

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: ICC-01/09-01/20  
Date: 4 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**

**Public redacted version of “Prosecution Second Application for Witness Summons and Resulting Request for State Cooperation”, ICC-01/09-01/20-277-Conf, 3 February 2022**

**Source: Office of the Prosecutor**

**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  
Defence**

**States' Representatives**

**Amicus Curiae**

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**REGISTRY**

**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

Mr Nigel Verril

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. Introduction

1. Pursuant to articles 64(6)(b) and 93(l)(b) of the Rome Statute and Trial Chamber III's<sup>1</sup> Decision on the Prosecution Request for Variation of Time Limit in order to Request a Summons of Witness,<sup>2</sup> the Office of the Prosecutor<sup>3</sup> hereby requests the Chamber to require:
  - (i) the compulsory attendance of Witness [REDACTED] to testify before the Chamber, in person or by video-link at a location [REDACTED],<sup>4</sup> on such dates, times and modalities as the Prosecution and/or the Registry will communicate to him;
  - (ii) the assistance of the Government [REDACTED] in ensuring the appearance of [REDACTED], using all means available under [REDACTED] law; and
  - (iii) the assistance of the Registry to prepare and transmit, [REDACTED]<sup>5</sup> and Prosecution, the necessary summons to Witness [REDACTED] as well as the necessary cooperation request to the relevant authorities of [REDACTED].
  
2. [REDACTED] is a Prosecution witness in this case<sup>6</sup> who resides in the territory of [REDACTED]. He is the [REDACTED] of the confirmed charges<sup>7</sup> and is expected to provide relevant testimony, including that GICHERU paid [REDACTED],<sup>8</sup> and also paid [REDACTED],<sup>9</sup> another Prosecution witness. As such, his evidence is relevant and material to the current proceedings and potentially necessary for the determination of the truth.

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<sup>1</sup> "Chamber".

<sup>2</sup> ICC-01/09-01/20-275-Conf.

<sup>3</sup> "Prosecution" or "OTP".

<sup>4</sup> Hereinafter, [REDACTED]

<sup>5</sup> Hereinafter, [REDACTED]

<sup>6</sup> ICC-01/09-01/20-220-Conf-AnxB, [REDACTED]

<sup>7</sup> See Prosecution's Trial Brief, ICC-01/09-01/20-220-Conf, paras. [REDACTED]

<sup>8</sup> ICC-01/09-01/20-220-Conf, paras. [REDACTED]

<sup>9</sup> ICC-01/09-01/20-220-Conf, para. [REDACTED]

3. [REDACTED] the Prosecution has maintained contact with [REDACTED] since the commencement of the proceedings in this case to secure his voluntary and timely attendance, [REDACTED]. The witness has however suddenly broken off all communications [REDACTED] and the OTP has no [REDACTED] means to locate or reach him. Given the upcoming commencement of the trial and the need to ensure a smooth presentation of the Prosecution evidence,<sup>10</sup> it is necessary to take urgent steps to obtain the assistance of the [REDACTED] authorities to summons him to testify before the Chamber.

## II. Confidentiality

4. This filing is classified as “Confidential” under Regulation 23(1)*bis* as it refers to information of a confidential nature relating to [REDACTED]. A public redacted version of this filing will be submitted as soon as possible within the next 5 days.<sup>11</sup>

## III. Background

5. After testifying in the *Ruto and Sang* case<sup>12</sup> pursuant to a summons,<sup>13</sup> [REDACTED] was interviewed by the OTP in the context of its then-ongoing article 70 investigations in the Kenya situation. On [REDACTED] 2015, [REDACTED] admitted to the OTP that before withdrawing his cooperation from the Court, [REDACTED].<sup>14</sup>
6. [REDACTED]
7. On 9 February 2015, the Prosecution submitted the Application for an arrest warrant for GICHERU *et al.*, for the offence of corruptly influencing Prosecution

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<sup>10</sup> E-mail from Trial Chamber III to the parties dated 18 January 2022 (17:41).

<sup>11</sup> ICC-01/09-01/20-189, para. 46.

<sup>12</sup> ICC-01/09-01/20-T-002-CONF-ENG ET (p. 27 onwards) to ICC-01/09-01/20-T-006-CONF ENG ET.

<sup>13</sup> ICC-01/09-01/11-1274-Corr2, p. 77, disposition.

