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**International
Criminal
Court**

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No.: ICC-01/09-01/20
Date: 22 October 2021

TRIAL CHAMBER III

Before: Judge Miatta Maria Samba

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF *THE PROSECUTOR v. PAUL GICHERU*

**Confidential
with confidential Annex A**

**Prosecution application under rule 68(3) to introduce the prior recorded testimony
of Witness P-0730**

Source: Office of the Prosecutor

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Court to:

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

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I. INTRODUCTION

1. The Office of the Prosecutor¹ requests submission of the prior recorded testimony of Witness P-0730, in accordance with rule 68(3) of the Rules of Procedure and Evidence² and the “Directions on the conduct of the proceedings”.³
2. P-0730 is the OTP Investigations Team Leader who led the investigation into the article 70 offences arising from witness interference in the *Ruto and Sang* case. The Prosecutor intends to call this witness to testify *viva voce* at trial⁴ and considers him an appropriate witness for the procedure under rule 68(3).
3. Specifically, the Prosecution seeks to introduce as part of P-0730’s testimony: i) his written declaration (“Prior Statement”),⁵ and ii) a selected pool of 69 relevant items referred or discussed in the Prior Statement (“Associated Exhibits”).⁶
4. All these items, listed in Confidential Annex A,⁷ are relevant and Witness P-0730 will be asked to confirm their accuracy and his knowledge about them at the beginning of his testimony.
5. Should the Trial Chamber⁸ deem the Prior Statement formally submitted, the Prosecution further requests leave to conduct a limited direct examination, of no more than one and a half (1.5) hours, elaborating specific issues raised therein, and other discrete aspects of the investigation relevant to the case.
6. Granting this request would considerably enhance the expeditiousness of the proceedings by reducing the length of P-0730’s in-court direct examination from an estimated 4.5 hours⁹ to 1.5 hours.¹⁰ Moreover, it would not unfairly prejudice

¹ “Prosecution” or “OTP”.

² “Rules”.

³ ICC-01/09-01/20-189 (“Request”), para. 31. *See also*, ICC-02/11-01/15-744 OA 8, para. 69.

⁴ ICC-01/09-01/20-171-Conf, para. 11(ii).

⁵ Annex A, Title I.

⁶ Annex A, Title II.

⁷ Confidential Annex A lists: (i) P-0730’s Prior Statement being introduced (“Title I”); and (ii) the corresponding Associated Exhibits (“Title II”). All items in Annex A are hyperlinked to e-Court and available to the Defence and the Trial Chamber.

⁸ “Chamber”.

⁹ ICC-01/09-01/20-171-Conf, para. 13 (table), p. 7. Therein P-0730 is referred as “Investigator 1”.

¹⁰ *See infra*. paras. 25-28.

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the Defence, as the witness will be fully available for cross-examination and any inquiry by the Chamber itself.¹¹

II. CONFIDENTIALITY

7. 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.¹²

III. SUBMISSIONS

A. Applicable Law

(i) Procedural framework

8. Rule 68(3) of the Rules provides that the Chamber may allow the introduction of the prior recorded testimony of a witness who is present before the Chamber where the individual does not object, and the Parties and Chamber have the opportunity to examine the witness.¹³ This does not attenuate the main purpose of its introduction — namely, to expedite proceedings and avoid unnecessary litigation in Court¹⁴ — but rather complements it within this context.¹⁵
9. Notably, the presence of the witness for examination by the Parties and the Trial Chamber, and their adoption of the prior written evidence without objection are the only limiting conditions.¹⁶ Thus, rule 68(3) does not preclude the introduction of prior recorded testimony even if it relates to issues materially in dispute, issues

¹¹ ICC-01/09-01/20-189, para. 23.

¹² ICC-01/09-01/20-189, para. 46.

¹³ ICC-01/05-01/08-1386, para. 78. *See also* ICC-02/11-01/15-870, para. 7 ; ICC-01/04-02/06-1640-Red, para. 7; ICC-02/04-01/15-621, para. 6.

¹⁴ ICC-01/14-01/18-685, para. 26. *See also* ICC-02/11-01/15-870, para. 15; ICC-01/05-01/08-1386, para. 55; *see also* Report of the Working Group on Lessons Learnt, Annex II.A, Executive Summary, para. 8 at p. 21 (noting expressly that the rule was “intended to reduce the length of ICC proceeding and to streamline evidence presentation” and “reflects practice in international criminal tribunals”).

¹⁵ ICC-01/14-01/18-685, para. 26.

