

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/20
Date: 28 January 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

**Public redacted version of “Response to Prosecution’s First Bar Table Motion”, 26
January 2022, ICC-01/09-01/20-266-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
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

Other

REGISTRY

Registrar
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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Mr. Paul Gicheru, through his Counsel (“the Defence”), hereby responds to the Office of the Prosecutor’s (“OTP”) First Bar table Motion.¹ This Response is filed confidentially pursuant to Regulation 23*bis*(2) of the Regulations of the Court since it responds to a filing bearing the same classification level.

1. “Unless immediately apparent from the exhibit itself,” the OTP is “to explain: (1) the relevance of a specific factual proposition to a material fact of the case; [and] (2) how the item of evidence tendered makes this factual proposition more probable or less probable.”²
2. The OTP fails to explain how KEN-OTP-0160-0877 and KEN-OTP-0160-0885 are relevant to any material fact in the Confirmation Decision or how these items make any factual propositions more or less probable:
 - a. KEN-OTP-0160-0877: An insurance contract [REDACTED]. The admission of this item is cumulative since the contact details can be found in other evidence.
 - b. KEN-OTP-0160-0885: A letter [REDACTED]. The admission of this items is, again, cumulative. [REDACTED].³ By attempting to introduce this document, the OTP insinuates a relationship between [REDACTED] that is not relevant to the timeframe of the charges, 2013 and 2014.
3. The OTP misrepresents the Defence’s consent to some of the documents. Consenting to the admissibility of a document introduced through a bar table motion does not axiomatically amount to an acquiescence to the representations made by the OTP as to its understanding of the substance or relevance of the document. Notably:
 - a. Mr. Gicheru did not attend Kapsbet High School *with* Ruto.⁴ As Mr. Gicheru explained in his interview with the OTP, he [REDACTED].⁵
 - b. Mr. Gicheru’s statements in his OTP interview that his law firm was created in 2005 and has since been located at Veecam House is not an admission that it was “used ... to direct the activities of the members of the Common Plan and advance it aims.”⁶ It

¹ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-261](#), Prosecution’s First Bar Table Motion, 19 January 2022 (“OTP Bar Table Motion”).

² *Prosecutor v. Katanga*, [ICC-01/04-01/07-2635](#), Decision on the Prosecutor’s Bar Table Motions, 17 December 2010, para. 16; *Prosecutor v. Katanga*, [ICC-01/04-01/07-3184](#), Decision on the Bar Table Motion of the Defence of Germain Katanga, 21 October 2011, para. 16.

³ [REDACTED].

⁴ [OTP Bar Table Motion](#), para. 24(iv), citing [OTP Trial Brief](#), paras. 37(a), 75.

⁵ [KEN-OTP-0159-0766](#), p. 771, lines 141-61.

⁶ [OTP Bar Table Motion](#), para. 33(i).

is only an acknowledgement that his law firm was created in 2005 and is located at Veecam house.

- c. The affidavits Mr. Gicheru prepared for P-0015 do not “confirm that the Accused was directly involved in arranging for the withdrawal of Prosecution witnesses from the *Ruto and Sang* case.”⁷ They only confirm that Mr. Gicheru prepared an affidavit on P-0015’s behalf to withdraw from the ICC.

WHEREFORE, considering that the OTP failed to explain the relevance of how KEN-OTP-0160-0877 and KEN-OTP-0160-0885, Trial Chamber III should, in the interests of justice and fairness of the proceedings, **DENY** the admission of these two documents.

Respectfully submitted, 28 January 2022,
In The Hague, the Netherlands.



Michael G. Karnavas
Counsel for Mr. Paul Gicheru

⁷ [OTP Bar Table Motion](#), para. 34. See also [Annex A](#) to OTP Bar Table Motion, p. 5, item [KEN-OTP-0093-1199](#); [KEN-OTP-0159-0736](#), at 0740, ln 128, 0743, lns. 221-27.