

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/21-01/25**
Original: **11 September**
2026
Date: **22 September 2026**

TRIAL CHAMBER III

Before: Judge Joanna Korner, Presiding Judge
Judge Keebong Paek
Judge Nicolas Guillou

SITUATION IN THE REPUBLIC OF THE PHILIPPINES

IN THE CASE OF THE PROSECUTOR v. RODRIGO ROA DUTERTE

PUBLIC

**Public Redacted Version of “Defence Response to the Prosecution’s First Application
Under Rule 68(3)”**

Source: Defence for Mr Rodrigo Roa Duterte

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

☒ The Office of the Prosecutor

☒ Counsel for the Defence

Duterte Defence Team

☒ 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

☐ Amicus Curiae

REGISTRY

Registrar

Osvaldo Zavala Giler

☐ Counsel Support Section

☐ Victims and Witnesses Unit

☐ Detention Section

☐ Victims Participation and Reparations
Section

☐ Other

I. INTRODUCTION

1. The charged period in this case runs between 1 November 2011 and 16 March 2019.¹ P-1100 [REDACTED], meaning before the charged period. He did not [REDACTED] during the charged period. He did not [REDACTED] during the charged period. [REDACTED].² He has no direct knowledge of the allegations in this case and [REDACTED].
2. There are obvious and insurmountable barriers to the admission under Rule 68(3) of the Rules of Procedure and Evidence of some of the exhibits associated to P-1100's testimony.³ The Prosecution seeks to admit, for example, [REDACTED], without even basic indicia of authenticity.⁴ The Prosecution also asks the Trial Chamber to admit [REDACTED].⁵ This material is not admissible through Rule 68(3) and the Prosecution's request should be rejected.
3. The Prosecution is proposing to call P-1100 not as an expert witness but as a witness of fact, in circumstances where he does not have personal knowledge of the matters which are in dispute in this case. P-1100's only connection to the charged period consists of his [REDACTED].⁶ As a fact witness, the value of P-1100's account must derive from what he knows and how he knows it, rather than from [REDACTED]. He is not permitted to give opinion evidence. Insofar as the Prosecution relies on his assessments to establish matters beyond that knowledge, it seeks to introduce expert opinion without the requisite qualification or evidentiary foundation.⁷
4. Rule 68(3) proscribes a potential mode for the presentation of evidence; it does not displace the requirements of establishing relevance, reliability, and admissibility. P-1100 cannot give direct relevant evidence, nor expert opinion, and the Defence

¹ Document Containing the Charges, [ICC-01/21-01/25-178-Conf](#), 4 July 2025, para. 1. This submission is filed confidentially pursuant to [Regulation 23bis\(2\)](#) of the ICC Regulations of the Court as it is responsive to a submission of the same classification. All references to "Article" and to "Rules" in the present submission are to the Rome Statute and the ICC Rules of Procedure and Evidence respectively.

² P-1100, [PHL-OTP-00001791-R01](#) at 0011, para. 39 ("[REDACTED]"); [PHL-OTP-00001798](#) at 0003 ([REDACTED]).

³ Prosecution's first application under rule 68(3) to introduce into evidence prior recorded testimony of witness P-1100, [ICC-01/21-01/25-484-Conf](#), 31 August 2026 ("[Application](#)").

⁴ Annex A to the Prosecution's first application under rule 68(3) to introduce into evidence prior recorded testimony of witness P-1100, [ICC-01/21-01/25-484-Conf-AnxA](#), 31 August 2026 ("[Annex A to the Application](#)"), p. 3; [PHL-OTP-00001799](#).

⁵ [Annex A to the Application](#), pp 2-3; [PHL-OTP-00001794](#); [PHL-OTP-00001795](#); [PHL-OTP-00001796](#). See P-1100, [PHL-OTP-00001791-R01](#) at 0014, para. 53 ("[REDACTED]") (emphasis added).

⁶ P-1100, [PHL-OTP-00001791-R01](#) at 0024, para. 103.

