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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 Second Bar Table Motion”, ICC-01/09-01/20-274-Conf, 2 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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I. Introduction

1. The Office of the Prosecutor¹ requests the formal submission into evidence of 66 items of evidence from the bar table pursuant to articles 69(9)(a), 69(3) and 69(4) of the Statute, rule 63(2) of the Rules of Procedure and Evidence², and Trial Chamber III's³ Directions on the Conduct of Proceedings.⁴
2. The evidence tendered through this application⁵ consists of three categories of material: (a) Documents associated with statements of Prosecution trial witnesses (including the *Ruto and Sang* case); (b) Legal documents; and (c) (Social) media articles and footage⁶ and comprises evidence cited in the Prosecution Trial Brief⁷ as well as additional evidence gathered in the ordinary course of the investigation.
3. The Tendered Evidence is *prima facie* relevant and probative of material issues at trial. While it does not constitute direct evidence of the charged offences of corruptly influencing witnesses through bribery, intimidation, or as combination of both,⁸ it is relevant *inter alia* to establish, underlying facts, to corroborate other evidence relevant to the Charged Offences, or to context and background that will assist the Chamber in its determination of issues in dispute. The Tendered Evidence additionally bears sufficient indicia of reliability to justify its introduction into evidence for the Chamber's consideration.
4. Introducing the Tendered Evidence from the bar table is consistent with the rights of the Accused in this case. The Accused had sufficient notice of the content

¹ "Prosecution" or "OTP".

² Of the Rules of Procedure and Evidence ("Rules").

³ "Chamber".

⁴ ICC-01/09-01/20-189 ("Conduct Decision"), paras. 9-19, 37-38.

⁵ Altogether, the "Tendered Evidence".

⁶ Each category of items that form part of the Tendered Evidence are listed and hyperlinked in Annex A together with the following information: (i) Evidence Registration Number ("ERN"); (ii) Type; (iii) Title; (iv) Date; (v) Source identity; (vi) Relevance, including probative value; (vii) Index of most relevant portion of lengthy document (viii) Date of Disclosure; and (ix) the Defence's position on the submission of each item.

⁷ ICC-01/09-01/20-220-Conf, "Trial Brief".

⁸ "Charged Offences".

of the Tendered Evidence. The Tendered Evidence will also assist in the Chamber's determination of the truth and will contribute to an expeditious trial.

5. The Defence was consulted and, save for six items,⁹ it opposes the introduction of the Tendered Evidence.¹⁰

II. Confidentiality

6. This filing and its annex are classified as "Confidential" as they refer to records of evidence and investigative activities, which also involved the Accused, that remain of a confidential nature. A public redacted version of this filing will be submitted as soon as possible within the next 5 days.¹¹

III. Background

7. On 30 September 2021, the Chamber directed the Prosecution to file a list of all items it planned to submit as evidence during the trial (the 'List of Evidence') by 15 November 2021.¹²
8. On 7 October 2021, the Chamber issued the Conduct Decision setting out, among others, the procedure for the parties wishing to introduce evidence in writing rather than through a witness.¹³
9. On 15 November 2021, the Prosecution filed its List of Evidence, which included the Tendered Evidence.¹⁴ On 21 January 2022, the Prosecution filed an updated List of Evidence.¹⁵ However, evidence tendered through this bar table motion does not include any new items included in the updated List of Evidence.

⁹ Items 11, 15, 33-35 and 66.

¹⁰ *Inter partes* e-mail communication dated 26 January 2022 and 31 January 2022.

¹¹ ICC-01/09-01/20-189, para. 46.

¹² ICC-01/09-01/20-185, para.18 and p. 9.

¹³ ICC-01/09-01/20-189, paras. 37-38.

¹⁴ ICC-01/09-01/20-220-Conf-AnxA.

¹⁵ ICC-01/09-01/20-262-Conf-AnxA.

10. On 26 January 2022, the Prosecution inquired with the Defence whether they consented or objected to the introduction of the Tendered Evidence, as per the Conduct Decision.¹⁶
11. On 31 January 2022, the Defence informed the Prosecution that it opposes the introduction of all items listed in the Annex except for six items. Of these six items two are investigator's reports falling in the category of materials under (a) above, one attributing a phone number to William RUTO¹⁷ and the other one reflecting [REDACTED]¹⁸ Three other items belong in the category (b), two being an expert report of Professor Maupeu along with its translation,¹⁹ and the third being a report of the Commission of Inquiry into Post-Election Violence (CIPEV),²⁰ all including information on the background and causes of the PEV. Finally one item of these six, a map of Kenya,²¹ falls into the third category. The Defence has not yet provided reasons for opposing the submission of the other 60 items and thus the Prosecution is unable to anticipate their arguments against submission. Should the Defence do so in its response to this Request, the Prosecution may seek leave to reply.

