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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 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

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. 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 Witness P-0730.¹ Aside from being conveniently economical in presenting the law on Rule 68(3), the OTP misleads in presenting P-0730’s solemn declaration as prior recorded testimony, fails to show that the introduction of P-0730’s solemn declaration and associated exhibits is not prejudicial to or inconsistent with Mr. Gicheru’s fair trial rights, and fails to show any significant time savings in court from introducing this evidence through Rule 68(3). If P-0730’s solemn declaration and associated exhibits are admitted through Rule 68(3), the Defence must be accorded adequate time and facilities to examine him. This Response is filed confidentially pursuant to Regulation 23bis(2) as it relates to submissions classified as confidential.

I. RESPONSE

A. The OTP is conveniently economical in presenting the law on Rule 68(3)

1. The OTP erroneously claims that introducing prior recorded testimony under Rule 68(3) is consistent with the Statute’s “notional default, as interpreted by the Appeals Chamber, ‘that witnesses must appear before the Trial Chamber in person and give their evidence orally ... [which gives] effect to the principle of orality’ and that of publicity.”² The OTP misquotes the Appeals Chamber and omits the context for this holding. The Appeals Chamber held that “the direct import [*sic*] of the first sentence [in Article 69(2) of the Rome Statute] is that witnesses must appear before the Trial Chamber in person and give their evidence orally. This sentence makes in-court personal testimony the rule, giving effect to the principle of orality.”³ “In deviating from the general requirement of in-court personal testimony,” the Appeals Chamber held that “a Chamber must ensure that doing so is not prejudicial to or inconsistent with the rights of the accused or the fairness of the trial more generally.”⁴ The requirement of orality in Article 69(2) is hardly “notional.”
2. The OTP erroneously claims that “the presence of the witness for examination by the Parties and the Trial Chamber, and their adoption of the prior written evidence without objection

¹ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-194](#), Prosecution application under rule 68(3) to introduce the prior recorded testimony of Witness P-0730, 22 October 2021 (“OTP Application for P-0730”).

² [OTP Application for P-0730](#), para. 9.

³ *Prosecutor v. Gbagbo and Blé Goudé*, [ICC-02/11-01/15-744](#), Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3),” 1 November 2016 (“*Gbagbo and Blé Goudé Appeals Chamber Judgment*”), para. 65 (internal citation omitted), citing *Prosecutor v. Bemba et al.*, [ICC-01/05-01/08-1386](#), Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence,” 3 May 2011 (“*Bemba Appeals Chamber Judgment*”), para. 76.

⁴ [Gbagbo and Blé Goudé Appeals Chamber Judgment](#), para. 65, citing to [Bemba Appeals Chamber Judgment](#), para. 78.

are the only limiting conditions” under Rule 68(3).⁵ While Rule 68(3) does not *per se* preclude the introduction of prior recorded testimony that (a) relates to issues materially in dispute; (b) is central to core issues; or (c) is uncorroborated, as a matter of context and completeness and fair presentation of the law, the OTP omits that the Appeals Chamber held that “a Chamber must be extra vigilant” in these circumstances that the introduction of the prior recorded testimony “will not be prejudicial to or inconsistent with the rights of the accused or the fairness of the trial generally.”⁶ Bearing in mind “the general requirement of in-court personal testimony,” the Trial Chamber’s “overriding concern” must be to guard against any prejudice to Mr. Gicheru and to vigilantly ensure the fairness of the trial.⁷

3. Whether prior recorded testimony may be introduced under Rule 68(3) “depend[s] on the circumstances of the case.”⁸ What is most important is that the Trial Chamber carries out a “cautious item-by-item analysis,” which is “sufficiently reasoned and explained.”⁹ In carrying out this assessment, the Trial Chamber “must also analyse the ‘importance’ of each witness statement in light of the charges and the evidence already presented or intended to be presented before it,” which is “part and parcel of the analysis a Chamber must undertake in determining whether it is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally....”¹⁰ “[T]he more important the Chamber assesses the evidence to be, the more likely it is that the Chamber will have to reject any application under this provision.”¹¹
4. In deciding whether to admit prior recorded testimony under Rule 68(3), the Trial Chamber must consider whether its admission would indeed save time in court.¹² In *Ntaganda*, for instance, the Trial Chamber refused to admit prior recorded testimony under Rule 68(3) because: (a) the charges against the accused and his acts and conduct were discussed at length in the extensive number of pages the OTP sought to have admitted; (b) the Defence would need a significant amount of time to examine the witness on the prior recorded testimony; and (c) the OTP’s proposal to limit certain aspects of the examination would not

⁵ [OTP Application for P-0730](#), para. 9.

