Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/21-01/25**
Original: **30 October 2026**
Date: **6 November 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 Fourth 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. In its fourth application pursuant to Rule 68(3),[1] the Prosecution impermissibly seeks to introduce the report prepared by P-1400 ("Expert Report"), together with the associated materials, even though these items have not been included in the List of Evidence, nor has leave been sought to add them.

2. Furthermore, whilst the Defence does not generally oppose the tendering of expert reports through Rule 68(3), for the reasons set out below it objects to the current attempt to introduce additional documents prepared by third parties containing information that P-1400 has not adequately addressed, and repetitive material that is unnecessary for an understanding of P-1400's Expert Report.

II. APPLICABLE LAW

3. Rule 68(3) allows, subject to strict conditions,[2] the admission into evidence of previously recorded testimony.[3]

4. 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-item[4] and case-by-

---

[1] Prosecution's fourth application under rule 68(3) to introduce into evidence the expert report provided by P-1400 and associated material, ICC-01/21-01/25-527-Conf, 21 October 2026 ("Application").
This submission is filed **confidentially** pursuant to Regulation 23*bis*(2) of the Regulations of the Court as it provides a response to a filing bearing the same classification. All references to "Article" and "Rule" in the present submission are to the Rome Statute and International Criminal Court Rules of Procedure and Evidence respectively.

[2] First Decision on the Prosecution's Request to introduce prior recorded testimony pursuant to Rule 68(3), ICC-01/21-01/25-514-Conf, 2 October 2026 ("First Decision on Rule 68(3)"), paras 9, 13, 14, 15. *See also 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.

[3] *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").

[4] *Bemba* Judgment on the appeals against the Decision on the admission into evidence of materials on the Prosecution's list of evidence, para. 81.

case,[5] as well as sufficiently reasoned and cautious[6] 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.[7]

5. With regard to associated materials, each item must be assessed individually for its relevance and probative value, that depend on the extent to which the witness discusses it in their prior recorded testimony. Where the individual has not "meaningfully" used and explained the material, and the level of substance provided is "minimal at best", the material cannot be considered necessary to an understanding of the witness's evidence and an integral part of the statement, and therefore cannot be introduced pursuant to Rule 68(3).[8]

III. SUBMISSIONS

i) Preliminary issue: absence of a request to add the Expert Report and associated materials to the List of Evidence

6. The Prosecution received the Expert Report, dated [REDACTED], and its [REDACTED] associated materials approximately [REDACTED] weeks after the deadline for submitting the List of Evidence. Trial Chamber III ("Chamber") has instructed the parties that evidence may be added thereafter only with its leave.[9] While the Defence appreciates the shortened timeframe faced by the Prosecution,[10] no explanation has been provided as to why leave was not sought before or alongside this Application, or why it has still not been made more than [REDACTED] days after receipt of the Expert Report.

7. This omission affects Mr Duterte's ability to prepare his defence, particularly as P-1400 is expected to be the [REDACTED] witness called by the Prosecution and the

[5] *Gbagbo & Blé* Goudé Judgment on the appeals against the Decision on the Prosecutor Rules 68(2)(b) and 68(3) application, para. 69; *Bemba* Judgment on the appeals against the Decision on the admission into evidence of materials on the Prosecution's list of evidence, para 79.
[6] *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.
[7] *Katanga & Ngudjolo Chui* Decision on Prosecutor's Rule 68 application, para. 19.
[8] First Decision on Rule 68(3), paras 32, 34.
[9] Directions on the conduct of proceedings, ICC-01/21-01/25-471, 19 June 2026 ("Directions on the Conduct of Proceedings"), para. 16.
[10] Email, Trial Chamber to parties, "[ICC-01/21-01/25 - Public] Instruction relating to Rule 68(3) Witnesses [REDACTED]", 15 October 2026, 11:53.

