

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/09-01/20
Date: 24 February 2022

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 Annex A**

Public redacted version of “Prosecution’s urgent application under rule 68(3) and regulation 35 for variation of time limits related to the introduction of the prior recorded testimony of Witness P-0341”, ICC-01/09-01/20-290-Conf, 20 February 2022

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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I. INTRODUCTION

1. The Office of the Prosecutor¹ requests submission of the prior recorded testimony and associated material of Witness P-0341, in accordance with rule 68(3) of the Rules of Procedure and Evidence,² Regulation 35(2) of the Regulations of the Court, and the “Directions on the conduct of the proceedings”.³
2. The alleged corrupt influence of P-0341 by the Accused and other members of the common plan form the basis for count 7 as set out in the Document Containing the Charges.⁴ P-0341 is scheduled to commence his testimony on 21 February 2022.⁵
3. Despite the Prosecution’s best efforts to estimate accurately the duration of P-0341’s examination in chief,⁶ based on the volume and nature of his anticipated evidence, it became apparent during the preparation sessions that he may require considerably more time to provide his testimony in court, for reasons explained below. The preparation session itself had to be extended.
4. [REDACTED].⁷ [REDACTED].
5. For all these reasons and in order to avoid further delaying the proceedings and ensure greater efficiency and expeditiousness, the Prosecution requests that P-0341’s prior statements and associated documentation be introduced under rule 68(3). The witness is ready to appear before the Trial Chamber⁸. P-0341 indicated he would have no objection to these items being submitted as evidence into the record of the case.

¹ “Prosecution” or “OTP”.

² “the Rules”.

³ ICC-01/09-01/20-189, para. 30-31.

⁴ ICC-01/09-01/20-125.

⁵ ICC-01/09-01/20-171-Conf, para. 11(ii).

⁶ ICC-01/09-01/20-171-Conf, para. 13 (table), p. 7.

⁷ [REDACTED].

⁸ “Chamber”.

6. The Prosecution requests that this application be granted in variation of the time limit set in the Chamber's "Directions on the conduct of the proceedings" as the reasons for filing this application at this time are outside of the Prosecution's control and only came to the Prosecution's attention after the expiry of the time limit to file R68 requests.⁹
7. Specifically, the Prosecution seeks to introduce P-0341's Prior Recorded Testimony, comprising of: i) his rule 111 and rule 112 recorded statements to the OTP ("Prior Statements") and ii) documents and other physical items referred or discussed in the Prior Statements ("Associated Materials").¹⁰ Note that the witness made clarifications to his Prior Statements during the witness preparation session,¹¹ which will be confirmed during his *viva voce* testimony and subsequently submitted into evidence.
8. All these items, listed in Confidential Annex A¹² are relevant, probative and reliable. In court, witness P-0341 will be asked to confirm their truthfulness, accuracy, and his knowledge of them at the beginning of his testimony.
9. Should this Request be granted, the Prosecution further requests leave to conduct a limited direct examination, of no more than one and a half (1.5) hours focused to clarify certain discrete portions of P-0341's evidence and seeking to introduce three items.¹³
10. Granting this request would not unfairly prejudice the Defence, as the witness will be fully available for cross-examination and any inquiry by the Chamber itself.¹⁴

⁹ ICC-01/09-01/20-189, para. 30.

¹⁰ Annex A, Title II; all together "Prior Recorded Testimony".

¹¹ Recorded in line with the witness preparation protocol, ICC-01/09-01/20-189-AnxA. para, 32.

¹² Confidential Annex A. As modified during P-0341's preparation session

¹³ KEN-OTP-0152-0091; KEN-OTP-0038-0207; KEN-OTP-0155-4982. All three items were listed in the witness's List of Materials that was submitted on 16 February 2022 pursuant to para. 26 of the Chamber's "Directions on the conduct of the proceedings" (ICC-01/09-01/20-189).

¹⁴ ICC-01/09-01/20-189, para. 23.

II. CONFIDENTIALITY

11. This filing is classified as Confidential, with Confidential annexes, pursuant to regulation 23*bis*(2) of the Regulations of the Court because it contains confidential information that relates to Prosecution witnesses and to OTP investigative methods. A public redacted version will be filed within five days from today.¹⁵ It is urgent because it concerns the evidence of a witness whose testimony is due to commence on Monday 21 February 2021.

