

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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*No.: ICC-01/09-01/20*  
Date: **29 November 2022**

**TRIAL CHAMBER III (ARTICLE 70)**

**Before: Judge Miatta Maria Samba**

**SITUATION IN THE REPUBLIC OF KENYA**

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

**Public**

**Second lesser redacted version of “Request to Exclude Audio-Recordings Collected in Violation of Part 9 of the Statute,” 15 December 2021, ICC-01/09-01/20-249-Conf**

**Source: Counsel for Paul Gicheru**

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

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Defence****States' Representatives****Other****REGISTRY**


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**Registrar**  
 Mr. Peter Lewis

**Counsel Support Section****Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations  
Section****Other**

Mr. Paul Gicheru, through his Counsel (“the Defence”), pursuant to Article 69(7) of the Rome Statute, requests the Trial Chamber to exclude the Office of the Prosecutor’s (“OTP”) audio-recordings that it collected in violation of Part 9 of the Statute. The OTP violated Part 9 of the Statute by covertly audio-recording Mr. Gicheru and OTP witnesses on the territories of [REDACTED] without submitting any Request for Assistance (“RFA”) to these States Parties or seeking the Pre-Trial Chamber’s (“PTC”) authorization. Admitting the audio-recordings would be antithetical to and would seriously damage the integrity of the proceedings since it would render the principles of State sovereignty and judicial cooperation in Part 9 meaningless. The audio-recordings sought to be excluded are listed in Annex A. This Request and Annexes A and B are filed confidentially pursuant to Regulation 23bis(1) since they contain confidential material.

## I. BACKGROUND

### A. The Kenya 1 and 2 investigations

1. *The PTC authorizes investigations in Kenya.* On 31 March 2010, considering “the sensitive and specific nature” of *proprio motu* investigations by the OTP under Article 15 of the Rome Statute – “one of the most delicate provisions” being “the product of extensive debates and division of views” over the OTP’s powers – PTC II authorized the OTP to open an investigation into the situation in Kenya.<sup>1</sup>
2. *Charges in the Kenya cases are confirmed.* Following the PTC’s authorization, the OTP opened two cases against six Kenyan nationals: *Prosecutor v. Ruto, Kosgey, and Sang* (“Kenya 1”)<sup>2</sup> and *Prosecutor v. Muthaura, Kenyatta, and Ali* (“Kenya 2”).<sup>3</sup> Finding insufficient evidence to confirm the charges against Kosgey and Ali, PTC II confirmed the charges against Ruto, Sang, Muthaura, and Kenyatta on 23 January 2012.<sup>4</sup>
3. *Without seeking any assistance from the PTC or Trial Chambers, the OTP complains of non-cooperation.* On 22 January 2013, without seeking any assistance with its investigation, the OTP requested permission from PTC II to amend its Document Containing the Charges in the Kenya 1 case, claiming: “1) lack of cooperation; 2) security concerns; 3) incidents ... regarding intimidation of witnesses ...; and 4) the difficulty in approaching insider witnesses.”<sup>5</sup> PTC II granted the request, finding reasonable justification

<sup>1</sup> [ICC-01/09-19-Corr](#), paras. 17-8.

<sup>2</sup> [ICC-01/09-01/11-26](#).

<sup>3</sup> [ICC-01/09-02/11-35](#).

<sup>4</sup> [ICC-01/09-02/11-382](#); [ICC-01/09-01/11-373](#).

<sup>5</sup> [REDACTED].

for the OTP continuing its investigation subsequent to the confirmation hearing, although it did not make findings on whether the Kenyan Government failed to cooperate.<sup>6</sup>

4. In preparation for the Status Conference to be held on 11 March 2013 in the Kenya 2 case, Trial Chamber V(B) requested the OTP to provide a “full and detailed account of the Prosecution’s pre- and post-Confirmation investigation.”<sup>7</sup> Again without seeking any relief, the OTP complained that it: (a) took multiple steps to interview senior members of the Kenyan police, which were blocked by a preliminary injunction in the Kenyan courts; (b) made RFAs to Kenya for documentary evidence; and (c) “expended considerable efforts to obtain co-operation from the [Kenyan Government] with respect to the Requests for Assistance, and to overcome various tactics employed to stall, delay, or altogether thwart the Prosecution’s collection of certain evidence in Kenya.”<sup>8</sup>
5. On 11 March 2013, the OTP notified its intention to withdraw charges against Muthaura, claiming: “[d]espite assurances of its willingness to cooperate with the Court, the Government of Kenya has in fact provided only limited cooperation to the Prosecution, and has failed to assist it in uncovering evidence that would have been crucial, or at the very least, may have been useful in the case against Mr Muthaura.”<sup>9</sup>
6. *Kenya responds to allegations of non-cooperation.* Finding the OTP’s statements “unhelpful to the cooperation relationship between the OTP and the Kenyan government,” the Kenyan Government considered that it was “obligated to answer such allegations pursuant to its Article 86 general obligation to cooperate with the Court, as well as its Articles 93(3) and (6) obligations to consult with and inform the Court on matters pertaining to cooperation requests,” submitting identical observations in the two Kenyan cases on 8 April 2014.<sup>10</sup>
7. The Kenyan Government informed Trial Chambers V(A) and V(B) that since 2010, it had received 37 RFAs from the OTP and “processed most of these requests and in circumstances where it has been unable to process them the Prosecutor ha[d] been made aware of the difficulties experienced by the Government.”<sup>11</sup> Specifically, the Kenyan Government “contend[ed] that there has to be a court order in place to fulfill th[e] request” for financial information from Ruto, Sang, Muthaura, and Kenyatta (“Records Request”), since the PTC

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<sup>6</sup> [REDACTED].

<sup>7</sup> [REDACTED].

<sup>8</sup> [REDACTED].