associated materials are extensive. The importance of complying with these safeguards is underscored by the Court's practice of rejecting the formal submission of new items for which leave to add them to the List of Evidence has not been advanced[11] or, at the very least, deferring the decision on a Rule 68(3) application, pending resolution of the request.[12] Accordingly, the Application should either be dismissed *in limine* or postponed until the Chamber has assessed whether the materials can be added to the List of Evidence.

ii) The associated materials were not meaningfully explained by the witness

8. The Defence does not take a position on whether P-1400 should be called pursuant to Rule 68(3) rather than *viva voce*. However, given that at the heart of [REDACTED] analysis is [REDACTED], there would appear to be merit in hearing [REDACTED] testimony concurrently with that of the Defence expert on [REDACTED],[13] pursuant to the Decision on the Conduct of Proceedings.[14] This may necessitate moving the order of [REDACTED] appearance to [REDACTED].

9. In addition, the Expert Report contains [REDACTED] footnotes citing other sources, [REDACTED] of which the Prosecution now seeks to introduce. First, the Defence opposes the Prosecution's attempt to submit two additional studies that P-1400 has not meaningfully used or explained and that, therefore, are not integral to [REDACTED] report.

10. The contribution authored by [REDACTED] entitled "[REDACTED]"[15] is paradigmatic in this respect. Although labelled by the Prosecution as a

[11] *Abd-Al-Rahman*, Decision on the Prosecution's bar table motion, ICC-02/05-01/20-885-Red, 27 February 2023, paras 31 ("the Prosecution has failed to apply for their inclusion pursuant to Regulation 35 of the Regulations of the Court, nor provided any explanation for its failure so to do. Such omission may result in rejection of material sought to be tendered via a bar table motion"), 34. *See also Bemba et al.*, Decision on 'Prosecution's Fifth Request for the Admission of Evidence from the Bar Table', ICC-01/05-01/13-1524, 14 December 2015, para. 6 ("[t]he Chamber considers that the failure to include these four annexes on the list of evidence creates an unacceptable risk that the accused were unprepared for these items during the Prosecution's evidence presentation […] In order to protect the rights of the accused, the Chamber does not recognise the formal submission of these items").
[12] *Abd-Al-Rahman*, Seventh Decision on Prosecution's applications to introduce prior recorded testimonies under Rule 68(3), ICC-02/05-01/20-651-Red, 29 March 2022, paras 34, 35.
[13] [REDACTED].
[14] Directions on the Conduct of Proceedings, para. 65 ("[w]here parties wish to introduce expert evidence on the same issue at trial, the Chamber will, hear this evidence grouped together, if possible, in order to enhance the expeditiousness of the proceedings. The Chamber will determine at what stage in the proceedings it will hear such evidence").
[15] PHL-OTP-00250774.

"[REDACTED]",[16] it is a report that "[REDACTED]".[17] While P-1400 acknowledges having used the [REDACTED],[18] [REDACTED] treatment of the considerably wider findings of this item is extremely limited. Notably, [REDACTED] refers to it only [REDACTED].[19]

11. The [REDACTED] report, however, goes well beyond what is cited by P-1400. It [REDACTED];[20] [REDACTED];[21] [REDACTED];[22] [REDACTED];[23] [REDACTED].[24] None of these matters is even remotely discussed in the Expert Report, which can be fully understood without the introduction of [REDACTED]'s report, which it does not rely on in any meaningful way.

12. The same applies to a report of more than [REDACTED] pages, prepared by [REDACTED], concerning [REDACTED].[25] P-1400 saying that [REDACTED] [REDACTED] "[REDACTED]" [26] and citing to the report in a footnote is insufficient to render the report admissible as associated material, especially where P-1400 refers to it only in a handful of passages,[27] and without identifying specific pages.

13. The Defence is particularly concerned that this second report contains contextual information that does not form part of the P-1400's own inquiry, encompassing (i) [REDACTED];[28] (ii) [REDACTED];[29] (iii) [REDACTED];[30] and (iv) [REDACTED].[31] P-1400's engagement with these aspects is entirely absent from [REDACTED] Expert Report as they address [REDACTED] that does not align with [REDACTED] approach [REDACTED] adopted,[32] and were therefore excluded from [REDACTED] study.