III. SUBMISSIONS

A. Regulation 35 (2) Request for variation of the time limit

12. The Prosecution requests this variation of the time limit set by the Chamber in its “Directions on the conduct of the proceedings”¹⁶ for applications under Rule 68(3) because it was unable to file this application for reasons outside its control. The need to re-evaluate the court time required for P-0341’s examination-in-chief and, as a consequence, the need to resort to Rule 68(3) in order to ensure the efficient and streamlined presentation of the evidence, became apparent only during the witness preparation which took place on 17-19 February 2022, after the expiry of the time limit set by the Chamber to file Rule 68 requests. The Prosecution thus submits that a variation of the deadline in these circumstances is justified.

B. Rule 68(3) Application

13. The Prosecution incorporate by reference its submission concerning rule 68(3)’s procedural framework and applicability made in its previous applications.¹⁷ In particular, the Prosecution notes that rule 68(3) does not preclude the

¹⁵ ICC-01/09-01/20-189, para. 46.

¹⁶ ICC-01/09-01/20-189, para. 30.

¹⁷ See, e.g. ICC-01/09-01/20-197, paras 8-17.

introduction of prior recorded testimonies even if they relate to issues materially in dispute, issues that are central to core matters in the case, or that are uncorroborated.¹⁸ Further, the mode is fully consistent with the Statute’s notional default, as interpreted by the Appeals Chamber, “that witnesses must appear before the Trial Chamber in person and give their evidence orally ... [which gives] effect to the principle of orality”¹⁹ and that of publicity.

14. As for the Associated Materials, the Court’s jurisprudence establishes that documents associated with prior testimony are “admissible so long as the witness uses or explains them in the prior recorded testimony, and particularly when these are necessary to read and understand the prior recorded testimony being introduced”.²⁰
15. There is no inherent limitation on the Chamber’s authority to “assess freely *all* evidence submitted to determine its relevance”,²¹ including under rule 68(3) – as distinguished from any other statutory mechanism for the admission of evidence, such as article 69, other sub-rules of rule 68(2), or through rule 69. This is, moreover, fully consonant with “the drafters of the Statute framework hav[ing] clearly and deliberately avoided proscribing certain categories or types of evidence, a step which would have limited – at the outset – the ability of the Chamber to assess evidence ‘freely’”.²²

C. The Prior Recorded Testimony fulfils all Requirements of Rule 68(3)

(i) P-0341’s Prior Statements are relevant

16. P-0341’s account establishes the facts underlying the charges of count 7. In his Prior Statements, he described how he was corruptly influenced, on or about just prior to 24 April 2013 to mid-April 2014, by GICHERU and others. He provided

¹⁸ ICC-02/11-01/15-744, paras. 2, 67, 69; *see also* ICC-02/04-01/15-621, paras. 6 and 7.

¹⁹ ICC-02/11-01/15-744, para. 65; *see also* ICC-01/14-01/18-685, para. 25.

²⁰ ICC-01/09-01/11-1938-Corr-Red2, para. 33; ICC-02/04-01/15-1288, paras. 9 and 10.

²¹ Rule 63(2) (emphasis added).

²² ICC-01/04-01/06-1399, para. 24; ICC-01/04-02/06-1770, para. 15.

details on how he was promised 5,000,000 KSh, a car, a farm, a plot of land, payment of his children's school fees and government jobs for his children. He further provided details of how he was actually paid bribes of at least 1,000,000 KSh and 2,000,000 KSh, and intimidated, to refuse to become a Prosecution witness, to cease attending ICC victims meetings and to sign an affidavits confirming his withdrawal from the ICC process.

17. Likewise, the Associated Materials are relevant to the central portions of P-0341's evidence. They are discussed or referred to in P-0341's Prior Statements.

(ii) The material is probative and reliable and its introduction does not prejudice the Accused

18. The Prior Statements consists of two rule 111 written statements, and one rule 112 audio-recorded interview and related transcripts that P-0341 provided in connection with the investigation into article 70 offences and with the proceedings in the *Ruto and Sang* case. The Associated Materials consist of the annexes to the statements and bank account documents, physical items and the photograph of the phones that P-0341 provided the investigators.