<sup>9</sup> [REDACTED].

<sup>10</sup> [REDACTED].

<sup>11</sup> [ICC-01/09-02/11-713](#), para. 40.

specifically rejected the OTP's condition that the Charged Persons provide financial information when deciding on their conditions of interim release in both Kenyan cases.<sup>12</sup> As for other RFAs, the Kenyan Government claimed that it facilitated the requests and provided access to facilities and documents, but for a request to interview police officials, which was subject to a preliminary injunction in the Kenyan courts.<sup>13</sup>

8. ***The OTP "foreshadows" non-cooperation.*** In its responses on 10 May 2013, the OTP "foreshadowed its intention" to request a finding of non-cooperation if the Kenyan Government did not comply with its Records Request.<sup>14</sup>
9. ***The OTP requests Trial Chamber V(A) to seek Kenya's assistance in summoning witnesses.*** On 28 November 2013, the OTP requested Trial Chamber V(A) in the Kenya 2 case to seek the Government of Kenya's assistance in summoning witnesses.<sup>15</sup> Making no claims of non-cooperation by Kenya, the OTP stated that it was not practicable to take sworn testimony in Kenya since a Kenyan court ordered injunction remained in place preventing the ICC from taking or recording evidence from Kenyan citizens.<sup>16</sup>
10. ***The OTP requests Trial Chamber V(B) to find Kenya non-cooperative.*** Just a month after requesting Trial Chamber V(A) to seek Kenya's assistance in summoning witnesses, it requested Trial Chamber V(B) to make a finding of non-cooperation under Article 87(7) of the Statute.<sup>17</sup> In response, the Kenyan Government reiterated that until the OTP "furnishes ... [a] court order directing the production of the requested information and providing necessary safeguards that ensure that the concerned persons' rights will not be unnecessarily infringed .... [it] will not be able to effect the relevant requests for assistance...."<sup>18</sup>
11. ***Trial Chamber V(B) defers making a finding on non-cooperation.*** Clarifying on 31 March 2014 that the OTP has independent statutory authority to validly issue RFAs, Trial Chamber V(B) deferred making a finding on non-cooperation, ordered the OTP to submit a revised request to Kenya, ordered the Kenyan Government to notify the OTP of any problems which may impede or prevent its execution, and suspended the commencement of the trial in order to resolve the cooperation issues.<sup>19</sup> After the OTP submitted a revised request, the Kenyan Government responded requiring clarifications and correspondence ensued, culminating in

<sup>12</sup> [ICC-01/09-02/11-713](#), para. 41.

<sup>13</sup> [ICC-01/09-02/11-713](#), paras. 42-4.

<sup>14</sup> [REDACTED].

<sup>15</sup> [ICC-01/09-01/11-1120](#), paras. 3, 63.

<sup>16</sup> [ICC-01/09-01/11-1120](#), para. 97.

<sup>17</sup> [ICC-01/09-02/11-866](#).

<sup>18</sup> [ICC-01/09-02/11-877-Anx2](#), para. 27.

<sup>19</sup> [ICC-01/09-02/11-908](#), para. 52, p. 46-7.

a meeting between the OTP and the Kenyan Government to discuss the scope of the request.<sup>20</sup> Joint submissions were filed to update the Trial Chamber on the status of cooperation and status conferences were held to identify areas of apparent dispute.<sup>21</sup>

12. ***Trial Chamber V(A) orders Kenya to summons OTP witnesses.*** Trial Chamber V(A) granted the OTP's request for State Party cooperation on 17 April 2014, finding that: (a) the Trial Chamber "has the power to compel the testimony of witnesses;" (b) the Trial Chamber "can, by way of requests for cooperation, obligate Kenya both to serve summonses and to assist in compelling the attendance (before the Chamber) of the witnesses thus summonsed;" and (c) "there are no provisions in Kenyan domestic law that prohibit this kind of a cooperation request."<sup>22</sup> It requested Kenya to communicate to P-0800, P-0397, P-0516, P-0495, and other witnesses that their attendance at trial was required, to facilitate their attendance before the Trial Chamber or by video-link in Kenya by way of compulsory measures, and to make arrangements for their security.<sup>23</sup>

13. ***Kenya cooperates in securing the attendance of OTP witnesses.*** As a result of the summons issued to them by the Kenyan authorities, P-0495 and P-0516 appeared by video-link and testified before Trial Chamber V(A) between 17-22 September and 22-26 September 2014 respectively.<sup>24</sup> P-0800 appeared in The Hague and testified between 17 and 26 November 2014.<sup>25</sup>

14. ***Trial Chamber V(B) denies the OTP's request for a finding of non-cooperation.*** Meanwhile in the Kenya 2 case, after the OTP and Kenyan Government filed further updates on the status of cooperation, the OTP, during a status conference on 7 October 2014, indicated that it maintained its request for a finding of non-cooperation.<sup>26</sup>

15. Trial Chamber V(B) denied the OTP's request on 3 December 2014, finding that "where cooperation may be a question of degree and where it was apparent to the Prosecution from an early stage that the Kenyan Government was repeatedly presenting obstacles to the execution of the request, a detailed and specific examination of the reasonableness of the positions presented by the Kenyan Government was required."<sup>27</sup> Although it found that the Kenyan Government failed to cooperate in facilitating the OTP's RFAs, Trial Chamber

<sup>20</sup> [ICC-01/09-02/11-982](#), para. 6.

<sup>21</sup> [ICC-01/09-02/11-982](#), paras. 11, 15.

<sup>22</sup> [ICC-01/09-01/11-1274](#), para. 193.

<sup>23</sup> [ICC-01/09-01/11-1274](#), p. 77-8.

<sup>24</sup> [ICC-01/09-01/20-T-024](#); [ICC-01/09-01/20-T-025](#); [ICC-01/09-01/20-T-002](#); [ICC-01/09-01/20-T-006](#).

