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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**

**Public redacted version of “Prosecution’s Response to the Defence “Request to Exclude Audio-Recordings Collected in Violation of Part 9 of the Statute””, ICC-01/09-01/20-258-Conf-Exp-Corr, 18 January 2022**

**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**

Mr James Stewart

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**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. INTRODUCTION

1. The Defence request to declare inadmissible materials alleged to have been collected in violation of the Statute should be dismissed.<sup>1</sup> The Defence Request seeks to exclude 614 items of evidence comprising 30 audio recordings, 129 transcripts, 449 translations and six summaries.<sup>2</sup> However, 362 of the Impugned Items do they pertain to recordings made by Prosecution witnesses in the course of the article 70 investigation at all.<sup>3</sup> Rather, these Irrelevant Items relate to telephone interceptions lawfully conducted by the [REDACTED] authorities pursuant to a request for assistance (“RFA”) from the Prosecution. Additionally, only 15 of these 362 Irrelevant Items are listed in the Prosecution’s List of Evidence as material that the Prosecution seeks to rely upon in evidence.<sup>4</sup> Accordingly, the request to exclude these Irrelevant Items should be dismissed *in limine* as both unsubstantiated and moot.

2. The Defence has not established that the remaining 252 items – which comprise of audio recordings of telephone conversations and meetings made by, or with the consent of, Prosecution witnesses<sup>5</sup> – were collected in violation of Part 9 of the Statute, as alleged. The investigative measures directly executed by the Prosecution were non-compulsory, and properly fell within article 99(4)(a) of the Statute. Consequently, they did not require a positive act of cooperation by the territorial State Party in question or authorisation by a Chamber of this Court. The Prosecution consulted with the relevant authorities to the extent possible in the circumstances.

3. The Appeals Chamber has found that a breach of cooperation obligations under Part 9 would not necessarily amount to a violation of the Statute for the purposes of article 69(7).<sup>6</sup> But even if this Chamber were to find a technical violation of the Statute on any ground pertaining to article 99(4), this does not justify the exclusion of the evidence under article 69(7) since any such violation could not affect the reliability of the evidence, nor would the admission of the OPC Recordings be “antithetical to and seriously damage the integrity of the proceedings”. To the contrary, *exclusion* would have this effect. The OPC Recordings are relevant, intrinsically

<sup>1</sup> *Contra* ICC-01/09-01/20-249-Conf (“Defence Request”).

<sup>2</sup> ICC-01/09-01/20-249-Conf-AnxA, comprising 30 audio recordings, 129 transcripts, 449 translations and six summaries together “the Impugned Items”.

<sup>3</sup> *To wit*: Audio Recording items 1, 27-29; Transcripts items 1, 122-126; Translation items 1, 105-449; and Summaries Items 1-6 (“Irrelevant Items”).

<sup>4</sup> *To wit* KEN-OTP-0106-0908\_01, KEN-OTP-0141-0970, KEN-OTP-0141-0977, KEN-OTP-0153-0513, KEN-OTP-0153-0526, KEN-OTP-0157-1758, KEN-OTP-0157-1791, KEN-OTP-0157-2701-R01, KEN-OTP-0157-2723-R01, KEN-OTP-0157-3118-R01, KEN-OTP-0157-3196, KEN-OTP-0157-3434, KEN-OTP-0157-3446-01, KEN-OTP-0157-3746, and KEN-OTP-0157-3783.

<sup>5</sup> “One Party Consent Recordings” or “OPC Recordings”.

<sup>6</sup> ICC-01/05-01/13-2275-Red (“*Bemba et al.* AJ”), para. 318.

reliable and highly probative of the charges. They were collected in good faith through non-compulsory investigative steps designed to counter rampant witness interference in a highly challenging security and cooperation environment. They provide a contemporaneous, accurate and unbiased record of conversations which the participating witnesses would in any event be free to describe to the Chamber in their evidence before it, and minimise potential inaccuracies due to faulty recollection, exaggeration or embellishment.

## II. CONFIDENTIALITY

4. This filing is submitted as “confidential” *ex parte* Prosecution and VWU under regulation 23bis (2) of the Regulations of the Court (“Regulations”) only as it refers to the contents of filings with similar classification. A confidential redacted version is filed simultaneously and a public redacted version will be filed within five days.

## III. LEGAL FRAMEWORK

5. Following the Directions of Conduct (adopting the submission of evidence regime), the Chamber must rule on the request to exclude the audio-recordings under article 69(7), separately from, and prior to, its assessment of evidence for a decision under article 74 of the Statute.<sup>7</sup>

### **The Defence bears the burden of proof under article 69(7)**

6. The Prosecution must establish the general admissibility of disputed evidence under article 69(4), and that its probative value is not outweighed by any prejudice that may be caused by its introduction.<sup>8</sup> However, since article 69(7) is *lex specialis* when compared with the general admissibility provisions in the Statute,<sup>9</sup> the Defence – as the moving party – bears the burden of establishing that the criteria for exclusion are met.<sup>10</sup> Accordingly, the Defence must substantiate its arguments, to the degree appropriate for the violation or breach alleged.<sup>11</sup>

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<sup>7</sup> See ICC-01/09-01/20-189 (“Directions of Conduct”), para. 15 (fn.3), referring *inter alia* to article 69(7) of the Statute and rule 63(3); see also *Bemba et al.* AJ, para. 586 (“[...] the Appeals Chamber recalls that when the legal framework of the Court provides for mandatory exclusionary rules – such as in the case of inadmissibility of evidence under article 69(7) of the Statute – a chamber is explicitly required to make rulings in this respect.”); ICC-01/12-01/18-1475-Red (“*Al Hassan* article 69(7) Decision”), paras. 24-26.

