

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/09-01/20**
Date: **14 December 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)(d)**

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 Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
for Participation/Reparations**

**The Office of Public Counsel
for Victims**

**The Office of Public Counsel
for the Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

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 Rules 68 & 165 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)(d)’.

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 the prior recorded testimony of P-0495 pursuant to Rule 68(2)(d) 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)(d) of the Rules (the ‘Request’). The Request pertains to a transcript of an interview conducted by the Prosecution with P-0495, as well as 10 items of ‘Associated Material’, which the Prosecution requests introduction of pursuant to Rule 68(2)(d) of the Rules.³
4. On 29 October 2021, the Chamber granted an extension of time for the Defence to respond to the Request.⁴
5. On 22 November 2021, the Defence responded to the Request (the ‘Response’).⁵

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 Prosecution’s request for the introduction of prior recorded testimony of Witness P-0495 pursuant to rule 68(2)(d), 22 October 2021, ICC-01/09-01/20-196-Conf (the ‘Request’) with confidential annex A, ICC-01/09-01/20-196-Conf-AnxA. A public redacted version of the Request was filed on 27 October 2021 ([ICC-01/09-01/20-196-Red](#)).

⁴ [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.

⁵ Response to Prosecution’s request for the introduction of the prior recorded testimony of Witness P-0495 pursuant to Rule 68(2)(d), 22 November 2021, ICC-01/09-01/20-230-Conf (the ‘Response’). A public redacted version was filed on 24 November 2021 ([ICC-01/09-01/20-230-Red](#)).

6. On 2 December 2021, the Prosecution filed an addendum to its Request (the ‘Addendum’).⁶

7. On 10 December 2021, the Defence responded to the Addendum (the ‘Addendum Response’).⁷

8. On 10 December 2021, the Prosecution filed the ‘supplementary request under regulation 35 to add updated transcriptions and translations to its List of Evidence and to amend [the Request]’ (the ‘Supplementary Request’).⁸ On 14 December 2021, the Chamber granted the Supplementary Request.⁹

II. APPLICABLE LAW

9. The Chamber notes that pursuant to Rule 68(2)(d) of the Rules, the prior recorded testimony of a witness may be introduced by the Chamber provided that: (1) the person has failed to attend as a witness, or having attended, has failed to give evidence with respect to a material aspect included in his or her prior recorded testimony; (2) the failure of the person to attend or to give evidence has been materially influenced by improper interference, including threats, intimidation or coercion; (3) reasonable efforts have been made to secure the attendance of the person as a witness or, if in attendance, to secure from the witness all facts known to the witness; (4) the interests of justice are best served by the prior recorded testimony being introduced; and (5) the prior recorded testimony has sufficient indicia of reliability. The Chamber also notes the specific requirement of Rule 68(2)(d)(iv) which provides that the fact that the prior recorded testimony goes to proof of acts and conduct of the accused may be a factor against its introduction, or part of it.

⁶ Addendum to the ‘Prosecution’s request for the introduction of the prior recorded testimony of Witness P-0495 pursuant to rule 68(2)(d)’ (ICC-1/09-01/20-196-Conf), dated 22 October 2021, 2 December 2021, ICC-01/09-01/20-237 (the ‘Addendum’) with confidential annexes A-D. A public redacted version of the Addendum was filed on 3 December 2021 ([ICC-01/09-01/20-237-Red](#)).

⁷ Response to “Addendum to the ‘Prosecution’s request for the introduction of the prior recorded testimony of Witness P-0495 pursuant to rule 68(2)(d)’ (ICC-01/09-01/20-1960Conf), dated 22 October 2021”, 10 December 2021, ICC-01/09-01/20-243-Conf. A public redacted version was notified on 13 December 2021 (ICC-01/09-01/20-234-Red).

⁸ Prosecution’s supplementary request under regulation 35 to add updated transcriptions and translations to its List of Evidence and to amend its rule 68(2)(d) request related to Witness P-0495, 10 December 2021, ICC-01/09-01/20-244.

⁹ Decision on the Prosecution’s Supplementary Request under Regulation 35 to add Updated Transcripts and Translations, 14 December 2021, ICC-01/09-01/20-246.