IV. Applicable Law

12. The Prosecution has already set out the applicable law in the Prosecution's First Request for the Admission of Evidence from the Bar Table,²² the contents of which are incorporated by reference herein.
13. In accordance with the established practice, the introduction of evidence from the bar requires consideration of three standard evidentiary criteria: the evidence in

¹⁶ ICC-01/09-01/20-189, para. 38.

¹⁷ Annex A, Category A, item KEN-OTP-0150-0345.

¹⁸ Annex A, Category A, item KEN-OTP-0147-1590-R01.

¹⁹ Annex A, Category B, items KEN-OTP-0093-0871 and KEN-OTP-0093-1308.

²⁰ Annex A, Category B, item KEN-OTP-0001-0364.

²¹ Annex A, Category C, item KEN-OTP-0033-0002.

²² ICC-01/09-01/20-261-Conf.

question must be *prima facie* (i) relevant²³ and (ii) probative to the issues at trial,²⁴ and (iii) its potential prejudicial effect must be weighed against its probative value.²⁵

14. In its Conduct Decision, the Chamber allowed the parties to introduce evidence from the bar, clarifying that it “will ultimately assess the relevance, probative value and potential prejudice of the evidence (the ‘standard evidentiary criteria’) as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused in its judgment pursuant to article 74 (...)”.²⁶

V. Submissions

15. As noted above, the Tendered Evidence consists of three categories of material:
 - A. Documents associated with statements of Prosecution trial witnesses (including the *Ruto and Sang* witnesses);
 - B. Legal documents; and
 - C. (Social) media articles and footage.
16. Each category of Tendered Evidence and their corresponding standard evidentiary criteria are addressed in the Annex hereto, in accordance with the Conduct Decision,²⁷ including (i) a short description of the content of each item; (ii) in the case of a lengthy document, an index of the most relevant portions of the document or recording; and (iii) a short description of its relevance and *prima facie* probative value, including authenticity. The Prosecution will, in addition, address in summary the standard evidentiary criteria, for each category of document in turn, below.

²³ ICC-01/04-01/06-1399-Corr, para.27; ICC-01/04-01/07-2635, section B; ICC-01/05-01/08-2012-Red, paras. 13-14; ICC-01/05-01/08-2299-Red, para. 8; ICC-01/09-01/11-1353, para. 15.

²⁴ ICC-01/04-01/06-1399-Corr, paras. 28-30; ICC-01/04-01/07-2635, section C; ICC-01/05-01/08-2012-Red, paras. 13 and 15; ICC-01/05-01/08-2299-Red, para. 8; ICC-01/09-01/11-1353, para. 15.

²⁵ ICC-01/04-01/06-1399-Corr, paras. 31-32; ICC-01/04-01/07-2635, section D; ICC-01/05-01/08-2012-Red, paras. 13, 16-17; ICC-01/05-01/08-2299-Red, para. 8; ICC-01/09-01/11-1353, para. 16; ICC-01/12-01/18-1475-Red, para. 73.

²⁶ ICC-01/09-01/20-189, para.10.

²⁷ ICC-01/09-01/20-189, para. 37.

(i) *The Tendered Evidence is prima facie relevant to the issues at trial*

Category A: Documents associated with statements of Prosecution trial witnesses (including the Ruto and Sang witnesses)

17. The Tendered Evidence listed in Category A of the Annex are all relevant to the to the issues at trial such as the existence of a relationship between the Accused, RUTO and Members of the Common Plan, and the existence of such Common Plan as set out in the Trial Brief.
18. As regards certain statements and affidavits²⁸ included in Category A, the Prosecution does not seek to introduce these as proof of the truth of their content, but rather to establish relevant objective facts, such as the date when a certain report was made or the fact that a witness showed investigators relevant contact details on their mobile phones. The Prosecution submits these items are thus relevant and probative in this case.

Category B: Legal Documents

19. The Tendered Evidence listed in Category B contains Legal documents that are relevant to issues at trial, since they are also probative of *inter alia* the relationships between members and associates of the Common Plan, as well as RUTO, the alleged beneficiary of the Charged Offences. They are thus also relevant to, but not dispositive of, the individual criminal responsibility of the Accused. Other documents provide background information concerning the PEV which will assist the Chamber to understand the historical and political context which formed the backdrop of the Charged Offences, including political alliances and rivalries and inter-ethnic tensions existing in Kenya at the relevant times.