<sup>8</sup> Notably however, the Defence Request does not dispute the relevance or probative value of the evidence. Suffice it to say that the Impugned Items are directly relevant to the pattern of corrupt influencing of Prosecution witnesses by members and associates of the Common Plan Group, including the Accused. Their admission would not cause any unfair prejudice to the Accused.

<sup>9</sup> *Al Hassan* article 69(7) Decision, para. 30.

<sup>10</sup> *Al Hassan* article 69(7) Decision, para. 37.

<sup>11</sup> *Al Hassan* article 69(7) Decision, para. 37.

## Article 69(7) sets a high threshold for exclusion of evidence

7. Article 69(7) envisages two consecutive inquiries.<sup>12</sup> *First*, according to the *chapeau* of article 69(7), the Chamber must determine whether the evidence at issue was “obtained by means of a violation of [the] Statute *or* internationally recognised rights”. *Second*, if – and only if – one of these *chapeau* conditions is met, the Chamber must consider whether (a) the violation casts substantial doubt on the reliability of the evidence; *or* (b) the admission of the evidence would be antithetical to *and* would seriously damage the integrity of the proceedings.<sup>13</sup> As to the second inquiry, and as detailed below, only limb (b) is relied upon by the Defence.<sup>14</sup>

8. Proper application of the article 69(7) test protects the integrity of the Court’s proceedings, while preserving its primary task of determining the truth.<sup>15</sup>

9. For the purpose of the *chapeau* of article 69(7), it is thus immaterial whether an alleged violation of the Statute or internationally recognised human rights relates to the rights of the accused or a third party,<sup>16</sup> or is occasioned by the conduct of the Prosecution or by domestic authorities, in specific circumstances.<sup>17</sup> Importantly, however, the phrase “obtained *by means of a violation*” makes clear the need to show a causal link between the violation and the gathering of evidence.<sup>18</sup> Since article 69(7) is narrowly framed, it is focused on the specific context of evidence gathering.<sup>19</sup> In this case, therefore, it requires an assessment directed at the investigative activities of the Prosecution which generated the OPC Recordings.<sup>20</sup>

10. In considering article 69(7)(b) (impact on the integrity of the proceedings), Chambers have considered factors such as: (i) the nature and gravity of the violation; (ii) whether the rights violated related to the accused; (iii) the Prosecution’s degree of control over the evidence gathering process or power to prevent any improper or illegal activity;<sup>21</sup> and (iv) the level of care that was displayed to minimise the risk of any violations occurring and measures taken once the violation has occurred to reduce the impact thereof.<sup>22</sup>

<sup>12</sup> *Al Hassan* article 69(7) Decision, para. 31.

<sup>13</sup> *Al Hassan* article 69(7) Decision, para. 31; *Bemba et al.* AJ, para. 280.

<sup>14</sup> See below paras. 47 *et. Seq.*

<sup>15</sup> See further *Al Hassan* article 69(7) Decision, paras. 32, 43; ICC-01/04-01/06-1981 (“*Lubanga* Bar Table Admission Decision”), para. 45. See also *The Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, 3 October 2003, paras. 61-63; *Prosecutor v. Zejnil Delalic et al.*, IT-96-21-T, 9 February 1998, paras. 18-20.

<sup>16</sup><sup>16</sup> *Lubanga*, Bar Table Admission Decision, para. 37.

<sup>17</sup> *Al Hassan* article 69(7) Decision, para. 40.

<sup>18</sup> *Al Hassan* article 69(7) Decision, para. 33.

<sup>19</sup> *Al Hassan* article 69(7) Decision, para. 41.

<sup>20</sup> *Al Hassan* article 69(7) Decision, para. 42.

<sup>21</sup> *Al Hassan* article 69(7) Decision, paras. 34, 43.

<sup>22</sup> *Bemba et al.* AJ, (*Judge Henderson Sep Op*), para. 34.

11. Accordingly, to succeed in the Request, the Defence must show that: (i) the Prosecution violated the Statute through a breach of Part 9; (ii) this led to the collection of the OPC Recordings ; *and* (iii) the admission of the OPC Recordings would be antithetical to *and* would seriously damage the integrity of the proceedings. As shown below, the Defence fails to discharge its burden in all aspects.

#### **The Chamber's enquiry is delimited by article 69(8)**

12. The Chamber's assessment of the Request remains subject to article 69(8), which unequivocally prohibits a ruling on the application of national law (to decide relevance or admissibility of evidence), and applies irrespective of whether evidence is collected directly by the Prosecution or by a State,<sup>23</sup> and requires the Chamber instead to base its decision only on the sources of law listed in article 21 of the Statute. However, the Chamber may, take into account, as a matter relevant to the factual background, efforts to comply with national law in the collection of evidence.<sup>24</sup>

### **IV. FACTUAL CONTEXT**

#### **The article 70 investigation was constrained by [REDACTED]**

13. [REDACTED]  
[REDACTED]  
[REDACTED]. The Prosecution was also required under articles 54 and 68 to exercise caution in preserving the security of witnesses and the integrity of the investigation while seeking to establish the truth. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>25</sup>

14. The Defence Request presents a skewed and at times inaccurate account of the cooperation environment in this situation.<sup>26</sup> In particular, it misrepresents the finding of Trial Chamber V(B) which, while initially denying the request to refer Kenya's non-cooperation to

<sup>23</sup> *Bemba et al.* AJ, para. 291.

<sup>24</sup> *Bemba et al.* AJ, para. 296.

