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**International
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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**

Lesser redacted version of the "Prosecution's request for the introduction of the prior recorded testimony of Witness P-0495 pursuant to rule 68(2)(d)", ICC-01/09-01/20-196-Red, 27 October 2021

Source: Office of the Prosecutor

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I. INTRODUCTION

1. The Office of the Prosecutor¹ requests the submission of the prior recorded testimony of Witness P-0495 and associated material listed in Annex A (“P-0495’s prior testimony”), under rule 68(2)(d) of the Rules of Procedure and Evidence.²
2. There is sufficient evidence to satisfy Trial Chamber III³ that P-0495 was subjected to improper interference that has resulted in his unavailability to testify at trial in this case, despite the Prosecution’s reasonable efforts to secure his cooperation and attendance.
3. Moreover, the interests of justice are best served by P-0495’s prior testimony being introduced under rule 68(2)(d). Not doing so would reward an attempt to obstruct justice and deny the Chamber the ability to assess the whole of the evidence.
4. Finally, all of the items sought to be submitted as prior testimony bear sufficient indicia of reliability. Additionally, P-0495’s prior testimony is probative and corroborated by other evidence.

II. CONFIDENTIALITY

5. This filing and annex are classified as confidential because they contain confidential information relating to Prosecution witnesses. The Prosecution will file a public redacted version simultaneously, or in any event within five days.

III. SUBMISSIONS

Background Information

6. P-0495 was a Prosecution witness in the *Ruto and Sang* case⁴ who provided information about the 2008 post-election violence in Kenya and in particular about

¹ “OTP” or “Prosecution”.

² “Rules”.

³ “Chamber”.

⁴ ICC/01/09-01/11 (“*Ruto and Sang* case”).

the alleged criminal responsibility of William Samoei RUTO.⁵ His identity was disclosed to the Defence in that case on 13 March 2013.

7. During a meeting on 13 September 2013, P-0495 attempted to corruptly influence P-0613, another witness in that case. At the Prosecution's request, P-0613 audio-recorded that meeting.⁶
8. Immediately after this meeting, the Prosecution intercepted P-0495 and interviewed him pursuant to article 55(2) of the Rome Statute. P-0495 admitted to having been corruptly influenced himself in exchange for his withdrawal as an ICC witness, expressed remorse as well as [REDACTED].⁷ [REDACTED].
9. However, during the night of 13-14 September 2013, with no prior warning, the witness disappeared from his accommodation and failed to respond to all subsequent attempts by the Prosecution to reach him.⁸
10. P-0495 was summoned to testify in the *Ruto and Sang* case from 16 to 22 September 2014.⁹ Although he responded to the summons, he refused to meet with the Prosecution for the purpose of witness preparation.
11. From 16 to 22 September 2014, P-0495 appeared before the Court to give *viva voce* testimony remotely, from [REDACTED].¹⁰ He repudiated almost the entirety of the incriminating evidence he had originally provided in his statement to the Prosecution.¹¹

⁵ See **P-0495**, ICC-01/09-01/20-T-047-CONF-ENG; ICC-01/09-01/20-T-024-CONF-ENG; ICC-01/09-01/20-T-016-CONF-Red-ENG; ICC-01/09-01/20-T-017-CONF-ENG; ICC-01/09-01/20-T-025-CONF-ENG.

⁶ **P-0613**, KEN-OTP-0115-0216 at 0229-0232, paras. 66, 74-80; **P-0613/P-0495**, KEN-OTP-0129-0740; **P-0495**, KEN-OTP-0130-0462-R01; KEN-OTP-0130-0507-R01 at 0514-0536; KEN-OTP-0130-0540-R01 at 0541-0561; KEN-OTP-0130-0563-R01 at 0565; KEN-OTP-0130-0566-R01 at 0567-0584; KEN-OTP-0138-0649; KEN-OTP-0138-0652; KEN-OTP-0138-0663.

⁷ **P-0495**, KEN-OTP-0130-0540-R01 at 0549-0550; KEN-OTP-0130-0566-R01 at 0579-0580.

⁸ KEN-OTP-0159-0884 at 0925, paras. 164-165. See also KEN-OTP-0160-0685-R01 at 0685.

⁹ See ICC-01/09-01/11-1274-Corr2, p. 77; KEN-OTP-0159-0884 at 0926, para. 166.

