2: Soon.

Interviewee: Yeah, we can continue with the session.³

2. [REDACTED], they discovered that he left without notice and did not respond to phone calls immediately after the events.⁴
3. On 28 November 2013, the OTP requested the *Ruto and Sang* Trial Chamber to seek the assistance of the Government of Kenya to serve summons on witnesses to secure their attendance "at an appropriate location in Kenya for purposes of testifying before the Court," explaining that despite repeated attempts, it was "not ... possible for the Prosecution to establish contact with P-0495" since he left the location of his Article 55(2) suspect interview.⁵
4. The Trial Chamber granted the OTP's request, finding that: (a) the Trial Chamber "has the power to compel the testimony of witnesses;" (b) the Trial Chamber "can, by way of requests for cooperation, obligate Kenya both to serve summonses and to assist in compelling the

³ [REDACTED].

⁴ [KEN-OTP-0159-0884](#), para. 164.

⁵ *Prosecutor v. Ruto and Sang*, [ICC-01/09-01/11-1120-Red2-Corr](#), Corrected and amended version of "Prosecution's request under article 64(6)(b) and article 93 to summon witnesses" (ICC-01/09-01/11-1120-Conf-Exp), 5 December 2013, paras. 3, 61, 63 ("OTP Request for Summons").

attendance (before the Chamber) of the witnesses thus summonsed;” and (c) “there are no provisions in Kenyan domestic law that prohibit this kind of a cooperation request.”⁶

5. P-0495 appeared before the *Ruto and Sang* Trial Chamber as a result of the summons and testified via video-link from 16 to 22 September 2014.⁷ P-0495 [REDACTED]⁸ After listening to the recording of the interview, P-0495 stated: [REDACTED]⁹ He continued: [REDACTED]¹⁰ Given what had transpired in court, the *Ruto and Sang* Trial Chamber directed the parties on 19 September 2014 to make written submissions on the admissibility of P-0495’s interview.¹¹
6. After P-0495 finished testifying, on 22 September 2014, OTP investigator P-0732 prepared a solemn declaration stating: [REDACTED]¹²
7. On 11 December 2014, the *Ruto and Sang* Trial Chamber issued its reasons for rejecting P-0495’s suspect interview, finding that it was “unable to determine that the witness’s right to counsel was fully availed to him, as required by Article 55(2) of the Statute.”¹³ It considered that the transcript of the interview “sufficiently indicates the failing” since it reveals “disproportionate pressure towards the investigator’s urgent need to interview the witness than in a balanced and careful explanation to the witness: (a) that he had a right to the presence of counsel during the interview, and (b) that the choice to waive that right was *entirely* his own to be made without overbearing pressure.”¹⁴ Specifically, the Trial Chamber considered that OTP investigators had repeatedly stressed that P-0495’s right to counsel was to be exercised “*if he felt that he needed to avail the right,*” prior to revealing to him the information in their possession about his involvement in criminal activity.¹⁵
8. The *Ruto and Sang* Trial Chamber found P-0732’s solemn declaration to be “insufficiently illuminating,”¹⁶ considering that there is: (a) no information specifying how P-0732 “came to the testimonial conclusion that his colleague did activate the recording device, or that it was

⁶ *Prosecutor v. Ruto and Sang*, [ICC-01/09-01/11-1274](#), Decision on Prosecutor’s Application for Witnesses Summons and resulting Request for State Party Cooperation, 17 April 2014, para. 193.

⁷ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-210](#), Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015 (“*Ruto and Sang* Rule 68 Decision”), para. 100.

⁸ [ICC-01/09-01/20-T-017-CONF-ENG](#), p. 5, lines 4-5.

⁹ [ICC-01/09-01/20-T-017-CONF-ENG](#), p. 6, lines 6-10.

¹⁰ [ICC-01/09-01/20-T-017-CONF-ENG](#), p. 7, lines 6-14.

¹¹ [ICC-01/09-01/20-T-017-CONF-ENG](#), p. 30 line 19 to p. 31, line 3; p. 32, lines 5-11.