<sup>25</sup> See further paras. 17 and 19 below.

<sup>26</sup> See Defence Request, paras. 3-17.

the Assembly of States Parties, unequivocally agreed that Kenya had failed to comply with its cooperation obligations under the Statute.<sup>27</sup> As the Chamber found, “cumulatively, the approach of the Kenyan Government, [...] falls short of the standard of good faith cooperation required under Article 93 of the Statute” and “this failure has reached the threshold of non-compliance required under the first part of Article 87(7) of the Statute”,<sup>28</sup> with the effect that it “not only *compromised the Prosecution's ability to thoroughly investigate the charges*, but [...] ultimately impinged upon the Chamber's ability to fulfil its mandate under Article 64, and in particular, its truth-seeking function in accordance with Article 69(3) of the Statute.”<sup>29</sup>

15. As set out in the Prosecution’s Trial Brief,<sup>30</sup> cooperation with Kenya in the *Ruto and Sang* case was similarly problematic. For example, Trial Chamber V(A) noted “the withering hostility directed against these proceedings by important voices that generate pressure within Kenya at the community or national levels or both. Prominent among those were voices from the executive and legislative branches of the Government.”<sup>31</sup> [REDACTED]

[REDACTED]

[REDACTED]<sup>32</sup> [REDACTED]

[REDACTED]<sup>33</sup> [REDACTED]

[REDACTED]

[REDACTED]<sup>34</sup>

16. Within this context, the Defence suggestion that Kenya was fully cooperative with the Prosecution, or the Court, is unrealistic and unconvincing. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>35</sup>

<sup>27</sup> ICC-01/09-02/11-982 (“*Contra Request*”), paras. 14-15 (stating that Trial Chamber V(B) “denie[d] the OTP’s request for a finding of non-cooperation”). As the Defence concedes, even the referral under article 87(7) was ultimately granted after the intervention of the Appeals Chamber: ICC-01/09-02/11-1032, paras. 87, 89.

<sup>28</sup> *Contra Request*, para. 78.

<sup>29</sup> *Id.*, para. 79 (emphasis added, footnotes omitted).

<sup>30</sup> ICC-01/09-01/20-220-Conf (“PTB”), paras. 22-25.

<sup>31</sup> ICC-01/09-01/11-2027-Red-Corr (“Decision on Defence Applications for Judgments of Acquittal”), p. 254 para. 142.

<sup>32</sup> [REDACTED]

<sup>33</sup> [REDACTED]

<sup>34</sup> [REDACTED]

<sup>35</sup> See e.g. ICC-01/09-02/11-700-Corr, para. 38; ICC-01/09-02/11-633, and [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>36</sup> [REDACTED]

[REDACTED]<sup>37</sup> [REDACTED]

[REDACTED]<sup>38</sup> The Defence fails to explain how judicial intervention from the Court could have altered these realities. In fact, subsequent events strongly suggest that it would not have [REDACTED]

[REDACTED]<sup>39</sup>

17. [REDACTED]

[REDACTED]<sup>40</sup>

[REDACTED]<sup>41</sup> [REDACTED]

[REDACTED]<sup>42</sup> [REDACTED]

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<sup>36</sup> [REDACTED]

<sup>37</sup> [REDACTED]

<sup>38</sup> [REDACTED]

<sup>39</sup> [REDACTED]

<sup>40</sup> [REDACTED]

<sup>41</sup> [REDACTED]

<sup>42</sup> [REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>43</sup>

**The Prosecution assessed that there was a heightened risk to witnesses** [REDACTED]

18. In its Trial Brief, the Prosecution outlined the witness security issues encountered from the outset of the Kenya investigation and how these ultimately contributed to the collapse of the *Ruto and Sang* case.<sup>44</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>45</sup> [REDACTED]

[REDACTED]

[REDACTED]<sup>46</sup> [REDACTED]

[REDACTED]

[REDACTED]<sup>47</sup>

19. [REDACTED]

[REDACTED]

[REDACTED]<sup>48</sup> [REDACTED]

[REDACTED]

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<sup>43</sup> [REDACTED]

[REDACTED]

[REDACTED]

<sup>44</sup> ICC-01/09-01/20-220-Conf, paras. 26-28; *See also* factual finding of PTC A (Article 70) ICC-01/09-01/20-153-Conf (“*Decision on the Confirmation of Charges*”), para. 55.

<sup>45</sup> [REDACTED]

[REDACTED]

<sup>46</sup> [REDACTED]

<sup>47</sup> [REDACTED]

<sup>48</sup> [REDACTED]

[REDACTED]

[REDACTED]

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**The investigative measures leading to the collection of the OPC Recordings did not occur on Kenyan territory**

20. Contrary to the implication in the Defence Request,<sup>51</sup> the investigative measures leading to the collection of the OPC Recordings – which are the products of audio recordings of telephone conversations between Prosecution witnesses (P-0800, P-0536, P-0613, P-0397 or P-0495) and various members and associates of the Common Plan/Purpose Group allegedly responsible for the charged offences<sup>52</sup> – did not take place on Kenyan territory.<sup>53</sup> In each instance:

- a. The recordings were made voluntarily by the witness in question;<sup>54</sup> and
- b. The witness was requested to record such conversations *after* reporting attempts to corruptly influence them by the person(s) in question, and the recordings were intended to corroborate such reports.

21. [REDACTED]

55

- a. [REDACTED]
- b. [REDACTED]  
[REDACTED] and
- c. [REDACTED]

**The investigative measures were non-compulsory**

<sup>49</sup> ICC-01/09-115-Conf-Exp, paras. 6-10; ICC-01/09-116-Conf-Exp, para. 11.

