

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

*Original: English*

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

**Date: 22 March 2022**

**TRIAL CHAMBER III**

**Before: Judge Miatta Maria Samba**

**SITUATION IN THE REPUBLIC OF KENYA**

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

**Public Document**

**Public Redacted Version of "Confidential  
Submission pursuant to Rule 74 of the Rules of Procedure and Evidence", ICC-  
01/09-01/20-286-Conf, 14 February 2022**

**Source: Rule 74 Counsel**

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**

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**REGISTRY**

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**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

Ms Vessela Terzieva, Rule 74 Counsel for  
Witness P-0800

## I. INTRODUCTION

1. On 31 January 2022 the Registrar of the International Criminal Court (“ICC” or “the Court”) appointed Ms Vessela Terzieva (“Rule 74 Counsel”) as Legal Adviser to Witness P-0800 (“Witness”) with mandate of notifying the Witness of the provisions of Rule 74 of the Rules of Procedure and Evidence (“Rules”) and providing him with an independent and qualified legal advice on issues relating to self-incrimination.<sup>1</sup>
2. On 7 February 2022 Rule 74 Counsel received from the Officer of the Prosecutor (“OTP”) *via* a secure channel 117 electronic files containing statements, transcripts of interviews, and other material pertaining to the Witness.
3. On 12 February 2022 Rule 74 Counsel conducted a confidential meeting with the Witness. At this meeting Rule 74 Counsel notified the Witness of the content of Rule 74 of the Rules, of articles 70 and 71 of the Rome Statute of the ICC (“Statute”), highlighting the provision of Article 70(1)(a), as well as of Rule 66(3) of the Rules.
4. Pursuant to Rule 74(9) of the Rules, on behalf of the Witness, Rule 74 Counsel makes the following submission to the Trial Chamber in the case of *Prosecutor v. Paul Gicheru* (respectively, “Trial Chamber” and “present case”).
5. Pursuant to Regulation 23 bis(1) of the Regulations of the Court (“RoC”) this submission is classified as confidential as it contains the reasons for a confidential request to the Trial Chamber.

## II. SUBMISSIONS

6. In October 2012 Witness P-0800 provided a statement to OTP relevant to the prosecution case in *Prosecutor v. William Samoei Ruto and Joshua Arap Sang* before the ICC (“Main Case”).<sup>2</sup> In the following months the Witness was interviewed by OTP

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<sup>1</sup> Registry, “Notification of the Appointment of Ms Vessela Terzieva as Legal Adviser to Witness P-0800, Public with Confidential Annexes I and II”, 2 February 2022, ICC-01/09-01/20-273 (“Notification of Appointment”).

<sup>2</sup> P-0800, KEN-OTP-0082-0187, e.g., paras 49-54, 56, 59-65.

on several occasions.<sup>3</sup> In some of these interviews [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] the Witness was

informed that he was considered a suspect in the OTP's investigation into allegations of offences against the administration of justice under Article 70 of the Statute in the context of the Kenya situation, namely interfering with the collection of evidence from one or more potential witnesses.<sup>8</sup> The Witness continues to retain this status.<sup>9</sup> In November 2014 the Witness testified as a prosecution witness in the Main Case.<sup>10</sup>

7. The Witness is one of the main prosecution witnesses in the present case. In its trial brief OTP relies largely on the Witness's evidence to prove the fourth incident alleged in the charges<sup>11</sup> as well as to prove matters such as the existence of a common plan involving the commission of the alleged crimes and the members of the alleged common plan.<sup>12</sup> The Witness's expected evidence is therefore important within the meaning of Rule 74(5)(a) and (b) of the Rules.

<sup>3</sup> See P-0800, KEN-OTP-0082-0250; P-0800, KEN-OTP-0097-0063; P-0800, KEN-OTP-0102-0205; P-0800, KEN-OTP-0103-2473; P-0800, KEN-OTP-0106-0388; P-0800, KEN-OTP-0109-0002; P-0800, KEN-OTP-0111-0140.

