

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: **ICC-01/09-01/20**  
Date: **15 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**

**Public redaction version of Decision on the Prosecution's Request to Admit Prior  
Recorded Testimony under Rule 68(2)(b)**

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**

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**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, and 74 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)(b).

## **I. PROCEDURAL HISTORY**

1. On 10 September 2021, the Office of the Prosecutor (the ‘Prosecution’) informed the Chamber that it was contemplating the calling of ‘up to three Prosecution investigators’, an analyst, and ‘two or three’ expert witnesses to testify in the trial against Mr Gicheru.<sup>1</sup>
2. On 30 September 2021, the Chamber imposed a deadline for the Prosecution to make all Rule 68 related requests by 22 October 2021.<sup>2</sup>
3. On 22 October 2021, the Prosecution submitted its request for the introduction of the prior recorded testimony 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 (the ‘Request’).<sup>3</sup>
4. On 22 November 2021, the Defence responded to the Request (the ‘Response’).<sup>4</sup>

## **II. ANALYSIS**

### **A. Applicable Law**

5. The Chamber notes that pursuant to Rule 68(2)(b) of the Rules, the prior recorded testimony of a witness that goes to proof of a matter other than the acts and conduct of the accused may be introduced by the Chamber provided that the introduction is not prejudicial to or inconsistent with the rights of the accused. Furthermore, the witness

<sup>1</sup> [Prosecution’s submissions on issues for the First Status Conference](#), 10 September 2021, ICC-01/09-01/20-171-Conf, para. 11. A public redacted version was filed on 14 September 2021.

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

<sup>3</sup> [Prosecution’s request for the introduction of the prior recorded testimony of Witnesses P-731, P-732, P-733, P-734, P-735, P-736 and P-737 pursuant to Rule 68\(2\)\(b\) of the Rules](#), ICC-01/09-01/20-198-Conf, ) with confidential annexes A-H. A public redacted version of the Request was filed on 27 October 2021.

<sup>4</sup> [Response to Prosecution’s request for the introduction of the prior recorded testimony of Witnesses P-0731, P-0732, P-0733, P-0734, P-0735, P-0736 and P-0737 pursuant to Rule 68\(2\)\(b\)](#), ICC-01/11-01/20-231-Conf. A public-redacted version was filed on 24 November 2021.

must sign a declaration attesting to the truth of their statement, which must be certified by a person authorised to witness such a declaration, as detailed in Rule 68(2)(b)(ii) and (iii) of the Rules. Finally, in exercising its discretion, the Chamber must consider at least whether the prior recorded testimony relates to issues that are not materially in dispute, is cumulative or corroborative in nature, relates to background information, has sufficient indicia of reliability and whether the interests of justice are best served by its introduction. It should be noted that the introduction of prior recorded testimony pursuant to Rule 68(2)(b) of the Rules is without prejudice to the Chamber's eventual evaluation of the evidentiary weight to be accorded to such testimony.<sup>5</sup>

6. It should also be stressed that the Chamber's authorisation is provisional and conditional upon the provision of the declarations and attestations required by Rule 68(2)(b)(ii) and (iii) of the Rules.

## **B. Analysis**

### *1. P-0731 and Associated Material*

7. According to the Prosecution, P-0731's statements are relevant only in relation to P-0397's disappearance. In fact, the Prosecution expressly indicated that it does not intend to rely on the part of P-0731's statements that implicates Mr Gicheru.<sup>6</sup>

8. Since the Defence has acknowledged P-0397's unavailability,<sup>7</sup> the Chamber sees no benefit in introducing P-0731's prior recorded testimony at this stage, especially in light of the fact that P-0397's evidence has already been introduced by the Chamber.<sup>8</sup> The Chamber will therefore not consider whether the conditions of Rule 68(2)(b) of the Rules have been met.

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<sup>5</sup> Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohammed Ag Mahmoud*, [Public redacted version of Decision on the introduction of P-0598's evidence pursuant to Rule 68\(2\)\(b\) of the Rules](#), 16 October 2020, ICC-01/12-01/18-1111-Red; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, [Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68\(2\)\(b\) of the Rules](#), 18 November 2016, ICC-02/04-01/15-596-Red; Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Decision on Prosecution Rule 68\(2\) and \(3\) Requests](#), 12 November 2015, ICC-01/05-01/13-1478-Red-Corr.

<sup>6</sup> Request, para. 13.

<sup>7</sup> [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, para. 1. *See further*, para. 4.

<sup>8</sup> [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-Red.