¹² [KEN-OTP-0145-0569](#), paras. 7-8.

¹³ *Prosecutor v. Ruto and Sang*, [ICC-01/09-01/11-1753](#), Reasons for the Decision on Admission of Certain Evidence Connected to Witness 495, rendered on 17 November 2014, 11 December 2014 (“*Ruto and Sang* Decision on P-0495’s Suspect Interview”), para. 33.

¹⁴ [Ruto and Sang Decision on P-0495’s Suspect Interview](#), para. 34 (emphasis in original).

¹⁵ [Ruto and Sang Decision on P-0495’s Suspect Interview](#), para. 37 (emphasis in original).

¹⁶ [KEN-OTP-0145-0569-R02](#), para. 8. [Ruto and Sang Decision on P-0495’s Article 55\(2\) interview](#), paras. 29-30.

done correctly;” and (b) “no suggestion offered as to why the recording device ‘had not recorded’ the initial conversation.”¹⁷ It considered that P-0732’s averments “are, thus, simply insufficient to permit the Chamber to conclude that it was not ‘possible’ to audio- or video-record the witness’s waiver – at the Point of Initial Contact – of his right to the presence of counsel during the Witness Interview,” and that in the absence of any recording, “it is not possible to determine whether or not the witness had been explicitly threatened as he claims to have happened.”¹⁸

9. Considering that the circumstances of P-0495’s Article 55(2) interview “strongly recommend the exercise of the Chamber’s discretion” to exclude it under Article 69(4) of the Statute, the *Ruto and Sang* Trial Chamber did so “simply as a function of gauging the probative value of the evidence to the *merits* of the case before the Chamber, measured against the possible prejudice which the admission of the evidence may cause to a fair trial or fair evaluation of the testimony of the concerned witness.”¹⁹
10. After Mr. Gicheru’s surrender to the ICC on 2 November 2020 up until 18 October 2021, the OTP made a number of attempts to locate and contact P-0495 to no avail.²⁰ “[REDACTED].”²¹ Nonetheless, the OTP deemed it “more efficient to submit the application to introduce his evidence by October 22, and to update the Chamber at later date should the situation change.”²²
11. The OTP has not requested Trial Chamber III to secure the Government of Kenya’s cooperation in locating and serving a summons on P-0495.

II. RESPONSE

A. Rule 68(2)(d) does not apply to Article 70 cases

12. The OTP erroneously claims that the interests of justice are best served by introducing P-0495’s prior recorded testimony under Rule 68(2)(d), since not doing so “would reward efforts to obstruct justice and deny the Chamber the ability to assess the evidence.”²³ Rule 68(2)(d) was not designed for use in Article 70 proceedings.

¹⁷ [Ruto and Sang Decision on P-0495’s Article 55\(2\) interview](#), paras. 29-30.

¹⁸ [Ruto and Sang Decision on P-0495’s Article 55\(2\) interview](#), paras. 30-1.

¹⁹ [Ruto and Sang Decision on P-0495’s Article 55\(2\) interview](#), para. 43 (emphasis in original).

²⁰ [KEN-OTP-0160-0685](#).

²¹ [OTP Application for P-0495](#), para. 31.

²² [OTP Application for P-0495](#), para. 31.

²³ [OTP Application for P-0495](#), para. 32.