⁶ [Gbagbo and Blé Goudé Appeals Chamber Judgment](#), para. 69 (internal citation omitted).

⁷ [Gbagbo and Blé Goudé Appeals Chamber Judgment](#), para. 69.

⁸ [Gbagbo and Blé Goudé Appeals Chamber Judgment](#), para. 69.

⁹ [Gbagbo and Blé Goudé Appeals Chamber Judgment](#), para. 69.

¹⁰ [Gbagbo and Blé Goudé Appeals Chamber Judgment](#), para. 71.

¹¹ [Gbagbo and Blé Goudé Appeals Chamber Judgment](#), para. 71.

¹² *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)*”), para. 25.

save time.¹³ The *Gbagbo* Trial Chamber similarly did not admit prior recorded testimony under Rule 68(3) where its introduction would not “reduce the time needed for examination by the Defence” and where “time would be spent on litigation on issues of procedure.”¹⁴

B. The OTP misleads in presenting P-0730’s solemn declaration as prior recorded testimony

5. The OTP erroneously claims that P-0730’s written statement qualifies as prior recorded testimony.¹⁵ The OTP concedes that Trial Chambers have repeatedly defined prior recorded testimony under Rule 68 as extending to “written witness statements like those taken under rules 111 and 112.”¹⁶ Yet the OTP misleads in claiming that the drafting history – i.e. the report of the Working Group on Lessons Learnt – supports its claim that “nothing in the law or jurisprudence explicitly prohibit that other documents, similar in nature and purpose to those written statements, be excluded from the application of rule 68(3).”¹⁷
6. The Working Group on Lessons Learnt, to which the OTP cites, opined that prior recorded testimony includes “video or audio recorded records, transcripts and *written witness statements*” and to “*written statements* taken by the parties or (inter)national authorities, provided that the requirements under one or more of the sub-rules are met.”¹⁸ A “witness statement” as defined in the “prevailing jurisprudence” cited by the Working Group, is “the transcript or other documented evidence [...] of the testimony” in accordance with Rule 111.¹⁹ Under Rule 111, a witness statement must: (a) be a record of “formal statements by a person who is questioned in connection with an investigation or proceedings;” (b) be “signed by the person who records and conducts the questioning and by the person who is questioned and his or her counsel, if present, and where applicable, the Prosecutor or Judge who is present;” and (c) “note the date, time, and place, and all persons present during the

¹³ *Prosecutor v. Ntaganda*, [ICC-01/04-02/06-961](#), Decision on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0055, 29 October 2015, paras. 10-1 (“*Ntaganda* Rule 68(3) Decision”).

¹⁴ *Prosecutor v. Gbagbo and Blé Goudé*, [ICC-02/11-01/15-870](#), Decision on the “Prosecution’s application to conditionally admit the prior recorded statements and related documents of Witnesses P-0108, P-0433, P-0436, P-0402, P-0438, P-0459 and P-0109 under rule 68(3) and for testimony by means of video-link technology for Witnesses P-0436, P-0402, P-0438, P-0459 and P-0109 under rule 67(1),” 7 April 2017, para. 15.

¹⁵ [OTP Application for P-0730](#), paras. 13-5.

¹⁶ [OTP Application for P-0730](#), para. 14 (internal citations omitted). See *Prosecutor v. Ruto and Sang*, [ICC-01/09-01/11-1938-Conf-Corr](#), Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015 (“*Ruto and Sang* Rule 68 Decision”), para. 33.

¹⁷ [OTP Application for P-0730](#), para. 14.

¹⁸ 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](#), Annex II. A, Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), para. 13 (emphasis added).