19. Chambers of this Court have repeatedly confirmed that written witness statements like those taken under rules 111 and 112 comprise "prior recorded testimony" under rule 68.²³ P-0341 signed and dated his written statements,²⁴ and the interpreter attested to its accuracy,²⁵ while his rule 112 audio-recorded interview consists of verbatim transcripts of the questioning.

20. P-0341's account is internally consistent and reliable. Further, it is corroborated by documentary evidence, such as bank account documents, in materials respects.

²³ ICC-01/04-01/06-1603; ICC-01/04-01/07-2289-Corr-Red; ICC-01/04-01/07-2362; ICC-01/05-01/08-2012-Red, paras. 134-136. See *also* ICC-01/05-01/08-1386, OA 5 OA 6, paras. 79-81.

²⁴ KEN-OTP-0159-0884, p. 68.

²⁵ Annex A, Title II.

21. P-0341 will appear before this Chamber as a witness to attest to the accuracy of his Prior Recorded Testimony and will be available for examination by the Parties and the Chamber. Accordingly, the introduction of his Prior Recorded Testimony is not prejudicial to or inconsistent with the rights of the Accused.
 - (iii) *The introduction of the material will contribute to more effective and expeditious proceedings*
22. P-0341's Prior Statements and Associated Material, including their annexes, comprise 16 items. To date, there is no agreement as to facts contained in the charges, documents, the expected testimony of witnesses, or other evidence pursuant to rule 69 which bear on the Prior Statements or Associated Materials.
23. The Prosecution estimates that, should this application be granted, it will require 1.5 hours to conduct its direct examination of the witness instead of at least 4.5 hours, as originally anticipated, but likely significantly longer²⁶ in light of the challenges encountered during P-0341's preparation session. This estimate takes into consideration the realistic pace of the proceedings, including the presentation of documentary evidence in court as facilitated by Court personnel, interpretation considerations, the use of the PIL and the limited supplementary examination described below.
24. The projected shortening of P-0341's direct examination is "considerable", and on balance the introduction of his Prior Statements and Associated Materials under rule 68(3) is appropriate. Moreover, there is no resulting prejudice. The Chamber's and the Parties' interests in advancing this confined case efficiently, good trial management, the expeditious conduct of the proceedings, and the fact that P-0341's prior recorded testimony is supported and corroborated by other

²⁶ The Prosecution's updated estimate, after the conclusion of the witness preparation session, is that it would require 9 hours for P-0341's examination-in-chief.

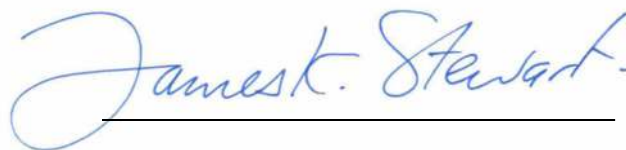
evidence to be tested at trial, warrants its formal submission in the fair exercise of the Chamber's broad discretion.

D. Request for supplemental examination

25. As foreshadowed above, the Prosecution requests to be permitted to conduct supplemental examination of P-0341. Although the Prior Statements are comprehensive, a limited and focused supplemental direct examination to clarify certain discrete portions of P-0341's testimony would be beneficial to the proper adjudication of the issues arising from the charges.
26. In addition, the Prosecution wishes to question P-0341 concerning three items of evidence that it will seek to introduce via P-0341's *viva voce* evidence.²⁷

IV. RELIEF SOUGHT

27. For the foregoing reasons, the Prosecution requests the Trial Chamber to allow the introduction of the Prior Recorded Testimony of Witness P-0341 and to consider it as formally submitted in the record of the case, subject to the fulfilment of the further conditions of rule 68(3). Should the Trial Chamber do so, Prosecution seeks leave to conduct a limited supplemental direct examination of this witness as indicated above.



James Stewart, Deputy Prosecutor

Dated this 24th day of February 2022
At The Hague, The Netherlands

²⁷ KEN-OTP-0152-0091; KEN-OTP-0038-0207; KEN-OTP-0155-4982. All three items were listed in the witness's List of Materials that was submitted on 16 February 2022 pursuant to para. 26 of the Chamber's "Directions on the conduct of the proceedings" (ICC-01/09-01/20-189).