¹⁰ ICC-01/09-01/20-T-047-CONF-ENG; ICC-01/09-01/20-T-024-CONF-ENG; ICC-01/09-01/20-T-016-CONF-Red-ENG; ICC-01/09-01/20-T-017-CONF-ENG; ICC-01/09-01/20-T-025-CONF-ENG.

¹¹ **P-0495**, ICC-01/09-01/20-T-016-CONF-Red-ENG, p. 13; ICC-01/09-01/20-T-024-CONF-ENG, p. 18, lns. 22-25.

12. Since then, all efforts employed by the Prosecution to locate and contact P-0495, [REDACTED], have failed.¹² As a result, the Prosecution is unable to secure his attendance as a witness in the *Gicheru* case.¹³ The Prosecution considers that P-0495's continued unavailability is the result of witness interference and thus seeks to introduce his evidence under rule 68(2)(d).
13. The Prosecution is still attempting to [REDACTED]contact [REDACTED] witnesses to secure their attendance at trial, but does not consider that all available avenues have been exhausted yet. Depending on the outcome, the Prosecution may file further rule 68(2)(d) applications for the introduction their prior recorded testimonies by 15 November 2021.

Relevance and description of P-0495's prior testimony

14. The Prosecution seeks to introduce P-0495's prior testimony for its truth, specifically the transcripts of P-0495's article 55(2) interview concerning issues of witness interference directly relevant to the charges in this case, as well as associated material listed in Annex A.
15. The associated material comprises a hand-written document entitled "Waiver of Rights" signed by P-0495 and an OTP representative, confirming that P-0495 waived his rights to remain silent, to legal assistance and to presence of counsel for the purpose his article 55(2) interview,¹⁴ as well as audio-files¹⁵ and associated transcripts and translations of recorded phone calls between P-0495 and P-0800, collected during the article 55(2) interview.

¹² KEN-OTP-0160-0685-R01 at 0685.

¹³ ICC-01/09-01/20 ("*Gicheru* case").

¹⁴ KEN-OTP-0114-0467.

¹⁵ The Forensic Science Section ("FSS") of the OTP is currently attempting to perform quality improvement of these audio-files in order to *inter alia* increase the intelligibility of the conversations. The Prosecution expects this activity to be completed by 22 February. Thereupon, should the quality of these audio-files be improved significantly, the Prosecution will request its languages services to provide a revised transcription and translation of the same audio-files and may seek to supplement its rule 68(2)(d) application in relation to Witness P-0495 with all these material.

16. The associated material further comprises photographs taken during the controlled meeting between P-0613 and P-0495 that directly preceded the article 55(2) interview and which were shown to P-0495 for comment during this interview.¹⁶

The requirement to introduce P-0495's prior testimony under Rule 68(2)(d) have been met

17. Rule 68(2)(d) governs the introduction of prior recorded testimony from a person who has been subjected to interference. Rule 68(2)(d)(i) sets out the specific requirements that must be met for prior recorded testimony to be introduced under this sub-rule, namely that (1) the person must have failed to attend as a witness, (2) as a result of improper interference, (3) despite reasonable efforts to secure his or her attendance as a witness. Moreover, (4) the interests of justice must be best served by the introduction of the prior recorded testimony and (5) the prior recorded testimony must have sufficient indicia of reliability.
18. In order to satisfy the Chamber that these requirements have been met, the relevant party must provide "evidence of sufficient specificity and probative value".¹⁷
19. *First*, as detailed below, the information available is sufficient to demonstrate that P-0495 was improperly interfered with prior to his in-court testimony in the *Ruto and Sang* case, and that this interference led him not only to recant his prior evidence about the Accused, but also to cut off all communication with the Prosecution, with the result that it is now unable to secure his attendance as a witness in the *Gicheru* case.
20. *Second*, the interests of justice are best served by P-0495's prior testimony being introduced and all of the items sought to be submitted bear sufficient indicia of reliability and are corroborated by other evidence.

¹⁶ **P-0495**, KEN-OTP-0130-0507-R01 at 0524. *See also* KEN-OTP-0159-0884 at 0924.

¹⁷ ICC-01/09-01/11-1938-Conf-Corr, Red-Corr, para. 37.