<sup>50</sup> *Id.* para. 8 and fn. 4.

<sup>51</sup> Defence Request, Introduction, para. 22.

<sup>52</sup> Common Plan Group.

<sup>53</sup> The locations of the various witnesses at the time they recorded the Impugned Items may be ascertained from their respective witness statements which document these activities, but for the sake of convenience, these are summarised in Annex A.

<sup>54</sup> See Annex A; KEN-OTP-0159-0884 at 0888, para. 20b; at 0896, paras. 43-44; at 0905, para. 81; at 0915, para. 119; at 0921, para. 148; at 0925, para. 162; at 0935, para. 208; at 0940, para. 226.

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22. Initially, the witnesses recorded the conversations using hand-held recording devices provided to them by the Prosecution for this purpose. When the calls were made or received by the witnesses, they would activate the recording devices, which recorded the conversation as heard by the witnesses. However, due to interference caused by the mobile phones, the quality of these recordings was sub-optimal. Additionally, the rudimentary mobile phones provided to the witnesses did not adequately record the call history. Thus, in certain instances and when available, the witnesses were provided with smart phones capable of recording conversations made or received on the device.

23. In no instance was interception technology or similar equipment used to intercept phone calls in the process of transmission, nor were similar compulsory measures used requiring the involvement of local authorities. As such, these were not “interceptions” of communications, but rather recordings made by a voluntary participant at the point of origin/receipt.<sup>56</sup> For that reason, the Defence’s reliance on national laws in [REDACTED] on intercepting telecommunications are inapposite.<sup>57</sup> Moreover, the witnesses never pretended to be anyone other than themselves—at all times, those being recorded knew that they were speaking to Prosecution witnesses, and that the content of their conversations could potentially be reported to the Prosecution.

24. While the Request stresses P-0730’s description of these investigative measures as “proactive” and “covert”,<sup>58</sup> this does not change their factual nature, as described above. Thus, the measures taken were “proactive” only in the sense that the Prosecution sought to investigate the attempts to corruptly influence witnesses *in the course of their commission*.<sup>59</sup> They were “covert” in the sense that the interlocutors were not advised that the Prosecution witnesses were recording the conversations. As explained further below, direct execution of these investigative measures complied with Part 9 of the Statute, since they did not require active State cooperation

<sup>56</sup> In its ordinary meaning, an “interception” refers to the acquisition or monitoring of a communication in the course of transmission rather than at either ‘end’. According to Cambridge Dictionary: the verb “intercept” means “to stop and catch something or someone **before that thing or person is able to reach a particular place**” e.g. *Law enforcement agents intercepted a shipment of drugs from Central America. Barry intercepted Naylor’s pass and scored the third goal.* Oxford Dictionary defines the noun “interception” as “the action or fact of preventing someone or something **from continuing to a destination**. ‘the interception of arms shipments’; (in sport) an act of catching a pass made by an opposing player ‘O’Hara made a good interception in midfield and then surged forward’; the action or fact of receiving electronic transmissions **before they reach the intended recipient**. ‘the clandestine interception of other people’s telephone calls’” (emphasis added).

<sup>57</sup> [REDACTED]

<sup>58</sup> Defence Request, paras. 46, 48; See also KEN-OTP-0159-0884, para. 20(a).

<sup>59</sup> As opposed to “re-active” investigations, in which crimes are investigated after the fact.

or judicial authorisation in any of the States in which they were conducted. Their description as “proactive” or “covert” does not change this.

### **The investigative measures were urgent and sensitive**

25. The bulk of the OPC Recordings were collected in the six months leading up to the commencement of the *Ruto and Sang* trial in September 2013 and at the height of the witness interference campaign. The investigation of the scheme to corruptly influence witnesses was accordingly urgently needed, not only for the purposes of a possible future prosecution, but more importantly to protect the integrity of the trial by attempting to avert the mass exodus of Prosecution witnesses that was a very real possibility at the time.<sup>60</sup> It was thus vital to ascertain who was behind the scheme and how they were operating in order to effectively combat it before it was too late.

26. It was also extremely sensitive, and the very success of the investigation depended on its secrecy. Since the investigations into the crimes were being conducted in real time, as it were, if those involved became aware of the investigation and the techniques employed this would defeat the very objective of the investigation.<sup>61</sup> Thus, applying a strict “need to know” policy was an important operational priority.

## **V. SUBMISSIONS**

### **The Request should be dismissed *in limine* insofar as it pertains to Irrelevant Items**

27. The Request erroneously treats unrelated materials as if they were the same. The gravamen of the Request concerns the use of ‘one party consent’ recordings directly executed by the Prosecution in [REDACTED], under article 99(4)(a) of the Statute, for the purpose of the article 70 investigation. However, many of the audio recordings and related transcripts and translations which the Defence seeks to exclude (and which are listed in Annex A to the Request) are not relevant in this respect.<sup>62</sup> Rather, these Irrelevant Items relate to telephone interceptions of witnesses located in [REDACTED]<sup>63</sup> conducted by the [REDACTED]

<sup>60</sup> Ultimately, and despite the best efforts of the Prosecution and VWU, no fewer than 18 of the 42 witnesses listed by the Prosecution failed to testify, or had to be compelled to do so, for reasons linked to witness interference.

<sup>61</sup> For this reason the Prosecution was permitted to withhold disclosure of material collected in the article 70 investigation from the *Ruto and Sang* defence until shortly before the relevant witnesses testified, and even then redacted all references to the recording of conversations in documents disclosed.

