

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-01/09-01/20  
Date: 27 October 2021

**TRIAL CHAMBER III**

**Before: Judge Miatta Maria Samba**

**SITUATION IN THE REPUBLIC OF KENYA**

**IN THE CASE OF *THE PROSECUTOR v. PAUL GICHERU***

**Public  
with confidential annexes A - H**

**Public redacted version of “Prosecution’s request for introduction of prior recorded testimony of Witnesses P-731, P-732, P-0733, P-0734, P-0735, P-0736 and P-0737 pursuant to rule 68(2)(b)”, ICC-01/09-01/20-198-Conf, 22 October 2021**

**Source: Office of the Prosecutor**

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  
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**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. INTRODUCTION

1. The Prosecution requests the Chamber to allow the conditional introduction into evidence of the prior recorded testimony<sup>1</sup> of witnesses P-0731, P-0732, P-0733, P-0734, P-0735, P-0736 and P-0737 pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence.<sup>2</sup>
2. P-0731 and P-0732 are respectively Team Leader / Senior Investigator and former Investigator with the Office of the Prosecutor.<sup>3</sup> P-0733 is an OTP Investigative Analyst. P-0734 and P-0735 are both Cyber Forensic experts. P-0736 is a Netherland Forensic Institute (NFI) [REDACTED] Expert. P-0737 is a NFI expert [REDACTED]. The material sought to be introduced consist of short reports documenting technical processes relating to digital and device evidence, summary evidence, investigator's solemn declarations, and a few associated documents.
3. The 68(2)(b) documents are reliable, probative and relevant to the charges. They do not go to matters relating to the acts and conduct of the Accused, but provide background, authentication, or context for other evidence that will be submitted during the trial.
4. Submitting the documents through rule 68(2)(b) would be in the interest of justice and the expeditiousness of the trial. The Prosecution estimates that it would save up to 24 hours of examination time.<sup>4</sup> The nature and limited scope of the rule 68(2)(b) documents is such that cross-examination is unnecessary, and their introduction does not prejudice the rights of the Accused.
5. Prior recorded testimony may only be introduced under rule 68(2)(b) if the testifying person declares that it is true and correct through the formalities specified in sub-rules (ii) and (iii). Should this application be granted, the Prosecution requests the Chamber to designate Registry Legal Counsel, or any

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<sup>1</sup> Also: "Rule 68(2)(b) documents".

<sup>2</sup> "Rule 68(2)(b)".

<sup>3</sup> "OTP".

<sup>4</sup> Evaluation based on figured provided in: ICC-01/09-01/20-171-Conf.

appropriate person delegated by him, as the person(s) authorised to witness declarations required pursuant to rule 68(2)(b)(ii) and (iii) for the purpose of this case.

6. The documents sought to be introduced under rule 68(2)(b) are listed, per witness, in Annexes A through F.<sup>5</sup> Documents that could not be hyperlinked are filed as numbered sub-annexes corresponding to the relevant witness.<sup>6</sup> Annexes G and H contain proposed templates to be approved by the Single Judge for the declaration and certification under rule 68(2)(b)(ii) and (iii).<sup>7</sup>

## II. CONFIDENTIALITY

7. This filing and Annexes A-H are classified as “confidential” as they refer to the identity of Prosecution witnesses and confidential items of evidence. A public redacted version will be filed as soon as possible, but in any event within five days.

## III. SUBMISSIONS

8. Rule 68(1) provides that a Trial Chamber may “allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that this would not be prejudicial to or inconsistent with the rights of the accused and that the requirements of one or more of the following sub-rules are met”. Rule 68(2)(b) concerns prior recorded testimony that goes to “proof of a matter other than the acts and conduct of the accused”, and is accompanied by a certified declaration.
9. Rule 68(2)(b)(i) lists non-exhaustive factors that the Chamber shall consider in determining whether to allow introduction of prior recorded testimony falling

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<sup>5</sup> Annex A: P-0731, Annex B: P-0732, Annex C: P-0733, Annex D: P-0734 and P-0735, Annex E: P-0736, Annex F: P-0737.

