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Pénale
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**International
Criminal
Court**

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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 Second Bar Table Motion,” 14
February 2022, ICC-01/09-01/20-285-Conf**

Source: Counsel for Paul Gicheru

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)**

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Defence**

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Detention Section

**Victims Participation and Reparations
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Other

Mr. Paul Gicheru, through his Counsel (“the Defence”), hereby responds to the Office of the Prosecutor’s (“OTP”) Second 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. Even though the ICC legal framework does not require evidence to be submitted through a witness, the Trial Chamber must consider the prejudice caused to the Defence and exercise “caution when items are submitted without any corresponding witness to comment on them.”³ Prejudice to the Defence is evident when: (a) the documents can and should be submitted through a witness;⁴ and (b) when the Defence has no opportunity to examine the author or source during trial.⁵
3. The OTP fails to explain how the documents it seeks to admit are relevant to any material fact in the Confirmation Decision or how these items make any factual propositions more or less probable. Considering that the Defence will have no opportunity to examine the authors of the documents to test their authenticity and reliability if they are admitted, the probative value of these documents is substantially outweighed by their prejudicial effect. Moreover, other documents – namely, KEN-OTP-0082-0262, KEN-OTP-0124-0293, KEN-OTP-0107-0287, and KEN-OTP-0108-0180 – can and should be introduced through a witness.

Category A – Documents associated with Statements of Prosecution Trial witnesses (including Ruto and Sang witnesses)

4. Item 1: KEN-OTP-0028-1630. A transcript of an ICC Interview with [REDACTED]. Considering that [REDACTED] is not testifying as a witness in the *Gicheru* case, the

¹ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-274-Conf](#), Prosecution’s Second Bar Table Motion, 2 February 2022 (“OTP Second 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 *Prosecutor v. Ongwen*, [ICC-02/04-01/15-615](#), Decision on Prosecution Request to Submit Interception Related Evidence, 1 December 2016, para. 10.

⁴ *Prosecutor v. Ntaganda*, [ICC-01/04-02/06-1838](#), Decision on Prosecution’s request for admission of documentary evidence, 28 March 2017, para. 46.

⁵ *Prosecutor v. Ongwen*, [ICC-02/04-01/15-615](#), Decision on Prosecution Request to Submit Interception Related Evidence, 1 December 2016, para. 10.

probative value of this document is substantially outweighed by its prejudicial effect. It is also unnecessarily cumulative of other evidence showing [REDACTED] contact details.

5. Items 2 and 3: KEN-OTP-0047-0248 and KEN-OTP-0124-0317. A handwritten document titled [REDACTED]⁶ along with a typed transcript. The OTP fails to establish how these documents are relevant to any material fact in the Confirmation Decision. Also, considering that [REDACTED] in the *Gicheru* case and that there is no opportunity to test how he came into possession of this document and who authored it, the probative value of this document is substantially outweighed by its prejudicial effect. The fact that the OTP Language Services Unit typed a transcript of the handwritten document does not verify that [REDACTED] ever gave such a statement.
6. Item 4: KEN-OTP-0116-0201. An affidavit by P-0015 [REDACTED]. This document is cumulative of other evidence and unnecessary to show that Mr. Gicheru drafted an affidavit of withdrawal on P-0015's behalf.⁷ Considering that P-0015 is not testifying as a witness in the *Gicheru* case and will not appear at trial to testify as to the circumstances around the drafting of this document, its probative value is substantially outweighed by its prejudicial effect.
7. Item 5: KEN-OTP-0116-0221. A petition signed by P-0015 to withdraw from the ICC. Considering that the document goes to the acts and conduct of Mr. Gicheru and that P-0015 is not testifying as a witness in the *Gicheru* case, the probative value of this document is substantially outweighed by its prejudicial effect. It also does *not* show that P-0015 was corrupted.⁸
8. Items 8 and 9: KEN-OTP-0082-0262 and KEN-OTP-0124-0293 (typed transcript). A handwritten report [REDACTED]. Considering that P-0800 *is* testifying at trial, this document should be introduced through P-0800 so he can be examined as to the accuracy of the report and how he obtained [REDACTED].
9. Item 10: KEN-OTP-0107-0287. An investigation report [REDACTED]. [REDACTED]⁹ [REDACTED], the document is unnecessarily cumulative of other evidence.

⁶ [REDACTED].

⁷ [KEN-OTP-0093-1195](#); [KEN-OTP-0093-1191](#); [KEN-OTP-0093-1199](#); [KEN-OTP-0095-0738](#); [KEN-OTP-0095-0730](#); [KEN-OTP-0095-0741](#); [KEN-OTP-0095-0743](#) admitted through the *Prosecutor v. Gicheru*, [ICC-01/09-01/20-261-Conf](#), Prosecution's First Bar Table Motion, 19 January 2022.