(i) *The Prosecution made all reasonable attempt to secure P-0495's attendance as a witness in this case*

21. Shortly after the proceedings in this case commenced further to the surrender of the Accused¹⁸ to the Court on 3 November 2020, the Prosecution attempted to contact P-0495. More specifically, the OTP tried [REDACTED]¹⁹ [REDACTED]. However, all these attempts were to no avail, leaving the Prosecution unable to reach P-0495 and secure his attendance as a witness in the *Gicheru* case.²⁰

(ii) *P-0495's failure to respond to the Prosecution's attempts to secure his attendance as a witness has been materially influenced by improper interference*

22. The Prosecution submits that P-0495's failure to respond to the Prosecution's attempts to secure his attendance as a witness in the present case has been materially influenced by improper interference by the Accused [REDACTED]. The Prosecution alleges that in August and September 2013, P-0495 accepted bribes by GICHERU [REDACTED], and in exchange he withdrew as a Prosecution witness in the *Ruto and Sang* case.²¹

23. More specifically, in August 2013, GICHERU [REDACTED] asked P-0800 to locate and bring P-0495 to them for the purpose of corruptly influencing him.²² As detailed in the Decision Confirming the Charges,²³ P-0495 agreed to an offer of 2,500,000 KSh in bribe money and agreed to locate other witnesses, including P-0613, for the same purpose.²⁴

¹⁸ "GICHERU" or "Accused".

¹⁹ KEN-OTP-0160-0685-R01 at 0685.

²⁰ *Ibid.* at 0686.

²¹ **P-0495**, ICC-01/09-01/20-T-016-CONF-Red-ENG, p. 13; ICC-01/09-01/20-T-024-CONF ENG, p. 18, lns. 22-25; KEN-OTP-0130-0540-R01 at 0541-0543; KEN-OTP-0135-0113 at 0121-0122, 0131, 0134; **P-0613/P-0495**, KEN-OTP-0129-0740 at 0744.

²² **P-0800**, KEN-OTP-0135-0113 at 0121-0122; **P-0495**, KEN-OTP-0130-0540-R01 at 0541-0542.

²³ ICC-01/09-01/20-153-Conf, para. 24.

²⁴ **P-0495**, KEN-OTP-0130-0540-R01 at 0542-0543; **P-0613**, KEN-OTP-0115-0216 at 0222, para. 30; **P-0613/P-0495**, KEN-OTP-0129-0740 at 0744, 0752.

24. He did so on 13 September 2013, when he met P-0613 to whom he confirmed to have accepted the bribery offer of 2,500,000 KSh, among others.²⁵ P-0613 had recorded the meeting.²⁶
25. P-0495 further confirmed the bribery when confronted by OTP investigators who interviewed him immediately after learning about the content of his meeting with P-0613.²⁷ During the article 55(2) interview that ensued, P-0495 also agreed to make a telephone call to P-0800 and record it. During the call P-0800 reassured P-0495 that “those people” would pay him the money promised,²⁸ and that there was a lot of pressure “from above”, which P-0495 interpreted as referring to pressure from GICHERU.²⁹
26. Notwithstanding P-0495’s cooperation with the OTP during the article 55(2) interview, the Prosecution submits that the corrupt influence he had been subject to led him to subsequently cease all cooperation with the OTP. In fact, the day after his article 55(2) interview, P-0495 deserted his accommodation without giving any warnings or reasonable explanations for doing so and cut all communications with the OTP,³⁰ to this date.
27. The Prosecution submits that P-0495’s subsequent refusal to appear in Court voluntarily³¹ and to meet with the Prosecution beforehand to prepare, his recanting all material evidence on the stand³² and his denying the bribery he had previously admitted to candidly,³³ are all indications that P-0495 had succumbed to the improper influence of GICHERU and his associates. It is also apparent from P-0495’s hostile demeanour when testifying in the *Ruto and Sang* case – that led to

²⁵ **P-0613/P-0495**, KEN-OTP-0129-0740 at 0744.

²⁶ **P-0613**, KEN-OTP-0115-0216 at 0230, para. 74.

²⁷ **P-0495**, KEN-OTP-0130-0540-R01 at 0542-0543, 0549-0550.

²⁸ **P-0800/P-0495**, KEN-OTP-0145-0587 at 0592.

²⁹ **P-0495**, KEN-OTP-0130-0585-R01 at 0590; **P-0800/P-0495**, KEN-OTP-0145-0594 at 0596.

³⁰ KEN-OTP-0159-0884 at 0925, paras. 164-165.

³¹ ICC-01/09-01/11-1274-Corr2.

