

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/09-01/20**
Date: **26 November 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 redacted

**Decision on the Prosecution's Request to Admit Prior Recorded Testimony
under Rule 68(2)(c)**

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

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TRIAL CHAMBER III of the International Criminal Court, in the case of *The Prosecutor v. Paul Gicheru*, having regard to Articles 64, 67 & 69 of the Rome Statute (the ‘Statute’) and Rule 68 of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Prosecution’s Request to Admit Prior Recorded Testimony under Rule 68(2)(c)’.

I. PROCEDURAL HISTORY

1. On 10 September 2021, the Office of the Prosecutor (the ‘Prosecution’) informed the Chamber that it intended to seek the introduction of prior recorded testimony of P-0397 pursuant to Rule 68(2)(c) of the Rules.¹
2. On 30 September 2021, the Chamber imposed a deadline for the Prosecution to make all Rule 68 related requests by 22 October 2021.²
3. On 22 October 2021, the Prosecution submitted a request under Rule 68(2)(c)³ of the Rules (the ‘Request’).⁴ The Request pertains to a written statement and a transcript of interview (including English translations) conducted by the Prosecution with P-0397, as well as 15 items of ‘Associated Material’, which the Prosecution requests introduction of pursuant to Rule 68(2)(c) of the Rules. In addition, the Prosecution makes reference to 15 items of additional material necessary to understand P-0397’s prior recorded testimony that the Prosecution does not seek to introduce as evidence.⁵
4. On 29 October 2021, the Chamber granted an extension of time for the Defence to respond to the Request.⁶
5. On 22 November 2021, the Defence responded to the Request (the ‘Response’).⁷

¹ Prosecution’s submissions on issues for the First Status Conference, 10 September 2021, ICC-01/09-01/20-171-Conf, paras 17-18. A public redacted version was filed on 14 September 2021 ([ICC-01/09-01/20-171-Red](#)).

² [Decision Setting the Commencement Date of the Trial and Related Deadlines](#), 30 September 2021, ICC-01/09-01/20-185.

³ Or Rule 68(2)(d) in the alternative.

⁴ 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, ICC-01/09-01/20-193-Conf (the ‘Request’) with confidential annex A, ICC-01/09-01/20-193-Conf-AnxA. A public redacted version of the Request was filed on 27 October 2021 ([ICC-01/09-01/20-193-Red](#)).

⁵ Request, Annex A.

⁶ [Decision on the Defence Request for Extension of Time to Respond to the Prosecution’s Five Rule 68 Requests](#), 29 October 2021, ICC-01/09-01/20-204.

⁷ [Response to Prosecution application for the introduction of prior recorded testimony of Witness P-0397 pursuant to Rule 68\(2\)\(c\), and alternatively, 68\(2\)\(d\)](#), 22 November 2021, ICC-01/09-01/20-229 (the ‘Response’).

II. APPLICABLE LAW

6. The Chamber notes that pursuant to Rule 68(2)(c) of the Rules, the prior recorded testimony of a witness may be introduced by the Chamber provided that: (1) the witness has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally; (2) the necessity of measures under Article 56 of the Statute could not be anticipated; and (3) the prior recorded testimony has sufficient indicia of reliability. The Chamber also notes the specific requirement of Rule 68(2)(c)(ii) which provides that where the prior recorded testimony goes to proof of acts and conduct of an accused, then this may be a factor against its introduction, or part of it.

7. The Chamber is of the view that the above requirements are to be assessed on a case-by-case basis and that the impact of any request on the fairness of the proceedings more generally should be considered.⁸

8. In addition, the Chamber is mindful of the wording of Rule 68(1) which reads that prior recorded testimony may be introduced pursuant to one of the sub rules of Rule 68 provided that it ‘would not be prejudicial to or inconsistent with the rights of the accused’. The Chamber also considers that Article 69 of the Statute is relevant in this context⁹ and, therefore, that the relevance and probative value of the prior recorded testimony vis-à-vis any prejudice that admission may cause to a fair trial or to a fair evaluation of the testimony of the witness should also be taken into consideration.¹⁰

III. ANALYSIS

9. In the Request, the Prosecution asks for permission to introduce a written statement and a transcript of interview (including English translations) conducted by the Prosecution with P-0397 under Rule 68(2)(c) of the Rules, as well 15 items of

⁸ Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [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, ICC-01/05-01/08-1386 OA5 OA6, para. 78 (*‘Bemba OA5 OA6 Judgment’*); Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, [Decision on Prosecution application under Rule 68\(2\)\(c\) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103](#), 20 November 2015, ICC-01/04-02/06-1029, (*‘Ntaganda Rule 68(2)(c) Decision’*), para. 14.

⁹ Specifically, Articles 69(2) and (4) of the Statute.