<sup>25</sup> [ICC-01/09-01/20-T-026](#).

<sup>26</sup> [ICC-01/09-02/11-982](#), para. 15.

<sup>27</sup> [ICC-01/09-02/11-982](#), para. 88.

V(B) was “dissatisfied by the Prosecution’s somewhat complaisant approach towards the explanations provided by the Kenyan Government,” considering that “the approach adopted by the Prosecution to the cooperation was, in some respects, not reflective of a prosecutorial and investigative body effectively seeking to obtain the requested materials.”<sup>28</sup> It “expected to see a greater degree of diligence, persistence and, where necessary, flexibility on the part of the Prosecution.”<sup>29</sup>

16. ***The Appeals Chamber remands the issue of non-cooperation to Trial Chamber V(B).*** On 9 March 2015, Trial Chamber V(B) granted the OTP leave to appeal its decision on non-cooperation on two legal issues, whether the Trial Chamber: (a) had already made the requisite findings that the Kenyan Government failed to cooperate; and (b) gave weight to extraneous or irrelevant considerations or failed to give sufficient weight to relevant considerations.<sup>30</sup> The Appeals Chamber remanded the issue of non-cooperation to the Trial Chamber, finding that it: (a) did not err in not automatically referring the Kenyan Government to the Assembly of States Parties (“ASP”); but (b) erred in failing to address whether judicial measures were exhausted and by assessing the OTP’s conduct in an inconsistent manner.<sup>31</sup>

17. ***Trial Chamber V(B) reverses and refers Kenya’s non-cooperation to the ASP.*** On 19 September 2016, Trial Chamber V(B) found that the Kenyan Government failed to comply with a cooperation request and referred the matter to the ASP.<sup>32</sup> Noting that the “situation had persisted even following a period of active judicial supervision,” it concluded that “judicial remedies had been exhausted and that cooperation proceedings had reached a deadlock.”<sup>33</sup>

### ***B. The Article 70 investigation***

18. [REDACTED] ***is appointed to head the Article 70 investigation.*** [REDACTED] was approached by the OTP Investigation Division in early May 2013 and requested to review allegations of witness interference in both Kenyan cases and to identify potential investigative opportunities.<sup>34</sup>

<sup>28</sup> [ICC-01/09-02/11-982](#), para. 88.

<sup>29</sup> [ICC-01/09-02/11-982](#), para. 88.

<sup>30</sup> [ICC-01/09-02/11-1004](#), para. 9.

<sup>31</sup> [ICC-01/09-02/11-1032](#), paras. 54-5, 90.

<sup>32</sup> [ICC-01/09-02/11-1037](#), paras. 27, 38.

<sup>33</sup> [ICC-01/09-02/11-1037](#), para. 20.

<sup>34</sup> [REDACTED].

19. Providing no specifics or reasoning, P-0730 represents in a solemn declaration that he [REDACTED].<sup>35</sup> [REDACTED].<sup>36</sup>
20. [REDACTED] P-0730 informs that the OTP employed “proactive techniques” and “covert activities,” including “[REDACTED].”<sup>37</sup> No indication is given whether the [REDACTED], authorized such covert measures of investigation.
21. According to [REDACTED], the Kenya Article 70 OTP team sent RFAs to [REDACTED],<sup>38</sup> although no information has been provided by the OTP as to when these RFAs were sent or what investigative measures were requested.<sup>39</sup> [REDACTED].<sup>40</sup>
22. *Investigators ask Article 70 witnesses to audio-record conversations in* [REDACTED]. [REDACTED], OTP investigators provided [REDACTED] audio-recording equipment and asked them to audio-record telephone conversations and physical meetings in [REDACTED].<sup>41</sup>
23. [REDACTED]. [REDACTED] audio-recorded her first telephone call,<sup>42</sup> OTP investigators interviewed [REDACTED], and instructed her to record any telephone calls she receives from [REDACTED] or any other person that calls her.<sup>43</sup>
24. [REDACTED]. OTP investigators interviewed [REDACTED], asked him to call [REDACTED], and instructed him to [REDACTED].<sup>44</sup> OTP investigators told [REDACTED] and advised how to use the device on his own.<sup>45</sup> When investigators re-interviewed [REDACTED], they instructed him to audio-record a physical meeting with [REDACTED] the following day in [REDACTED].<sup>46</sup>
25. [REDACTED]. OTP investigators interviewed [REDACTED] and provided her an audio-recording device to record conversations [REDACTED] should he call.<sup>47</sup> Between [REDACTED], by telling [REDACTED] her locations during audio-recorded

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<sup>35</sup> [REDACTED].

<sup>36</sup> [REDACTED].

<sup>37</sup> [REDACTED].

<sup>38</sup> [REDACTED].

<sup>39</sup> *See infra*, paras. 29-31.

<sup>40</sup> [REDACTED].

<sup>41</sup> *See infra*, paras. 23-7.

<sup>42</sup> [REDACTED].

<sup>43</sup> [REDACTED].

<sup>44</sup> [REDACTED].

<sup>45</sup> [REDACTED].

<sup>46</sup> [REDACTED].