<sup>14</sup> ICC-01/09-01/20-220-Conf, [REDACTED].

witnesses, including [REDACTED].<sup>15</sup> An Arrest Warrant was issued 10 March 2015, [REDACTED].<sup>16</sup>

8. Following the surrender of GICHERU to the Court on 3 November 2020, the Prosecution re-interviewed [REDACTED] pursuant to article 55(2) of the Statute. [REDACTED] and the interview lasted two days, [REDACTED] 2021.<sup>17</sup>
9. On 12 March 2021, the Prosecution filed its document containing the charges against the Accused [REDACTED].<sup>18</sup> On 15 July 2021, the Pre Trial Chamber confirmed all the charges, [REDACTED].<sup>19</sup>
10. On 15 November 2021, the Prosecution filed its Trial Brief and List of Witnesses ("LoW"), which included [REDACTED],<sup>20</sup> together with a summary of his anticipated evidence.<sup>21</sup>
11. On [REDACTED], the witness had just been informed [REDACTED] that he was expected to testify in the *Gicheru* case in [REDACTED]. The witness told the OTP that he was concerned [REDACTED]. After the process was explained further, including the possibility that the Court might order him to appear, the witness agreed to reflect upon the matter until [REDACTED].
12. [REDACTED], the witness informed the Prosecution that he was willing to testify. On [REDACTED], the witness sought to inquire with [REDACTED] whether he could testify later in the year [REDACTED]. He was informed that potential solutions [REDACTED] would be explored [REDACTED].
13. On [REDACTED], [REDACTED], the Prosecution contacted him again. [REDACTED] reiterated his [REDACTED]. He was informed that [REDACTED]

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<sup>15</sup> ICC-01/09-144-Conf-Red, paras. [REDACTED].

<sup>16</sup> ICC-01/09-01/15-1-Red, disposition, [REDACTED].

<sup>17</sup> KEN-OTP-0160-0057, -0078, -0107, -0139, -0149, -0188.

<sup>18</sup> ICC-01/09-01/20-125-Conf-AnxA-Corr3, [REDACTED].

<sup>19</sup> ICC-01/09-01/20-153-Conf, [REDACTED].

<sup>20</sup> ICC-01/09-01/20-220-Conf-AnxB.

<sup>21</sup> ICC-01/09-01/20-220-Conf-AnxB1, [REDACTED].

was working toward resolving the issue and the witness agreed to send the necessary documentation.

14. On 18 January 2022, [REDACTED] the witness was cooperating [REDACTED]. On the same day, the Chamber directed “the Prosecution to liaise with the Registry in a timely and diligent manner on all necessary aspects in order to facilitate the smooth presentation of evidence”.<sup>22</sup>
15. On 25 January 2022, [REDACTED] had since been unreachable. [REDACTED] on 28 January 2022. On the latter date [REDACTED] despite their best efforts, [REDACTED] were unable to get through to the witness and he appeared to have turned off his phone.
16. On 31 January 2022, [REDACTED] were again unable to get through to the witness. On the same day, the Prosecution advised the Chamber of the situation and sought a variation of the time limit to file a request to summons [REDACTED],<sup>23</sup> which the Defence did not oppose.<sup>24</sup>
17. On 2 February 2022, the Chamber varied the time limit and directed the Prosecution to file a formal request for summons for [REDACTED] by 3 February 2022,<sup>25</sup> and the next day issued a formal decision to this effect.<sup>26</sup>

#### IV. Applicable Law

18. The Prosecution incorporates by reference the submissions made on the relevant applicable law in its Application for Witness Summons and Resulting Request for State Party Cooperation submitted on 17 January 2022.<sup>27</sup>

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<sup>22</sup> E-mail from Trial Chamber III to the parties dated 18 January 2022 (17:41).

<sup>23</sup> E-mail from the Prosecution to Trial Chamber III dated 31 January 2022 at 16:53.

<sup>24</sup> The Defence left “the matter to the Trial Chamber’s wise and fair discretion”, *see* email to Trial Chamber III dated 2 February 2022 at 15:45.

<sup>25</sup> E-mail by Trial Chamber III to the Parties dated 2 February 2022 at 19:21. The Defence left “the matter to the Trial Chamber’s wise and fair discretion”, *see* email to Trial Chamber III dated 2 February 2022 at 15:45.

<sup>26</sup> ICC-01/09-01/20-275-Conf.

<sup>27</sup> ICC-01/09-01/20-260-Conf, paras. 8-11. (“First Application”). The Defence also did not oppose the Prosecution’s First Application “leaving the matter to the Trial Chamber’s discretion to dispense with it as it sees fit and fair” (*see* e-mail from the Defence to Trial Chamber III dated 18 January 2022 at 10:23).

