

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

*Original: English*

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

**Date: 25 March 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 with Confidential Annex A**

**Public redacted version of “Request for disclosure of video-recording of P-0516’s  
proofing session,” 16 March 2022, ICC-01/09-01/20-304-Conf**

**Source: Counsel for Paul Gicheru**

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

**The Office of the Prosecutor**  
Ms. Nazhat Shameem Khan  
Mr. Anton Steynberg

**Counsel for the Defence**  
Mr. Michael G. Karnavas  
Ms. Suzana Tomanović

**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**

**Other**

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**REGISTRY**

**Registrar**  
Mr. Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**  
Mr Gregory Townsend,  
Legal Adviser to Witness P-0516

Mr. Paul Gicheru, through his Counsel (“the Defence”), hereby requests Trial Chamber III to order the Office of the Prosecutor (“OTP”) to disclose the video-recording of P-0516’s proofing session. This Request is made necessary by the Defence’s continuing obligation to be due diligent.<sup>1</sup> This request and Annex A are filed confidentially pursuant to Regulation 23*bis*(1) since they contain confidential material.

1. Between [REDACTED], the OTP conducted a proofing session with P-0516 for approximately [REDACTED].<sup>2</sup> Present during the session were two OTP trial lawyers, an OTP associate legal officer, an OTP interpreter, and Gregory Townsend, legal advisor to P-0516.<sup>3</sup> Only a three-page summary was provided to the Defence.<sup>4</sup>
2. During the proofing session, P-0516 revealed for the very first time that: (a) [REDACTED];<sup>5</sup> [REDACTED];<sup>6</sup> [REDACTED].<sup>7</sup>
3. The first time P-0516 claimed that [REDACTED] during his interview with the OTP [REDACTED].<sup>8</sup> Six years later, the OTP met with and interviewed P-0516 [REDACTED] in the presence of the OTP Senior Trial Lawyer and his legal advisor, Mr. Townsend, to go over and clarify certain segments of the witness’s evidence, in particular, concerning [REDACTED].<sup>9</sup>
4. Noting that this particular aspect of P-0516’s evidence had not been elicited by the investigators in [REDACTED], [REDACTED], the OTP spent 10 pages asking him questions concerning [REDACTED].<sup>10</sup> [REDACTED], P-0516 claimed that

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<sup>1</sup> Defence counsel’s ethical and professional duties of zealotness and diligence are overarching duties central to and connected with other ethical duties of independence, loyalty, confidentiality, lack of conflicts of interest, and communication. The duties of zealotness and diligence require Defence counsel to do anything and everything to ensure that all fair trial rights are fully accorded to the client, including making legal challenges through written and oral submissions, checking the veracity and accuracy of evidence that may be used against the client, objecting to the admissibility of evidence, confronting witnesses, consulting with experts when necessary and relevant, and so on. Although the ICC Code of Professional Conduct for Counsel does not explicitly mention zealotness as being part of counsel’s duties, it is an integral part of their professional responsibilities, generally requiring Counsel to press for every conceivable advantage of a client’s case. Doing anything less *could* amount to ineffective legal assistance. ICC Code of Professional Conduct for Counsel, [ICC-ASP/4/Res.1](#), 2 December 2005, Art. 5.

<sup>2</sup> Annex A, p. 1.

<sup>3</sup> Annex A, p. 1-2.

<sup>4</sup> Annex A, p. 3-5.

<sup>5</sup> Annex A, p. 4.

<sup>6</sup> Annex A, p. 4.

<sup>7</sup> Annex A, p. 4.

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

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

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

[REDACTED],<sup>11</sup> [REDACTED],<sup>12</sup> [REDACTED].<sup>13</sup> When pressed by the interviewers, [REDACTED].<sup>14</sup>

5. Before investigators terminated the interview, Mr. Townsend requested a moment with his client, P-0516.<sup>15</sup> After coming back from his consultation with his lawyer, P-0516 confirmed: “[REDACTED].”<sup>16</sup> Noting that his participation in the interview was voluntary, Investigator [REDACTED] told P-0516 that he would not put any further questions but indicated that Mr. Steynberg had something to say.<sup>17</sup> Unconvinced that P-0516 was answering questions truthfully, Mr. Steynberg continued for 14 pages, putting information to P-0516 for him to comment: “[REDACTED]”<sup>18</sup>
6. No less than six times during Mr. Steynberg’s questioning, P-0516 asked for the interview to stop:
  - a. “[REDACTED].”<sup>19</sup>
  - b. “[REDACTED].”<sup>20</sup>
  - c. “[REDACTED].”<sup>21</sup>
  - d. “[REDACTED].”<sup>22</sup>
  - e. “[REDACTED].”<sup>23</sup>
  - f. “[REDACTED].”<sup>24</sup>
7. Despite P-0516’s clear indications that he wished to stop the interview, Mr. Townsend did not intervene to stop the interview according to his client’s wishes – neither at the outset of the session after consulting with his client nor during Mr. Steynberg’s questioning.

