

**Cour  
Pénale  
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**International  
Criminal  
Court**

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Date: 27 October 2021

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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 Prosecution application for the introduction of prior recorded testimony of Witness P-0397 pursuant to rule 68(2)(c), and alternatively 68(2)(d), 27 October 2021**

**Source: Office of the Prosecutor**

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

**The Office of the Prosecutor**

Ms Nazhat Shameen Khan

Mr Anton Steynberg

**Counsel for the Defence**

Mr Michael G. Karnavas

Ms Suzana Tomanovic

**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  
Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Osvaldo Zavala Giler

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. INTRODUCTION

1. The Prosecution requests the introduction into evidence of the prior recorded testimony of Witness P-0397 pursuant to rule 68(2)(c), because he is unavailable to give oral testimony, or in the alternative, under article 68(2)(d), since the witness has been subjected to interference.
2. P-0397 was a Prosecution witness in the *Ruto and Sang* case who provided information detrimental to RUTO, and later stated that GICHERU and others corruptly influenced him to withdraw as a witness. At risk for his safety, P-0397 [REDACTED] and has not been located since, despite extensive efforts. P-0397's evidence is mostly relevant to Count 1 of the charges against GICHERU, and to his criminal liability.
3. P-0397's prior recorded testimony should be accepted as formally submitted because (i) the witness is unavailable; (ii) the Prosecution could not anticipate the need to resort to article 56; (iii) the documents are reliable. The fact that P-0397's prior recorded testimony goes to the acts and conduct of the accused should not preclude its introduction, particularly since there are strong indicia that P-0397's unavailability resulted from interference deployed for the benefit of members of the Common Plan to interfere with witnesses, notably the Accused. P-0397's prior testimony would not be prejudicial to or inconsistent with the rights of the accused when weighed against its high probative value.
4. "Prior recorded testimony" in rule 68(2)(c) includes out-of-court testimony such as witness statements and interview transcripts, as well as in-court testimony. The Prosecution has listed in Annex A P-0397's statement, transcriptions of witness interview, and other associated documents it seeks to admit.<sup>1</sup> These include the audio files and corresponding transcriptions of controlled recorded phone calls to GICHERU and YEBEI recorded by P-0397 . Items referred to in these documents

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<sup>1</sup> "P-0397's prior testimony".

that are necessary to understand P-0397's prior testimony are also listed. The material is accessible through hyperlinks.

## II. CONFIDENTIALITY

5. This filing is classified as confidential because it identifies Prosecution witnesses. A public redacted version will be filed as soon as possible, but in any event within five days.

## III. SUBMISSIONS

### *Relevance and description of P-0397's prior testimony*

6. P-0397 was a Prosecution witness in the *Ruto and Sang* case who originally provided a rule 111 statement in 2012 about the 2007-2008 post-election violence in Kenya, with linkage evidence detrimental to RUTO. In May 2013, the Prosecution received a letter and affidavit from P-0397, through advocate [REDACTED], withdrawing as a witness.<sup>2</sup> At this time, P-0397 ceased contact with OTP investigators. In January 2014, in fear for his safety, P-0397 resumed contact with the Prosecution and gave a rule 112 interview about facts relevant to article 70 offences. [REDACTED]. A summon to appear was issued by Trial Chamber V(A).<sup>3</sup> However, [REDACTED], P-0397 did not testify in the *Ruto and Sang* case. P-0397's evidence supports Count 1 of the charges against GICHERU, and elements of his criminal liability.<sup>4</sup>
7. The Prosecution seeks to submit into evidence P-0397's prior testimony and associated material, as listed in Annex A. P-0397's written statement about the post-election violence is introduced only to establish that P-0397 was a Prosecution witness in the *Ruto and Sang* case whose anticipated evidence was detrimental to RUTO. Admission of the annexes to this statement are not necessary for the

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<sup>2</sup> KEN-OTP-0099-0286.

<sup>3</sup> ICC-01/09-01/11-1274-Corr2.

<sup>4</sup> ICC-01/09-01/20-125-Conf-AnxA-Corr3, paras. 71-72.

purpose of this case, but they are listed since they are referenced in the statement. P-0397's affidavit and associated material are relevant to show that he withdrew as a witness, and the circumstances around surrounding this withdrawal.

