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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 Annexes A-B**

**Public redacted version of “Prosecution’s Application for Witness Summons and
Resulting Request for State Party Cooperation”, ICC-01/09-01/20-260-Conf, 17
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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Other

I. Introduction

1. Pursuant to articles 64(6)(b) and 93(l)(b) of the Rome Statute and in compliance with the Chamber's directions,¹ the Office of the Prosecutor² requests Trial Chamber III³ to require:
 - (i) the compulsory attendance of Witness P-0743⁴ to testify before the Chamber, by video-link at a location [REDACTED], on such dates and times as the Chamber may determine;
 - (ii) the assistance of the Government [REDACTED]⁵ in ensuring the appearance of P-0743, using all means available under [REDACTED] law; and
 - (iii) the assistance of the Registry to prepare and transmit, in consultation with the Prosecution, the necessary summons to Witness P-0743 (with or without the assistance of the [REDACTED]) as well as the necessary cooperation request to the relevant authorities of the [REDACTED].
2. P-0743 is a [REDACTED] national believed to be residing in [REDACTED] and a Prosecution witness in this case.⁶ [REDACTED],⁷ [REDACTED].⁸ As such, his evidence is relevant and material to the current proceedings and potentially necessary for the determination of the truth.
3. Despite the Prosecution use of all reasonable efforts at its disposal to locate or contact P-0743 to secure his voluntary attendance at trial, P-0743 remained unreachable. Given the upcoming commencement of the trial and the lack of progress in locating P-0743, it is necessary to take urgent steps to obtain the

¹ E-mail communication from Trial Chamber III to the parties dated 15 December 2021 at 12:14.

² "Prosecution" or "OTP".

³ "Chamber".

⁴ [REDACTED].

⁵ [REDACTED].

⁶ ICC-01/09-01/20-220-Conf-AnxB, p. 4.

⁷ [REDACTED].

⁸ See *infra*, para. 28.

assistance of the [REDACTED] authorities to summons him to testify before the Chamber.

II. Confidentiality

4. This filing and its annex are classified as “Confidential” as they refer to items of evidence and investigative activities of a confidential nature, which also involved the Accused. A public redacted version of this filing will be submitted as soon as possible within the next 5 days.⁹

III. Background

5. On 15 November 2021, the Prosecution filed its List of Witnesses (“LoW”) to be called to testify at trial¹⁰ together with, *inter alia*, a summary of their anticipated evidence.¹¹ Therein, the Prosecution listed P-0743 and explained that it had been unable to contact the witness despite its best efforts do so directly and indirectly, [REDACTED].¹²
6. On 30 November 2021, the Prosecution requested the urgent assistance of the [REDACTED] to locate P-0743, a [REDACTED] national believed to reside in [REDACTED], and to inform the Prosecution of the execution of such request by 7 January 2022.¹³ The [REDACTED] authorities acknowledged receipt of the request on 6 December 2021.
7. Having received no response [REDACTED] by 7 January 2022, on 11 January 2022 the Prosecution renewed its request to locate P-0743 and advise the Office of the steps taken toward executing this pending request, by no later than 17 January.¹⁴ The [REDACTED] acknowledged receipt of the request the following day, but to date such request remains unanswered.

⁹ ICC-01/09-01/20-189, para. 46.

¹⁰ ICC-01/09-01/20-220-Conf-AnxB.

¹¹ ICC-01/09-01/20-220-Conf-AnxB1.

¹² CC-01/09-01/20-220-Conf-AnxB1, p. 10.

¹³ Annex A.

¹⁴ Annex B.

