

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/09/01/20

Date: 22 March 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 Redacted Version (of filing of 15 March 2022)

Submission pursuant to Rule 74

Source: Gregory Townsend, Legal Adviser to Witness P-0516

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
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**Victims Participation and Reparations
Section**

Other

Mr Gregory Townsend,
Legal Adviser to Witness P-0516

I. INTRODUCTION

1. On 24 January 2022, the Registrar of the International Criminal Court (ICC or Court), under Rule 74(10), appointed myself, Gregory Townsend as Legal Adviser to Witness P-0516 (Witness) with the mandate of notifying the Witness of the provisions of rule 74 of the Rules of Procedure and Evidence (Rules) on issues relating to self-incrimination, and providing him with independent and qualified legal advice.¹ On 31 January 2022, the Registry filed a notification of this appointment.²

2. On 18 February 2022, I requested disclosure from the Officer of the Prosecutor (OTP) related to Witness P-0516 and received access to such disclosure on 7 March 2022, namely electronic files containing statements, transcripts, interviews, and other material pertaining to the Witness.

3. Between 25 January 2022 and 15 March 2022, I conferred in private with and advised Witness P-0516 via several confidential video- and telephone calls. During the course of these discussions, I notified him of the content of rule 74 of the Rules, of articles 70 and 71 of the Rome Statute of the ICC (Statute), highlighting Article 70(1)(a), as well as of rule 66(3) of the Rules. During the course of the OTP's preparation of the Witness, he also has been notified of these legal provisions.

4. Pursuant to Rule 74(9) of the Rules, on behalf of Witness P-0516, I file this submission, before the single Judge of the Trial Chamber in the case of *Prosecutor v. Paul Gicheru*, respectfully seeking assurances under rule 74 of the Rules.

II. CLASSIFICATION

5. Pursuant to regulation 23 *bis*(1) of the Regulations of the Court (RoC), I file this submission under the classification of "confidential" as it contains information that, if disclosed to the public, might identify the Witness and thwart the very rule 74 assurances being sought. I will file a public redacted version in due course.

¹ Registry, "Notification of the Appointment of Mr Gregory Townsend as Legal Adviser to Witness P-0516, Public with Confidential Annexes I and II", 31 January 2022, ICC-01/09-01/20-268 (Notification of Appointment). I note that the Registry previously appointed me as Duty Counsel to Witness P-0516 from 17 December 2020 to 13 January 2021, including during investigative interviews of the Witness.

² *Ibid.*

III. APPLICABLE LEGAL PROVISIONS

6. Rule 74 of the Rules relates to self-incrimination by a witness. Under Rule 74(3)(a), a witness may object to making a statement [or giving evidence] that might tend to incriminate him or herself. Under Rule 74(3)(c), a Chamber may *require* such a witness to answer potentially self-incriminating questions *after assuring the witness* that any statement by him or her that might tend to incriminate him or herself: (i) will be kept confidential (barring any disclosure to the public or any State); and (ii) will not be used directly or indirectly against him or her in any subsequent prosecution by the Court, except under Articles 70 and 71 of the Rome Statute. Under Rule 74(6), in the alternative, if a Chamber determines that it would not be appropriate to provide such an assurance to such a witness, it *shall not require* that witness to answer a potentially self-incriminating question.

7. According to settled ICC jurisprudence, Rule 74(3)(c) provides a self-incriminating witness protection from subsequent prosecution for crimes within the jurisdiction of the Court, except those crimes concerning the integrity of a witness's ICC testimony after such assurances. The Appeals Chamber has held that assurances provided under rule 74 to a self-incriminating witness "do not provide any protection against prosecutions for offences under article 70 of the Statute [...] should the witness's testimony [after such assurances] be false."³

8. One, therefore, should understand Rule 74(3)(c) as protecting the integrity of the proceedings, by allowing a witness to testify without fear of prosecution with respect to his or her prior conduct, while at the same time taking steps to guarantee that the witness's evidence before the Chamber will be truthful.

³ Appeals Chamber, *Prosecutor v. Bemba et al.*, "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", 8 March 2018, ICC-01/05/13-2275-Red, para. 1533. *See also* Trial Chamber II, *Prosecutor v. Katanga and Ngudjolo*, "Directions for the conduct of the proceedings and testimony in accordance with rule 140", 1 December 2009, ICC-01/04-01/07-1665-Corr, para. 55 (holding that Rule 74 does not provide protection "if the witness perjures him or herself before the Chamber, in accordance with rules 66(3) of the Rules and article 70(1)(a) of the Statute"); Trial Chamber IX, *Prosecutor v. Ongwen*, "Decision on Protocols to be Adopted at Trial", 22 July 2016, ICC- 02/04-0115-504, para. 23(ii) (interpreting Rule 74 in accordance with Rule 66(3) of the Rules and the offence defined in Article 70(1)(a) of the Statute).