¹⁹ *Prosecutor v. Lubanga*, [ICC-01/04-01/06-1603](#), Decision on the prosecution’s application for the admission of the prior recorded statements of two witnesses, 15 January 2009, paras. 15, 19.

questioning.”²⁰ P-0730’s solemn declaration does not meet these requirements: it is not a record of formal statements in relation to questioning, it is not signed by anyone other than P-0730, and is “predominantly based on reports and evidential products produced by *other* investigators,” who were invited to review the declaration and “complete their own declarations as to its accuracy.”²¹

7. The OTP further misleads when it claims that it annexed P-0730’s written statement to its application to admit the prior recorded testimony of six witnesses in the *Ruto and Sang* case.²² P-0730’s solemn declaration was not submitted to the *Ruto and Sang* Trial Chamber as prior recorded testimony under Rule 68 nor admitted as such.²³ Rather, it was submitted pursuant to the Trial Chamber’s directions to provide evidence (or lacking evidence, solemn declarations), in support of the factual assertions in its Rule 68 applications.²⁴ Given that the *Ruto and Sang* Trial Chamber unambiguously considered that Rule 68 “extends to written statements taken pursuant to Rule 111 ... and transcripts of interviews taken pursuant to Rule 112,” it would not have admitted P-0730’s solemn declaration as prior recorded testimony.²⁵

C. P-0730’s solemn declaration is highly prejudicial and its introduction is inconsistent with Mr. Gicheru’s fair trial rights

8. The OTP erroneously claims that “there is no resulting prejudice” from introducing P-0730’s solemn declaration and associated exhibits to shorten his direct examination by two thirds.²⁶ This is absurd. P-0730 is far too important of a witness for the OTP’s case for his solemn declaration and associated exhibits to be introduced through Rule 68(3).
9. In his solemn declaration, P-0730 discusses at length virtually the entirety of the OTP’s case against Mr. Gicheru – factual and legal issues that are materially in dispute and which are central to the case. P-0730’s narration of the events he investigated is based on hearsay that goes to Mr. Gicheru’s acts and conduct as they relate to the charges concerning almost all of the OTP’s witnesses: i.e., that Mr. Gicheru or other common plan members offered bribes

²⁰ [Rules of Procedure and Evidence](#), Rule 111 (emphasis added).

²¹ [KEN-OTP-0159-0884](#), para. 11 (emphasis added).

²² [OTP Application for P-0730](#), para. 13.

²³ [OTP Application for P-0730](#), para. 13, citing *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1866-Conf, Public redacted version of “Prosecution’s request for the admission of prior recorded testimony of [REDACTED] witnesses”, 29 April 2015, ICC-01/09-01/11-1866-Conf + Annexes, 21 May 2015. The Defence does not have access to the confidential version of these filings.

²⁴ *Prosecutor v. Ruto and Sang*, [ICC-01/09-01/11-1312](#), Decision No. 4 on the Conduct of Proceedings (Evidence and Solemn Declarations in Support of Applications), 21 May 2014, para. 2.

²⁵ [Ruto and Sang Rule 68 Decision](#), para. 33.

²⁶ [OTP Application for P-0730](#), para. 27.

to or otherwise interfered with P-0536,²⁷ P-0397,²⁸ P-0516,²⁹ P-0800,³⁰ P-0495,³¹ P-0613,³² and P-0341.³³ It further bears recalling that much of P-0730's solemn declaration, especially as it relates to these witnesses, contains massive volumes of hearsay from other investigators, witnesses, and others.³⁴ P-0730 should testify in full so he can be examined as to *his* memory, the source of his evidence, rather than simply admitting his heavily-footnoted solemn declaration that was effectively prepared by other investigators for the purpose of supporting the OTP's Rule 68 applications in the *Ruto and Sang* case.³⁵

10. P-0730 also discusses [REDACTED].³⁶ 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.

11. Effectively, P-0730's solemn declaration is the foundation for the OTP's Document Containing the Charges. While it may be appropriate for other investigators to have their prior recorded testimony introduced through Rule 68(3) if the criteria are met, considering that this is the *Lead* OTP investigator in the Article 70 case, the importance of this witness to the OTP's case in light of the charges, and the prejudice caused to Mr. Gicheru by limiting the questioning of this witness in court, P-0730's solemn declaration is not suitable for admission under Rule 68(3).³⁷

D. Admitting P-0730's solemn declaration and associated exhibits under Rule 68(3) would not save time in court

12. The OTP erroneously claims that introducing P-0730's solemn declaration would considerably enhance the expeditiousness of the proceedings by reducing his in-court direct examination from an estimated 4.5 hours to 1.5 hours, along with a supplemental examination "that may be necessary in light of emerging lines of defence."³⁸ Introducing P-0730's solemn declaration would not "reduce the time needed for examination by the

²⁷ [KEN-OTP-0159-0884](#), paras. 41-58.