<sup>62</sup> See Audio Recording items 1, 27-29; Transcripts items 1, 122-126; Translation items 1, 105-449 and Summaries Items 1-6 (“Irrelevant Items”).

<sup>63</sup> [REDACTED]

authorities pursuant to a request for assistance (“RFA”) from the Prosecution—a practice which is not challenged in the Defence Request. Nor does the Prosecution rely upon the majority of the Irrelevant Items for the trial or include them in its List of Evidence (“LoE”),<sup>64</sup> and the vast majority were in fact disclosed only under rule 77 as potentially material to the preparation of the Defence. Accordingly, the Request should be dismissed *in limine* with respect to the Irrelevant Items, since in these respects it is not only unsubstantiated but moot.

### **The Defence has not established a violation of the Statute**

28. The Request fails to establish any violation of the Statute,<sup>65</sup> and does not argue – much less substantiate – any violation of internationally recognised human rights.<sup>66</sup> Accordingly, since the Defence fails to satisfy the threshold conditions in the *chapeau* of article 69(7), the Request should be dismissed on its merits.

### *The Request has been brought prior to the formal submission of the OPC Recordings*

29. At the outset, the Prosecution notes that the Request has been brought in advance of the trial and before the OPC Recordings have been formally submitted to the Chamber,<sup>67</sup> as envisaged by rule 64(1). Consequently, no evidence has yet been elicited as to the circumstances in which the OPC Recordings were collected, or the context for the decision to employ the investigative measures in question and the Defence Request rests largely on evidence tendered for a different purpose.<sup>68</sup> While the Defence refers to aspects of the solemn declaration of P-0730 in contending that the OPC Recordings were collected in violation of the Statute, the Prosecution notes that the relevant portion of this declaration only forms part of the general background to the investigation (as summarised by P-0730), and was not the focus of the declaration. Accordingly P-0730’s declaration does not specifically address many of the issues raised in the Defence Request.

### *The Prosecution complied with article 99(4)(a), which permitted the direct execution of the investigative measures in the territorial States Parties*

<sup>64</sup> Only 15 of the 362 Irrelevant Items are contained in the LoE. *See* fn. 4 above.

<sup>65</sup> *See* Defence Request, introduction and para. 63.

<sup>66</sup> With the exception of a reference to the Accused’s right to privacy, which is raised in the context of the second leg of the enquiry only, i.e. the admissibility of the Impugned Evidence as a result of the alleged violation of Part 9 of the Statute; *See* Defence Request para. 61.

<sup>67</sup> With the exception of material included in the rule 68(2)(c) request for P-0397.

<sup>68</sup> The Prosecution notes that P-0730’s solemn declaration was originally drafted in support of the Prosecution’s request to admit prior recorded testimony in the *Ruto and Sang* case and not for the purpose of determining the admissibility of the impugned items. *See* ICC-01/09-01/20-203-Conf-AnxC1-Corr.

30. At all material times, the Prosecution complied in good faith with its obligations under articles 54(2), 70(2), and Part 9 of the Statute, read with rule 167.

31. Article 54(2) provides that the Prosecutor may conduct investigations on the territory of a State *either* in accordance with Part 9 of the Statute *or* as authorized by the Pre-Trial Chamber (“PTC”) under article 57(3)(d). Since article 57(3)(d) is not applicable in the circumstances relevant to the Request,<sup>69</sup> as noted below, the Prosecution was obliged to ensure its investigative measures on the territory of a State Party complied with Part 9 of the Statute.

32. This was not altered by article 70(2), which makes clear that “the conditions for providing international cooperation to the Court” for the purpose of article 70 proceedings “shall be governed by the domestic laws of the requested State.” As rule 167 makes clear, article 70(2) serves only to ensure that the Court may *request* a State to provide any form of cooperation corresponding to those set out in Part 9 but – unlike for article 5 investigations<sup>70</sup> – the requested State Party has no obligation to ensure the availability of procedures under national law in that regard. Nothing in article 70(2) means that Part 9 is otherwise disapplied for the purpose of governing the conduct of the Prosecution in carrying out article 70 investigations. This would not only be inconsistent with rule 163, but would also deprive the Prosecution of any statutory basis to carry out investigative measures on the territory of a State under article 54(2), other than in the exceptional circumstances envisaged in article 57(3)(d), which cannot be correct. The Prosecution notes that the Request likewise assumes the applicability of Part 9 to this article 70 case, as has the Appeals Chamber to other article 70 cases.<sup>71</sup>

33. Within Part 9, article 99(4) amounts to a specific regime permitting the Prosecution to *directly execute* certain kinds of non-compulsory investigative measures on the territory of a State Party. By definition, such measures do not require positive action by the territorial State, - as indicated by the illustrative examples listed within the provision. Article 99(4) is not displaced by article 70(2). Indeed, the limited types of investigative measures which may be directly executed under article 99(4) do not exceed the kinds of activities which may be undertaken by any person in the exercise of their fundamental rights, such as the freedoms of

<sup>69</sup> *Contra* Request, paras. 53-56. *See* Statute, art. 57(3)(d).

<sup>70</sup> *Compare* Statute, arts. 88, 93(1). *See also* art. 93(3), (5).