10. The Chamber further incorporates, by reference, the applicable law set out in paragraphs 7 and 8 of its previous decision on the introduction of prior recorded testimony under Rule 68(2)(c),¹⁰ which it finds applies *mutatis mutandis* to its assessment of requests pursuant to Rule 68(2)(d) of the Rules.

III. ANALYSIS

11. At the outset, the Chamber expresses concern about the late filing of the Addendum. As a general rule, the Chamber expects that when applications are filed that they contain all the relevant information necessary for the responding party to adequately respond and for the Chamber to properly rule.¹¹ The Chamber will not accept the filing of addendums to applications and the filing party should not be submitting applications speculatively which are incomplete.

12. However, in the present instance, the Chamber is conscious of the fact that the Prosecution has had difficulties contacting P-0495,¹² albeit it was still trying to locate the witness at the time of filing the Request,¹³ and that there were uncertainties surrounding P-0495's cooperation.¹⁴ The Chamber appreciates that these difficulties largely cannot be attributed to the Prosecution itself. Accordingly, the Chamber will, on this occasion, exceptionally have regard to the Addendum, and the Addendum Response, in its consideration of the Request.

1. Applicability of Rule 68(2)(d) to Article 70 proceedings

13. Before turning to its consideration of the requirements of Rule 68(2)(d), the Chamber will first address the Defence's argument regarding the applicability of Rule 68(2)(d) to Article 70 proceedings. The Defence submits in the Response that 'Rule

¹⁰ Decision on the Prosecution's request to Admit Prior Recorded Testimony under Rule 68(2)(c), 26 November 2021, ICC-01/09-01/20-235-Conf. A public redacted version was filed simultaneously ([ICC-01/09-01/20-235-Red](#)).

¹¹ See Regulation 23(1)(a) of the Regulations of the Court; Trial Chamber IV, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, [Decision on the 'Requête aux fins d'être autorisés à soumettre un Addendum'](#), 6 March 2012, ICC-02/05-03/09-304, para. 5. See also Transcript of hearing, ICC-01/09-01/20-T-048-CONF-ENG, p. 3, lines 8-10.

¹² Request, paras 12, 21.

¹³ Request, para. 31.

¹⁴ Request, para. 26.

68(2)(d) was not designed for use in Article 70 proceedings’,¹⁵ making reference to Rule 92 *quinquies* of the Rules of Procedure and Evidence from the International Criminal Tribunal for the Former Yugoslavia and Rule 68(2)(d) of the Rules’ drafting history from the Working Group on Lessons Learnt.¹⁶ Similarly, the Defence also argues that to admit the prior recorded testimony of P-0495 would ‘impermissibly amount to a prejudgment’ as this witness is ‘alleged to have been influenced by Mr. Gicheru’.¹⁷

14. The Chamber is unconvinced by the Defence’s submissions to the effect that Rule 68(2)(d) does not apply to Article 70 proceedings. Nothing in the plain wording of the provision lends itself to such an interpretation. Indeed, the Chamber notes that Rule 165(2) of the Rules, which explicitly declares certain provisions of the Statute and Rules inapplicable to Article 70 proceedings, does not mention Rule 68(2)(d).

15. Furthermore, in respect of the Defence’s submissions that to admit the prior recorded testimony of P-0495 would ‘amount to a prejudgment’,¹⁸ the Chamber notes that the applicability of Rule 68(2)(d) does not require that interference is attributed to the accused person.¹⁹ Rather, the Chamber only needs to be satisfied that the witness’s failure to attend or to give evidence with respect to a material aspect is due to interference. In this regard, whether or not that interference can be attributed to the Accused is secondary for the purposes of determining whether this particular requirement of Rule 68(2)(d) is satisfied. In the Chamber’s view, attribution to the accused person is more relevant for the purposes of determining whether the introduction of such prior recorded testimony is prejudicial or inconsistent with the rights of the accused.

16. Accordingly, for the reasons set out above, the Chamber rejects the Defence’s submissions in this respect and will proceed to determine whether the requirements of Rule 68(2)(d) of the Rules are satisfied in respect of P-0495’s prior recorded testimony.

¹⁵ Response, para. 12.