²⁸ Annex A, items 1-10.

Category C: (Social) Media articles and footage

20. The Tendered Evidence listed in Category C of the Annex is relevant to issues at trial since it is also probative of *inter alia* the relationships between members and associates of the Common Plan, as well as RUTO, the alleged beneficiary of the Charged Offences. It is thus also relevant to, but not dispositive of, the individual criminal responsibility of the Accused. Other documents provide background information that will assist the Chamber in its assessment of issues in dispute.

(ii) *The Tendered Evidence has prima facie probative value*

Category A: Documents associated to statements of Prosecution trial witnesses (including the Ruto and Sang case)

21. The Tendered Evidence listed in Category A is probative of issues at trial as contains all formal indicia of reliability and authenticity. As far as ICC official documents are concerned, they bear indicia of reliability such as the ICC(-OTP) letterhead, date and/or are stamped with an ICC record number containing the code of the present case. As far as non-ICC documents are concerned they bear indicia of reliability such as the date and signature of the deponent.

Category B: Legal Documents

22. The Tendered Evidence listed in Category B are equally probative of issues at trial. These documents all contain sufficient indicia of reliability, including authenticity, to be submitted into evidence. In particular the Prosecution observes that:

- The reports of the CIPEV are publicly available from the public record of the Commission's findings, bearing the date (and time) of publication.
- The publicly available ruling of the High Court of Kenya includes the case number, name of the presiding judge and the date of origin.

- The expert report of Professor Maupeu on the background and causes of the PEV was submitted via e-mail to the OTP official account and bears the name of the author. Its translation is an official ICC translation bearing the ICC letterhead and the reference to the original document. It was also admitted into evidence through the witness, who testified as an expert in the *Ruto and Sang* case.
- The e-mails and cover letters of legal representatives, including [REDACTED] bear the letterhead of the respective law firm, the contact details as well as the date and signatures of the acting attorneys.
- The letter from [REDACTED] to the ICC President bears the letterhead of the [REDACTED] as well as his signature and date and place.

Category C: (Social) Media articles and footage

23. The Tendered Evidence listed in Category C comprise (social) Media articles and footage which are open source material. They are from reputable sources and were produced contemporaneously to the events they describe, and are mutually corroborating. The press articles were downloaded from media websites with the URL indicated at the top or bottom of the page and most show the logo of the press media concerned. Moreover, most press articles contain a date of publication, which is the main reason for their admission into evidence as their relevance largely relates to providing a timeframe for the events described in the Trial Brief. As far as open source screenshots attributing contact details to certain individuals are concerned, they each indicate the URL of the source, which is a reputable parliamentary monitoring organisation, operational since 2005, which provides comprehensive information on the operations and members of the Kenyan parliament.²⁹

²⁹ See <https://mzalendo.com/about/> last accessed 31/01/2022.

(iii) *The Tendered Evidence's probative value outweighs any prejudicial effect to a fair trial*

24. The introduction of all items listed in the Annex does not cause any undue prejudice.³⁰ The following factors cumulatively establish that the probative value of these items outweighs any prejudicial effect:

- each item is relevant to the issues at trial, if not directly then at least to enable the Chamber to establish the background and chronology of events leading to the Charged Offences;
- each of the items proposed in the Annex possesses sufficient indicia of reliability and has been either produced or collected within the ordinary course of the investigation;
- each item will assist the Chamber in the determination of the truth while providing for an expeditious trial;
- the Accused had sufficient notice of the content of the items as well as the Prosecution's intention to rely on them because the Tendered Evidence has been disclosed to the Defence for some time now – the most recent disclosure occurred on 8 November 2021 – and included in the Prosecution's List of Evidence, which was filed on 15 November 2021; and
- the Tendered Evidence does not pertain to the acts and conduct of the accused, nor is it dispositive of the essential elements of the Charged Offences. Rather it relates to corroborative and background information that does not justify presenting to the Chamber by way of *viva voce* evidence, but nonetheless needs to be established in the absence of any agreement under rule 69 of the Rules of Procedure and Evidence.

³⁰ ICC-01/05-01/13-1013-Conf, para. 29.

VI. Relief Requested

25. For the foregoing reasons, the Prosecution requests the Chamber to recognize the Tendered Evidence as formally submitted into the record of the case.



James Stewart, Deputy Prosecutor

Dated this 2nd day of February 2022
At The Hague, The Netherlands