<sup>71</sup> *Bemba et al.* AJ, para. 317.

assembly and expression (voluntary interviews) or the freedoms of movement and expression (inspection of a public place).<sup>72</sup>

34. When acting under article 99(4), the Prosecution must make a prior “request” to the territorial State Party. However, unlike conventional requests for assistance under article 93, this need not satisfy all the formalities under article 96.<sup>73</sup> In appropriate circumstances, and depending in part on whether the Prosecution proceeds under article 99(4)(a) or (b), it may not necessarily be more than a bare notification of the Prosecution’s intention to proceed under article 99(4) in that State. This necessarily follows, for example, from the caveat in article 99(4)(a) that the Prosecution need only consult with the territorial State Party to the extent “possible”.<sup>74</sup> Consequently, insofar as the Defence suggests that the Prosecution should necessarily have submitted detailed requests for assistance meeting the requirements of article 96,<sup>75</sup> this is incorrect. So too is the assertion that the measure that may be executed directly under art 99(4) are limited to “the interview of or taking evidence from a person on a voluntary basis”<sup>76</sup> The Request omits the preceding qualifier “...including specifically...” which clearly shows that this is only exemplary, not definitive.<sup>77</sup>

35. As the following paragraphs explain, article 99(4)(a) permitted the direct execution of the investigative measures leading to the collection of the OPC Recordings in this case:

36. *First*, the alleged pattern of “crimes”<sup>78</sup> under investigation<sup>79</sup> was suspected to have occurred at least in part on the territory of the States Parties where the investigative measures were to be directly executed [REDACTED].<sup>80</sup> [REDACTED]  
[REDACTED]

<sup>72</sup> See e.g. Statute, art. 99(4) (referring to non- “compulsory” measures, “including specifically the interview of or taking evidence from a person on a voluntary basis” and “the examination without modification of a public site or other public place”).

<sup>73</sup> See e.g. C. Kreß and K. Prost, ‘Article 99: Execution of requests under articles 93 and 96,’ in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4<sup>th</sup> Ed. (“Kreß and Prost”), p. 2679 (mn. 28: citing ICC-02/05-03/09-169 for the proposition that there is an important distinction between assistance sought pursuant to articles 93(1) and 99(4), and that the “the direct execution of measures is *lex specialis*”).

<sup>74</sup> See e.g. Kreß and Prost, pp. 2678 (mn. 24), 2679 (mn. 30). See also p. 2676 (mn. 16).

<sup>75</sup> Defence Request, para. 37.

<sup>76</sup> Defence Request, para. 38.

<sup>77</sup> See also Kreß and Prost, p. 2677 (mn. 20).

<sup>78</sup> For the purpose of article 99(4) the term “crimes” should be interpreted to include “offences against [the Court’s] administration of justice” in the meaning of article 70(1). See further e.g. ICC-01/05-01/13-1989-Red (“*Bemba et al.* Judgment pursuant to Article 74 of the Statute”), para. 54. The Appeals Chamber likewise endorsed the application of article 25(3) to article 70 offences, on the basis of rule 163: *Bemba et al.* AJ, para. 680.

<sup>79</sup> Described by P-0730 in KEN-OTP-0159-0884, para. 26.

<sup>80</sup> See Statute, art. 99(4)(a) (referring to a State Party “on the territory of which the crime is *alleged* to have been committed”, emphasis added).

[REDACTED]

[REDACTED]<sup>81</sup>

37. *Second*, it was not possible to obtain a “determination of admissibility pursuant to article 18 or 19” for the purpose of the article 70 investigation,<sup>82</sup> since rule 163(2) disapplies the “provisions of Part 2, and any rules thereunder, [...] with the exception of article 21.” Consistent with article 70(2), rule 162 provides a distinct and special regime for the exercise of jurisdiction over article 70 cases, which does not contain any equivalent to the concept of “admissibility” for article 5 crimes. Accordingly, this requirement of article 99(4)(a) of the Statute is to be disapplied for the purpose of article 70 investigations, consistent with rule 163(1).<sup>83</sup>

38. *Third*, the investigative measures to be directly executed by the Prosecution were non-compulsory, insofar as they amounted to “taking evidence from a person on a voluntary basis, [...] without the presence of the authorities of the requested State Party if it is essential for the request to be executed”, as well as “the examination without modification of a public site or other public place”.<sup>84</sup> In determining that OPC recordings fall within the meaning of such voluntary measures, the Prosecution specifically took into account its appreciation of the domestic law of the territorial States as one factor in its decision making:

a. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>85</sup>

b. [REDACTED]

[REDACTED]

[REDACTED]<sup>86</sup>

<sup>81</sup> As confirmed by PTC A (Article 70); See *Decision on the Confirmation of Charges*, p. 79-80, counts 3,4 and 6.

<sup>82</sup> See Statute, art. 99(4)(a) (requiring “a determination of admissibility pursuant to article 18 or 19”).

<sup>83</sup> See ICC Rules of Procedure and Evidence, rule 163(1) (“the Statute and the Rules shall apply *mutatis mutandis* to the Court’s investigation, prosecution and punishment of offences defined in article 70”).

<sup>84</sup> See Statute, art. 99(4).

<sup>85</sup> [REDACTED]

<sup>86</sup> [REDACTED]



c.

<sup>87</sup> [REDACTED] <sup>88</sup> [REDACTED]  
 [REDACTED] <sup>89</sup> [REDACTED]  
 [REDACTED] <sup>90</sup> [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]

39. The Prosecution assessed at the time that it was essential for the investigative measures to be carried out without the presence of the territorial authorities, in order to preserve the effectiveness of the measures. [REDACTED]

[REDACTED]  
 [REDACTED]  
 [REDACTED] <sup>91</sup>

40. Fourth, and finally, the Prosecution carried out all possible consultations with the territorial States Parties prior to the direct execution of the investigative measures on their territory. It is for the Prosecution to determine, in good faith, what degree of consultation is “possible” in the context of its investigation.<sup>92</sup> [REDACTED]

[REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]

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<sup>87</sup> [REDACTED]

<sup>88</sup> [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]

<sup>89</sup> [REDACTED]

<sup>90</sup> [REDACTED]  
 [REDACTED]

<sup>91</sup> [REDACTED]

<sup>92</sup> By analogy, *see* Kreß and Prost, p. 2677 (mn. 22).