¹⁶ Response, para. 13.

¹⁷ Response, para. 14.

¹⁸ Response, para. 14.

¹⁹ See Study Group on Governance (Cluster I: Expediting the Criminal Process), Working Group on Lessons Learnt, [Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence \(Prior Recorded Testimony\)](#), 31 October 2013, ICC-ASP/12/37/Add.1, (‘WGLL Rule 68 Report’) Annex II.A, p. 28, para. 34.

2. *Whether P-0495 has failed to attend as a witness, or having attended, has failed to give evidence with respect to a material aspect included in his prior recorded testimony*

i. Recent developments in respect of P-0495

17. In its consideration of this limb of Rule 68(2)(d), the Chamber finds it necessary to first recount the recent developments in respect of P-0495.

18. In the Request, the Prosecution submits that since giving testimony in the *Ruto and Sang* case in 2014, it was unable to locate and contact P-0495,²⁰ but that it was still seeking the '[REDACTED]' and would 'update the Chamber at a later date should the situation change'.²¹ In the Addendum the Prosecution notes that, following the filing of the Request, P-0495 're-contacted the Prosecution on [REDACTED]', upon which it 'arranged to meet P-0495 at the earliest opportunity to establish his willingness to cooperate with the Court, including by testifying voluntarily at trial, and to obtain updated information concerning [REDACTED]'.²²

19. On [REDACTED], the Prosecution met with P-0495 and conducted a further interview with him under Article 55(2) of the Statute.²³ During the course of that interview, P-0495 largely maintained the evidence he provided during his testimony in the *Ruto and Sang* case.²⁴ When asked whether he would be willing to testify in the present proceedings, his counsel responded that it would be 'unlikely'.²⁵ [REDACTED]²⁶ [REDACTED].²⁷

ii. Analysis of the first limb of Rule 68(2)(d) of the Rules

20. Turning to the requirements of the first limb of Rule 68(2)(d), Rule 68(2)(d)(i) provides that the Chamber must be satisfied that the person has failed to attend as a

²⁰ Request, para. 12.

²¹ Request, para. 31.

²² Addendum, para. 3.

²³ Addendum, para. 4.

²⁴ Addendum, para. 4; KEN-OTP-0160-1092-R01, at 1104, line 397, *see also* 1102-1104, lines 339-403.

²⁵ Addendum, para. 4; KEN-OTP-0160-1106, at 1108, line 38.

²⁶ [REDACTED].

²⁷ [REDACTED].

witness or, having attended, has failed to give evidence with respect to a material aspect included in his or her prior recorded testimony. The Chamber notes that in order to fulfil this requirement it must be satisfied that the calling party has undertaken all reasonable efforts in order to secure the witness's attendance, as reflected in the third limb of Rule 68(2)(d), which provides, in relevant part, that 'reasonable efforts have been made to secure the attendance of the person as a witness'. In this sense, the Chamber finds that the first and third limbs of Rule 68(2)(d) are interconnected.²⁸

21. In determining what constitutes 'reasonable efforts' to secure the attendance of a witness, the Chamber notes the drafting history of Rule 68(2)(d) where it was highlighted that 'reasonable efforts' must be 'exhausted'.²⁹ In this regard, the Chamber finds that, in principle, 'reasonable efforts' includes, *inter alia*, requesting a summons for the witness's attendance.

22. In making this determination, the Chamber recalls Article 69(2) of the Statute which provides that the testimony of a witness 'shall be given in person'. The Chamber notes that this encompasses the general principle of orality, whereby there is a preference for witnesses to appear in person at trial. This, in turn, is in line with the accused's right to examine the witnesses testifying against him or her.³⁰ In this vein, the Chamber emphasises that the measures in Rule 68 comprise a deviation from the principle of orality and that recourse to this provision requires a cautious and stringent assessment.³¹ Accordingly, in conjunction with its observations above, the Chamber is of the view that resort to Rule 68(2)(d) of the Rules is largely a measure of last resort, where the witness has either failed to attend following all reasonable efforts to obtain his or her attendance, or, attended but failed to give evidence with respect to a material aspect of his or her prior recorded testimony.