⁷ *Id.* at 0018-0019, para. 76 ("[REDACTED]"), 0027, paras 114 ("[REDACTED]"), 117 ("[REDACTED]"), 0028, para. 120 ("[REDACTED]").

accordingly invites the Trial Chamber to begin its adjudication of the Prosecution's application with an assessment of the relevance and probative value of his proposed testimony under Article 69(4) of the Statute. The Defence submits that this would lead to the inevitable conclusion that, in the specific context of this case, P-1100's evidence has neither.

II. APPLICABLE LAW

5. Rule 68(3) of the Rules of Procedure and Evidence allows, subject to strict conditions,⁸ the admission into evidence of previously recorded testimony.⁹ It serves as a discretionary exception to the rule of in-court testimony as provided in Article 69(2), with its overarching purpose being to streamline proceedings, promote judicial economy, and reduce the duration of trials without compromising the rights of the accused. A Rule 68(3) determination must therefore be item-by-item¹⁰ and case-by-

⁸ *Bemba*, 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", [ICC-01/05-01/08-1386](#), 3 May 2011 ("[Bemba Judgment on the appeals against the Decision on the admission into evidence of materials on the prosecution's list of evidence](#)"), para. 80 ("[a]t the trial [...] the Trial Chamber must respect article 69 (2). Witness statements may only be introduced under rule 68 of the Rules of Procedure and Evidence if the strict conditions of that rule are met.").

⁹ *Gbagbo & Blé Goudé*, Decision on the Prosecutor's application to introduce prior recorded testimony under Rule 68(2)(b) and 68(3), [ICC-02/11-01/15-573-Red](#), 9 June 2016, para. 24 (recalling that Rule 68(3) admission of prior recorded testimony requires that the witness will be present before the Trial Chamber, does not object, and that all parties and the Chamber will have the opportunity to examine him), confirmed by the Appeals Chamber, 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)", [ICC-02/11-01/15-744](#), 1 November 2016 ("[Gbagbo & Blé Goudé Judgment on the appeals against the Decision on the Prosecutor Rules 68\(2\)\(b\) and 68\(3\) application](#)").

¹⁰ [Bemba Judgment on the appeals against the Decision on the admission into evidence of materials on the prosecution's list of evidence](#), para. 81 ("the Appeals Chamber concludes that the decision of the Trial Chamber to admit all prior recorded statements without a cautious item-by-item analysis was incompatible with article 69 (2) of the Statute and with rule 68 of the Rules of Procedure and Evidence").

case,¹¹ as well as sufficiently reasoned and cautious¹² to ensure that deviation from in-court personal testimony is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial.¹³

6. While proposed testimony that is materially in dispute, central to core issues and/or lacks corroboration is not automatically precluded, the Chamber must be “extra vigilant” to ensure that the accused’s rights and the fairness of the trial remain the overriding concern.¹⁴

¹¹ [Gbagbo & Blé Goudé Judgment on the appeals against the Decision on the Prosecutor Rules 68\(2\)\(b\) and 68\(3\) application](#), para. 69 (“[w]hether such testimony may be introduced under rule 68 (3) of the Rules will [...] depend upon the circumstances of the case [...] This assessment, sufficiently reasoned and explained, should be made on a case-by-case basis where the factors to be considered may vary per case and per witness”); [Bemba Judgment on the appeals against the Decision on the admission into evidence of materials on the prosecution’s list of evidence](#), paras 79 (“the Appeals Chamber notes that there is no indication in the Impugned Decision that the Trial Chamber considered, in respect of each witness statement, whether the conditions for its admission under rule 68 of the Rules of Procedure and Evidence were met. Although the ‘Decision on Directions for the Conduct of Proceedings’, which was rendered on the same day as the Impugned Decision, foreshadowed that the Trial Chamber would, in respect of each witness, inquire whether he or she objected to the introduction of the witness statement, thus taking up elements of rule 68 (b) of the Rules of Procedure and Evidence, the Impugned Decision does not indicate that the Trial Chamber assessed each of the statements. Moreover, there is no indication that the Trial Chamber considered whether the admission of a given statement would be prejudicial to or inconsistent with the rights of the accused. Instead the Chamber admitted into evidence indiscriminately *all* the witness statements on the Revised List of Evidence. In the Appeal Chamber’s view, this mode of receiving evidence was an improper exercise of the Trial Chamber’s discretion. It resulted in the Chamber paying little or no regard to the principle of orality, to the rights of the accused, or to trial fairness generally”) (internal citations omitted), 81 (“the Appeals Chamber concludes that the decision of the Trial Chamber to admit all prior recorded statements without a cautious item-by-item analysis was incompatible with article 69 (2) of the Statute and with rule 68 of the Rules of Procedure and Evidence.”).