19. The Prosecution notes that on 2 February 2022, the Chamber approved the First Application holding that “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).”<sup>28</sup>

## V. Submissions

[REDACTED] is unreachable and the Prosecution cannot secure his attendance at trial

20. As indicated above, the Prosecution last met the witness in person in mid-[REDACTED]. Since then, the OTP was only able to speak to [REDACTED] on a few occasions by, [REDACTED]. This included on [REDACTED] when the witness was informed of the Pre Trial Chamber’s decision confirming the charges and prospective trial proceedings, and again on [REDACTED] and [REDACTED].
21. On [REDACTED] when the OTP called the witness, he had just been informed [REDACTED] that he was expected to testify in the *Gicheru* case in [REDACTED]. The witness told the OTP that he was concerned that [REDACTED]. After being explained the process further, including the possibility that the Court might order him to appear, the witness agreed to reflect upon the matter until [REDACTED].
22. On [REDACTED] 2022, the witness informed the Prosecution that he was willing to testify. On [REDACTED] 2022, the witness inquired whether he could testify later in the year, [REDACTED]. He was informed [REDACTED] would be explored [REDACTED].
23. On [REDACTED], further to [REDACTED] indication [REDACTED]. [REDACTED] reiterated his concerns about [REDACTED] being critically disrupted by him testifying in February or March and doubted he could attend trial. [REDACTED].

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<sup>28</sup> ICC-01/09-01/20-272-Conf, para. 9.

24. On 18 January 2022, [REDACTED] the witness was cooperating and was able to travel as scheduled.
25. On 25, 28 and 31 January 2022, [REDACTED] broken off all communications [REDACTED]. The Prosecution asked that further attempts be made to locate the witness who, to date, remains unreachable.
26. As indicated above, [REDACTED], the Prosecution is not in a position to [REDACTED] contact or locate this witness. As such, since the witness now appears to be unwilling to cooperate further with the Court and time is of the essence to ensure a smooth presentation of the evidence, the Prosecution can only secure [REDACTED] attendance at the upcoming trial *via* a summons request, which if granted, should be executed by the authorities of the [REDACTED].

[REDACTED] testimony is relevant to the case and the crimes charged

27. [REDACTED]
28. Since the Accused is charged [REDACTED], the anticipated testimony of this witness has a [REDACTED] nexus to the crimes charged and as such should be considered relevant for the purposes of issuing a summons to appear. [REDACTED] evidence should be treated with caution, it will be corroborated by the evidence of other Prosecution witnesses as to the circumstances pertaining to [REDACTED] specifically, as well as the Accused's role and contribution in the corruption scheme charged.

The relief sought is sufficiently specific

29. [REDACTED] is clearly identified and can be reasonably believed to be within the jurisdiction of [REDACTED] national authorities, [REDACTED]. [REDACTED]

[REDACTED] testimony is potentially necessary for the determination of the truth



30. [REDACTED] anticipated testimony is potentially necessary for the determination of the truth. [REDACTED] may provide important testimony on the crimes charged and the individual criminal responsibility of the Accused. This information includes GICHERU's role in promising and paying money [REDACTED],<sup>29</sup> [REDACTED] Prosecution witnesses.
31. The summons is necessary to obtain [REDACTED] testimony. The Prosecution has detailed the limited means at its disposal to obtain the voluntary cooperation of the witness and to do so on time to ensure a smooth presentation of its evidence. [REDACTED], good cause exists to issue the requested summons. It is also justified, since [REDACTED], and bearing in mind that his withdrawal of cooperation comes just weeks before the start of the trial, at a time when it is too late for the Prosecution to take any available measures to replace [REDACTED] evidence.
32. As regards the possible cooperation of the Government of [REDACTED], the Prosecution is unable to make any specific submissions, [REDACTED]. [REDACTED].

## VI. Conclusion

33. 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 Parties to employ measures to compel such witnesses to appear before the Chamber, if certain requirements are met.
34. The Prosecution has met these requirements by showing that (i) [REDACTED] 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.

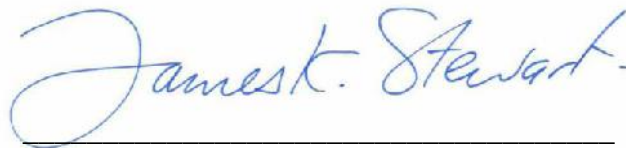
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<sup>29</sup> ICC-01/09-01/20-220-Conf, paras. [REDACTED].

35. As such and since [REDACTED] resides in the territory of [REDACTED], the Chamber should compel him to testify through the issuance of a summons to be served to him in [REDACTED] by the competent authorities.

## **VII. Relief Requested**

36. 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 [REDACTED], as a matter of obligation upon him, to testify before the Chamber in person or by video-link at a location in [REDACTED] on such dates, times and modalities as the Prosecution and/or the Registry will communicate to him;
  - (ii) the assistance of the Government of [REDACTED] in ensuring the appearance of [REDACTED], using all means available under [REDACTED]; and
  - (iii) the assistance of the Registry to prepare and transmit, in consultation with [REDACTED] Prosecution, the necessary subpoena to Witness [REDACTED] (with or without the assistance of [REDACTED]) as well as the necessary cooperation request to the relevant authorities of [REDACTED].



**James Stewart, Deputy Prosecutor**

Dated this 4th day of February 2022  
At The Hague, The Netherlands