¹⁶ CC-02/11-01/15-744, para. 68.

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that are central to core matters in the case, or that are uncorroborated.¹⁷ 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"¹⁸ and that of publicity.

(ii) *Associated Exhibits*

10. 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".¹⁹

11. There is no inherent limitation on the Chamber's authority to "assess freely *all* evidence submitted to determine its relevance",²⁰ 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'".²¹

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

(i) *P-0730's Prior Statement is a prior recorded testimony under rule 68(3)*

12. The Prior Statement is a written document that P-0730 prepared in April 2015 at the end of the investigation he led into article 70 offences arising from witness interference in the *Ruto and Sang* case.²² Therein, P-0730 states his role and activities, describes the conduct of the investigation, and discusses the

¹⁷ ICC-02/11-01/15-744, paras. 2, 67, 69; *see also* ICC-02/04-01/15-621, paras. 6 and 7.

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

¹⁹ ICC-01/09-01/11-1938-Corr-Red2, para. 33; ICC-02/04-01/15-1288, paras. 9 and 10.

²⁰ Rule 63(2) (emphasis added).

²¹ ICC-01/04-01/06-1399, para. 24; ICC-01/04-02/06-1770, para. 15.

²² KEN-OTP-0159-0884. *See in particular*, paras. 3-4, and p. 68.

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- circumstances of collection of several documents, including the Associated Exhibits.
13. On 29 April 2015, the Prosecution annexed P-0730's written document to its application to admit the prior recorded testimony of six witnesses in the *Ruto and Sang* at case.²³ It did so at the direction of the Trial Chamber that had required that evidence and solemn declarations be filed by the parties in support of certain types of applications.²⁴ Such solemn declarations were to attest to "(a) the truth of any critical factual assertions, or (b) information (indicating its source) and belief of the truth of such critical assertion".²⁵ P-0730's written document fulfilled these criteria²⁶ and should be considered a "prior recorded testimony" as contemplated in rule 68(3).
14. While chambers of this Court have repeatedly extended "prior recorded testimony" under rule 68 to written witness statements like those taken under rules 111 and 112,²⁷ nothing in the law or jurisprudence explicitly prohibit that other documents, similar in nature and purpose to those written statements, be excluded from the application of rule 68(3). This conclusion is also supported by the drafting history of the amended rule 68, which considered "unduly restrictive to understand 'prior recorded testimony' in a narrower manner. Rule 68 may therefore apply to written statements taken by the parties or (inter)national authorities, provided that the requirements under one or more of the sub-rules are met".²⁸
15. Like records under rule 111, P-0730's Prior Statement is a formal statement made in connection with the investigation into article 70 offences and with the

²³ ICC-01/09-01/11-1866-Conf, para. 59, and ICC-01/09-01/11-1866-Conf-AnxC1.

²⁴ ICC-01/09-01/11-1312, para. 2.

²⁵ ICC-01/09-01/11-1312, para. 2.

²⁶ KEN-OTP-0159-0884, para. 2.

²⁷ 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.

²⁸ Study Group on Governance: Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties, 31 October 2013, ICC-ASP/12/37/Add.1, p. 22, para. 13.

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proceedings in the *Ruto and Sang* case.²⁹ P-0730 authored, signed and dated the Prior Statement,³⁰ and other OTP investigators attested to its accuracy.³¹ The OTP further collected this statement for judicial purposes in the context of criminal proceedings before this Court, and Trial Chamber V(A) scrutinized and implicitly accepted it as valid when granting the Prosecution's 29 April application.³²

(ii) *P-0730's Prior Statement is relevant*

16. As mentioned above, P-0730 was the OTP senior investigator who, from May 2013 to April 2015,³³ directed the OTP investigations into article 70 offences against the administration of justice in connection with the *Ruto and Sang* case. This investigation culminated in the Prosecution seeking a warrant of arrest for the Accused and another individuals under article 70(1)(c).³⁴

17. In light of his role and functions, P-0730 is uniquely placed to assist the Chamber in appreciating the circumstances that led to investigating this case and the conduct of the investigation itself, including its complexity and challenges. P-0730 detailed all these aspects in his Prior Statement.

18. More specifically, P-0730's Prior Statement establishes the following:

- a. Nature and background of the article 70 investigation;
- b. Investigative strategy, steps and activities taken during such investigation, including phone conversations recorded with the consent of one of the parties to the conversation at the request of Prosecution investigators;
- c. Nature of the evidence and data gathered, including the associated exhibits; and
- d. Results of analysis performed on such data.