III. SUBMISSIONS

9. Witness P-0516 testified in the *Ruto and Sang* case on 23 to 26 September 2014. On 25 September 2014, the Prosecution asked Witness P-0516, “Do you know such a lawyer [called Paul Gicheru]?” to which he responded in the negative.⁴ On the same trial date, the Prosecution further asked Witness P-0516 if he was offered a specific amount of money to withdraw as a witness for the prosecution, to which he responded in the negative.⁵

10. Witness P-0516, however, is one of the main prosecution witnesses in the present case. In its trial brief, the Prosecution relies largely on Witness P-0516’s evidence to prove the alleged second incident alleged in the charges.⁶ This incident alleges inter alia that in 2014 Gicheru offered Witness P-0516 the sum of 800,000 Kenyan shillings in installments, which Witness P-0516 accepted, and Gicheru eventually paid Witness P-0516 four installments totaling 500,000 Kenyan shillings.⁷

11. The anticipated evidence of Witness P-0516 in the present case, therefore, is: “important,” “unique,” and (self-)“incriminating” under Rule 74(5)(a), (b) and (c). The Trial Chamber, therefore, should provide Rule 74 assurances to Witness P-0516.

12. In the present case, the Trial Chamber’s assurances under both limbs of Rule 74(3)(c) are required for the likely majority of Witness P-0516’s anticipated testimony that concern: (a) [redacted]; (b) his dealings with Gicheru and others as to [redacted], and; (c) [redacted].

13. It is respectfully requested that any questioning of Witness P-0516 with respect to these matters be conducted in private session and that the Trial Chamber assure Witness P-0516 that any evidence given by him on these matters (and any matters that “might tend to incriminate” him within the meaning of Rule 74(3)(a))

⁴ *Prosecutor v. Ruto and Sang*, trial transcript, 25 September 2014, at 71, lines 18-20, ICC-01/09-01/20-T-005-CONF-Red-ENG ET 25-09-2014 1-86 SZ PT (open session).

⁵ *Ibid.*, at 73, lines 18-24.

⁶ OTP, *Prosecutor v. Gicheru*, “Public redacted version of “Prosecution Trial Brief”, ICC-01/09-01/20- 220-Conf, 15 November 2021”, 22 November 2021, ICC-01/09-01/20-220-Red (Prosecution Trial Brief), paras 104-121; Pre-Trial Chamber A (Article 70), *Prosecutor v. Gicheru*, “Decision on the confirmation of charges against Paul Gicheru”, 15 July 2021, ICC-01/09-01/20-153-Red (“Decision on Confirmation of Charges”), paras 71-87; page 78 (charge 2).

⁷ See Decision on Confirmation of Charges, paras 80-81.

will remain confidential, not be disclosed to the public or any State, and will not be used against him in any proceedings under the jurisdiction of the Court, except for giving false testimony or committing misconduct before the Trial Chamber in the present case.

14. Further, considering the previously-granted, in-court, witness protection measures afforded to the Witness (namely, the use of a pseudonym, voice distortion, and face distortion) *shall continue* in this case,⁸ the Trial Chamber should hear in private session the portions of Witness P-0516's upcoming testimony covered by the proposed assurances given the likelihood of such evidence to lead to his identification and which might violate the protective measures.

15. The requested assurances will enable Witness P-0516 to testify without violating his right not to be compelled to incriminate himself. In addition, such assurances are restricted to what is strictly necessary to ensure an appropriate balance between protecting Witness P-0516 from self-incrimination and the right of the accused to a public trial.

IV. RELIEF REQUESTED

16. For the above reasons, as Legal Adviser to Witness P-0516 and on his behalf, I respectfully REQUEST that the Trial Chamber:

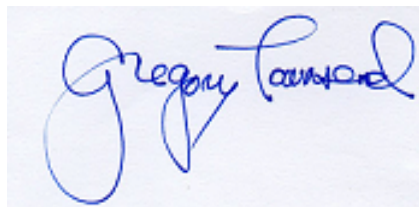
(1) pursuant to Rules 74(2) and 74(3)(c) of the Rules, ASSURE Witness P-0516, before he commences his testimony, that evidence given by him in relation to issues identified above in paragraph 12 and any matters that "might tend to incriminate" him within the meaning of Rule 74(3)(a) will be kept confidential at all times, not disclosed to the public or any State, and not be used against the Witness in any proceedings under the jurisdiction of the Court, except for giving false testimony or committing misconduct before the Trial Chamber in the present case;

⁸ In the *Ruto and Sang* case, Trial Chamber V granted P-0516 the indicated protective measures. See ICC-01/09-01/20-276-Conf and Red, para. 15 and p. 11 (disposition, first sentence). Such measures continue to have full force and effect as per a decision of Trial Chamber III in the *Gicheru* case [as indicated in an email from the OTP].

(2) pursuant to Rules 74(3)(c) and 74(7) of the Rules, ORDER that any questioning of Witness P-0516 with respect to the matters identified above in paragraph 12 and any matters that “might tend to incriminate” him within the meaning of Rule 74(3)(a) be conducted in private session and the transcripts and records of the proceedings be classified as confidential, and that the identity of the Witness and the content of his evidence shall not be disclosed to the public or any State;

(3) pursuant to Rule 73(3)(c) of the Rules, ORDER that the evidence with respect to the matters identified above in paragraph 12 and any matters that “might tend to incriminate” him within the meaning of Rule 74(3)(a), shall not be used, directly or indirectly, against Witness P-0516 in any subsequent prosecution by the Court, except for giving false testimony or committing misconduct before the Trial Chamber in the present case under Articles 70 and 71 of the Statute.

Respectfully submitted,



Gregory Townsend,
Legal Adviser to Witness P-0516,
Filed on behalf of Witness P-0516

Date: 22 March 2022

At The Hague, Netherlands.