## 2. *P-0732*

9. P-0732's prior recorded testimony is very short and limited to explaining how two Prosecution investigators approached P-0495 in a public location, asked him for an interview, and outlined his rights as a suspect under the Statute.<sup>9</sup> The statement further purports to explain that the investigators were trying to record their exchange with P-0495 but found out later that their recording device had failed. According to the Prosecution, P-0732's prior recorded testimony is relevant to its request to introduce P-0495's prior recorded testimony.<sup>10</sup>

10. The Defence argues that the Chamber should reject the introduction of P-0732's prior recorded testimony because it does not contain sufficient information and because P-0732 would not be a trustworthy witness.<sup>11</sup>

11. As the Chamber has rejected the Prosecution's application pursuant to Rule 68(2)(d) of the Rules to introduce P-0495's prior recorded testimony,<sup>12</sup> the Chamber sees no benefit in introducing P-0732's prior recorded testimony at this stage. The Chamber will therefore not consider whether the conditions of Rule 68(2)(b) of the Rules have been met.

## 3. *P-0733 and Associated Material*

12. P-0733 is a Prosecution analyst who analysed [REDACTED] information that was retrieved from [REDACTED]. In particular, the witness analysed whether any of the [REDACTED] belong to individuals who allegedly play a role in the present case. P-0733's report lists [REDACTED] which are said to belong to 'persons associated with the Kenya investigations'.<sup>13</sup> The report suggests that the fact that there were [REDACTED]<sup>14</sup> However, as P-0733 acknowledges in the report, it has not been established if and when Mr Gicheru actually communicated with any of these individuals. In fact, the report notes that [REDACTED] it appears that Mr Gicheru did

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<sup>9</sup> KEN-OTP-0145-569.

<sup>10</sup> Request, para. 16.

<sup>11</sup> Response, paras 4-5.

<sup>12</sup> Decision on the Prosecution's Request to Admit Prior Recorded Testimony under Rule 68(2)(d), 14 December 2021 ICC-01/09-01/20-247.

<sup>13</sup> KEN-OTP-0160-0699 at 0700-701.

<sup>14</sup> KEN-OTP-0160-0699 at 0700.

not communicate [REDACTED] with any of the listed persons in the period between August 2020 and November 2020.<sup>15</sup>

13. The Defence objects to the introduction of P-0733's report on the ground that it would be prejudicial to Mr Gicheru because the Prosecution 'effectively asks the Trial Chamber to speculate and assume that, since Mr Gicheru [REDACTED] he must have been in contact with them during the period relevant to the charges.'<sup>16</sup> Moreover, the Defence argues that if P-0733 does not appear to be cross-examined, the Chamber's ability to determine the truth would be 'circumscribed'.<sup>17</sup>

14. The Chamber does not agree with the Defence's characterisation of P-0733's report as inviting assumptions about who Mr Gicheru has been in contact with. As noted, the report specifically states that P-0733 did not find any evidence of actual contact between Mr Gicheru and any of the persons who are mentioned in the report. The Chamber is also cognisant of the fact that [REDACTED] postdates the period relevant for the charges by several years. Bearing in mind these important caveats, the Chamber rejects the Defence's blunt and unreasoned assertion that its ability to ascertain the truth would be circumscribed if P-0733 does not testify in person.

15. On the contrary, the only value of the report lies in that it identifies other evidence in the Prosecution's database mentioning the same [REDACTED]. P-0733 does not purport to vouch for, or otherwise proffer an opinion on, the trustworthiness of these other sources. In fact, the narrative content of P-0733's report is limited to giving a brief description of how P-0733 compared several datasets. Unlike the reports of P-0734 and P-0735, P-0736, and P-0737, it provides no significant technical or methodological information. Indeed, P-0733 does not appear to have applied any specialised technical expertise in executing the evidence review. In this sense, P-0733's report is indistinguishable from the countless internal documents and memoranda that are habitually prepared in the context of legal proceedings by lawyers and analysts working for the parties in preparation of a case. This is borne out by the introductory paragraph, which states that P-0733 prepared the report 'to identify information relevant to the case at this time, to support the disclosure process'.<sup>18</sup> The Chamber also observes that the

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<sup>15</sup> KEN-OTP-0160-0699 at 0702.

<sup>16</sup> Response, para. 8.

<sup>17</sup> Response, para. 9.

<sup>18</sup> KEN-OTP-0160-0699.

report is not signed and contains no commitment by the author to the truth of its content. Accordingly, considering that P-0733's report does not provide any new information that is relevant to the case or to authenticate other evidence but merely describes what seems to be a highly routine work process in which no specific scientific or technical methods were applied, it is more appropriately categorised as internal work product in the sense of Rule 81(1) of the Rules and the Chamber does not consider it qualifies as prior recorded testimony for the purposes of Rule 68 of the Rules.<sup>19</sup> It can therefore not be introduced into the case record via this provision.