³² **P-0495**, ICC-01/09-01/20-T-016-CONF-Red-ENG, p. 13; ICC-01/09-01/20-T-024-CONF -ENG, p. 18, lns. 22-25.

³³ **P-0495**, ICC-01/09-01/20-T-016-CONF-Red-ENG, p. 13, lns. 9-19, pp. 59-66; ICC-01/09-01/20-T-017-CONF-ENG, pp. 14-16.

Trial Chamber V(A) declaring him a hostile witness³⁴ – that he has no intention of cooperating with the Prosecution. Trial Chamber V(A) found that there was sufficient specific and probative evidence to conclude that this was due to improper interference and admitted P-0495's prior statement on the post-election violence under rule 68(2)(d).³⁵

28. Moreover, P-0800 confirmed that P-0495's recantation was the result of GICHERU's corrupt influence. In a phone call between 5 and 16 September 2014, shortly before taking the stand in the *Ruto and Sang* case, P-0495 told P-0800 that he was not concerned about testifying because "10 lawyers" led by GICHERU would tell him what to say,³⁶ and that their plan was for him to "blame everything" on P-0613 in his testimony and to claim that P-0613 had coached witnesses on what to say to OTP investigators.³⁷

29. Given that P-0495 cut all his communication with the OTP since he admitted to having been bribed and evaded all attempts by the Prosecution to contact him since,³⁸ the Prosecution submits that P-0495 remains unavailable to this date to attend and testify in this case for the same reasons that led him to recant his evidence in the *Ruto and Sang* case, i.e. having been improperly interfered with including by the Accused.

(iii) *All reasonable efforts were made to secure P-0495's attendance as a witness*

30. As previously mentioned, the Prosecution has made all reasonable efforts to secure P-0495's attendance as a witness in this case. Since the commencement of proceedings in this case in November 2020, the Prosecution has resumed attempts to contact P-0495 [REDACTED].³⁹ The Prosecution also tried to obtain his current location and contact details [REDACTED].⁴⁰

³⁴ **P-0495**, ICC-01/09-01/20-T-016-CONF-Red-ENG, p. 13.

³⁵ ICC-01/09-01/11-1938-Conf-Corr, Red-Corr, paras. 104-109.

³⁶ **P-0800**, KEN-OTP-0144-0272-R01 at 0283-0285.

³⁷ *Ibid.* at 0285.

³⁸ KEN-OTP-0160-0685-R01 at 0685.

³⁹ KEN-OTP-0160-0685-R01 at 0685.

⁴⁰ *Ibid.* at 0685.

31. The Prosecution considers that it has now exhausted all means at its disposal to contact the witness without exposing him to unreasonable risks. [REDACTED]. However, in light of the witness' consistent unavailability, the Prosecution deems it more efficient to submit the application to introduce his evidence by 22 October, and to update the Chamber at a later date should the situation change.⁴¹
- (iv) Interests of justice are best served by P-0495's prior testimony being introduced*
32. The interests of justice are best served by the introduction of P-0495's prior testimony — to do otherwise would reward efforts to obstruct justice and deny the Chamber the ability to assess the evidence in its totality, impeding its truth finding function and the proper administration of justice. Moreover, the introduction of P-0495's prior testimony does not cause undue prejudice to the Accused.
33. Though not a requirement, an accused's involvement in the improper interference is a "relevant consideration when deciding whether it is in the interests of justice to introduce prior recorded testimony under Rule 68(2)(d) of the Rules".⁴² In the present case, GICHERU's alleged involvement in corruptly influencing P-0495,⁴³ is an additional factor for the introduction of P-0495's prior testimony. This would serve the interests of justice by preventing the Accused from benefitting from crimes he allegedly committed. The very mission of the Court to end impunity would be placed in jeopardy if an accused could evade justice through improper interference with Prosecution witnesses. Denying the Prosecution's request to submit P-0495's prior testimony in these circumstances, would also send out the wrong message to likeminded persons and encourage them to adopt the same strategy.
34. Moreover, the interests of justice are best served if the Chamber has all of the relevant evidence available to determine the truth, as article 69(3) requires.⁴⁴ As long as P-0495 remains unavailable, the Chamber can only compensate for the loss

⁴¹ *Ibid.* at 0686.

⁴² ICC-01/09-01/11-1938-Conf-Corr, Red-Corr, para. 44.

⁴³ *See above* paras. 22-29.