²⁸ [KEN-OTP-0159-0884](#), paras. 61-3, 75-6, 78-84, 91.

²⁹ [KEN-OTP-0159-0884](#), paras. 95, 100, 107, 110.

³⁰ [KEN-OTP-0159-0884](#), paras. 113, 115, 133, 139, 145-6.

³¹ [KEN-OTP-0159-0884](#), paras. 161, 168.

³² [KEN-OTP-0159-0884](#), paras. 196-7, 206, 209, 224, 230.

³³ [KEN-OTP-0159-0884](#), paras. 245, 248, 256, 260.

³⁴ [KEN-OTP-0159-0884](#), para. 11 (emphasis added). *See also supra*, para. 6.

³⁵ [KEN-OTP-0159-0884](#), para. 6.

³⁶ [KEN-OTP-0159-0884](#), paras. 20, 23-24.

³⁷ [Ntaganda Rule 68\(3\) Decision](#), paras. 10-1; [Gbagbo and Blé Goudé Appeals Chamber Judgment](#), para. 69.

³⁸ [OTP Application for P-0730](#), paras. 6, 26.

defence”³⁹ and on balance, any time that may be saved in direct examination is outweighed by the prejudice caused to Mr. Gicheru.⁴⁰

13. Realistically, introducing a document of this magnitude through Rule 68(3) would significantly *increase* the amount of time spent in court for examination because the Defence would need to examine him on the points raised in his reports *in addition* to any further points raised in his associated exhibits and in direct examination by the OTP.⁴¹ Thus, the OTP, as it alerts the Trial Chamber in its application, would require significant time thereafter to tease out, expand on, or clarify points of P-0730’s examination “in light of emerging lines of defence.”⁴² If P-0730 is subject to a full direct examination by the OTP, such supplemental questioning would be unnecessary.

E. If P-0730’s solemn declaration and associated exhibits are admitted under Rule 68(3), the Defence must be given adequate time and facilities to confront him

14. The Trial Chamber should not admit P-0730’s solemn declaration and associated exhibits under Rule 68(3). However, should the Trial Chamber find otherwise, it must provide the Defence adequate time and facilities to meaningfully confront P-0730.⁴³ 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.

15. Where the 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.⁴⁴ This is necessary to ensuring both 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

³⁹ See [Gbagbo and Blé Goudé TC Decision on Rules 68\(2\)\(b\) and 68\(3\)](#), para. 38.

⁴⁰ See *supra*, paras. 8-11.

⁴¹ See [Ntaganda Rule 68\(3\) Decision](#), paras. 10-1.

⁴² [OTP Application for P-0730](#), paras. 6, 26.

⁴³ 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); [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.

⁴⁴ [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.

OTP.⁴⁵ In 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.”⁴⁶

16. While the OTP’s time estimate of 4.5 hours is an alluring yard stick for the time necessary for the Defence to examine P-0730, it should not be limited to this estimate 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.

17. Suffice it to say, admitting evidence 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-0730, is hardly conducive in ensuring his equal footing with the OTP and full enjoyment of all fair trial rights.

II. CONCLUSION AND RELIEF SOUGHT

18. The OTP presents no compelling reasons why P-0730 should not testify in full. He is available to testify before the Trial Chamber and having him attend for a full direct examination comes at no cost to the Court. Nor will it disrupt the proceedings, [REDACTED]. The Trial Chamber, in accordance with statutory duty under Article 64(2), must not place efficiency over the fairness of the proceedings. It should have an opportunity to fully hear and compare the OTP’s and Defence’s full examination of the witness, as opposed to admitting this witness’s hearsay-based solemn declaration.

WHEREFORE, the Defence requests Trial Chamber III to **DENY** the OTP’s Request under Rule 68(3) to introduce the solemn declaration and associated exhibits of P-0730, and in the alternative, **PROVIDE** the Defence sufficient time to examine him.

Respectfully submitted, 29 November 2022,

In The Hague, the Netherlands.



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⁴⁵ *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.

⁴⁶ *Katanga Judgment*, para. 1572.