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<sup>11</sup> [KEN-OTP-0160-0149](#), lines 1006-1018.

<sup>12</sup> [KEN-OTP-0160-0149](#), lines 1017.

<sup>13</sup> [KEN-OTP-0160-0149](#), line 1148-1153.

<sup>14</sup> [KEN-OTP-0160-0149](#), lines 1179, 1240.

<sup>15</sup> [KEN-OTP-0160-0149](#), line 1306.

<sup>16</sup> [KEN-OTP-0160-0188](#), lines 37-38

<sup>17</sup> [KEN-OTP-0160-0188](#), lines 53-54.

<sup>18</sup> [KEN-OTP-0160-0188](#), p. 190-204, esp. lines 166-170.

<sup>19</sup> [KEN-OTP-0160-0188](#), line 193.

<sup>20</sup> [KEN-OTP-0160-0188](#), lines 195, 199.

<sup>21</sup> [KEN-OTP-0160-0188](#), line 299.

<sup>22</sup> [KEN-OTP-0160-0188](#), line 312.

<sup>23</sup> [KEN-OTP-0160-0188](#), line 371.

<sup>24</sup> [KEN-OTP-0160-0188](#), line 338.

8. During the 2022 proofing session, P-0516 claimed that “[REDACTED],” and that “[REDACTED]”<sup>25</sup> Despite consulting with Mr. Townsend during his [REDACTED] interview, P-0516 explained in the 2022 proofing session that “[REDACTED]”<sup>26</sup> and that he had “[REDACTED]” [REDACTED].<sup>27</sup>
9. The new information that came about during the proofing session, in particular P-0516’s revelation [REDACTED] (when he was called back to clarify this part of his account), is an integral part of P-0516’s disclosable evidence and is vital to the Defence. Without the video-recording and with only a three-page summary from the OTP, the Defence is unable to determine: (a) how this new information came about; (b) the extent to which P-0516 explained himself; and (c) any contradictions that P-0516 may have made in explaining the circumstances for not revealing this fact before.
10. Notably, the topics discussed in P-0516’s proofing session seemingly mirrors the topics discussed with the OTP investigator and Senior Trial Lawyer in [REDACTED]. It was not merely an attempt to familiarize the witness with his prior statements for the purpose of giving testimony, but to elicit new information and to “clarify”<sup>28</sup> aspects which were not fully explained in [REDACTED] because the witness asked to stop the interview, or which would have contradicted the witness’s prior statements given to the OTP investigators.
11. In granting the Defence’s request to access the video-recording of P-0800’s proofing session, Trial Chamber III recalled that: (a) “any assessment of whether the defence has demonstrate that information is material to the preparation of the defence should be made on a *prima facie* basis; and (b) the term “material to the preparation of the defence” should be understood as referring to all objects that are relevant to the preparation of the defence.”<sup>29</sup> Noting that P-0800’s credibility in respect to his account of [REDACTED] was a “key matter in issue between the Parties,” Trial Chamber III found a portion of the video-recording to be disclosable under Article 67(2) of the Statute.”<sup>30</sup>
12. Likewise, P-0516’s credibility concerning his account of [REDACTED] is also a key matter in issue between the Parties. Given that the Defence is not in possession of all evidence related to P-0516’s revelation but for a mere three-page summary, access to the

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<sup>25</sup> Annex A, p. 4.

<sup>26</sup> Annex A, p. 4.

<sup>27</sup> Annex A, p. 4.

<sup>28</sup> See Annex A, p. 4 “On 15 March 2022, the Witness provided the following clarifications/information.”

<sup>29</sup> [ICC-01/09-01/20-278](#), para. 8 citing [ICC-02/05-03-09-501](#), para. 35 and [ICC-01/09-01/11-1465](#), para. 12(iii).

<sup>30</sup> [ICC-01/09-01/20-278](#), para. 9.

video-recording is material to the preparation of the Defence and thus disclosable under Article 67(2) of the Rome Statute.

13. There is no legal or rational reason why the video-recording should not be disclosed. The whole purpose of video-recording the proofing sessions is to ensure transparency. This is especially so when there is a high probability of there being fertile ground for relevant and indispensable confrontation. In this case, it should be noted that the OTP interviewed P-0516 [REDACTED].
14. Neither will the OTP be prejudiced, nor will the Chamber be inconvenienced by granting this Request. If anything, the disclosure of the video-recording would only serve to enhance Mr. Gicheru's full enjoyment of his fair trial rights.

**WHEREFORE**, for all the reasons stated herein, Trial Chamber III should **ORDER** the OTP to disclose the video-recording of P-0516's proofing session to the Defence.

Respectfully submitted, 25 March 2022,  
In The Hague, the Netherlands.



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**Michael G. Karnavas**  
**Counsel for Mr. Paul Gicheru**