13. Rule 68(2)(d) was inspired by Rule 92 *quinquies* of the ICTY Rules of Procedure and Evidence,²⁴ which was adopted to “enable core proceedings to go forward even where there are attempts to interfere with the administration of justice,” rather than to expedite the proceedings as provided for in ICTY Rules 92*bis* to 92*quater*.²⁵ Rule 68(2)(d) was similarly adopted at the ICC at a time when witness interference was “a live and ongoing issue in ICC cases,”²⁶ and was viewed as having a “deterrent effect, in that there will be no benefit to interfering with a witness if their prior recorded testimony can be admitted to the Trial Chamber as evidence.”²⁷ The Working Group on Lessons Learnt expressly noted that Rule 68(2)(d)(iii) was intended to “create a link to article 70 of the Statute,” in allowing the Trial Chamber to take judicial notice of facts from “completed proceedings for offences defined in article 70” in determining whether to admit prior recorded testimony.²⁸ Conversely nothing in the drafting history indicates that Rule 68(2)(d) was designed for use in Article 70 proceedings.
14. Admitting the prior recorded testimony of a witness alleged to have been influenced by Mr. Gicheru, who is charged with corruptly influencing that witness under Article 70(c) of the Rome Statute, would ineluctably, and more alarmingly, impermissibly amount to a prejudgment – a finding of guilt of the specific count related to and the basis of P-0495’s alleged corruption by Mr. Gicheru. The OTP argues that evidence on Mr. Gicheru’s acts and conduct should be admitted without confrontation by the Defence. Thus, it logically flows that if the Trial Chamber is satisfied that P-0495 was influenced by Mr. Gicheru based on his statement, what more would be required by the OTP to move the Trial Chamber’s mind from being satisfied to a finding of guilt beyond reasonable doubt? Nothing.
15. Simply, admitting P-0495’s prior recorded testimony under Rule 68(2)(d) would be prejudicial to and inconsistent with Mr. Gicheru’s rights to be presumed innocent,²⁹ to

²⁴ Study Group on Governance, Working Group on Lessons Learnt: Second Report of the Court to the Assembly of States Parties, 31 October 2013, [ICC-ASP/12/37/Add.1](#) (“Working Ground on Amendments Recommendations, Rule 68”), para. 3.

²⁵ [ICTY Statement by Judge Patrick Robinson](#), President of the International Criminal Tribunal for the former Yugoslavia, to the Security Council on 18 June 2010, (June 18, 2010). Specifically, ICTY Rule 92 *quinquies* was adopted at a time when the *Šešelj* trial had been delayed for nearly a year due to allegations of witness intimidation. [ICTY Press Release](#), 13 January 2010.

²⁶ [Working Ground on Amendments Recommendations, Rule 68](#), para. 34.

²⁷ [Working Ground on Amendments Recommendations, Rule 68](#), para. 34.

²⁸ [Working Ground on Amendments Recommendations, Rule 68](#), paras. 31, 37.

²⁹ [Rome Statute](#), Art. 66(1).

confrontation,³⁰ and to not have imposed on him any reversal of the burden of proof or onus of rebuttal.³¹

B. The requirements of Rule 68(2)(d) are not met

i. The OTP did not make all reasonable efforts to secure P-0495's attendance

16. The OTP erroneously claims that it made all reasonable efforts to secure P-0495's attendance as a witness in the *Gicheru* case.³² Not only did the [REDACTED], but it presents no compelling or rational reason why it could not request Trial Chamber III to request the Government of Kenya to locate and serve a summons to secure P-0495's attendance in the *Gicheru* case. P-0495 testified before the *Ruto and Sang* Trial Chamber as a result of a summons, even when the OTP claimed that it was "not ... possible for the Prosecution to establish contact with [him]."³³

ii. The OTP fails to show that P-0495 was influenced not to attend the Gicheru trial

17. The OTP misleads in claiming that "the information available is sufficient to demonstrate that P-0495 was improperly interfered with prior to his in-court testimony in the *Ruto and Sang* case."³⁴ Having failed to make reasonable efforts to secure P-0495's attendance, the OTP makes no showing that P-0495 has been influenced not to attend the *Gicheru* trial or to recant any evidence in the *Gicheru* case. It simply speculates that P-0495's "failure to respond to the Prosecution's attempts to secure his attendance as a witness in the present case has been materially influenced by improper influence by the Accused [REDACTED]."³⁵ P-0495's alleged failure in *Ruto and Sang* to give evidence consistent with his prior recorded testimony against Ruto is insufficient to establish that the requirements under Rule 68(2)(d) are met in this case against Mr. Gicheru.³⁶

iii. The interests of justice are not served because P-0495's prior recorded testimony was taken in contravention of his right to assistance of Counsel

18. The OTP erroneously claims that "notwithstanding Trial Chamber V(A)'s decision to exclude the article 55(2) interview from the record of the *Ruto and Sang* case, there was in

³⁰ [Rome Statute](#), Art. 67(1)(e).

