

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

*Original: English*

*No.: ICC-01/09-01/20*

**Date: 22 November 2021**

**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**

**Response to Prosecution application for the introduction of prior recorded testimony of  
Witness P-0397 pursuant to Rule 68(2)(c), and alternatively, 68(2)(d)**

**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**

Mr. James Stewart

Mr. Anton Steynberg

**Counsel for the Defence**

Mr. Michael G. Karnavas

Ms. Suzana Tomanović

**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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**Registrar**

Mr. Peter Lewis

**Counsel Support Section****Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations  
Section****Other**

Mr. Paul Gicheru, through his Counsel (“the Defence”), hereby responds to the Prosecution application for the introduction of prior recorded testimony of Witness P-0397 pursuant to Rule 68(2)(c), and alternatively, 68(2)(d).<sup>1</sup>

1. The Defence acknowledges P-0397’s unavailability.
2. Rule 68(2)(c) unambiguously allows the Trial Chamber to consider the prior recorded testimony of a witness who is unavailable if it has sufficient indicia of reliability.
3. The weight to be accorded to this evidence is to be determined at the end of the trial once the Trial Chamber has all admitted evidence before it.<sup>2</sup>
4. P-0397’s unavailability not being an issue, there is no rational or compelling reason to admit P-0731’s six solemn declarations under Rule 68(2)(b).<sup>3</sup>
5. The OTP’s alternative application under Rule 68(2)(d) is moot.
6. Considering its Decision on the OTP’s Requests to Admit Prior Recorded Testimony under Rule 68(3), the Trial Chamber should refrain from ruling on the admissibility of any audio-recordings of conversations and their transcriptions until it rules on the Defence’s submissions against the admission of this evidence.<sup>4</sup>

Respectfully submitted, 22 November 2021,

In The Hague, the Netherlands.




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**Michael G. Karnavas**  
**Counsel for Mr. Paul Gicheru**

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<sup>1</sup> *Prosecutor v. Gicheru*, [ICC-01/09-01/20-193](#), Prosecution application for the introduction of prior recorded testimony of Witness P-0397 pursuant to rule 68(2)(c), and alternatively 68(2)(d), 22 October 2021.

<sup>2</sup> *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, para. 145.

<sup>3</sup> *See Prosecutor v. Gicheru*, [ICC-01/09-01/20-198](#), Prosecution’s request for introduction of prior recorded testimony of Witnesses P-731, P-732, P-0733, P-0734, P-735, P-0736 and P-0737 pursuant to rule 68(2)(b), 22 October 2021, para. 13. The OTP admits in its Rule 68 application for P-0731 that statements in his solemn declarations are “unverified” and “do[] not relate directly to the present charges,” and thus the OTP “does not oppose the relevant portion being excluded.”

<sup>4</sup> *Prosecutor v. Gicheru*, [ICC-01/09-01/20-223](#), Decision on the Prosecution’s Request to Admit Prior Recorded Testimony under Rule 68(3), 16 November 2021, para. 27.