IV. Applicable Law

8. It has been established that Chambers of this Court have the power to compel the testimony of witnesses pursuant to article 64(6)(b) and can, when properly justified, obligate State Parties by way of requests of cooperation both to serve summonses and to assist in compelling the attendance of the witnesses thus summonsed before the Chambers,¹⁵ pursuant to article 93(1)(b).¹⁶
9. In evaluating whether to exercise this power and issue summonses to witnesses, Chambers will conduct a case-by-case assessment of the individual circumstances surrounding each witness and consider whether the request to a State Party to assist in summonsing each witness is (i) relevant (ii) specific and (iii) necessary.¹⁷ Only when these tripartite principles are met, Chambers may issue a binding cooperation request requiring a State Party to employ compulsory measures to compel the appearance of the witnesses summonsed.
10. The Chamber has affirmed its power to summons witnesses and on at least two occasions. *First*, when it denied the Prosecution's application to admit the prior recorded testimony of Witness P-0495 under Rule 68(2)(d) and held that "the Prosecution has not used all reasonable efforts at its disposal to obtain P-0495's attendance [including] requesting a summons for his attendance".¹⁸ *Second*, when it set the deadline for and directed the Prosecution to "seek a summons" to secure the attendance at trial of Witness P-0495, or of any other witness.¹⁹
11. The Prosecution notes that the Defence did not take issue with the notion that ICC Chambers have the power to summons witnesses to testify. On the contrary, in objecting to the admission of P-0495's prior recorded testimony, the Defence argued that the Prosecution had failed to explain why it "cannot request Trial

¹⁵ Subject, in the instant case, to the provisions of article 70(2).

¹⁶ ICC-01/09-01/11-1598, paras. 107, 113, 114, 118, 132; ICC-01/09-01/11-1274-Corr2.

¹⁷ ICC-01/09-01/11-1274-Corr2, paras. 180-181.

¹⁸ ICC-01/09-01/20-247-Conf, para. 26 (emphasis added).

¹⁹ E-mail communication from Trial Chamber III to the parties dated 15 December 2021 at 12:14.

Chamber III to request Kenya to issues a summons”²⁰ and that summoning (hostile) witnesses was a “sound evidentiary approach adopted by the *Ruto and Sang* Trial Chamber”.²¹

V. Submissions

12. P-0743 is one the [REDACTED] witnesses the OTP relied upon [REDACTED].²²

13. As detailed below, P-0743 has been unresponsive and uncooperative towards the OTP since [REDACTED].

P-0743 is unreachable and the Prosecution cannot secure his attendance at trial

14. [REDACTED].

15. [REDACTED].

16. On [REDACTED], the Prosecution spoke with P-0736 who refused to reaffirm his cooperation with the Court. The Prosecution did not, however, receive any notification of withdrawal or any affidavit recanting his statements. Despite subsequent repeated efforts, the Prosecution was unable to communicate with him further [REDACTED].²³

17. [REDACTED].²⁴

18. In [REDACTED], after having succeeded in re-establishing contact with P-0743 in [REDACTED], the Prosecution interviewed him in the context of its then-ongoing article 70 investigations in the Kenya situation.²⁵ In his audio-recorded statement, the witness stated that GICHERU and others had influenced him [REDACTED].²⁶

19. [REDACTED].

²⁰ ICC-01/09-01/20-243-Conf, para. 4.

²¹ ICC-01/09-01/20-243-Conf, para. 8.

²² ICC-01/09-01/11-1274-Corr2, disposition.

²³ [REDACTED].[REDACTED]

²⁴ [REDACTED].

²⁵ KEN-OTP-0144-0011, KEN-OTP-0144-0042, KEN-OTP-0144-0074, KEN-OTP-0144-0106 and KEN-OTP-0144-0139.

²⁶ KEN-OTP-0144-0074, at 0085-0104.

20. [REDACTED].²⁷ [REDACTED].²⁸
21. [REDACTED]. Since then the witness broke off all communications, including with the OTP. There is no indication suggesting the witness is [REDACTED].
22. In light of P-0743's evidence against GICHERU, and after the latter's surrendered to the Court in November 2020, the Prosecution tried to re-establish contact with the witness. It pursued all available means, directly and through the use of third parties, including [REDACTED], but to no avail. The witness remains unreachable to this date.
23. As a last resort, on 30 November 2021 the Prosecution requested the assistance of the [REDACTED] to locate the witness.²⁹ However, as indicated above, despite its follow-ups, the Prosecution has received no substantive response from the [REDACTED].

P-0743's testimony is relevant to the case and the crimes charged

24. [REDACTED]. As stated above, he [REDACTED] stated that GICHERU and others had been involved in paying him [REDACTED].
25. More specifically, P-0743's stated that GICHERU, [REDACTED] and YEBEI had been involved in a series of concerted activities [REDACTED] in exchange for money, [REDACTED].³⁰ He further stated that other Prosecution witnesses, [REDACTED], had been improperly interfered with.³¹
26. As such, and despite the fact that the Accused is not charged in respect of the corrupt influence of P-0743, the Prosecution submits that the anticipated testimony of this witness has a sufficient nexus to the crimes charged so as to be considered relevant for the purposes of issuing a summons to appear. At a minimum, his evidence – if accepted – will corroborate the evidence of other

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ Annexes A-B.