<sup>6</sup> Annexes C1, C2, C3 and F1. These items will be disclosed to the Defence as soon as possible.

<sup>7</sup> Both proposed templates were approved in the *Ntaganda* case: ICC-01/04-02/06-729, para.6, ICC-01/04-02/06-657-AnxA.

under sub-rule (b). These are: whether the prior testimony relates to issues that are not materially in dispute; is of a cumulative or corroborative nature; relates to background information; is such that the interests of justice are best served by its introduction; and has sufficient indicia of reliability.<sup>8</sup>

10. Chambers of the Court consider that the decision to introduce a prior recorded testimony pursuant to this rule is discretionary,<sup>9</sup> and that its purpose is to “identify situations where it is not necessary to examine witnesses, while preserving a fair and expeditious trial”.<sup>10</sup>
11. As discussed below, the submitted prior testimony of each witness does not go to the acts and conduct of the Accused, should be allowed to be introduced through this sub-rule, and is not prejudicial. Introduction of the prior testimony of all seven witnesses would expedite the presentation of the Prosecution case without infringing the fair trial right of the Accused, and therefore serve the interests of justice.

#### **P-0731**

12. P-0731 is a Prosecution Senior Investigator and the current Team Leader of the Kenya article 70 investigation. He has also been a Senior Investigator in the main Kenya since May 2010.<sup>11</sup> [REDACTED].<sup>12</sup> The Prosecution seeks to introduce six solemn declarations and four associated investigative reports<sup>13</sup> cited in one solemn declaration. All the documents are authored by P-0731, and relevant only to the investigation [REDACTED].<sup>14</sup> The solemn declarations detail [REDACTED]. The investigative reports record recent contacts with [REDACTED].

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<sup>8</sup> Rule 68(2)(b)(i).

<sup>9</sup> *Al Hassan*: ICC-01/12-01/18-1111. Para. 11; *Ongwen*: ICC-02/04-01/15-596-Red, para. 6; *Bemba et al.*: ICC-01/05-01/13-1478-Red-Corr, para. 95.

<sup>10</sup> *Al Hassan*: ICC-01/12-01/18-1111. Para. 11.

<sup>11</sup> KEN-OTP-0149-0444, para. 2.

<sup>12</sup> KEN-OTP-0149-0444, para. 3.

<sup>13</sup> These investigative reports detail recent contacts with [REDACTED].

<sup>14</sup> Listed in Annex A.

13. In one solemn declaration, P-0731 reports that [REDACTED].<sup>15</sup> This unverified allegation does not relate directly to the present charges and the Prosecution does not rely on it. The Prosecution does not oppose the relevant portion being excluded should the Chamber deem it necessary. Except for this allegation, P-0731's prior testimony does not go to the acts and conduct of the Accused, but relates mainly to P-0397's unavailability to testify *viva voce*.
14. The Chamber should allow the introduction of P-0731's prior recorded testimony under rule 68(2)(b). It has sufficient indicia of reliability. The solemn declarations contain the name, occupation, signature of the author; are dated and are certified as true to the best of P-0731's knowledge; and are expressly made cognisant of the consequences under article 70(1)(b) for presenting false evidence. The facts stated in the witness' prior recorded testimony fell within the duties and responsibility of P-0731 and documents steps taken and information gathered in the ordinary course of the investigation.
15. Introduction of P-0731's prior testimony does not require cross-examination and does not prejudice the rights of the Accused, given its limited nature and scope and peripheral relevance. The Accused is not charged with [REDACTED]. The facts are relevant to understand the background of the Count 1, and its introduction would therefore be in the interest of justice. The Defence will be able to challenge this evidence should it elect to do so, though examination of other witnesses, such as P-0730, and by presenting its own evidence.

#### **P-0732**

16. P-0732 is a former Prosecution Investigator who worked on the Kenya article 70 investigation. The Prosecution seeks to introduce a solemn declaration by P-0732, whereby he explains [REDACTED] the recording of his initial explanation of

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<sup>15</sup> KEN-OTP-0135-0446 at 0447, para.8; information transmitted to [REDACTED]: KEN-OTP-0141-0495 at 0496.

article 55(2) rights to witness P-0495 before he was interviewed.<sup>16</sup> It does not go to the acts and conduct of the Accused, but is relevant to the introduction of P-0495's prior testimony.