⁸ [ICC-01/09-01/20-274-Conf-AnxA](#), Item 5.

⁹ [REDACTED].

10. Item 12: KEN-OTP-0159-1638. Investigation report attributing number found in MZALENDO to RUTO. The OTP fails to explain how this document is relevant to any fact in the Confirmation Decision. Not only is the document irrelevant to the time frame of the charges, but it also does not establish a relationship between Mr. Gicheru and RUTO that is relevant to the charges.
11. Item 13: KEN-OTP-0159-1693. An investigation report prepared on [REDACTED]. Considering that the investigation report was prepared eight years after the events it covers, that no information (such as investigator's notes, database entries, etc.) have been disclosed to the Defence, and that P-0540 is not testifying as a witness in the *Gicheru* trial, the probative value of this document is substantially outweighed by its prejudicial effect.
12. Item 14: KEN-OTP-0160-0697. An investigation report [REDACTED]. The document does not establish any relationship between [REDACTED] that is relevant to the time frame of the charges. Also, considering that no information is provided about the [REDACTED] – the probative value of this document is substantially outweighed by its prejudicial effect.
13. Item 16: KEN-OTP-0129-0326. An investigation report [REDACTED]. [REDACTED]¹⁰ the probative value of this document is substantially outweighed by its prejudicial effect.
14. Item 17: KEN-OTP-0148-4912. A list of contacts extracted from [REDACTED]. The document does not establish any relationship between Mr. Gicheru and any individuals that is relevant to the time frame of the charges. Also, considering that no information is provided about the extraction process, who performed it, how it was performed, or when it was performed, the probative value of this document is substantially outweighed by its prejudicial effect.
15. Item 18: KEN-OTP-0108-0180. A forensic report attributing a text message from [REDACTED]. Considering that P-0613 *is* testifying at trial, this document should be introduced through P-0613 so she can be examined as to the provenance of the text message and its accuracy.
16. Item 19: KEN-OTP-0130-0165. A forensic report on the extraction of [REDACTED]. [REDACTED]. Considering the late submission of this document beyond the deadline for

¹⁰ [REDACTED].

Rule 68 applications,¹¹ and that the Defence has no opportunity to examine [REDACTED], the probative value of this document is substantially outweighed by its prejudicial effect.¹²

17. Item 20 KEN-OTP-0130-0165. A report on analysis [REDACTED] mobile phone and SIM. The text messages extracted from [REDACTED]. Considering there is no opportunity to examine [REDACTED], the probative value of this document is substantially outweighed by its prejudicial effect.
18. Items 21 to 30.¹³ Photographs [REDACTED] taken by investigators. Considering that the OTP has made a deliberate choice not to seek a summons for [REDACTED] and concluded that introducing his prior recorded testimony was [REDACTED]¹⁴ the probative value of this document is substantially outweighed by its prejudicial effect.

Category B: Legal Documents

19. Item 31: KEN-OTP-0007-0852. P-0017's [REDACTED]. Considering that P-0017 is not an OTP witness in this case, that OTP has not requested to summons P-0017 or made a Rule 68 application for the introduction of P-0017's prior recorded testimony, there is no way of testing the accuracy of the information in this 73-page-long report, for which the OTP does not indicate which portion it considers relevant.
20. Item 32: KEN-OTP-0159-1749. A civil application in the [REDACTED] not being at issue in the *Gicheru* case, this document is irrelevant to the charges against Mr. Gicheru.
21. Item 36: KEN-OTP-0135-1135. P-0604's [REDACTED]. Considering that the OTP has made a deliberate choice not to seek a summons for P-0604 and concluded that introducing his prior recorded testimony was [REDACTED]¹⁵ the probative value of this document is substantially outweighed by its prejudicial effect.
22. Items 37 and 38: KEN-OTP-0140-0048 and KEN-OTP-0135-1134. Emails from [REDACTED]. It does not establish any "pattern of interference." Considering that P-0604

¹¹ [REDACTED].

¹² See *Prosecutor v. Ntaganda*, [ICC-01/04-02/06-1838](#), Decision on Prosecution's request for admission of documentary evidence, 28 March 2017, para. 46.

¹³ [KEN-OTP-0117-1029](#); [KEN-OTP-0117-1030](#); [KEN-OTP-0117-1031](#); [KEN-OTP-0117-1032](#); [KEN-OTP-0117-1033](#); [KEN-OTP-0117-1034](#); [KEN-OTP-0117-1036](#); [KEN-OTP-0117-1037](#); [KEN-OTP-0117-1038](#); [KEN-OTP-0117-1039](#).