³⁰ [REDACTED].

³¹ [REDACTED].

Prosecution witnesses as to the existence of the Common Plan, the identity of its members, its modus operandi and the Accused's role in its activities.

The relief sought is sufficient specific

27. P-0743 is clearly identified and can be reasonably believed to be within the jurisdiction of the [REDACTED] national authorities. As such, the Prosecution has identified its relief with sufficient specificity.

P-0473's testimony is potentially necessary for the determination of the truth

28. The anticipated testimony is potentially necessary for the determination of the truth. P-0743 may provide important testimony on the crimes charged and the individual criminal responsibility of the Accused. This information includes anticipated testimony regarding: (i) GICHERU's role in influencing P-0743 [REDACTED] against the promise of money and other benefits;³² (ii) the role and contribution of GICHERU's associates' in influencing P-0743 [REDACTED], such as YEBEI's and [REDACTED]'s;³³ (iii) [REDACTED]'s involvement in approving the payments to witnesses;³⁴ and (iv) the improper influence of other Prosecution's witnesses, [REDACTED].³⁵
29. The summons is necessary to obtain the testimony of P-0743. The Prosecution has detailed reasonable attempts to obtain the voluntary cooperation of the witness, and has been unsuccessful. Given P-0743's history [REDACTED] [REDACTED], good cause exists to issue the requested summons.

VI. Conclusion

30. The Chamber has the power under the Statute to compel the testimony of witnesses in this case and to issue binding cooperation requests requiring State

³² KEN-OTP-0144-0011, at 0026-0028; at 0030, Ins. 638-66; at 0032, Ins. 710-735; KEN-OTP-0144-0074, at 0082-0104; KEN-OTP-0144-0106, at 0114-0121, at 0127-0130, at 0133-0134, at 0137-0138; KEN-OTP-0144-0139, at 0141-0142, at 0146-0147, at 0155, at 0159; [REDACTED]; [REDACTED].

³³ KEN-OTP-0144-0011, at 0026-0027; KEN-OTP-0144-0042, at 0050-0051; KEN-OTP-0144-0074 at 0083; at 0089, Ins. 499-513; at 0094-0095 and at 0098-0104; KEN-OTP-0144-0106 at 0109-0113, at 0118, at 0125-0127, at 0132-0134; KEN-OTP-0144-0139, at 0141-0142; [REDACTED].

³⁴ KEN-OTP-0144-0106, at 0119-0120; KEN-OTP-0144-0139, at 0144-0145; [REDACTED].

³⁵ [REDACTED].

Parties to employ measures to compel such witnesses to appear before the Chamber, if certain requirements are met.

31. The Prosecution has met these requirements by showing that (i) P-0743's testimony is relevant to the case; (ii) potentially necessary for the determination of the truth; and (iii) the Prosecution is legitimately unable to secure his appearance at trial.
32. As such and since P-0743 is a [REDACTED] national who is believed to reside in [REDACTED], the Chamber should compel him to testify through the issuance of a summons to be served to him in [REDACTED] competent authorities.

VII. Relief Requested

33. The Prosecution requests the Chamber to order the Registrar, in consultation with the Prosecution, to request the assistance, pursuant to article 93(1)(d) and (l), and article 99(1),
 - (i) the attendance of Witness P-0743, as a matter of obligation upon him, to testify before the Chamber by video-link at a location in [REDACTED] on such dates and times as the Chamber may determine;
 - (ii) the assistance of the Government of [REDACTED] in ensuring the appearance of P-0743, using all means available under the [REDACTED]; and
 - (iii) the assistance of the Registry to prepare and transmit, in consultation with the Prosecution, the necessary subpoena to Witness P-0743 (with or without the assistance of the [REDACTED]) as well as the necessary cooperation request to the relevant authorities of the [REDACTED].



James Stewart, Deputy Prosecutor

Dated this 19th day of January 2022
At The Hague, The Netherlands