17. The Chamber should allow the introduction of P-0732's prior recorded testimony under rule 68(2)(b). It has sufficient indicia of reliability. The solemn declaration contains the name, occupation, signature of the author, it is dated and undertaken to be true to the best of P-0732's knowledge. The facts reported upon were in the area of duties and responsibility of P-0732, who has direct knowledge of them.
18. Introduction of the P-0732's prior testimony does not require cross-examination and does not prejudice the rights of the Accused, given its very limited nature and scope. It does not prevent the Defence from challenging this evidence with other evidence disclosed in this case.

### **P-0733**

19. P-0733 is an Investigative Analyst with the OTP. The Prosecution seeks to introduce her revised report on the review of forensic extractions of [REDACTED] with its annex as summary evidence.<sup>17</sup> The purpose of P-0733's review was to identify relevant information to the case among [REDACTED] data extract by P-0734 and P-0735 from the Forensic Science Section. In particular, the report highlights the intersection between [REDACTED] [REDACTED] data and numbers attributed to persons associated with the Kenya investigation.
20. The Chamber should allow the introduction of P-0732's prior recorded testimony under rule 68(2)(b). It has sufficient indicia of reliability. The report contains the name of the author and is dated. P-0733's report is intended to assist the Chamber by identifying the intersection between the [REDACTED] data extracted [REDACTED] and information gathered from diverse sources during the course of the investigation of the Kenya Situation that would otherwise require the

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<sup>16</sup> Listed in Annex B.

<sup>17</sup> Listed in Annex C.

Chamber to sift through large volumes of raw data. The report annexes the extracted data and references the underlying sources for the corresponding attributions, permitting independent verification.

21. Given the limited nature and scope of the report and that it can be independently verified, its introduction does not require cross-examination or prejudice the rights of the Accused. The Defence is able to challenge the evidence underlying the attribution and adduce evidence on the topic.

#### **P-0734 and P-0735**

22. P-0734 and P-0735 are both Cyber Forensic experts<sup>18</sup> with the OTP. The Prosecution seeks to introduce their technical report<sup>19</sup> recording the initial<sup>20</sup> data extractions from [REDACTED].<sup>21</sup> Although the witnesses are both qualified experts in the field of digital forensics, the report itself merely documents the routine technical process of data extraction. The report does not go to the acts and conduct of the Accused.
23. The Chamber should allow the introduction of P-0734 and P-0735's prior recorded testimony under rule 68(2)(b). The report is *prima facie* probative and reliable. The steps of the process are carefully described and documented, the report is signed, dated, and authored by P-0734 and P-0735 who possess the required credentials to perform this technical process.<sup>22</sup> The authenticity of the data extracted is verified by the use of hashsums. The [REDACTED] is still in the Prosecution's possession and the process may be duplicated and verified by Defence experts if necessary.
24. The report concerns background information relating to the technical extraction process. The Prosecution is not yet aware whether the Defence intends to dispute this process. P-0734 and P-0735's report also respond to technical questions from

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<sup>18</sup> The Prosecution can provide details of their training and experience, if this is disputed.

<sup>19</sup> KEN-OTP-0160-0045.

<sup>20</sup> The [REDACTED] was subsequently referred to the Netherlands Forensic Institute for the extraction of additional data.

<sup>21</sup> Listed in Annex D.