<sup>47</sup> [REDACTED].

conversations so [REDACTED] could meet her.<sup>48</sup> [REDACTED] did not show up and the operation was terminated.<sup>49</sup>

26. [REDACTED]. [REDACTED], OTP investigators took [REDACTED] and assisted her [REDACTED] for a meeting with [REDACTED].<sup>50</sup> [REDACTED] before proceeding to audio-recording a conversation with him [REDACTED].<sup>51</sup> Immediately after this meeting, OTP investigators conducted [REDACTED],<sup>52</sup> asked him to record a call with [REDACTED], and provided him a script of what to say.<sup>53</sup>

27. [REDACTED]. [REDACTED], OTP investigators interviewed [REDACTED], asked him to call Mr. Gicheru [REDACTED], provided [REDACTED] and inserted [REDACTED] SIM card into a mobile telephone capable of recording the conversation.<sup>54</sup>

28. **Audio-recordings are used to confirm the charges against Mr. Gicheru.** In 2021, seeking the confirmation of charges against Mr. Gicheru, the OTP relied on [REDACTED], conducted at the request of OTP investigators.<sup>55</sup> In confirming the charges, PTC A “consider[ed] it appropriate to draw the Trial Chamber’s attention to this evidence in order to conduct any inquiries it may deem necessary pursuant to article 69(4) and (7) of the Statute,” since “the Trial Chamber is better equipped to undertake an assessment of the admissibility of the said evidence, due to the limited information available to this Chamber at this stage of the proceedings.”<sup>56</sup>

29. **The Gicheru Defence requests information.** Considering that the material disclosed by the OTP lacks critical information to determine whether to agree or object to the admissibility of the audio-recordings during the trial phase, the Defence wrote to the OTP on 8 September 2021 and requested the following information:

- a. The locations of all witnesses during their audio-recorded interviews;
- b. All Requests for Judicial Assistance made to the ICC in the Kenya investigation and any decisions by the PTC(s) on those requests;

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<sup>48</sup> [REDACTED].

<sup>49</sup> [REDACTED].

<sup>50</sup> [REDACTED].

<sup>51</sup> [REDACTED].

<sup>52</sup> [REDACTED].

<sup>53</sup> [REDACTED].

<sup>54</sup> [REDACTED].

<sup>55</sup> [REDACTED].

<sup>56</sup> [ICC-01/09-01/20-153](#), para. 36.

- c. All RFAs sent to [REDACTED] to conduct investigative activities in the territories of these States, including the specific investigative measures, evidence, and documents, etc. requested by the OTP;
- d. All responses by [REDACTED] in relation to any RFAs, including follow-up communications or consultations between the OTP and these States;
- e. Whether there were any instances where the OTP decided not to submit RFAs and to proceed in investigating due to security concerns or because the OTP did not consider it “relevant” to submit an RFA;
- f. Whether, based on consultations or communications with [REDACTED] or its understanding of the security situation, the OTP formed an opinion that its investigative activities were legal under the ICC framework and the domestic laws of [REDACTED];
- g. Whether, since the drafting of [REDACTED] report in April 2015, there were any responses to RFAs from [REDACTED];
- h. Whether all transcripts of audio-recordings had been fully translated into English; and
- i. Whether any audio-recordings or their transcripts had not yet been disclosed.<sup>57</sup>

30. ***The OTP responds.*** On 15 October 2021, the OTP responded to the Defence request with the following:

- a. “[O]nly [REDACTED] made audio recordings of calls to other persons during the course of their audio recorded interviews with the OTP.... The Defence has not provided any basis for the disclosure of the locations of audio recorded interviews that did not involve making audio recorded calls;”
- b. “[T]he Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70” does not “[REDACTED], nor is it relevant to any evidence or witness relied on by the Prosecution in this case;”
- c. “[N]o RFAs were sent to the relevant states pursuant to the Prosecution above-mentioned filing or the Chamber’s decision;”
- d. “[N]o RFAs were sent to the relevant states pertaining to the voluntary recording of a conversation by any Prosecution witness in this case;”

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<sup>57</sup> Annex B, pp. 1-4.

- e. [REDACTED];
- f. [REDACTED]; and
- g. [REDACTED].<sup>58</sup>

31. In a footnote, the OTP avers that it could not have sent RFAs to [REDACTED] since [REDACTED].<sup>59</sup>

32. *The OTP provides an update.* On 28 October 2021, the OTP “updated” its information, stating that [REDACTED]. [REDACTED].<sup>60</sup>

## II. APPLICABLE LAW

### A. International cooperation and judicial assistance under Article 70

33. At the Rome conference, many delegations were concerned that various principles and procedures in the Statute were not appropriate for non-core crimes, including the stringent obligations to cooperate under Part 9 of the Statute.<sup>61</sup> Consequently, Article 70(2) provides that “[t]he conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State,” leaving further elaboration of the Article 70 procedure to the Rules. Rule 167(1) provides that the Court in Article 70 cases “may request a State to provide any form of international cooperation or judicial assistance corresponding to those forms set forth in Part 9” and must specify in the request “that the basis for the request is an investigation or prosecution of offences under article 70.” Rule 167(2) reemphasizes that “the conditions for providing judicial assistance to the Court with respect to offences under article 70 shall be set forth in article 70, paragraph 2.”

### B. International cooperation and judicial assistance under Part 9

34. During the negotiations in Rome, some delegations “feared that unless there was a statutory obligation ... the Prosecutor would be unable to carry out on site activity,”<sup>62</sup> while other States argued against such a provision, “not[ing] that the requested State Party would have no opportunity to protect its interests or those of its citizens, if such a wide-ranging power

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<sup>58</sup> Annex B, pp. 5-9.

<sup>59</sup> Annex B, pp. 10-1.

<sup>60</sup> Annex B, pp. 10-1.

<sup>61</sup> Donald K. Piragoff, *Article 70* in KAI AMBOS AND OTTO TRIFFTERER, [ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, A COMMENTARY](#) (3d ed. 2016), p. 1755.