41. However, consistent with the legal framework of article 99(4)(a),<sup>93</sup> the Prosecution notes that it did *not* specifically apprise the authorities of these States Parties that it intended to carry out “one party consent” recordings because it did not consider that this was possible for the reasons already advanced, nor in any event was this required by article 99(4)(a) in these circumstances. The Prosecution’s good faith view of the adequacy of the notice it provided to the authorities of the territorial States Parties, for the purpose of article 99(4), is illustrated by the fact that it did not consider it necessary to provide further notice of its activities after the fact, following regulation 108(2),<sup>94</sup> whereas it did direct formal requests to [REDACTED] when compulsory measures were sought to obtain call data records and when secrecy was no longer required.

42. The Prosecution acknowledges that it did not inform the authorities of [REDACTED] that the presence of Prosecution staff on their territories was specifically for the purpose of an article 70 investigation.<sup>95</sup> The Prosecution stresses, however, that these measures were not conducted *exclusively* for the purposes of investigating article 70 offences. To the contrary, they were equally important for the purposes of protecting the security of witnesses and the integrity of the trial in the *Ruto and Sang* case. However, to the extent that the Prosecution should have indicated that the investigative steps being undertaken were *also* for the purposes of the article 70 investigation, the Prosecution submits that it was a harmless omission insofar as the notification to the authorities in question was for the purpose of article 99(4) only—and therefore did not materially alter the nature of their obligations under the Statute. This is unlike a request for assistance under article 93(1), for example, where this clarification serves to regulate the legal regime under which the request for assistance is to be executed by that State.<sup>96</sup>

43. Likewise, contrary to the implication in the Defence Request, recourse to the PTC was neither legally required nor even possible in the prevailing circumstances. Since the Prosecution only sought to execute non-compulsory measures, and since article 99(4) authorises it to carry out these types of activities, the conditions for requesting judicial intervention by the PTC to authorise the activities, or for the issuance or execution of a request for assistance, were not met. If judicial authorisation were required, then the Prosecution would have been obliged to proceed by way of request for assistance to the territorial State Party under articles 70(2) and

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<sup>93</sup> See *above* para. 34.

<sup>94</sup> See Regulations of the Court, reg. 108(2).

<sup>95</sup> See ICC Rules of Procedure and Evidence, rule 167(1).

<sup>96</sup> See *above* para. 32.

93(1), rather than article 99(4). Such request would then have been determined by the authorities of the State concerned, not the PTC. Thus, in the material circumstances, there was no scenario in which the PTC would have been competent to decide on the matter.

*Failure to comply with Part 9 is not necessarily a “violation of the Statute” for the purpose of article 67(9)*

44. Even if the Chamber considers that the investigative measures did in some way breach Part 9 of the Statute, the Appeals Chamber has held that this does not necessarily constitute a “violation of the Statute” for the purpose of excluding evidence under article 69(7).<sup>97</sup> The Appeals Chamber noted that Part 9 of the Statute regulates the interactions between the Court and States and endorsed the observation of the *Bemba et al* Trial Chamber, that the “[s]afeguard clauses embedded in the various provisions of Part [9] *address sovereignty concerns of States and are not generally apt to protect the interests of the individual*”.<sup>98</sup>

45. Accordingly, the Prosecution submits that the Defence must not only establish a breach of Part 9 *per se*, but also that the breach was of such a nature that it rises to the level of a violation of the Statute under article 69(7), for instance, where the breach of Part 9 impacted not only the sovereignty interests of the relevant State(s), but also on the legitimate interests of the Accused, such as his right to a fair trial. This cannot be established in this case, where any breach (if established) pertains to technical deficiencies in the degree of consultation prior to directly executing non-compulsory investigative measures. There is no basis to conclude that the investigative measures would not have been carried out had consultation on OPC recordings occurred, or that these would have protected the rights of the Accused. Significantly, all but four OPC Recordings involve persons *other* than the Accused, with whom he denies any association.<sup>99</sup> As such, for the vast majority of the OPC Recordings, there can be no tangible impact at all on the Accused’s individual rights, flowing from the direct execution of the investigative measures, especially when they were permitted by domestic law. Even to the extent that concerns regarding State sovereignty might be relevant under article 69(7), the failure to adequately consult on the measures to be undertaken in the context of article 70 investigations (if established) was harmless, given that no State assistance for the execution of

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<sup>97</sup> *Bemba et al.* AJ, para. 318.

<sup>98</sup> *Bemba et al.* AJ, para. 319 (citing First Western Union Decision, para. 36, emphasis added).

<sup>99</sup> Those recorded by P-0397 with the Accused: Defence Request Annex A, Audio Recording Items 24-26, 30 and their corresponding Transcripts (Items 110-121) and Translations (Items 94-104).

the measure was required. Additionally, such measures were permitted, or at very least not prohibited, under the domestic legal regime of the States where the witnesses were present.

**The Defence has not established grounds for exclusion under article 69(7)(a) or (b)**

46. Furthermore, and in any event, even if the Chamber finds that the investigative measures did entail a violation of the Statute, the Defence fails to show either of the grounds for exclusion specified in article 69(7). For this reason too, the Request must be dismissed.

*There can be no substantial doubt as to the reliability of the evidence*

47. The Prosecution observes that the Request relies solely on the second ground for exclusion under article 69(7)(b), and does not even attempt to argue that any violation of the Statute in collecting the OPC Recordings casts substantial doubt on their reliability.