8. The Prosecution also seeks to introduce the transcriptions and English translations of P-0397's interview pursuant to article 55(2) of the Rome Statute in January 2014 for the truth of their content, as they are directly relevant to the charges in this case, and items provided by P-0397 during the interview. During this audio recorded interview, and on request from the investigators, P-0397 and on request from the investigators, P-0397 called GICHERU and YEBEI. The Prosecution also submits those recordings and their corresponding transcripts and translations as material associated with P-0397's prior recorded testimony. The recordings of the controlled phone calls have been enhanced by the Netherlands Forensic Institute (NFI), and new transcripts and translations are being prepared and will be disclosed as soon as possible. The Prosecution will then ask to substitute those for the corresponding transcripts and translations listed in Annex A.

***Prior recorded evidence of P-0397's [REDACTED]***

9. Prior recorded testimony of P-0397 about the post-election violence was [REDACTED]. [REDACTED],<sup>5</sup> [REDACTED]. [REDACTED].

***P-0397 is unavailable to testify orally***

10. P-0397 [REDACTED]. He [REDACTED] "is unavailable to testify orally due to obstacles that cannot be overcome with reasonable diligence", as per the requirement of sub rule 68(2)(c). [REDACTED]. [REDACTED]. [REDACTED].<sup>6</sup>

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

<sup>6</sup> **P-0731**: KEN-OTP-0149-0444 (April 2014); KEN-OTP-0149-0449 (May 2014); KEN-OTP-0135-0446 (July 2014); KEN-OTP-0141-0495 (September 2014); KEN-OTP-0144-0168 (October 2014); KEN-OTP-0160-0690 (October 2021).

The Prosecution relies on five affidavits drafted by P-0731, the lead investigator in charge of this part of the case, who details these steps.<sup>7</sup> The Prosecution also relies on the affidavit of P-0730, the Kenya article 70 investigation team leader at the time [REDACTED].<sup>8</sup>

11. After being interviewed under article 55(2) by OTP investigators and detailing how GICHERU and others corruptly influenced him, P-0397 – [REDACTED]- was [REDACTED] relocated [REDACTED] due to the risk to their safety.<sup>9</sup> [REDACTED].<sup>10</sup> [REDACTED].<sup>11</sup> [REDACTED].<sup>12</sup> [REDACTED].<sup>13</sup> [REDACTED]<sup>14</sup> [REDACTED].<sup>15</sup> [REDACTED].
12. [REDACTED].<sup>16</sup> [REDACTED]. [REDACTED]. [REDACTED].<sup>17</sup>
13. The Prosecution believes that P-0397 [REDACTED] for the purpose of rule 68(2)(c). [REDACTED]. In April 2014, [REDACTED] threatened P-0341, who had just met with OTP investigators. [REDACTED], who knew about the meeting with investigators, told P-0341 that RUTO had sent him to see P-0341. He threatened: “[REDACTED]” and said [REDACTED].<sup>18</sup> In July 2014, [REDACTED].<sup>19</sup> In December 2014, [REDACTED]. [REDACTED]. [REDACTED].<sup>20</sup>
14. In any case, P-0397 is certainly “unavailable due to obstacles that cannot be overcome with reasonable diligence”.<sup>21</sup> In addition to the efforts by the OTP described above, the summon to appear issued in relation to the witness in the

<sup>7</sup> A request to introduce these solemn declarations and associated material under rule 68(2)(b) is filed separately.

<sup>8</sup> A request to introduce this solemn declaration under rule 68(3) is filed separately.

<sup>9</sup> **P-0730**: KEN-OTP-0159-0884 at 0906, para. 85.

<sup>10</sup> **P-0730**: KEN-OTP-0159-0884 at 0906, paras. 85-86.

<sup>11</sup> **P-0730**: KEN-OTP-0159-0884 at 0906, para. 86.

<sup>12</sup> **P-0730**: KEN-OTP-0159-0884 at 0907, para. 91; **P-0731**: KEN-OTP-0149-0144 at 0445, para. 9.

<sup>13</sup> [REDACTED]; **P-0731**: KEN-OTP-0160-0690 at 0692, para. 10.

<sup>14</sup> **P-0731**: KEN-OTP-0144-0168 at 169 at 0169, para. 6.

<sup>15</sup> **P-0731**: KEN-OTP-0144-0168 at 169 at 0169, para. 6.