<sup>62</sup> Claus Kreß and Kimberly Prost, *Article 99* in KAI AMBOS AND OTTO TRIFFTERER, [ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, A COMMENTARY](#) (3d ed. 2016), (“Kreß and Prost, Article 99”), p. 2148.

was given to the Prosecutor, without any requirement for State consent.”<sup>63</sup> The text that was ultimately accepted in Part 9 of the Statute “represented a true compromise” in seeking to achieve a balance between State interests and the interests of the OTP.<sup>64</sup>

35. Under Article 99(1) of the Statute, RFAs “shall be executed in accordance with the relevant procedure under the law of the requested State[.]” Article 93 provides that States Parties, “under the procedures of national law,” must comply with RFAs from the ICC to provide assistance in relation to investigations or prosecutions such as the execution of searches and seizures,<sup>65</sup> provision of records and documents,<sup>66</sup> and “any other type of assistance which is not prohibited by the law of the requested State...”<sup>67</sup> Professor Claus Kreß and ICC Judge Kimberly Prost observe that “it was the agreed understanding during the negotiations that modern intrusive measures such as, *e.g.* telephone interception” would fall under Article 93(1)(l) as “any other type of assistance which is not prohibited by the law of the requested State...”<sup>68</sup>
36. Article 96 of the Statute places a corresponding obligation on the ICC (whether the Chamber or OTP)<sup>69</sup> to make its RFA in writing and provide: (a) a concise statement of the object of the request and reason for the assistance sought, including the legal basis and grounds for the request; (b) as much detailed information about the location or identification of any person or place that must be found or identified in order for the assistance to be provided; (c) a concise statement of the essential facts; (d) the reasons for and details of any procedure or requirement to be followed; (e) information that may be required under the law of the requested State in order to execute the arrest; and (f) any other information relevant for the assistance sought.
37. Article 99(4) permits the OTP, in certain circumstances, to conduct its investigations directly on the territory of a State Party. To alleviate the concerns of States fearing an unrestrained OTP, Article 99(4) requires that direct investigation is “necessary” for the successful execution of “a request” and limits the OTP’s investigative acts to those “which can be executed without compulsory measures.”<sup>70</sup> Article 99(4) presupposes that there has already been an RFA under Article 93 for non-compulsory measures of investigation by

<sup>63</sup> [Kreß and Prost, Article 99](#), p. 2148.

<sup>64</sup> [Kreß and Prost, Article 99](#), p. 2148.

<sup>65</sup> [Rome Statute](#), Article 93(1)(h).

<sup>66</sup> [Rome Statute](#), Article 93(1)(i).

<sup>67</sup> [Rome Statute](#), Article 93(1)(l).

<sup>68</sup> Claus Kreß and Kimberly Prost, *Article 93* in KAI AMBOS AND OTTO TRIFFTERER, [ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, A COMMENTARY](#) (3d ed. 2016), (“Kreß and Prost, Article 93”), p. 2086.

<sup>69</sup> [ICC-01/05-01/13-2275](#), para. 481.

<sup>70</sup> See [Kreß and Prost, Article 99](#), p. 2148.

requiring that direct execution of these measures is “necessary” to successfully execute the RFA.<sup>71</sup>

38. Article 99(4) further limits the OTP’s ability to directly investigate “without the presence of authorities of the requested State Party” to “the interview of or taking evidence from a person on a voluntary basis,” and only if “it is essential for the request to be executed.”<sup>72</sup> According to Kreß and Prost, “[t]his was a critical proviso, which reduced the concerns of State about a Prosecutor carrying out a wide range of measures within a State, outside the knowledge and control of national authorities.”<sup>73</sup>
39. Article 99(4) also imposes an obligation on the OTP to consult with the requested State Party. Article 99(4)(a) provides that where the crimes or offences are alleged to have taken place on the territory of a State Party and there has been a determination of admissibility, the OTP may directly investigate “following all possible consultations with the requested State Party.” According to Kreß and Prost, “[t]his language was chosen to reflect that the Prosecutor should pursue consultations whenever possible, but at the same time it recognizes that consultations may not be *possible*, in which instance there will be no discussion with the State Party, prior to execution and, by the same token, no need to await that State’s consent to the direct execution.”<sup>74</sup> In other cases, Article 99(4)(b) permits the OTP to directly investigate on the territory of a State Party “following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party.”

### C. The PTC’s authority to authorize investigations in a State Party

40. The drafting history of the Rome Statute “reveal[s] that many delegations were uncomfortable with a provision that might be interpreted to enable the Prosecutor to – without restriction – take action on the territory of a State without that State’s permission,” while at the same time recognizing that States in certain instances, such as “the collapse of

<sup>71</sup> See [Kreß and Prost, Article 99](#), p. 2151. See also Xiang Binxin, *Article 99* in MARK KLAMBERG (ed), [COMMENTARY ON THE LAW OF THE INTERNATIONAL CRIMINAL COURT](#) (Torkel Opsahl Academic Epublischer 2017) (“Binxin, Article 99”), p. 670, fn. 763.

<sup>72</sup> See e.g., Proposal Submitted by Canada, Article 91(4), [A/Conf.183/WGIC/L.12](#), 2 June 1988. See also Working Group on International Cooperation and Judicial Assistance, Rolling Text of Article 91(4), [A/Conf.183/C.1/WGIC/L.13](#), 6 June 1988. Working Group on International Cooperation and Judicial Assistance, Rolling Text of Article 91(4), [A/Conf.183/C.1/WGIC/L.13/Rev.1](#), 10 July 1998.

<sup>73</sup> [Kreß and Prost, Article 99](#), p. 2149.

<sup>74</sup> [Kreß and Prost, Article 99](#), p. 2153 (emphasis in original). See also, [Binxin, Article 99](#), p. 671, fn. 764.

public order,” may not be able to respond to requests for cooperation.<sup>75</sup> The outcome is the carefully negotiated provisions of Article 57(3).