¹² [Gbagbo & Blé Goudé Judgment on the appeals against the Decision on the Prosecutor Rules 68\(2\)\(b\) and 68\(3\) application](#), para. 65; [Bemba Judgment on the appeals against the Decision on the admission into evidence of materials on the prosecution’s list of evidence](#), para. 78; [Katanga & Ngudjolo Chui](#), Decision on Prosecutor’s request to allow the introduction into evidence of the prior recorded testimony of P-166 and P-219, [ICC-01/04-01/07-2362](#), 3 September 2010 (“[Katanga & Ngudjolo Chui Decision on Prosecutor’s Rule 68 application](#)”), para. 19.

¹³ [Katanga & Ngudjolo Chui Decision on Prosecutor’s Rule 68 application](#), para. 19.

¹⁴ [Gbagbo & Blé Goudé Judgment on the appeals against the Decision on the Prosecutor Rules 68\(2\)\(b\) and 68\(3\) application](#), para. 69 (“the Appeals Chamber considers, in particular, that where statements relate to issues that are materially in dispute, central to core issues of the case or are uncorroborated, a Chamber must be extra vigilant that introduction of the prior recorded testimony in question will not be prejudicial to or inconsistent with the rights of the accused or the fairness of the trial generally. This must be the Chamber’s overriding concern”); [Bemba Judgment on the appeals against the Decision on the admission into evidence of materials on the prosecution’s list of evidence](#), para. 79 (“the Chamber paying little or no regard to the principle of orality, to the rights of the accused, or to trial fairness generally [...] had the potential effect of depriving Mr Bemba of his right ‘to examine, or have examined the witnesses against him’.”).

III. SUBMISSIONS

i) P-1100's evidence is neither sufficiently relevant nor probative of the facts in dispute in this case

7. [REDACTED].¹⁵ The Prosecution contends that his evidence “goes to proof of a policy to ‘neutralise’ through violent crimes, including murder, alleged criminals in the Philippines. It also provides evidence of the DDS’s *modus operandi*, as well as the Accused’s individual criminal responsibility, including in relation to his knowledge and intent.”¹⁶
8. Although facts predating the charges may, in principle, be relevant for a properly identified and limited purpose, P-1100’s account of earlier circumstances cannot, by virtue of [REDACTED] alone, establish how those circumstances subsequently developed or support conclusions about conduct beyond his own observation.
9. Take, for example, paragraphs 117 and 120 of P-1100’s statement. In paragraph 117, P-1100 invokes his “[REDACTED]” to interpret the term ‘neutralise’ and to explain how Philippine police officers would understand it, without identifying an adequate basis in his personal knowledge for that assessment.¹⁷ In paragraph 120, he links alleged killings in 2009 to those allegedly committed during Mr Duterte’s presidency from 2016, without identifying any event he personally observed or [REDACTED] during the charged period capable of supporting that connection.¹⁸ The latter assessment appears to rest instead on [REDACTED]¹⁹ and his having [REDACTED].²⁰ Neither [REDACTED] nor [REDACTED] supplies the missing factual foundation for the connection he draws.
10. While the Prosecution asserts that P-1100 can provide evidence of the DDS’s *modus operandi*, his evidence shows that he had no personal knowledge of this *modus operandi*, or the structure, operations, hierarchy, or command of any such group. On his own account, [REDACTED]²¹ and [REDACTED] raises questions rather than provides answers, stating “[REDACTED]”.²² This is unsurprising given that

¹⁵ [REDACTED].