48. Nor could the Defence make such an argument, since the recording of the relevant phone conversations has precisely the opposite effect—it greatly *enhances* the reliability of this evidence. Instead of the Chamber relying solely upon the witnesses’ accounts of their conversations with the persons allegedly trying to corruptly influence them, the recordings provide a contemporaneous, verbatim and unfiltered record of the exchanges. Thus, they eliminate, or at least substantially reduce, potential inaccuracies arising from misconstruction by the witness, the corrosive effect of fading memory, conscious or unconscious bias and/or exaggeration, embellishment or misrepresentation. They also assist the Chamber in properly evaluating the credibility of the witnesses against objective facts. Indeed, if admitted, these recordings will give the Chamber a direct insight into the very commission of the offence as it unfolded. In short, it is the best possible evidence of what transpired between the witnesses and the direct perpetrators.

*Admission of the recordings could not be antithetical to or seriously damage the integrity of the proceedings*

49. The Request fails to show that admission of the OPC Recordings would be antithetical to and would seriously damage the integrity of the proceedings. It does not engage with the factors identified by other Chambers seized with this question or explain how these factors militate in favour of exclusion. Instead, it focuses largely on irrelevant<sup>100</sup> or incorrect<sup>101</sup> submissions.

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<sup>100</sup> See for instance Defence Request paras. 58, 62.

<sup>101</sup> See for instance Defence Request para. 61, first sentence.

50. First, as noted above, to any extent that the Prosecution violated the Statute, this was limited in its nature and gravity, and flowed only from an inadequate degree of consultation with the relevant States Parties prior to directly executing non-compulsory investigative measures. At all times the Prosecution acted in good faith, and the actions it took were both sound and necessary, consistent with its obligations under articles 54 and 68(1). The Prosecution accepts, however, that any violation of the Statute must necessarily have been due to its own oversight, since on this occasion it directly executed the investigative measures in question and controlled them.<sup>102</sup> Nevertheless, the violations alleged are procedural in nature and do not detract from the probity or reliability of the evidence.<sup>103</sup>

51. Second, any violation of the Statute did not violate the internationally recognised rights of the Accused. While the Request asserts that the Prosecution's conduct "resulted in a violation of Mr. Gicheru's internationally recognized human right of privacy",<sup>104</sup> it fails to substantiate this claim—especially since the vast majority of the OPC Recordings relate to the voluntary recording of conversations with *other persons*. Indeed, this argument could only pertain to the four recorded conversations between P-0397 and the Accused, which were recorded by P-0397

52. Third, the Prosecution sought to minimise the consequences of the investigative measures it considered necessary.<sup>105</sup> For example, before embarking on the investigative measures leading to the collection of the OPC Recordings, the Prosecution considered the feasibility of obtaining similar evidence through other means. However, given the context described above, the Prosecution concluded that alternative avenues would be unlikely to succeed either in mitigating or investigating the ongoing campaign of witness interference prior to the *Ruto and Sang* trial.

Furthermore, the Prosecution considered that any degree to which the "one party consent" recordings were unexpected by the other party to the conversation was proportionate in the circumstances, having regard in particular to the content of the discussion in question and its apparent criminal purpose and the fact that the corrupt interference was initiated by the recorded parties. The

<sup>102</sup> *Al Hassan* article 69(7) Decision, paras. 34, 43.

<sup>103</sup> See *The Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, 3 October 2003, paras. 61-63; *Prosecutor v. Zejnil Delalic et al.*, IT-96-21-T, 9 February 1998, paras. 18-20; *Khan v. United Kingdom* (2001) 31 EHRR 45, 12th May 2000 [ECtHR], paras. 36-37, 40.

<sup>104</sup> Defence Request, para. 61.

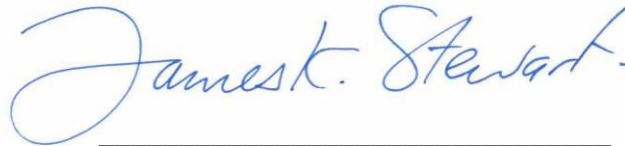
<sup>105</sup> *Bemba et al. AJ (Judge Henderson Sep Op)*, para. 34.

Prosecution limited the scope of these investigative measures by only requesting witnesses who had reported prior attempts to corruptly influence them to make (voluntary) recordings of such conversations with the persons responsible.<sup>106</sup>

53. Finally, the fact that the evidence contained in the OPC Recordings is precisely the same evidence about which the witnesses in question would undoubtedly be permitted to testify – merely preserved in a more durable and reliable format – weighs heavily in favour of concluding that admission would *not* harm the integrity of the proceedings. There could be no objection, for example, if the witnesses had been requested to take contemporaneous notes of their conversations – even verbatim notes if possible – and then consulted these prior to or during their testimony, or even tendering them into evidence. It is thus difficult to imagine – and the Defence does not explain – how the admission of such evidence would be antithetical to and seriously compromise the integrity of the proceedings.

## VI. CONCLUSION AND RELIEF SOUGHT

54. For the foregoing reasons, the Defence Request to exclude the OPC Recordings fails to substantiate a violation of article 69(7) or the need to exclude this evidence and should accordingly be dismissed. As regards the remaining Irrelevant Items, it should also be dismissed as both unsubstantiated and moot.



**James Stewart, Deputy Prosecutor**

Dated this 14<sup>th</sup> day of January 2022  
At The Hague, The Netherlands

<sup>106</sup> Unlike a phone interception operation or request for call data records, which typically include *all* calls made and received on the relevant device.