41. Article 57(3)(a) provides the PTC authority to “issue such orders and warrants as may be required for the purposes of an investigation.” Fabricio Guariglia, who was closely involved in the negotiations in Rome as Legal Advisor to the Argentine Ministry of Justice,<sup>76</sup> and Professor Gudrun Hochmayr remark that such orders may relate to “the questioning of persons being investigated, the production and service of documents and records, the examination of sites or places, the preservation of evidence and the execution of searches and seizures.”<sup>77</sup> Under Article 57(3)(a), the PTC’s order is transmitted to States Parties through an RFA under Part 9 of the Statute.<sup>78</sup>
42. Article 57(3)(d) provides the PTC further power to authorize the OTP to “take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned,” the PTC finds that “the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.” If the OTP “considers that article 57, paragraph 3 (d) applies,” it must submit a written request to the PTC for authorization under Rule 115(1). The PTC must then “whenever possible, inform and invite views from the State Party concerned” and consider any views expressed by that State.<sup>79</sup> When the PTC finds that Article 57(3)(d) applies, the OTP may directly execute the PTC’s order in the State Party.<sup>80</sup>

#### **D. The exclusionary rule**

43. Article 69(7) provides that “[e]vidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.” ICC Trial Chambers have considered the following factors to guide their assessment under

<sup>75</sup> Fabricio Guariglia and Gudrun Hochmayr, *Article 57* in KAI AMBOS AND OTTO TRIFFTERER, [ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, A COMMENTARY](#) (3d ed. 2016) (“Guariglia and Hochmayr, Article 57”), p. 1433.

<sup>76</sup> Fabricio Guariglia, Biography, <https://www.icc-cpi.int/about/otp/who-s-who/Pages/Fabricio-Guariglia.aspx>.

<sup>77</sup> [Guariglia and Hochmayr, Article 57](#), p. 1427.

<sup>78</sup> [Guariglia and Hochmayr, Article 57](#), p. 1427-8.

<sup>79</sup> [Rules of Procedure and Evidence](#), Rule 115(1)-(2).

<sup>80</sup> [Guariglia and Hochmayr, Article 57](#), p. 1428.

Article 69(7)(b): (a) the nature and gravity of the violation;<sup>81</sup> (b) whether the Accused's rights were violated;<sup>82</sup> and (c) the OTP's degree of control over the evidence gathering process and power to prevent improper or illegal activity.<sup>83</sup>

44. According to Donald K. Piragoff, principle Canadian Negotiator on issues related to criminal law, procedure, and evidence during the negotiations on the Rome Statute, and Paula Clarke, counsel in the Canadian Department of Justice, while a violation of the Statute or internationally recognized human right is a precondition to inadmissibility, the detrimental effect to the integrity of the proceedings expressed in Article 69(7)(b) is triggered by the "admission" of the evidence, not the violation itself, explaining:

The rationale for this paragraph is that it would be antithetical to the purposes and integrity of a Court ... to admit and use evidence that was obtained by means of a violation of its own Statute or internationally recognized human rights. Essentially, the admission and use of such evidence by the Court would damage the purpose and integrity of its own proceedings, which are to uphold the rule of law and human rights in the world....<sup>84</sup>

### III. ARGUMENT

#### A. The OTP violated Part 9 of the Statute by failing to issue RFAs or seek the PTC's authorization

45. Article 54(2) of the Rome Statute discretely permits the OTP to conduct investigations on the territory of a State Party: (a) "In accordance with the provisions of Part 9;" or (b) "As authorized by the Pre-Trial Chamber." By the OTP's admission, "no RFAs were sent to the relevant states pertaining to the voluntary recording of a conversation by any Prosecution witness in this case."<sup>85</sup> Nor did the OTP seek authorization under Article 57(3). Rather, it opted to deliberately and unjustifiably ignore safeguards afforded to States Parties under Part 9 of the Statute by breaching well-delineated and assiduously adopted principles of State sovereignty and judicial cooperation.

#### 1. The OTP failed to submit RFAs to [REDACTED]

<sup>81</sup> [ICC-01/04-01/06-1981](#), paras. 34, 47; [ICC-01/05-01/13-1948](#), para. 33.

<sup>82</sup> [ICC-01/04-01/06-1981](#), para. 47.

<sup>83</sup> [ICC-01/04-01/06-1981](#), paras. 45-7. [ICC-01/05-01/13-1854](#), paras. 65, 68-9; [ICC-01/05-01/13-1948](#), paras. 33, 36-7, 39; [ICC-01/05-01/13-2275-Anx](#), ("Judge Henderson Separate Opinion"), para. 34.

<sup>84</sup> Donald K. Piragoff and Paula Clarke, *Article 69* in KAI AMBOS AND OTTO TRIFFTERER, [ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, A COMMENTARY](#) (3d ed. 2016) ("Piragoff and Clarke, Article 69"), p. 1748.

<sup>85</sup> Annex B, pp. 5-9.

46. Confirming the OTP’s deliberate failure to issue RFAs, the Senior OTP Trial Lawyer speculatively claims as its excuse for circumventing the Statute that: [REDACTED].<sup>86</sup> [REDACTED].<sup>87</sup>
47. Contrary to [REDACTED] erroneous claims that the OTP could rely on Article 99(4) to covertly audio-record communications in [REDACTED],<sup>88</sup> the OTP made no requests to any of these three ICC States Parties for assistance to conduct covert communications surveillance permitting recourse to Article 99(4).<sup>89</sup> Article 99(4) required the OTP to submit RFAs before “execut[ing] such request directly on the territory” of these States Parties.<sup>90</sup> Any anticipatory rejections assumed by the OTP as a pretext for not complying with its statutorily proscribed obligations should brook no contenance, lest the OTP be anointed – no less then by the Judicial branch of the ICC – to be above the Statute with authority to act as it solely sees fit *sans* consequences.
48. Article 99(4) does not permit the OTP to use “proactive” and “covert” methods of investigation without notifying State Party authorities since they require compulsory measures.<sup>91</sup> As Article 70(2) and Rule 176(2) make clear, “the domestic law of the requested state” governs “the conditions for providing international cooperation” in Article 70 investigations. [REDACTED].<sup>92</sup> [REDACTED].<sup>93</sup> [REDACTED],<sup>94</sup> [REDACTED].
49. The OTP did not consult with [REDACTED] before conducting the impugned covert investigations as required by Article 99(4). With the ICC having determined the [REDACTED],<sup>95</sup> the OTP was obligated to “follow[] all possible consultations” before “directly execut[ing]” an RFA under Article 99(4)(a). [REDACTED]. Nothing can be clearer from a plain and ordinary reading of Article 99(4).
50. In a flight of fancy and fantasy, Investigator P-0730 gratuitously [REDACTED].<sup>96</sup> The procedural history in the two Kenyan cases belies this assertion. It also shows how the OTP’s approach to cooperation was “not reflective of a prosecutorial and investigative body