¹⁰ [Ntaganda Rule 68\(2\)\(c\) Decision](#), para. 15; See also Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Decision on Prosecution request for Admission of Prior Recorded Testimony](#), 19 August 2015, ICC-01/09-01/11-1938-Red-Corr, paras 65 and 150.

‘Associated Material’ which the Prosecution also seeks to introduce under this provision, which includes audio recordings and corresponding transcripts of [REDACTED]. In addition, the Prosecution makes reference to 15 items of additional material ‘necessary to understand [P-0397’s] prior recorded testimony that the Prosecution does not seek to introduce as evidence’.¹¹

10. The Chamber notes the Prosecution’s submissions to the effect that P-0397’s prior recorded testimony in respect of the post-election violence was previously admitted under Rule 68(2)(c) by Trial Chamber V(A) in the *Ruto and Sang* case for the truth of its contents.¹² However, as also expressed by Pre-Trial Chamber A,¹³ whilst the Chamber takes note of this decision it will not simply follow the findings contained therein. Rather, the Chamber will conduct an independent assessment, and all conclusions reached will be based on the Chamber’s own evaluation of the evidence and submissions before it.

11. At the outset, the Chamber notes, with some concern, the lack of clarity of the Defence’s response despite initially requesting a month extension. The Chamber observes that the Defence has largely not made substantive submissions in respect of the specific requirements of Rule 68(2)(c) and it is unclear to the Chamber whether the Defence is content to have P-0397’s prior recorded testimony submitted into evidence or not given the lack of relief sought. In any event, the Chamber will proceed to analyse whether the requirements of Rule 68(2)(c) are met with respect to P-0397’s prior recorded testimony.¹⁴

¹¹ Request, Annex A, p. 5.

¹² Request, para. 9.

¹³ Decision on the confirmation of charges against Paul Gicheru, 15 July 2021, ICC-01/09-01/20-153-Conf, para. 29. A public redacted version was notified on 15 July 2021 ([ICC-01/09-01/20-153-Red](#)).

¹⁴ See, [Bemba OA5 OA6 Judgment](#), paras 2-3, 53-57, 59-60.

1. *Whether P-0397 is unavailable to testify orally*

12. The Prosecution submits that P-0397 [REDACTED].¹⁵ Specifically, the Prosecution avers that it has [REDACTED].¹⁶ The Chamber notes the Prosecution's submissions that [REDACTED].¹⁷

13. The Defence in its response 'acknowledges P-0397's unavailability.'¹⁸

14. [REDACTED]. That being said, the Chamber is satisfied that the witness is unavailable to testify orally due to obstacles that cannot be overcome with reasonable diligence. The Chamber bases this finding on the fact that all attempts by the Prosecution to locate P-0397 to date have failed and [REDACTED].

2. *Whether the necessity of measures under Article 56 of the Statute could have been anticipated*

15. The Prosecution submits in support of this limb that [REDACTED].¹⁹ The Defence makes no submissions in this regard.

16. The Chamber considers that this requirement is to avoid introducing evidence through Rule 68(2)(c) when Article 56 measures would have been a viable alternative at an earlier stage.²⁰

17. As to whether the necessity of Article 56 measures could have been anticipated in the present case, the Chamber notes that P-0397 had only recently resumed cooperation with the Prosecution and [REDACTED]. Bearing in mind this context, the Chamber finds that [REDACTED] and the Prosecution could not have reasonably anticipated whether measures under Article 56 of the Statute would have been necessary at the time.

¹⁵ Request, para. 10.

¹⁶ Request, para. 10.

¹⁷ See Request, para. 12.

¹⁸ Response, para. 1.

¹⁹ Request, para. 15.

²⁰ See Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Decision on 'Prosecution Submission of Evidence Pursuant to Rule 68\(2\)\(c\) of the Rules of Procedure and Evidence'](#), 12 November 2015, ICC-01/05-01/13-1481-Red, ('*Bemba et al* Rule 68(2)(c) Decision'), para. 19.

3. *Whether P-0397's prior recorded testimony have sufficient indicia of reliability*

18. The Prosecution submits that 'indicia of reliability is not a factor that is specifically required by rule 68(2)(c)', however, 'the Chamber is not obliged to consider factors beyond formal requirements.'²¹ In this regard, the Prosecution notes that 'P-0397's written statement complies with the requirements of rule 111(1)', his 'affidavit and associated material bear signatures, times and locations' and the 'article 55(2) questioning complies with the requirement of rule 112(1).'22