16. Nevertheless, since the Chamber cannot discern any prejudice the Defence might suffer as a result of the submission of P-0733's report,<sup>20</sup> including its annex,<sup>21</sup> it will be considered as formally submitted.

#### 4. *P-0734, P-0735 and Associated Material*

17. The Prosecution seeks to introduce a report<sup>22</sup> by two members of the Prosecution's Forensic Science Section Cyber Unit concerning the [REDACTED] as well as the [REDACTED] data as associated material.<sup>23</sup> The report does not contain any substantive information or analysis that is relevant to this case.

18. Despite not calling into question the [REDACTED] process, the Defence argues that the report and the [REDACTED] data 'do not sufficiently provide all the necessary information to assist the Trial Chamber.'<sup>24</sup> The Defence therefore wants to cross-examine at least one of the witnesses.

19. The Defence implies that certain information would be missing but makes no effort to identify what this missing information might pertain to. It is also entirely unclear why the Defence would need to confront these witnesses, seeing that it does not

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<sup>19</sup> Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Corrigendum of Public Redacted version of Decision on Prosecution Rule 68\(2\) and \(3\) Requests](#), 11 November 2015, ICC-01/05-01/13-1478-Conf, para. 33; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Decision on the Prosecutor's Bar Table Motions](#), ICC-01/04-01/07-2635, para. 49.

<sup>20</sup> KEN-OTP-0160-0699.

<sup>21</sup> KEN-OTP-0160-0695.

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

<sup>23</sup> The extracted data are contained in two excel sheets [REDACTED] (KEN-OTP-0160-0042) and [REDACTED] (KEN-OTP-0160-0043).

<sup>24</sup> Response, para. 11.

challenge the [REDACTED]. The Chamber further notes that the report does not relate to issues that are materially in dispute. In fact, the purpose of its introduction appears limited to authenticating the [REDACTED], the authenticity of which is not contested.<sup>25</sup> Accordingly, the Chamber deems that there would be little to gain from calling P-0734 or P-0735 and the Chamber cannot discern any prejudice the Defence might conceivably suffer from not being able to cross-examine these witnesses.

20. The Chamber further observes that it is unusual for a single document to be presented as the prior recorded testimony of more than one individual. As the Appeals Chamber has pointed out, this may lead to complications in terms of ascertaining whether all the events and details described in a joint statement truly reflect the observations and recollections of all the individual signatories and whether they would give an identical account if questioned individually.<sup>26</sup> This, in turn, may lead to questions about who is responsible for the content of the joint statement and to what extent authors may have exerted influence on one another in the process of formulating their collective testimony. Therefore, it would ordinarily not be appropriate to consider a document drafted by several authors as testimony in the strict sense of the term as it is used in Rule 68 of the Rules.

21. The Chamber considers, however, that when a report merely describes the process or methodology applied by several individuals jointly conducting a purely technical investigation and reporting the outcome of such investigation, it may be permissible to view such report as the joint testimony of all the named authors of the report. The same may hold true for reports that express the shared opinion of more than one expert.

22. In this instance, since P-0734 and P-0735's report is a purely technical account describing the collaborative effort by the two witnesses to [REDACTED],<sup>27</sup> it may be introduced in both their names via Rule 68(2)(b) of the Rules. The implication is that both witnesses have to make a separate declaration pursuant to Rule 68(2)(b)(ii) of the Rules and that they are both individually responsible under Article 70 of the Statute for

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<sup>25</sup> Response, para. 11.

<sup>26</sup> Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute"](#), 8 March 2018, ICC-01/05-01/13-2275-Red, para. 306.

<sup>27</sup> KEN-OTP-0160-0045 at 0054.



the accuracy and reliability of the entire content of the report and the associated material.

#### 5. *P-0736 and Associated Material*

23. P-0736 is an expert from the Netherlands Forensic Institute who [REDACTED]. The Prosecution asserts that P-0736's report<sup>28</sup> is 'largely duplicative' of P-0734 and P-0735's report. The report only describes the technical process by which [REDACTED].

24. The Defence objects to the introduction of P-0736's report on the grounds that, if P-0734 and P-0735's report were to be admitted, it would be 'utterly unnecessary' to introduce another expert report that would be cumulative.<sup>29</sup>

25. As the Chamber has decided to allow the introduction of P-0734 and P-0735's report and seeing that the Defence raises no substantive objection against P-0736's report, the Chamber also allows the introduction of the latter.

#### 6. *P-0737 and Associated Material*

26. P-0737's report explains the measures taken by the witness to enhance the audio quality of a number of recordings of [REDACTED]. As the Prosecution points out, P-0737's report does not provide any information about or comment on the content of these recordings.