<sup>22</sup> KEN-OTP-0160-0045 at 0054.



the Senior Trial Lawyer, but this information was required only for planning purposes and to determine if any [REDACTED] review was required and is not relied upon for evidential purposes. The report does not otherwise provide expert opinions or comment on the meaning or significance of the data.<sup>23</sup>

25. Introduction of the report does not prejudice the rights of the Accused, even if no cross-examination takes place. The [REDACTED] is still in the Prosecution's possession and the process may be duplicated and verified by Defence experts, if necessary. The Defence will be able to cross-examine other witnesses on the content of the data. It also does not prevent the Defence from introducing evidence or calling witnesses to challenge this evidence.
26. Other Chambers have allowed the introduction of technical reports - through rule 68(2)(b).<sup>24</sup>

#### **P-0736**

27. P-0736 is a [REDACTED] expert with the Netherlands Forensic Institute ("NFI").<sup>25</sup> The Prosecution seeks to introduce P-0736's report on the examination of [REDACTED], and the associated letter of instruction.<sup>26</sup> The report documents technical processes employed in the further extraction of data, especially encrypted message content, from [REDACTED], and does not go to the Accused's acts and conduct.
28. P-0736 prior recorded testimony should be allowed to be introduced under sub-rule (b). The report is *prima facie* probative and reliable. The steps of the process are carefully described and documented, the report is signed, certified to be true and complete, dated, and authored by P-0736, who possesses the required

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<sup>23</sup> KEN-OTP-0160-0045 at 0054.

<sup>24</sup> *Al Hassan*: ICC-01/12-01/18-1402-Red2, paras.21-23

<sup>25</sup> KEN-OTP-0160-0244 at 0244.

<sup>26</sup> Listed in Annex E. The Prosecution note that it has not annexed the extracted data to the report in Annex E as it is extremely voluminous, and is not necessary to understand the report. The data extracted by the NFI has been disclosed to the Defence.

credentials to perform this technical process and is registered as a court expert in digital forensics.<sup>27</sup>

29. The report relates to background information, as it merely describes the data extraction process. The report is also largely duplicative of the similar report of P-0734 and P-0735, although different extraction processes were employed and additional data retrieved. As noted, the Prosecution is not yet aware if the Defence intends to dispute the extraction process employed. P-0736 does not comment on the extracted data or provide expert opinions.
30. Introduction of the report does not prejudice the rights of the Accused, even if no cross-examination takes place. The report is merely technical, and its scope and nature is limited to the extraction of data from [REDACTED]. The Defence will be able to question witnesses about the data, to introduce its own evidence or call witnesses to challenge this evidence.

#### **P-0737**

31. P-0737 is a NFI expert<sup>28</sup> [REDACTED].<sup>29</sup> The Prosecution seeks to introduce his forensic report and annexes, documenting the technical process of enhancement of audio recordings [REDACTED] relating to witnesses P-0397 and P-0536.<sup>30</sup> The report does not go to the Accused acts and conduct.
32. The Chamber should allow the introduction of P-0737's prior recorded testimony under rule 68(2)(b). The report is *prima facie* probative and reliable. The steps of the process are carefully described and documented. The report is signed, dated, and authored by P-0737 who possesses the required credentials to perform this technical process.<sup>31</sup>

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<sup>27</sup> KEN-OTP-0160-0244 at 0249.

<sup>28</sup> KEN-OTP-0160-0228.

<sup>29</sup> KEN-OTP-0160-0221 at 0221.

<sup>30</sup> Listed in Annex F.

<sup>31</sup> KEN-OTP-0160-0228.

33. The report relates to background information, as it only describes to the technical process of enhancement and does not provide expert opinions. The Prosecution is not yet aware if, the technical enhancement of audio files is materially in dispute in this case. P-0737 does not comment on the content of [REDACTED], which are not sought to be introduced through him, but through the witnesses who took part in [REDACTED].
34. Introduction of the report does not prejudice the rights of the Accused, even if no cross-examination takes place. The report is merely technical, and its scope and nature is limited to the enhancement of the audio files. It does not prevent the Defence to introduce evidence or call witnesses to challenge this evidence. In any event, the Defence will be able to cross-examine other witnesses on the content of [REDACTED].

#### IV. CONCLUSION AND RELIEF SOUGHT

35. For the above reasons, the Prosecution requests that the Single Judge conditionally considers the rule 68(2)(b) documents submitted, subject to the fulfilment of rules 68(2)(b)(ii) and (iii); and designate the Registry Legal Counsel or any appropriate person delegated by him to witness the required declarations.



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**James Stewart, Deputy Prosecutor**

Dated this 27<sup>th</sup> day of October 2021  
At The Hague, The Netherlands