23. In the present instance, the Prosecution submits that P-0495 is 'unlikely to agree to testify, but that even if he did, he would not provide evidence on material facts'.³²

²⁸ See [WGLL Rule 68 Report](#), p. 28, para. 35.

²⁹ [WGLL Rule 68 Report](#), p. 28, para. 35.

³⁰ Article 67(1)(e) of the Statute.

³¹ See Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Decision on second Prosecution request for the introduction of P-0113's evidence pursuant to Rule 68\(2\)\(b\) of the Rules](#), 15 November 2021, ICC-01/12-01/18-1924, ('*Al Hassan* Rule 68 Decision') para. 18.

³² Addendum, para. 5.

Further, the Prosecution acknowledges that ‘[a]lthough it is possible that his appearance before the Court could be secured by means of summons, even if he were to testify it is clear that he would again fail to give evidence with respect to material facts.’³³ The Chamber observes that the Prosecution also relies on P-0495’s recantation in the *Ruto and Sang* case as evidence that he has failed (or would fail) to give evidence with respect to a material aspect included in his or her prior recorded testimony.³⁴

24. The Defence in the Response submits the Prosecution has ‘not [made] all reasonable efforts to secure P-0495’s attendance’ and that it has presented ‘no compelling or rational reason why it could not request Trial Chamber III to request the Government of Kenya to locate and serve a summons to secure P-0495’s attendance’.³⁵ Similarly, in the Addendum Response, the Defence makes further reference to the fact that ‘the [Prosecution] offers no justification for bypassing the requirement in Rule 68(2)(d)(i) that P-0495 [has] “*failed to attend as a witness*” or “*failed to give evidence*” in the *Gicheru* trial.’³⁶

25. At the outset, the Chamber is of the view that the fact that a witness has failed to attend or failed to give evidence with respect to a material aspect of his or her prior recorded testimony in another case does not, in turn, mean that he or she will fail to attend or give evidence with respect to a material aspect of his or her evidence in *all* cases. The Chamber finds that, for the purpose of introducing prior recorded testimony in the present proceedings, the Prosecution must satisfy the Chamber that P-0495 has failed to attend as a witness in this case and cannot necessarily rely on any failure to attend or failure to give evidence in another case.

26. In respect of whether P-0495 has failed to attend in the present case, the Chamber finds that the Prosecution has not used all reasonable efforts at its disposal to obtain P-0495’s attendance, this includes requesting a summons for his attendance. The wording of the first limb of Rule 68(2)(d) is clear: the witness must have failed to attend or having attended, failed to give evidence with respect to a material aspect included in his or her prior recorded testimony. Any anticipated failure to attend in this case is

³³ Addendum, para. 6.

³⁴ Request, paras 27-29; Addendum, paras 5-7, 9.

³⁵ Response, para. 16.

³⁶ Addendum Response, para. 5.

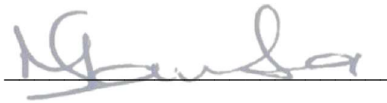
speculative and largely due to the Prosecution not wishing to seek a summons for P-0495's attendance because he would, according to the Prosecution, likely be hostile to the Prosecution.³⁷

27. The Chamber agrees with the Defence that the Prosecution cannot unilaterally choose to bypass the requirements of Rule 68(2)(d) in this way. In other words, the Prosecution cannot seek to rely on Rule 68(2)(d) to avoid calling P-0495.³⁸ As already detailed above, in the Chamber's view recourse to Rule 68(2)(d) of the Rules is a measure of last resort. The Prosecution must, therefore, use all reasonable measures available to it to try and obtain P-0495's attendance before seeking recourse to Rule 68(2)(d). It has not done so in the present proceedings, despite expressly acknowledging that requesting a summons is available to it.³⁹ Accordingly, the Chamber finds that the Prosecution has not satisfied the first limb of Rule 68(2)(d) of the Rules.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request.

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



Judge Miatta Maria Samba

Dated 14 December 2021

At The Hague, The Netherlands

³⁷ See Addendum, paras 5-6, 9.

³⁸ See further, [Al Hassan Rule 68 Decision](#), para. 9.

³⁹ See Addendum, para. 6.