<sup>16</sup> **P-0731**: KEN-OTP-0141-0495 at 0497, para.8, KEN-OTP-0160-0690 at 0691, paras. 6-7.

<sup>17</sup> **P-0731**: KEN-OTP-0160-0690 at 0691-0692, paras. 8-10; KEN-OTP-0160-0676; KEN-OTP-0160-0679; KEN-OTP-0160-0680; KEN-OTP-0160-0681.

<sup>18</sup> See CC-01/09-01/20-125-Conf-AnxA-Corr3, para. 286.

<sup>19</sup> **P-0731**: KEN-OTP-0135-0446 at 0447, para.8.

<sup>20</sup> **P-0730**: KEN-OTP-0159-0884 at 0909, para. 91(h).

<sup>21</sup> See [REDACTED].

*Ruto and Sang* case [REDACTED], and P-0397 did not attend his schedule testimony hearing.<sup>22</sup>

***The Prosecution could not anticipate the use of article 56 in relation to P-0397***

15. P-0397's [REDACTED] and could not have been anticipated. The Witness had just resumed cooperation with the Prosecution and was [REDACTED] relocated.<sup>23</sup> [REDACTED].

***P-0397's prior testimony has sufficient indicia of reliability***

16. Although indicia of reliability is not a factor that is specifically required by rule 68(2)(c), other Chambers have considered this in making their determinations. However, the Chamber is not obliged to consider factors beyond formal requirements.<sup>24</sup>

17. P-0397's prior recorded testimony comprises statements and interviews taken by Prosecution investigators in the ordinary course of the investigation.<sup>25</sup> P-0397's written statement complies with the requirements of rule 111(1). It is signed by the witness, the OTP investigator, the OTP trial lawyer, certified by the interpreter; and initialled by them on every page. It records the dates, times and place of, and all persons present during the questioning.<sup>26</sup> The witness's affidavit and associated materials bear signatures, times and locations.<sup>27</sup> P-0397's article 55(2) questioning complies with the requirement of rule 112(1).<sup>28</sup> P-0397's phone calls were discussed during the article 55(2) interview, recorded, transcribed and translated.

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<sup>22</sup> *Ibid.*

<sup>23</sup> **P-0730**: KEN-OTP-0159-0884 at 0906, para. 85. See [REDACTED].

<sup>24</sup> *Al Hassan*, ICC-01/12-01/18-1413, para. 15; ICC-01/12-01/18-1588-Conf, para. 28; *Gbagbo* ICC-02/11-01/15-744 OA8, paras. 3, 103-104; *Ruto and Sang* ICC-01/09-01/11-1353, para. 15.

<sup>25</sup> See [REDACTED].

<sup>26</sup> KEN-OTP-0074-0264.

<sup>27</sup> KEN-OTP-0124-0029; KEN-OTP-0124-0030; KEN-OTP-0099-0286.

<sup>28</sup> See transcripts KEN-OTP-0159-1004 to KEN-OTP-0159-1473; explanation of rights: KEN-OTP-0159-1248 at 1255-1275; waiver of rights: KEN-OTP-0124-0020.

***P-0397's prior testimony is relevant and probative***

18. Similarly, relevance and probative value is not specifically required by rule 68(2)(c), but may be relevant to the Chamber's exercise of its discretion to allow the introduction of evidence under rule 68(2)<sup>29</sup> and its general powers to assess evidence under article 69(4). P-0397's article 55(2) statement is highly probative, internally consistent, and displays a detailed first hand narrative of the corrupt influence just a few months after the facts. The witness was willing to take part in controlled phone calls were he confronted his interlocutors with allegations he made before the investigators, when he could have been contradicted by his interlocutors. The witness's assertions are corroborated by the recorded controlled phone conversations with GICHERU and YEBEL, notably their lack of denial. P-0397's bank statements, and the expected evidence of the other witnesses, about P-0397<sup>30</sup> and about the *modus operandi* of GICHERU and other members of the corruption plan are also corroborative of his evidence.

***P-0397's prior testimony about the Accused's acts and conduct should not be an obstacle to its introduction as evidence***

19. P-0397's article 55(2) interview does go to the acts and conducts of the accused to a significant extent. The Prosecution notes that "acts and conduct of the accused" within the meaning of Rule 68(2) refers to "the personal actions and omissions of the accused as opposed to the acts and conduct of other persons which could be attributed to the accused by reason of the mode of liability charged".<sup>31</sup> However Rule 68(2)(c)(ii) does not prohibit the introduction of prior testimony which goes to the acts and conduct of an accused, but rather indicates that it is merely "a factor". Other Chambers have admitted evidence under rule 68(2)(c) when part of

<sup>29</sup> See *chapeau* : "... the Chamber *may* allow..." (emphasis added).