<sup>4</sup> See P-0800, KEN-OTP-0102-0205, paras 28-29, 33 39-46; KEN-OTP-0102-0217; P-0800, KEN-OTP-0103-2473, paras 13, 24-31; P-0800, KEN-OTP-0106-0388, paras 19-21; P-0800, KEN-OTP-0109-0002, para. 27; P-0800, KEN-OTP-0111-0140, paras 13-14, 20-21, 39-42, 43-45.

<sup>5</sup> See e.g., KEN-OTP-0119-0141, lines 155-156; P-0800, KEN-OTP-0135-0041, line 3131.

<sup>6</sup> KEN-OTP-0130-0087, paras 8, 10, 19, 23-32.

<sup>7</sup> See P-0800, KEN-OTP-0135-0041.

<sup>8</sup> P-0800, KEN-OTP-0135-0054, lines 88-96. See also P-0800, KEN-OTP-0135-0041, lines 216-217; KEN-OTP-0130-0086.

<sup>9</sup> See P-0800, KEN-OTP-0135-0509, lines 407-419; KEN-OTP-0144-0272P-0800; KEN-OTP-0141-0065; KEN-OTP-0160-0257; P-0800, KEN-OTP-0160-0280, lines 90-93.

<sup>10</sup> Pre-Trial Chamber A (Article 70), *Prosecutor v. Paul Gicheru*, "Decision on the confirmation of charges against Paul Gicheru", 15 July 2021, ICC-01/09-01/20-153-Red ("Decision on Confirmation of Charges"), para. 113.

<sup>11</sup> OTP, *Prosecutor v. Paul Gicheru*, "Public redacted version of "Prosecution Trial Brief", ICC-01/09-01/20-220-Conf, 15 November 2021", 22 November 2021, ICC-01/09-01/20-220-Red (Prosecution Trial Brief), paras 178 -200 and footnotes. For the fourth charge, see Decision on Confirmation of Charges, p. 79, item 4.

<sup>12</sup> See Prosecution Trial Brief, paras 32-37 and footnotes.

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

9. The ICC jurisprudence has interpreted Rule 74(3)(c) as providing protection from subsequent prosecution for crimes within the jurisdiction of the Court, except those crimes concerning the integrity of a witness's testimony before a Chamber. The Trial Chamber in *Katanga*, for example, has noted that Rule 74 does not provide protection "if the witness perjures him or herself before the Chamber, in accordance with rules 66(3) of the Rules and article 70(1)(a) of the Statute".<sup>13</sup> The Trial Chamber in *Ongwen* similarly has interpreted Rule 74 in accordance with Rule 66(3) of the Rules and the offence defined in Article 70(1)(a) of the Statute.<sup>14</sup> As held by the Appeals Chamber, assurances under Rule 74 "do not provide any protection against prosecutions for offences under article 70 of the Statute [...] *should the witness's testimony be false*".<sup>15</sup> Rule 74(3)(c) therefore could be seen as protecting the integrity of the proceedings, by allowing a witness to testify without fear from prosecution with respect to his or her prior conduct, while at the same time providing a guarantee that the witness's evidence before the Chamber will be truthful.

10. As noted earlier, the Witness has been involved in an OTP investigation into offences against the administration of justice pursuant to Article 70 of the Statute,

<sup>13</sup> Trial Chamber II, *Prosecutor v. Katanga*, "CORRIGENDUM - Directions for the conduct of the proceedings and testimony in accordance with rule 140", 1 December 2009, ICC-01/04-01/07-1665-Corr, para. 55.

<sup>14</sup> Trial Chamber IX, *Prosecutor v. Ongwen*, "Decision on Protocols to be Adopted at Trial", 22 July 2016, ICC-02/04-0115-504, para.23(ii).

