

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/09-01/20**
Date: **2 February 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

Decision on the Prosecution Request for a Summons for P-0743

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

The Office of the Prosecutor

Mr James Stewart
Mr Anton Steynberg

Counsel for the Defence

Mr Michael G. Karnavas
Ms Suzana Tomanović

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
for Participation/Reparations**

**The Office of Public Counsel
for Victims**

**The Office of Public Counsel
for the Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

TRIAL CHAMBER III of the International Criminal Court, in the case of *The Prosecutor v. Paul Gicheru*, having regard to Articles 64(6)(b) and 93(1)(b) of the Rome Statute, issues this ‘Decision on the Prosecution Request for a Summons for P-0743’.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 17 January 2022, the Office of the Prosecutor (the ‘Prosecution’) filed a request for a summons for witness P-0743 (the ‘Request’).¹ Therein, it requests the Chamber: (i) to compel P-0743 to testify via video-link [REDACTED]; (ii) to request the assistance from [REDACTED] to ensure the witness’s appearance for the purposes of giving oral testimony; and (iii) to order the Registry to facilitate the preparation and transmission of the summons to P-0743 and to prepare and transmit the necessary cooperation request to [REDACTED].²

2. The Prosecution explains that P-0743, was [REDACTED] was supposed to testify in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (the ‘Main Case’).³ Originally the witness was [REDACTED], he [REDACTED] stopped cooperating with the Prosecution.⁴

3. In response to these events, the Prosecution requested [REDACTED], which was granted.⁵ Several months later, the Prosecution was able to re-establish contact with P-0743; the witness then appeared [REDACTED] before the Chamber in the Main Case.⁶

4. Following his testimony in the Main Case, P-0743 [REDACTED] broke off all communication with the Court. To date, the Prosecution has been unable to contact him, having also requested assistance from [REDACTED] and [REDACTED], where the Prosecution assumes the witness currently resides.⁷

¹ Prosecution’s Application for Witness Summons and Resulting Request for State Party Cooperation, ICC-01/09-01/20-260-Conf. A lesser public-redacted version was filed on 24 January 2022, [ICC-01/09-01/20-260-Red2](#).

² Request, ICC-01/09-01/20-260-Conf, paras 1 and 33..

³ Request, ICC-01/09-01/20-260-Conf, para. 12.

⁴ Request, ICC-01/09-01/20-260-Conf, paras 14-16.

⁵ Request, ICC-01/09-01/20-260-Conf, paras 16-17.

⁶ Request, ICC-01/09-01/20-260-Conf, paras 18, 20.

⁷ Request, ICC-01/09-01/20-260-Conf, paras 21-23.

5. The Prosecution submits that P-0743's testimony in the current case is relevant since the witness also testified on witness interference during his testimony before the Chamber in the Main Case, implicating the Accused and mentioning witnesses whose interference is subject of the current proceedings.⁸
6. The Prosecution further avers that its request for cooperation is specific enough, clearly identifying the witness and that it has reasonable grounds to believe him to be located within the jurisdiction of [REDACTED].⁹
7. Lastly, the Prosecution argues that P-0743's testimony is required for the 'determination of the truth' and therefore necessary. It explains the relevance of the expected testimony of the witness and argues that – due to the current situation but also P-0743's behaviour in the past – a summons is necessary to obtain his testimony.¹⁰
8. On 18 January 2021, the Defence informed the Chamber that it leaves it to the discretion of the Chamber 'to dispense with [the Request] as it sees fit and fair'.¹¹

⁸ [Request](#), ICC-01/09-01/20-260-Red2, paras 24-26.

⁹ Request, ICC-01/09-01/20-260-Conf, para. 27.

¹⁰ Request, ICC-01/09-01/20-260-Conf, paras 28-29.

¹¹ Email to the Chamber, on 18 January 2022, at 10:25.

II. ANALYSIS

9. The Chamber notes that it is established jurisprudence of the Court, that a chamber has the power to compel the appearance of a witness, pursuant to Article 46)(b) of the Statute.¹² As a consequence, the witness in question has a legal obligation to appear should the Chamber issue a summons for his attendance.¹³

10. Under Article 93(1)(b) of the Statute, a chamber may request a State Party's cooperation in order to serve the summons and compel the person in question to appear before the Court, either sitting *in situ* in the territory of the State Party or appearing via video link.¹⁴

11. Such a request to a State Party must, as in the case of any other request for cooperation, fulfil the three criteria of relevance, specificity and necessity.¹⁵

12. Concerning the criterion of relevance, the Chamber notes that P-0743 has made statements concerning witness interference in the Main Case.¹⁶ Furthermore, the Prosecution interviewed the witness in relation to its then ongoing Article 70 investigations, where he implicated, among others, the Accused, who the witness states influenced him to withdraw from the Main Case.¹⁷ Accordingly, the Chamber finds that a request for cooperation is relevant.