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<sup>86</sup> Annex B, pp. 5-9.

<sup>87</sup> [REDACTED].

<sup>88</sup> [REDACTED].

<sup>89</sup> Annex B, pp. 5-9.

<sup>90</sup> See [Kreß and Prost, Article 99](#), p. 2676. See also [Binxin, Article 99](#), p. 670, fn. 763.

<sup>91</sup> [REDACTED].

<sup>92</sup> [REDACTED].

<sup>93</sup> [REDACTED].

<sup>94</sup> [REDACTED].

<sup>95</sup> [REDACTED].

<sup>96</sup> [REDACTED].

effectively seeking to obtain the requested materials” – i.e., complaining of non-cooperation when convenient while failing to take concrete measures to secure it. [REDACTED].<sup>97</sup>

51. [REDACTED], the Kenyan Government was well within its rights – as any State Party – to challenge the OTP’s RFAs.<sup>98</sup> [REDACTED].

52. The OTP’s justification for its claims for having to circumvent the Statute are unfounded. [REDACTED].<sup>99</sup> [REDACTED].<sup>100</sup>

## 2. The OTP failed to seek authorization from the PTC

53. At no point did the OTP seek the PTC’s assistance before conducting covert investigations in [REDACTED]. If the OTP considered that it could not secure these States Parties’ cooperation, Article 57(3) required it to seek the PTC’s authorization before proceeding to investigate.

54. Judge Geoffrey Henderson correctly explained in his dissenting opinion in *Bemba et al.* that if the OTP is operating in an environment where legal authorities are not or cannot reasonably be expected to provide genuine judicial oversight, then it is incumbent on the OTP to come before the PTC “to seek authorisation for all investigatory acts that may infringe upon internationally recognized human rights.”<sup>101</sup> Indeed, Article 57(3) was drafted to allay States Parties’ concerns of having an unbridled OTP by providing for judicial oversight.<sup>102</sup>

55. Judicial oversight is built into Article 57(3). Under Article 57(3)(a), the PTC has authority to issue a request for State Party cooperation in the form of an RFA to be transmitted to the State Party under Part 9.<sup>103</sup> Should the State Party be “clearly unable to execute a request for cooperation,” the PTC under Article 57(3)(d) also has the power to authorize the OTP to “take specific investigative steps” in the territory of that State after hearing its views. Since the PTC directs the “specific investigative steps” that the OTP may take, more investigative measures are permitted than under Article 99(4). For instance, Article 57(3)(d)

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<sup>97</sup> [REDACTED]. [REDACTED].

<sup>98</sup> [REDACTED].

<sup>99</sup> [REDACTED].

<sup>100</sup> [REDACTED].

<sup>101</sup> [Judge Henderson Separate Opinion](#), para. 17; [Rome Statute](#), Arts. 54(1)(c) and 57(3)(a).

<sup>102</sup> *See supra*, paras. 40-2.

<sup>103</sup> *See supra*, para. 41.

does not restrict the investigation to non-compulsory measures or require that on site investigation be “necessary” or “essential” to executing an RFA.<sup>104</sup>

56. The functions of Article 57(3), its main underlying principles, and relationship with the provisions of Part 9 of the Statute all reflect the States Parties’ attempt to strike a balance between the need for effective investigations and principles of State sovereignty and judicial cooperation. The OTP unabashedly violated these principles. It neither made any RFAs to [REDACTED], nor did it request the PTC for authorization to covertly investigate in these States Parties.

**B. The admission of the audio-recordings would be antithetical to and seriously damage the integrity of the proceedings**

57. The OTP knew or should have known that it needed to make an RFA or request authorization from the PTC to covertly investigate in the territories of States Parties. It knew that covertly audio-recording an individual requires compulsory measures in [REDACTED]. And it also knew that it would have been required to consult with any requested States Parties before proceeding with its investigation. [REDACTED], it could simply disregard the “[s]afeguard clauses embedded in the various provision of Part 9 of the Statute to address sovereignty concerns of States.”<sup>105</sup>

58. As a general principle under the ICC Code of Conduct for the OTP, the OTP has a duty to uphold “professional ethics and integrity” and respect “human rights and fundamental freedoms recognised by international law in conformity with the Statute.”<sup>106</sup> Specifically, the OTP must “refrain from proffering evidence reasonably believed to have been obtained by means of a violation of the Statute or internationally recognised human rights” if admitting this evidence “would be antithetical to and would seriously damage the integrity of the proceedings.”<sup>107</sup> The OTP violated these ethical principles by knowingly circumventing the proper safeguards and principles in Part 9 of the Statute.

59. “[R]espect for the integrity of the proceedings is necessarily made up of respect for the core values which run through the Rome Statute,”<sup>108</sup> such as respect for the sovereignty of

<sup>104</sup> Compare [Rome Statute](#), Arts. 57(3)(d) and 99(4). [Kreß and Prost, Article 99](#), p. 2151, fn. 5.