27. The Defence objects to the introduction of P-0737's report because it is claimed to be 'incomprehensible to anyone without a degree in audio engineering'.<sup>30</sup> According to the Defence, P-0737 should therefore be called to explain orally the enhancement process and its results.

28. While the Chamber recognises that P-0737's report contains some information that is highly technical, it considers that it sufficiently explains which steps the expert took to enhance the audio quality. The report also provides a general warning that 'the modification of the audio can also have unwanted side effects', which can result in

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<sup>28</sup> KEN-OTP-0160-0244.

<sup>29</sup> Response, para. 13.

<sup>30</sup> Response, para. 15.

misperceptions.<sup>31</sup> The Chamber considers that the report itself provides adequate information about the enhancement process. Since the Defence does not indicate any intention of challenging the quality of P-0737's work or methodology, which would presumably require the involvement of a Defence expert, the Chamber sees no need for calling P-0737. It notes, in this regard, that P-0737's report does not contain any information that is materially in dispute and the Chamber cannot identify any prejudice the Defence would suffer from its introduction pursuant to Rule 68(2)(b) of the Rules. Indeed, the only purpose of introducing P-0737's report is to confirm the authenticity and relative reliability of the enhanced recordings. The Chamber notes, in this regard, that its decision to allow the introduction of P-0737's report is without prejudice to the question of the admissibility of the recordings.

#### *7. Declaration and certification*

29. In paragraph 5 of the Request, the Prosecution asks the Chamber to appoint the Registry Legal Counsel or any appropriate person delegated by him as the person authorised to witness the declarations pursuant to Rule 68(2)(b)(iii) of the Rules. The Prosecution also proposes two templates for the declaration and certification.<sup>32</sup>

30. The Defence did not make submissions on this point.

31. The Chamber approves the Prosecution's suggestion to authorise the Senior Legal Adviser of the Registry Legal Office to witness the declarations or to delegate this responsibility to a qualified person who will act under his responsibility.

32. The Chamber emphasises the need for the certifying officer to ensure that the relevant witness understands that by signing the Rule 68(2)(b)(ii) declaration, he or she essentially makes a solemn declaration about the truth of his or her prior recorded testimony. This implies that the prior recorded testimony may not withhold any relevant information. Indeed, the witness would be responsible under Article 70(1)(a) of the Statute even if he or she did not give false testimony but intentionally provided a partially incomplete account.<sup>33</sup> The Rule 68(2)(b)(ii) declaration should therefore

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<sup>31</sup> KEN-OTP-0160-0221 at 0225.

<sup>32</sup> Request, Annexes G and H.

<sup>33</sup> Trial Chamber VII, *The Prosecutor v. Bemba et al.*, [Judgment pursuant to Article 74 of the Statute](#), 16 October 2016, ICC-01/05-01/13-1989-Red, para. 21.

include an affirmation by the witness that they understand that withholding true information and providing incomplete testimony is an offence against the administration of justice and that their prior recorded testimony is complete in this sense.

33. The Chamber is mindful of the fact that Rule 68(2)(b)(ii) of the Rules does not allow the addition of new information. Accordingly, if the witness expresses the wish to make substantial changes to their prior recorded testimony, then the Chamber's authorisation to introduce the testimony pursuant to Rule 68(2)(b) of the Rules automatically lapses. In such a case, the prior recorded testimony may still be introduced pursuant to Rule 68(3) of the Rules.

34. However, if a witness wishes to make minor corrections that do not change the substance of their testimony, this must be clearly reflected in the witness' declaration, attested to by the certifying officer, and brought to the Chamber's attention. The Chamber will then review the amendments and may decide to rescind its provisional authorisation to introduce the testimony pursuant to Rule 68(2)(b) of the Rules.

35. In light of the above, the Chamber declines to formally approve the templates provided by the Prosecution and leaves it to the certifying officer to draw up the appropriate declaration and certification documents.

**FOR THESE REASONS, THE CHAMBER HEREBY**

**PARTIALLY GRANTS** the Request and allows the introduction of the prior recorded testimony and associated materials of P-0734 and P-0735, P-0736, and P-0737;

**REJECTS** the remainder of the Request;

**DECLARES** that P-0733's report and associated material are formally submitted; and

**DESIGNATES** the Senior Legal Adviser of the Registry Legal Office, or any appropriate person delegated by him, to be the person authorised to witness declarations made pursuant to Rule 68(2)(b)(iii) of the Rules for the purposes of this case.

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



**Judge Miatta Maria Samba**

Dated 15 December 2021

At The Hague, The Netherlands