¹⁶ [Application](#), paras 13, 17-18.

¹⁷ P-1100, [PHL-OTP-00001791-R01](#) at 0028, para. 117.

¹⁸ *Id.* at 0028, para. 120.

¹⁹ P-1100, [PHL-OTP-00001793](#) at 0002; [PHL-OTP-00001791-R01](#) at 0009, para. 31 and at 0027, para. 114.

²⁰ P-1100, [PHL-OTP-00001793](#) at 0007; [PHL-OTP-00001791-R01](#) at 0024, para. 103.

²¹ P-1100, [PHL-OTP-00001791-R01](#) at 0017, paras 69 (“[REDACTED]”), 70 (“[REDACTED]”).

²² [PHL-OTP-0005-0737](#) at 0753, para. 43 (emphasis added).

[REDACTED], [REDACTED].²³ [REDACTED], has very little chance of producing evidence that is probative in a criminal trial in which Judges are assessing individual responsibility for events in an entirely different period.

11. Similarly, the Prosecution contends that P-1100 can give evidence of “the Accused’s individual criminal responsibility, including in relation to his knowledge and intent.”²⁴ While Mr Duterte’s individual criminal responsibility is a matter for the Trial Chamber, P-1100’s only direct evidence of Mr Duterte’s alleged knowledge and intent is drawn from [REDACTED],²⁵ the circumstances of which require particular caution. [REDACTED], the parties have no way to identify the [REDACTED] relied upon, [REDACTED] full context, or [REDACTED] connection to the charged period. Describing the evidence as concerning Mr Duterte’s [REDACTED]²⁶ does not itself establish those matters. While P-1100’s proposed evidence may establish [REDACTED], this objectively extremely limited factual foundation cannot support the substantially broader propositions for which his evidence is being offered, [REDACTED].
12. The imperative of efficient proceedings is magnified in the present case, given the vulnerability and age of the accused. The Trial Chamber has already directed the Prosecution to “review your evidence to make sure that we avoid having repetitive, irrelevant or over-voluminous evidence”.²⁷ The Prosecution’s desire to introduce P-1100’s evidence does not conform to this directive and would undoubtedly require lengthy cross-examination to put the limits of his knowledge to him, taking the parties and the Trial Chamber even further away from the matters actually in dispute.
13. Article 69(4) requires the Trial Chamber to weigh the relevance and probative value of proffered evidence against any prejudice its admission may cause to a fair trial or the fair evaluation of the testimony. Evidence of little or no probative value may, accordingly, be excluded. In some cases, Trial Chambers have declined to hear proposed witnesses on the grounds that the proffered evidence lacked sufficient

²³ P-1100, [PHL-OTP-00001791-R01](#) at 0015, para. 56.

²⁴ [Application](#), paras 3, 13, 17-18.

²⁵ P-1100, [PHL-OTP-00001791-R01](#) at 0016, para. 63.

²⁶ [Application](#), paras 13 ([REDACTED]), 18 ([REDACTED]).

²⁷ Transcript of Status Conference, [ICC-01/21-01/25-T-009-CONF-ENG](#), 27 May 2026 (“[Transcript of the First Status Conference](#)”), p. 47, lines 20-23.

relevance to the matters in dispute,²⁸ or is repetitive of other evidence.²⁹ P-1100's proposed evidence does not meet the requirements of Article 69(4), and the Prosecution should be directed to limit its case to witnesses whose testimony is probative of the case as charged.

ii) *Items of “associated material” do not meet the requirements for admission through Rule 68(3)*

14. P-1100's associated material is comprised of (i) [REDACTED]; (ii) [REDACTED]; (iii) [REDACTED], and; (iv) [REDACTED].³⁰
15. The Prosecution argues that these exhibits are admissible because they form an integral part of P-1100's prior recorded testimony and cites to two decisions in *Yekatom & Ngaïssona* and *Ongwen* where the associated documents were admitted because the witness “used and explained” the documents in question, thus they formed an integral part of the prior recorded testimony.³¹ The “[REDACTED]” is not referred to in P-1100's statement.³² In its table of associated material for which it is seeking admission, the Prosecution says that [REDACTED]. This paragraph reads:

[REDACTED].
16. This vague reference does not render this composite document admissible; it was not “used and explained” by P-1100, therefore becoming an integral part of his statement, nor is it in admissible form, with no attempt having been made to [REDACTED]. Moreover, it is difficult to see how “[REDACTED]” could have been “[REDACTED]”.
17. As for the [REDACTED] that P-1100 [REDACTED],³³ [REDACTED],³⁴ and the [REDACTED]³⁵ – they are similarly referenced in passing in paragraphs 8 and 9 of P-1100's statement. These paragraphs recount that P-1100 [REDACTED],

²⁸ See e.g. *Ntaganda*, Decision on Defence Requests to add D-0185, D-0207, and D-0243 to its List of Witnesses and for the admission of prior recorded testimony pursuant to Rule 68(25)(b), [ICC-01/04-02/06-2099](#), 6 November 2017, paras 22-28.

²⁹ *Ongwen*, Decision on Defence Request to Add Two Witnesses to its List of Witnesses and Accompanying Documents to its List of Evidence, [ICC-02/04-01/15-1565](#), 13 August 2019, paras 16-22.

³⁰ [Application](#), para. 14; [Annex A to the Application](#) (emphasis added).

³¹ [Application](#), para. 10, fn. 20, citing *Yekatom & 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, [ICC-01/14-01/18-907-Red](#), 10 March 2021, para. 26; *Ongwen*, Decision on Defence Request Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence, [ICC-02/04-01/15-1288](#), 19 June 2018, paras 8, 10.

³² [PHL-OTP-00001799](#).

³³ [PHL-OTP-00001796](#).

³⁴ [PHL-OTP-00001794](#).

³⁵ [PHL-OTP-00001795](#).

[REDACTED]. The [REDACTED] is also described in very general terms in paragraph 44.³⁶ Again, referring to the existence of these documents does not show that the witness “used and explained” them so that they became an integral part of his prior testimony. It cannot be that a witness [REDACTED] acts as a vehicle for their automatic admission.

IV. CONCLUSION AND RELIEF SOUGHT

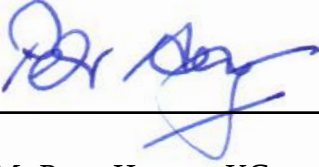
18. The Defence is not opposed to the reasonable use of Rule 68(3) in the present proceedings, as a means of facilitating an expeditious trial, particularly in light of the obvious constraints which come with arresting a defendant in his eighties who is in poor health. The Defence does object, however, to the use of Rule 68(3) as a vehicle through which [REDACTED] can be admitted, particularly in light of the Trial Chamber’s direction encouraging the very opposite.³⁷
19. More broadly, the Defence cannot see how the imperative for expeditious proceedings, considered together with the Trial Chamber’s request that the parties review their material to ensure only relevant evidence is presented, can translate into P-1100 being presented as the Prosecution’s [REDACTED] witness in this case. The decision to call [REDACTED], to offer what is opinion evidence about matters in dispute and which post-date the period of his direct knowledge, sets a worrying precedent. Importantly, his evidence cannot reasonably be considered sufficiently relevant and probative under Article 69(4) of the Statute.
20. For the foregoing reasons, the Defence respectfully requests that the Trial Chamber

REJECT the Prosecution’s Application on the basis that P-1100’s proposed evidence is not sufficiently relevant or probative of the matters in dispute in this case; or, in the alternative

³⁶ P-1100, [PHL-OTP-00001791-R01](#) at 0012, para. 44 (“[REDACTED]”).

³⁷ [Transcript of the First Status Conference](#), pp 19-20.

REJECT the request for admission of PHL-OTP-00001799, PHL-OTP-00001796, PHL-OTP-00001794, and PHL-OTP-00001795 under Rule 68(3).



Mr Peter Haynes, KC
Counsel for Mr Rodrigo Roa Duterte

Dated this 22nd day of September 2026
At The Hague, the Netherlands