19. The Defence submits that '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.'²³

20. At the outset, the Chamber disagrees with the Prosecution's submission that 'indicia of reliability is not a factor specifically required by rule 68(2)(c)'. The duty to consider reliability is expressly provided by the plain wording of the final limb of Rule 68(2)(c)(i). In any event, the Chamber considers that the assessment of reliability is preliminary at this stage of the proceedings.²⁴ The Chamber recalls the jurisprudence of the Appeals Chamber which provides that, in their assessment of indicia of reliability, 'Trial Chambers are not obliged to consider factors beyond formal requirements' but 'are not precluded from looking beyond formal requirements if they consider it to be appropriate in a particular case.'²⁵ In the present instance, for the purposes of determining whether the introduction of P-0397's prior recorded testimony would unduly prejudice the Defence, the Chamber finds it necessary to consider both formal requirements of reliability, as well as to have regard to aspects of the internal reliability of the prior recorded testimony sought to be introduced.

²¹ Request, para. 16.

²² Request, para. 17.

²³ Response, para. 2.

²⁴ See [Bemba et al Rule 68\(2\)\(c\) Decision](#), para. 20; see further Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, 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, ICC-02/11-01/15-744 OA 8, ('Gbagbo OA 8 Judgment') paras 3, 72, 104.

²⁵ [Gbagbo OA 8 Judgment](#), para. 104.

21. First, as to issues of formal reliability, in respect of the witness statement sought to be introduced,²⁶ the Chamber notes that the statement has been signed by the witness, the Prosecution investigator, the Prosecution trial lawyer and certified by the interpreter and initialled by all of them on every page.²⁷ The statement also records the dates, times and locations and those individuals present during questioning.²⁸

22. Similarly, in respect of the interview transcripts, the Chamber notes that the requirements of Rule 112(1) of the Rules have been complied with in that the questioning was audio recorded, fully transcribed and translated. Further, P-0397 appears to have understood his rights during questioning, was assisted at all times by an interpreter, answered voluntarily and understood the questions asked of him.²⁹ Last, P-0397 appears to have understood that his interview could be used in evidence.³⁰

23. As to the internal reliability of P-0397's prior recorded testimony itself, the Chamber finds that his prior recorded testimony bears sufficient indicia of reliability for the purposes of introduction under Rule 68(2)(c). In support of this finding the Chamber notes the Prosecution's contentions that P-0397's prior recorded testimony is 'highly probative, internally consistent, and displays a detailed first hand narrative of the corrupt influence just a few months after the facts'.³¹ In addition, without prejudice to any final ruling the Chamber may reach (see below), the Chamber further has regard to the Prosecution's submissions that P-0397's 'assertions are corroborated by [REDACTED]'.³² Last, the Chamber also notes the reference to P-0397's bank statements and 'the expected evidence of other witnesses' in this regard.³³

4. Whether any prejudicial effect outweighs the probative value of P-0397's prior recorded testimony

24. Turning to the potential prejudicial effect of P-0397's prior recorded testimony. The Prosecution makes specific submissions in respect of the considerations required

²⁶ KEN-OTP-0074-0264-R01.

²⁷ See KEN-OTP-0074-0264.

²⁸ KEN-OTP-0074-0264.

²⁹ See KEN-OTP-0159-1262, lines 435-554.

³⁰ KEN-OTP-0159-1264, lines 509-511.

³¹ Request, para. 18.

³² Request, para. 18.

³³ Request, para. 18.

by Rule 68(2)(c)(ii), notably where the prior recorded testimony goes to proof of acts and conduct of an accused then this ‘may be a factor against its introduction, or part of it’. The Prosecution submits that Rule 68(2)(c)(ii) does ‘not prohibit the introduction of prior testimony which goes to the acts and conduct of an accused, but rather indicates that it is merely “a factor”.’³⁴ In this regard, the Prosecution submits that this factor ‘should bear little weight’ in the Chamber’s decision ‘due to [REDACTED]’.³⁵

25. Furthermore, the Prosecution submits that the fact that the prior recorded testimony ‘has not been subjected in cross examination is a factor that can be taken into account by the Chamber when assessing the weight to be attached to this evidence’. However, that aside, in the Prosecution’s view, P-0397’s prior recorded testimony should be ‘afforded full weight’.³⁶

26. Last, the Prosecution notes that the introduction of P-0397’s prior recorded testimony would not be prejudicial to the rights of the Accused because the Defence will be able to ‘cross-examine other witnesses on their expected evidence about the *modus operandi* of the members of the common [plan]’ and ‘be able to bring evidence to rebut P-0397’.³⁷

27. The Defence makes no submissions with respect to prejudice to the Accused or probative value of P-0397’s prior recorded testimony, but notes that ‘[t]he 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’.³⁸

28. The Chamber notes at the outset that Rule 68(2)(c)(ii) does not prevent the introduction of material which goes to the acts and conduct of the accused *per se*, but rather may be a factor against its introduction, or part of it.