<sup>30</sup> ICC-01/09-01/20-125-Conf-AnxA-Corr3, para. 86.

<sup>31</sup> AC Ntaganda: ICC-01/04-02/06-2666-Red, para.631; Ongwen: ICC-02/04-01/15-596-Red, paras 11-12; Ntaganda: ICC-01/04-02/06-1667-Red, para. 11; Al Hassan: ICC-01/12-01/18-1588, para.9.



it went to the acts and conduct of the accused.<sup>32</sup> In *Ntaganda*, the Trial Chamber admitted a witness's prior recorded testimony which contained "extensive references to the acts and conduct" of the accused.<sup>33</sup>

20. In the case of P-0397, this factor should bear little weight in the decision to introduce P-0397's prior testimony, due to strong indications that the reason for his unavailability is interference perpetrated for the benefit members of the Common Plan, including the Accused. In addition, P-0397 was the subject of improper interference by GICHERU as described in his article 55(2) interview, which led him to withdraw as a witness as cease contact with the OTP in the first instance. At the moment of [REDACTED], the witness was assessed to be at risk because he was collaborating with the Prosecution: he was under [REDACTED]. It would defeat the purpose of the rule – and of the Statute – if the evidence could be suppressed because it goes to the acts and conduct of the accused in those circumstances.
21. The fact that P-0397's prior recorded evidence, including evidence going to the acts and conduct of the Accused, has not been subjected in cross examination is a factor that can be taken into account by the Chamber when assessing the weight to be attached to this evidence, in light of the entirety of the evidence on record, at the end of the case. However, the Prosecution will argue that P-0397's prior recorded evidence should be afforded full weight, since it is relevant, probative and corroborated. Furthermore, to afford the evidence lesser weight in circumstances where the conduct of the Accused and his associates contributed to the unavailability of the witness would defeat the object and purpose of rules 68(2)(c) and (d).

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<sup>32</sup> *Al Hassan*: ICC-01/12-01/18-1413, para. 21; *Ntaganda*: ICC-01/04-02/06-1802-Red, paras. 26-31.

<sup>33</sup> *Ntaganda*: ICC-01/04-02/06-1802-Red, para. 26.

*The introduction of P-0397's prior testimony would not be prejudicial to or inconsistent with the rights of the accused*

22. Introduction of P-0397's prior testimony is not prejudicial or inconsistent with the rights of the accused and the right to a fair trial, when balanced with its high probative value. The arguments developed above in the paragraphs about reliability and acts and conduct apply.
23. The Defence will be able to discuss P-0397's evidence, cross-examine other witnesses on their expected evidence about the *modus operandi* of the members of the common, GICHERU, and on P-0397. The Defence will also be able to bring evidence to rebut P-0397, should it wish to do so.

*P-0397's prior testimony also satisfies the requirements of rule 68(2)(d)*

24. Alternatively, the Prosecution seeks to introduce P-0397's prior testimony under rule 68(2)(d), as it "comes from a person who has been subjected to interference" . [REDACTED], the facts and arguments developed above apply *mutatis mutandis* to satisfy the required limbs of the sub-rule (d). The witness has failed to attend as a witness despite being summoned to appear, his failure to attend was cause by threats, intimidation and coercion as described in his article 55(2) interview, and arise from the circumstances of his [REDACTED]. This interference related to his physical, psychological and economic interests. Reasonable efforts has been made to secure his attendance and the prior testimony has sufficient indicia of reliability. The interests of justice would be best served if the evidence given by P-0397 [REDACTED], but assist in the determination of truth in this case.

#### IV. CONCLUSION AND RELIEF SOUGHT

25. For the foregoing reasons, the Prosecution requests the Chamber to recognise the prior recorded testimony of Witness P-0397 as formally submitted into evidence, pursuant to rule 68(2)(c), and alternatively 68(2)(d).



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**Ms Nazhat Shameen Khan, Deputy Prosecutor**

Dated this 15<sup>th</sup> day of June 2023

At The Hague, The Netherlands