³¹ [Rome Statute](#), Arts. 66(2), 67(1)(i).

³² [OTP Application for P-0495](#), para. 21.

³³ [OTP Request for Summons](#), para. 61.

³⁴ [OTP Application for P-0495](#), para. 19.

³⁵ [OTP Application for P-0495](#), para. 22.

³⁶ *Contra* [OTP Application for P-0495](#), para. 19.

fact no violation of P-0495’s statutory right during the interview conducted under article 55(2)(d) of the Statute,” and that if a violation had occurred, “it was inadvertent and marginal at most.”³⁷ Notably, the *Ruto and Sang* Trial Chamber disregarded P-0732’s solemn declaration, wherein he claims that a faulty recording device had not recorded the initial conversation with P-0495,³⁸ finding it to be “insufficiently illuminating.”³⁹ The OTP shows no error in the *Ruto and Sang* Trial Chamber’s reasoning.⁴⁰ For Trial Chamber III to now admit P-0495’s Article 55(2) interview despite the violation of his right to assistance of counsel not only denies Mr. Gicheru the right to equal treatment vis-à-vis the accused in *Ruto and Sang*,⁴¹ but rewards the OTP for avoidable mistakes and encourages it to “employ systems and equipment prone to avoidable faults – and then hope later to receive easy remission for the failings.”⁴²

III. CONCLUSION AND RELIEF SOUGHT

19. The Trial Chamber should deny the OTP’s application. Rule 68(2)(d) was not designed for use in Article 70 proceedings. Even if Rule 68(2)(d) applies, the OTP has not met its burden in showing that the criteria are met. Having not requested the Trial Chamber’s assistance to summons P-0495, the OTP has not made all reasonable efforts to secure P-0495’s attendance or shown that P-0495 has been influenced not to attend the *Gicheru* trial. Moreover, admitting P-0495’s Article 55(2) interview does not serve the interests of justice because it denies Mr. Gicheru equal treatment and gives the stamp of approval to the OTP investigators to violate statutory requirements, knowing that there will be not impact on the admissibility of the evidence collected.

WHEREFORE, the Defence requests Trial Chamber III to **DENY** the OTP’s request for the introduction of the prior recorded testimony of Witness P-0495 pursuant to Rule 68(2)(d).

³⁷ [OTP Application for P-0495](#), para. 36 (footnotes omitted).

³⁸ [Ruto and Sang Decision on P-0495’s Article 55\(2\) interview](#), paras. 29-32.

³⁹ [KEN-OTP-0145-0569-R02](#), para. 8. [Ruto and Sang Decision on P-0495’s Article 55\(2\) interview](#), paras. 29-30.

⁴⁰ [Ruto and Sang Decision on P-0495’s Article 55\(2\) interview](#), para. 41.

⁴¹ Article 67(1) provides that the accused shall be entitled to the statutory minimum fair trial rights guarantees “in full equality.” See also *Prosecutor v. Bemba et al.*, [ICC-01/05-01/13-955](#), Decision on the Defence applications for judicial review of the decision of the Registrar on the allocation of resources during the trial phase, 21 May 2015, paras. 35-6; *Prosecutor v. Bemba et al.*, [ICC-01/05-01/13-2276-Red](#), Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VIII entitled “Decision on Sentence pursuant to Article 76 of the Statute,” 8 March 2018, para. 245.

⁴² [Ruto and Sang Decision on P-0495’s Article 55\(2\) interview](#), para. 25.

Respectfully submitted, 29 November 2022,
In The Hague, the Netherlands.

A handwritten signature in black ink, appearing to read 'M. Karnavas', is positioned above a solid horizontal line.

Michael G. Karnavas
Counsel for Mr. Paul Gicheru