³⁴ Request, para. 19.

³⁵ Request, para. 20.

³⁶ Request, para. 21.

³⁷ Request, para. 23.

³⁸ Response, para. 3.

29. The Chamber recalls that there are instances where other chambers of the Court have admitted prior recorded testimony which goes to the acts and conduct of the accused, which also relate to ‘live and important issues in the case’.³⁹

30. Having fully considered the content of P-0397’s prior recorded testimony, and the lack of objection by the Defence, the Chamber is of the view that P-0397’s prior recorded testimony, with the exception of Items 10-15 of P-0397’s Associated Material⁴⁰ (see below), can be introduced into evidence at this stage. However, the Chamber stresses that it will only determine what weight, if any, to attribute to this evidence as part of the eventual deliberation of its judgment. In this regard, the Chamber is fully cognisant of the Appeals Chamber’s ruling, which is reflected in established human rights law,⁴¹ that to protect an accused’s rights under Article 67(1)(e) of the Statute, ‘prior recorded testimony must not form the sole or decisive basis for the conviction for a particular crime as such’.⁴²

5. P-0397’s Associated Material that the Prosecution seeks to introduce under Rule 68(2)(c)

31. As noted above, the Chamber observes that the Prosecution seeks to introduce audio recordings and corresponding transcripts and translations as ‘Associated Material’ pursuant to Rule 68(2)(c) of the Rules. These audio recordings comprise [REDACTED].⁴³ The Defence submits that ‘[c]onsidering its Decision on the [Prosecution’s] Requests to Admit Prior Recorded Testimony under Rule 68(3), the

³⁹ See Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Decision on the introduction into evidence of P-0125’s prior recorded testimony pursuant to Rule 68\(2\)\(c\) of the Rules](#), 14 April 2021, ICC-01/12-01/18-1413, para. 21; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, [Decision on Prosecution application under Rule 68\(2\)\(c\) for admission of prior recorded testimony of Witness P-0016](#), 24 February 2017, ICC-01/04-02/06-1802-Red, paras 26-31; *Ntaganda Rule 68(2)(c) Decision*, paras 37-38.

⁴⁰ KEN-OTP-0124-0018; KEN-OTP-0143-0173; KEN-OTP-0143-0185; KEN-OTP-0124-0019; KEN-OTP-0125-0045; and KEN-OTP-0125-0248.

⁴¹ European Court of Human Rights, *Al-Khawaja & Tahery v. The United Kingdom*, [Grand Chamber Judgment](#), 15 December 2011, Application Nos 26766/05, 22228/06, paras 119, 128; European Court of Human Rights, *Lucà v. Italy*, [Judgment](#), 27 February 2001, Application No. 33354/96, para. 40; European Court of Human Rights, *Sadak & Others v. Turkey (No.1)*, [Judgment](#), 17 July 2001, Application Nos 29900/96, 29901/96, 29902/96 and 29903/96, para. 65.

⁴² Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, [Public redacted version of Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’](#), 30 March 2021, ICC-01/04-02/06-2666-Red, paras 16, 630.

⁴³ Request, Annex A, Items 10-15 of P-0397’s Associated Material.

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.⁴⁴

32. The Chamber notes that the recordings sought to be submitted in respect of P-0397 fall into a similar category as those sought to be submitted in respect of P-0613, P-0800 and P-0536.⁴⁵ The Chamber recalls its Decision in respect of the Prosecution's Rule 68(3) requests ('Rule 68(3) Decision') wherein it considered that the ambiguity about the status of similar recordings was a matter that needed to be resolved as soon as possible and instructed the Parties to make submissions accordingly.⁴⁶ In this regard, the Chamber defers ruling on the admissibility of the aforementioned audio recordings and highlights that the Parties should also address their status in their forthcoming submissions, as set out in the Rule 68(3) Decision.

⁴⁴ Response, para. 6.

⁴⁵ See Prosecution application under rule 68(3) to introduce the prior recorded testimony and associated material of Witnesses P-0613, P-0800 and P-0536, 22 October 2021, ICC-01/09-01/20-197-Conf, paras 26, 39, 49. A public redacted version was notified on 27 November 2021 ([ICC-01/09-01/20-197-Red](#))

⁴⁶ [Decision on the Prosecution's Request to Admit Prior Recorded Testimony under Rule 68\(3\)](#), 16 November 2021, ICC-01/09-01/20-223, para. 27.

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the Request, with the exception of Items 10-15 of P-0397's Associated Material in Annex A;

Done in both English and French, the English version being authoritative.

A handwritten signature in blue ink, appearing to read 'Msamba', is written above a horizontal line.

Judge Miatta Maria Samba

Dated 26 November 2021

At The Hague, The Netherlands