¹² Appeals Chamber, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", 9 October 2014 2014, [ICC-01/09-01/11-1598](#) (the 'Kenya Appeals Chamber Judgement'), TC V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014, [ICC-01/09-01/11-1274-Corr2](#); Trial Chamber VII, *The Prosecutor v. Jean Pierre Bemba Gombo et al.*, Public redacted version of Decision on the 'Prosecution's Requests under Articles 64(6)(b) and 93 of the Rome Statute to Summon Witnesses', 3 December 2015, [ICC-01/05-01/13-1343-Red](#) (the 'Bemba et al. Trial Chamber Decision'); Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the Prosecution Request to Summon a Witness, 8 January 2021, ICC-01/14-01/18-804-Conf.

¹³ [Kenya Appeals Chamber Judgement](#), paras 107 and 113.

¹⁴ [Kenya Appeals Chamber Judgement](#), paras 2 and 132; [Bemba et al. Trial Chamber Decision](#), para. 17.

¹⁵ [Bemba et al. Trial Chamber Decision](#), para. 18

¹⁶ Transcript of hearing, 21 January 2015, ICC-01/09-01/11-T-182-Conf-Eng, pages 8 and 85 ff.

¹⁷ [Request](#), ICC-01/09-01/20-260-Red2, para. 18.

13. The Chamber also finds that the cooperation request is sufficiently specific in stating the identity of the person the Prosecution requests to be summoned, as well as the location where the witness is presumed to reside.

14. Lastly, in respect of the question of whether a cooperation request is necessary, the Chamber notes that the Prosecution has detailed its (unsuccessful) attempts to contact the witness.¹⁸ Further, the Chamber also notes the witness's previous interactions with the Court and the details of his testimony before the Chamber in the Main Case.¹⁹ Considering these facts, the Chamber also finds that the Request is necessary in order to obtain the testimony of P-0743. Accordingly, the Chamber grants the Request.

15. The Chamber notes that the Prosecution requests the summons 'on such dates and time as the Chamber may determine'.²⁰ However, the Chamber does not have the necessary information and details on how the Prosecution plans to present its evidence and call its witnesses. In the interests of efficiency, it considers the Prosecution best-placed to determine – in cooperation with the Registry, if necessary – the dates, time and place of the summons of P-0743. As a result, as soon as the Prosecution has taken this decision, it is to inform the Chamber and the Defence of the dates and time in question.

¹⁸ See, paragraph 4 above.

¹⁹ See, paragraphs 2 and 3 above.

²⁰ [Request](#), ICC-01/09-01/20-260-Red2, paras 1(ii) and 33(i).

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the Request;

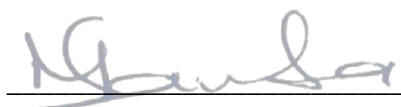
REQUIRES the appearance of P-0743 for the purposes of testimony via video-link at the dates, time and place the Prosecution, and the Registry as the case may be, communicate to the witness;

REQUESTS the assistance of [REDACTED], where necessary in consultation with the Court according to Article 93(3) of the Statute, in ensuring the appearance of witness P-0743 as indicated above, including by:

- (i) informing P-0743 of his obligation to appear as indicated above and serving the summons upon him;
- (ii) facilitating, by way of compulsory measure as necessary, the appearance of witness P-0743 to give testimony before the Chamber by video-link on such dates and time and according to the modalities communicated to him by the Prosecution and/or the Registry; and
- (iii) to make appropriate arrangements for the security of witness P-0743, in consultation with the Victims and Witnesses Unit; and

INSTRUCTS the Registry to prepare and transmit forthwith, in consultation with the Prosecution, the necessary summons to witnesses P-0743 (with or without the assistance of [REDACTED]), as well as the necessary cooperation request to the relevant authorities of [REDACTED] in accordance with Articles 70(2), 96 and 99(1) of the Statute and Rule 167 of the Rules, as specified in this Decision

Done in both English and French, the English version being authoritative.



Judge Miatta Maria Samba

Dated 2 February 2022

At The Hague, The Netherlands