---

[16] Annex A to the Prosecution's fourth application under rule 68(3) to introduce into evidence the expert report provided by P-1400 and associated material, ICC-01/21-01/25-527-Conf-AnxA, 21 October 2026, p. 3.
[17] PHL-OTP-00250774, at 0001.
[18] P-1400, PHL-OTP-00250808, at 0022, para. 32.
[19] P-1400, PHL-OTP-00250808, at 0029, para. 50, fn. 50.
[20] PHL-OTP-00250774, at 0003.
[21] PHL-OTP-00250774, at 0003.
[22] PHL-OTP-00250774, at 0003.
[23] PHL-OTP-00250774, at 0004.
[24] PHL-OTP-00250774, at 0005-0006.
[25] PHL-OTP-00250777.
[26] P-1400, PHL-OTP-00250808, at 0017, para. 21.
[27] P-1400, PHL-OTP-00250808, at 0023, para. 33, fn. 35; at 0029, para. 51, fn. 52.
[28] PHL-OTP-00250777, at 0009-0010.
[29] PHL-OTP-00250777, at 0010-0017.
[30] PHL-OTP-00250777, at 0017-0019.
[31] PHL-OTP-00250777, at 0020.
[32] P-1400, PHL-OTP-00250808, at 0008, para. 2 ("[REDACTED]").

14. In reality, the Prosecution is attempting indirectly to introduce material prepared by other professionals who are not on its witness list via the instant Expert Report which – by its own admission – only "[REDACTED]".[33] These additional materials do not form an integral part of P-1400's evidence. Rather, they are supplements, providing the Chamber with a separate set of further [REDACTED][34] with [REDACTED] that P-1400 did not comprehensively examine nor use in [REDACTED] report.

15. The Chamber has held that it must analyse each item of associated material to determine its relevance and probative value, which is necessarily linked to the extent to which a witness discusses it in their prior recorded testimony.[35] In this case, the absence of any substantive consideration of these two reports means that their proposed introduction falls outside the parameters set out in the First Decision on Rule 68(3).

16. Finally, the Defence objects to the Prosecution's improper attempt to submit [REDACTED][36] on the basis that P-1400 mentions the events they describe. These [REDACTED] are not necessary to understand the Expert Report's contents. They merely reproduce information already provided in P-1400's study, which refers to them without engaging with their substance.[37] Their introduction would be redundant, and would burden the Chamber with evidence of negligible relevance, contrary to its express directions.[38]

IV. CONCLUSION AND RELIEF SOUGHT

17. The Defence recognises the importance of expediting the proceedings through the use of Rule 68(3). This procedure does not exempt the Prosecution from complying with

[33] Application, para. 15.
[34] The Prosecution disclosed [REDACTED].
[35] First Decision on Rule 68(3), para. 32.
[36] PHL-OTP-00250732; PHL-OTP-00250738; PHL-OTP-00250740; PHL-OTP-00250741; PHL-OTP-00250745; PHL-OTP-00250746; PHL-OTP-00250752; PHL-OTP-00250775.
[37] First Decision on Rule 68(3), para. 34.
[38] First Decision on Rule 68(3), para. 39.

the Chamber's instructions on the submission of new evidence not included in the List of Evidence, and the need to seek leave to do so.

18. In addition, the Defence opposes the use of Rule 68(3) to introduce additional materials that are not necessary for an understanding of P-1400's Expert Report and contain information that the witness has not adequately used and explained.

19. For the foregoing reasons, the Defence respectfully requests that the Trial Chamber

> **DISMISS** the Application *in limine* or, in the alternative, defer its consideration pending a decision on the requisite Prosecution request to add the documents to the List of Evidence after the deadline; and
>
> **REJECT** the request to introduce [REDACTED] into evidence as associated materials under Rule 68(3).



Mr Peter Haynes, KC
Counsel for Mr Rodrigo Roa Duterte

Dated this 6th day of November 2026
At The Hague, the Netherlands