⁴⁴ *See* ICC-01/09-01/11-1938-Conf-Corr, Red-Corr, paras. 60, 81, 111, 128.

of the evidence that could have been provided by him *viva voce* through the admission of his prior testimony. Although P-0495's prior testimony encompasses acts and conducts of the Accused,⁴⁵ this presents no obstacle to its submission⁴⁶ because the Defence will have the opportunity to present controverting evidence during their case and the Chamber will be able to freely assess the probative value of P-0495's evidence in light of the totality of the other evidence submitted at trial by both parties.⁴⁷

35. [REDACTED]⁴⁸ [REDACTED].⁴⁹ As such, the Prosecution submits that this Chamber can competently and independently assess whether the introduction of P-0495's article 55(2) interview is in the interests of justice.
36. Introducing P-0495's prior testimony into the record of the case does not cause prejudice to the Accused. The Prosecution submits that, [REDACTED],⁵⁰ there was in fact no violation of P-0495's statutory right during the interview under article 55(2)(d) of the Statute. However, even if the Chamber considers that a violation of the witness' rights had occurred, it was inadvertent and marginal at most and related to the rights of P-0495, and not of the Accused. Therefore, the submission of this evidence will cause no unfairness to the Accused.
37. Moreover, the purpose and circumstances of the requested introduction of the article 55(2) interview in this case is factually distinguishable from [REDACTED]. Firstly, [REDACTED] the Prosecution sought to introduce the prior testimony first

⁴⁵ **P-0495**, KEN-OTP-0130-0507-R01, at 0527-0528; KEN-OTP-0130-0540-R01, at 0544, 0548-0550, 0559; KEN-OTP-0130-0585-R01, at 0590. *See also* **P-0800/P-0495**, KEN-OTP-0145-0594 at 0596.

⁴⁶ ICC-01/09-01/11-1938-Conf-Corr, Red-Corr, paras. 60, 81, 111, 128. *See also on provisions similar to rule 68(2)(d)(iv)* ICC-01/12-01/18-1413, para. 21; ICC-01/05-01/13-1481-Red-Corr, para. 21; ICC-01/09-01/11-1353, paras. 24-26; ICC-01/04-02/06-1029, para. 37; ICC-02/11-01/15-950-Red, paras. 77-78, 80; ICTY, *Prosecutor v Prlić et al*, IT-04-74-AR73.16, Decision on Jadranko Prlić's Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, para. 27; ICTY, *Prosecutor Haradinaj et al.*, IT-04-84-T, Decision on Prosecution's Motion to Admit Five Statements of Witness 1 into Evidence pursuant to Rule 92quater with Confidential Annex, 28 November 2007, paras. 10-11.

⁴⁷ *See* ICC-01/09-01/11-1938-Conf-Corr, Red-Corr, paras. 60, 81, 111, 128.

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

and foremost to impeach the witness, raising the spectre of future charges under article 70(1)(a) should it be proved that he had lied under oath, notwithstanding assurances provided [REDACTED] under rule 74 that his evidence in court would not be used against him in any subsequent prosecution.⁵¹ However, P-0495 is not himself at peril in these proceedings and the submission of his prior testimony in this case will not affect his rights. Secondly, [REDACTED].⁵² [REDACTED] the matters discussed in the article 55(2) interview are directly probative of Counts 3 and 5 of the charges. Nor do any shortcomings in the article 55(2) warnings given to P-0495 affect any rights of the Accused. In these circumstances, the introduction of P-0495's prior testimony is in the interests of justice.

38. Furthermore, there are no grounds to exclude P-0495's prior testimony under article 69(7). Any shortcomings, *arguendo*, in the warnings given to P-0495 have no bearing on the reliability of the evidence, which is recorded and transcribed verbatim. It is also corroborated in material respects⁵³ by other available evidence, such as:

- a. the direct evidence of P-0800⁵⁴ and P-0613;⁵⁵
- b. the records of the P-0613's meeting with P-0495, including photographs;⁵⁶
- c. the records of the phone calls between P-0495 and P-0800;⁵⁷ and
- d. the OTP investigator's declaration.⁵⁸

⁵¹ [REDACTED].

⁵² [REDACTED].

⁵³ See ICC-01/09-01/20-125-Conf-AnxA-Corr3, paras. 220-223. The Prosecution argued that P-0495 was not fully frank with investigators about the extent of his involvement with the witness interference scheme, and only admitted what he had to. Nonetheless, notwithstanding his efforts to minimise his culpability, the admissions that he made contrary to his interests may be accepted as reliable.