²⁹ KEN-OTP-0159-0884, paras. 6.

³⁰ KEN-OTP-0159-0884, p. 68.

³¹ Annex A, Title II, items 59-69.

³² ICC-01/09-01/11-1938-Conf-Corr. While the Appeals Chamber overturned the Trial Chamber decision, it did so only on a matter of procedural law, *see* ICC-01/09-01/11-2024, paras. 74-96.

³³ KEN-OTP-0159-0884, para.15 and p. 68.

³⁴ ICC-01/09-144-US-Exp.

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19. Moreover, in his Prior Statement P-0730 discussed the Associated Exhibits, which may further assist the Chamber in determining whether to allow their introduction as per present request.

(iii) The Associated Exhibits are part of the Prior Recorded Testimony

20. The Prosecution seeks to introduce 69 relevant Associated Exhibits, as set out in Confidential Annex A. These exhibits are OTP internal documents, which comprise (i) reports drafted by OTP investigators accounting for investigative activities carried out in the context of the article 70 inquiries, such as interactions with witnesses and other individuals relevant to the investigation (“Investigator’s Reports”), (ii) e-mail communications containing information related to the individual security circumstances of witnesses (“E-mails”), (iii) other reports drafted by OTP staff about of contacts with witnesses (“Contact Reports”), and (iv) declarations by other OTP investigators attesting to the accuracy of P-0730’s Prior Statement (“Solemn Declarations”).

21. In his Prior Statement, P-0730 referred to or discussed the Associated Exhibits, explaining the circumstances of collection for some of them as well as their relevance to the investigation. P-0730 either supervised or requested the drafting, registration and analysis of these exhibits or was the recipient of them. As such, he is uniquely placed to attest their providence and accuracy and explain their relevance. Moreover, the Associated Exhibits are necessary to properly understand P-0730’s Prior Statement.

22. Finally, since P-0730 relies upon and discusses the Associated Exhibits in his Prior Statement they form an integral part of the testimony itself.³⁵

23. For the foregoing reasons, the introduction of the Associated Exhibits pursuant to rule 68(3) as part of P-0730’s prior recorded testimony would further be the most efficient and effective way to manage P-0730’s overall evidence.

³⁵ ICC-01/14-01/18-907-Conf, para. 13.

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(iv) P-0730 will be present before the Trial Chamber

24. As previously mentioned, P-0730 will be appearing before this Chamber as a witness, attest to the accuracy of his prior recorded testimony (i.e. Prior Statement and Associated Exhibits), and be available for examination by the Parties and the Chamber.

C. Balance of interests

25. P-0730's Prior Statement comprises 68 pages and there are 69 Associated Exhibits. To date, there are no agreements as to facts contained in the charges, documents, the expected testimony of witnesses, or other evidence pursuant to article 69 which bear on the Prior Statement or Associated Exhibits.

26. The Prosecution has carefully reviewed the estimate it had previously given for its examination of P-0730 – 4.5 hours.³⁶ The Prosecution considers that it can reduce this estimate by three hours, leaving the Prosecution with 1.5 hours to conduct its direct examination of the witness. This estimates takes into consideration the realistic pace of the proceedings, including the presentation of documentary evidence in court as facilitated by Court personnel, interpretation considerations, and accounts for the prospect of supplementary examination that may be necessary in light of emerging lines of defence.

27. The projected shortening of P-0730's direct examination by two thirds is "considerable", and on balance the introduction of his Prior Statement and Associated Exhibits 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-0730's prior recorded testimony is supported and corroborated

³⁶ Comprising direct and re-direct examination, see ICC-01/09-01/20-171-Conf, para. 13 (table), p. 7 ("Investigator 1").

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by other 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

28. As foreshadowed above, the Prosecution requests to be permitted to conduct supplemental examination of P-0730. Although the Prior Statement is comprehensive, a limited and focused supplemental direct examination to clarify certain discrete portions of P-0730's testimony would be beneficial to the proper adjudication of the issues arising from the charges.
29. The topics to be addressed orally will include use of one party consent recordings as an investigative tool, emerging lines of defence and identification and explanation of further documents produced in the ordinary course of the investigation.

IV. CONCLUSIONS AND RELIEF SOUGHT

30. For all the foregoing reasons, the Prosecution requests the Trial Chamber to allow the introduction of the prior recorded testimony of Witness P-0730 (Prior Statement and Associated Exhibits) and to consider it as formally submitted in the record of the case. 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 22nd day of October 2021
At The Hague, The Netherlands