<sup>105</sup> [ICC-01/05-01/13-2275](#), para. 319, quoting in part [ICC-01/05-01/13-1854](#), para. 36.

<sup>106</sup> [ICC Code of Conduct for the Office of the Prosecutor](#), Chapter 1, Section 4, paras. 8(b), 8(e).

<sup>107</sup> [ICC Code of Conduct for the Office of the Prosecutor](#), Chapter 3, Section 2, para. 51(d).

<sup>108</sup> Trapp and Lonsdale, *Excluding Evidence: The Timing of a Remedy* (unpublished manuscript, McGill University 1998), p. 21 quoted in [Piragoff and Clark, Article 69](#), p. 1741.

States,<sup>109</sup> respect for the rights of the person,<sup>110</sup> the protection of victims and witnesses,<sup>111</sup> and the effective prosecution and punishment of crimes within the Court's jurisdiction.<sup>112</sup> No singular value can be singled out as guaranteeing the integrity of the proceedings.<sup>113</sup> Thus, in considering whether the admission of evidence obtained in violation of Part 9 of the Statute is antithetical to and would seriously damage the integrity of the proceedings, the Trial Chamber should not only consider whether Mr. Gicheru's rights were violated and the OTP's degree of control over the evidence gathering process,<sup>114</sup> but also whether the admission of this evidence offends the core values of sovereignty and judicial cooperation.

60. It is antithetical to and would seriously damage the integrity of the proceedings were Trial Chamber III to admit and rely on evidence that was obtained by the OTP's knowing violation of Part 9 of the Statute. To do so risks rendering Part 9 of the Statute meaningless, effectively giving the OTP *carte blanche* authority to investigate in States Parties without any judicial oversight.<sup>115</sup> Unlike the circumstances in *Bemba et al.*, where the OTP notified the Austrian authorities prior to conducting its direct investigation and the Trial Chamber could rely on domestic authorities to conduct relevant checks and balances (i.e. to ensure that RFAs were authorized in compliance with national safeguards and international human rights),<sup>116</sup> the OTP was acting covertly and independently of State authorities.

61. The OTP's violation of Part 9 of the Statute and disregard of domestic law also resulted in a violation of Mr. Gicheru's internationally recognized human right of privacy – a relevant consideration under Article 69(7)(b).<sup>117</sup> While ICC Trial Chambers have considered that infringements of the right to privacy may not be so severe as to taint the fairness of the proceedings,<sup>118</sup> the impropriety in this case arises from the OTP's willful disregard of the carefully negotiated judicial cooperation regime and the requirements of domestic law. Given its *knowing* disregard of Part 9 as well as Mr. Gicheru's fundamental rights, the violation was egregious such that only the exclusion of the audio-recordings can prevent the integrity of the proceedings from being seriously damaged.

<sup>109</sup> [Rome Statute](#), Preamble, Arts. 1, 12, 17, 86-100.

<sup>110</sup> [Rome Statute](#), Arts. 55, 66, 67.

<sup>111</sup> [Rome Statute](#), Art. 68.

<sup>112</sup> [Rome Statute](#), Arts. 53-4, 56-61, 103-11.

<sup>113</sup> Trapp and Lonsdale, *Excluding Evidence: The Timing of a Remedy* (unpublished manuscript, McGill University 1998), p. 21 quoted in [Piragoff and Clark, Article 69](#), p. 1741.

<sup>114</sup> [ICC-01/04-01/06-1981](#), paras. 45-7. [ICC-01/05-01/13-1854](#), paras. 65, 68-9; [ICC-01/05-01/13-1948](#), paras. 33, 36-7, 39; [Judge Henderson Separate Opinion](#), para. 34.

<sup>115</sup> See [Judge Henderson Separate Opinion](#), paras. 16-7.

<sup>116</sup> [ICC-01/05-01/13-2275](#), paras. 320-5. See also [Judge Henderson Separate Opinion](#), para. 16.

<sup>117</sup> See *supra*, para. 43; [Judge Henderson Separate Opinion](#), para. 35.

<sup>118</sup> [ICC-01/05-01/13-1948](#), para. 33.

62. In negotiating the Rome Statute, the States Parties did not wish for the OTP to be permitted to investigate as it pleases, but to protect their sovereign interests as well as the rights of their citizens.<sup>119</sup> To admit evidence collected in a knowing violation of judicial cooperation principles, such as the OTP's conduct in this case, would effectively render Part 9 of the Statute meaningless, potentially leading to the withdrawal of States Parties wishing to protect their sovereign interests as well as the fundamental rights of their citizens.

#### IV. CONCLUSION & RELIEF SOUGHT

63. The OTP is the master of its investigative process. Required to diligently comply with the requirements of Part 9 of the Statute and the laws of the States Parties in which was operating, it deliberately and without legal justification chose not to. To find that there was no violation of Part 9 of the Statute would not only be illogical but would green-light the OTP to go rogue when investigating: to investigate directly on the territories of States Parties, conduct investigative activities prohibited by national law, and violate the principles of judicial cooperation and State sovereignty reflected in the Statute – as it pleases, without attempting to secure judicial cooperation [REDACTED]. Admitting the audio-recordings despite the violation would not only deprive Mr. Gicheru of a fair trial but would also seriously damage the integrity of the proceedings, setting a dangerous precedent of rewarding the OTP for circumventing its statutory obligation in respecting the rights, interests, and laws of the States Parties.

**WHEREFORE**, the Defence requests Trial Chamber III to **EXCLUDE** the OTP's audio-recordings listed in Annex A from the proceedings in accordance with Article 69(7).

Respectfully submitted, 29 November 2022,  
In The Hague, the Netherlands.



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<sup>119</sup> See *supra*, paras. 34-9.