⁵⁴ **P-0800**, KEN-OTP-0135-0113 at 0121-0122, 0135; KEN-OTP-0160-0506; KEN-OTP-0160-0529.

⁵⁵ **P-0613**, KEN-OTP-0115-0216 at 0222, para. 30, at 0229-0232, paras. 66, 74-80;

⁵⁶ **P-0613/P-0495**, KEN-OTP-0129-0740; **P-0495**, KEN-OTP-0138-0649; KEN-OTP-0138-0652; KEN-OTP-0138-0663. P-0495 recognizes himself and P-0613 in these photographs, see **P-0495**, KEN-OTP-0130-0507-R01 at 0524.

⁵⁷ **P-0800/P-0495**, KEN-OTP-0114-0471; KEN-OTP-0145-0576; KEN-OTP-0145-0587; KEN-OTP-0114-0472; KEN-OTP-0145-0581; KEN-OTP-0145-0594.

⁵⁸ KEN-OTP-0145-0569-R02.

39. Given the inadvertent and marginal nature of any breach of his rights under article 55(2), the introduction of the evidence would not be antithetical to, or seriously damage, the integrity of the proceedings. To the contrary, the *exclusion* of P-0495's prior testimony would have this effect, for the reasons discussed in paragraph 33 above. The introduction of this evidence, will allow the Chamber to "ultimately assess the relevance, probative value and potential prejudice of the evidence [...] as part of the holistic assessment of all evidence".⁵⁹
40. In light of the foregoing, allowing the introduction of P-0495's prior testimony into the record of the case will cause no undue prejudice to the Accused and would not render the trial unfair.

(v) *P-0495's prior testimony has sufficient indicia of reliability*

41. The Prosecution submits that P-0495's prior testimony is reliable for the purpose of rule 68(2)(d). At this stage of the procedure, the assessment of the reliability of the prior testimony is made on a *prima facie* basis and against a threshold that is "reasonably lower than the threshold for deciding on the innocence or guilt of the accused".⁶⁰ In assessing indicia of reliability, the Chamber is not obliged to consider factors beyond formal requirements.⁶¹
42. As such, in determining whether the prior recorded testimony has sufficient *indicia* of reliability the Chamber may consider the circumstances in which the testimony arose,⁶² including whether the testimony was obtained in the ordinary course of the investigations,⁶³ whether the testimony was given voluntarily,⁶⁴ and whether the witness acknowledged that their statement may be used in legal proceedings.⁶⁵

⁵⁹ ICC-01/09-01/20-189, para. 11.

⁶⁰ ICC-01/09-01/11-1938-Conf-Corr, Red-Corr, para. 65.

⁶¹ ICC-02/11-01/15-744 OA8, paras. 3, 103-104; ICC-01/12-01/18-1413, para. 15; ICC-01/12-01/18-1588-Conf, para. 28; ICC-01/09-01/11-1353, para. 15.

⁶² ICC-01/09-01/11-1938-Conf-Corr, Red-Corr, para. 65.

⁶³ *Ibid.*, paras. 65-66, 114-115.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

Additionally, the Chamber may also consider the content of the testimony and whether the evidence is corroborated by other evidence.⁶⁶

43. With respect to the circumstances in which P-0495's prior testimony arose, the Prosecution submits that it was obtained in the ordinary course of the OTP's investigations, namely during an interview pursuant to article 55(2), given voluntarily and with awareness that it could be used in subsequent legal proceedings.⁶⁷ As noted, the article 55(2) interview was accompanied by a handwritten "Waiver of Rights" signed by P-0495 and OTP representatives stating that P-0495 waived his rights to remain silent, to legal assistance and to presence of counsel for the purpose of the interview.⁶⁸
44. Accordingly, the Prosecution submits that the indicia of reliability discussed above satisfy the requirements of rule 68(2)(d).

IV. CONCLUSION

45. For the foregoing reasons, the Prosecution requests the Chamber to allow the introduction of P-0495's prior testimony under rule 68(2)(d) and to consider it formally submitted in the record of the case.



Ms Nazhat Shameen Khan, Deputy Prosecutor

Dated this 15th day of June 2023
At The Hague, The Netherlands

⁶⁶ *Ibid.*, paras. 65-66.

⁶⁷ P-0495, KEN-OTP-0130-066-R01 at 0579.

⁶⁸ KEN-OTP-0114-0467.