<sup>15</sup> Appeals Chamber, *Prosecutor v. Bemba Gombo et al.*, "Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII", 8 March 2018, ICC-01/05/13-2275-Red, para. 1533 (emphasis added).

specifically interference with potential witnesses in the Main Case. In the present proceedings, the Witness may testify, among other issues, about his past interactions with potential witnesses in the Main Case as well as about meetings involving the accused and other individuals currently involved in the OTP's investigation into offences against the administration of justice in the context of the situation in Kenya.

11. In light of the above, Rule 74 Counsel respectfully requests the Trial Chamber to provide the Witness with assurances under Rule 74(3)(c) of the Rules with respect to any evidence given in the present proceeding relevant to: (i) the Witness's interactions with potential witnesses in the Main Case; and (ii) the Witness's meetings with individuals currently involved in the OTP's investigation into witness interference in the context of the situation of Kenya. It is respectfully requested that any questioning of the Witness with respect to these matters be conducted in private session and that the Witness is assured that any evidence given by him in this regard will remain confidential and will not be used against the Witness in any proceedings under the jurisdiction of the Court, except for giving false testimony or committing misconduct before the Trial Chamber in the present case.

12. The Witness has been granted protective measures in the courtroom in the form of visual and audio distortion, the use of pseudonym and closed or private session, based on decision of the Trial Chamber.<sup>16</sup> In addition, topics with respect to which the above-mentioned assurances are being requested are likely to fall within the scope of an ongoing OTP investigation and may be confidential on this basis. Granting the above-mentioned assurances therefore would not significantly affect the accused's right to a public hearing and the public nature of the proceedings. At the same time, a decision to grant the requested assurances will allow the Witness to give evidence before the Trial Chamber and to answer freely questions related to central issues in the present case.

13. The Witness has requested that Rule 74 Counsel attends in court during his testimony. Rule 74 Counsel remains at the disposal of the Trial Chamber.

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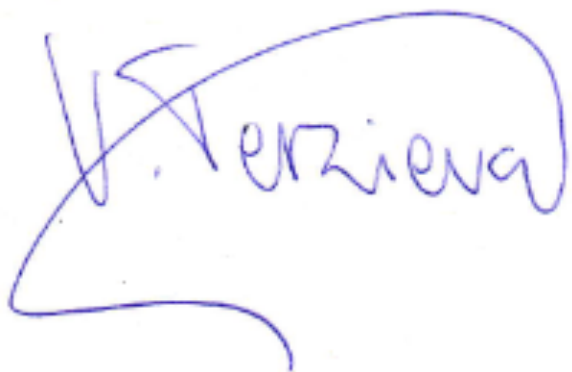
<sup>16</sup> Email correspondence between Victims and Witnesses Unit and Rule 74 Counsel, 10 February 2022, 13:02 hours.

### III. RELIEF REQUESTED

For the foregoing reasons, Rule 74 Counsel respectfully REQUESTS the Trial Chamber:

- (1) pursuant to Rule 74(2) and 74(3)(c) of the Rules, to assure the Witness, before he commences his testimony, that evidence given by him in relation to issues identified in paragraph 11 above will be kept confidential and will not be used against the Witness in any proceedings under the jurisdiction of the Court, except for giving false testimony or committing misconduct before the Trial Chamber in the present case;
- (2) pursuant to Rule 74(3)(c) and 74(7) of the Rule, to order that any questioning of the Witness with respect to the matters identified in paragraph 11 above be conducted in camera and the record of the proceedings be sealed, and that the identity of the Witness and the content of the evidence shall not be disclosed;
- (3) pursuant to Rule 73(3)(c) of the Rules, to order that the evidence with respect to the matters identified in paragraph 11 above, shall not be used, directly or indirectly, against the Witness in any subsequent prosecutions by the Court, except for giving false testimony or committing misconduct before the Trial Chamber in the present case.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'V. Terzieva', with a large, sweeping flourish above the name.

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Vessela Terzieva

Dated this twenty-second day of March 2022

At The Hague, The Netherlands

At [place, country]