¹⁴ [REDACTED].

¹⁵ [REDACTED].

does not form part of the charges against Mr. Gicheru, Mr. MUTAI's contact details are irrelevant to any material fact in the Confirmation Decision.

23. Item 39: KEN-OTP-0142-0103. An email from [REDACTED]. Considering that P-0604 does not form part of the charges against Mr. Gicheru, [REDACTED] contact details are irrelevant to any material fact in the Confirmation Decision.
24. Items 40 and 41 KEN-OTP-0148-0973 and KEN-OTP-0096-0239. A letter from [REDACTED], to the ICC President dated 12 January 2015 along with the envelope in which it was sent. Considering that [REDACTED] is neither mentioned in the Confirmation Decision nor the OTP Trial Brief, this document is irrelevant to any material fact in the Confirmation Decision.
25. Item 42: KEN-OTP-0112-0126. A cover letter from [REDACTED]. It appears to be an exact copy of KEN-OTP-0145-0566, but for handwritten markings at the top of KEN-OTP-0145-0566 [REDACTED]. Given that P-0800 has previously testified about KEN-OTP-0145-0566 in the *Ruto and Sang* case,¹⁶ and will be testifying in the *Gicheru* case, this document is unnecessarily cumulative of other evidence establishing [REDACTED] contact details.
26. Item 43: KEN-OTP-0147-2132. An email from [REDACTED]. It appears to have been copy-pasted into a Word document, lacking information regarding its authenticity: no emails are provided nor is there a logo (Outlook, Google, etc.) indicating the address from which it was printed. Considering that the information in the email is hearsay and goes to the acts and conduct of Mr. Gicheru, the probative value of this document is substantially outweighed by its prejudicial effect.

Category C: (Social) media article and footage

27. Item 44: KEN-OTP-0153-0497. A media article from The Star dated 23 September 2013 stating that [REDACTED]. This document is unnecessarily cumulative of other evidence in the record, namely, [REDACTED].¹⁷
28. Item 45: KEN-OTP-0047-0098. An article from the American Chronicle dated 12 July 2010 entitled "Writer threatened by RUTO Allies." The OTP fails to explain how this

¹⁶ [ICC-01/09-01/20-T-027](#), p. 24-5.

¹⁷ [REDACTED].

document is relevant to any material fact in the Confirmation Decision, since it relates to facts outside the time frame of the charges.

29. Item 46: KEN-OTP-0159-1631. A screenshot from MZALENDO with a profile of Elisha Kipkorir BUSIENEI and contact details. The screenshot also does not show the date of origin. The OTP fails to explain how this document is relevant to any fact in the Confirmation Decision. Not only is the document irrelevant to the time frame of the charges, but it also does not establish a relationship between Mr. Gicheru and BUSIENEI that is relevant to the charges.
30. Item 47: KEN-OTP-0159-1647. An alumni magazine from Kapsabet Boy's School published in 2015. Considering that the OTP continues to erroneously insinuate that RUTO and Mr. Gicheru went to school together, despite evidence to the contrary,¹⁸ the probative value of this document is substantially outweighed by its prejudicial effect.
31. Items 48-51: KEN-OTP-0159-1690, KEN-OTP-0159-1696, KEN-OTP-0152-0171, KEN-OTP-0152-0173. Media articles covering [REDACTED]. The OTP fails to explain how these documents are relevant to any material fact in the Confirmation Decision. Also, considering that it was [REDACTED],¹⁹ and that [REDACTED] is not testifying as a witness in the *Gicheru* trial, the probative value of this document is substantially outweighed by its prejudicial effect.
32. Item 52: KEN-OTP-0159-1731. A screenshot from AMACO Insurance's website downloaded on 9 March 2021. Considering that this document is not relevant to the time frame of the charges, the OTP fails to explain how this document is relevant to any material fact in the Confirmation Decision.
33. Items 53-54: KEN-OTP-0159-1735 and KEN-OTP-0159-1740. Media articles concerning RUTO's purported shares in AMACO insurance. These documents neither provide any verification for the fact that RUTO was a shareholder of AMACO Insurance nor make any fact in the Confirmation Decision more or less probable.
34. Item 55: KEN-OTP-0159-1767. An undated article from Uasin Gishu County news downloaded in 2021. Not only is this document irrelevant to the time frame of the charges but it is also unnecessarily cumulative of other evidence, namely, [REDACTED].²⁰

¹⁸ [KEN-OTP-0159-0766](#), p. 771, lines 141-61.

¹⁹ [REDACTED].

²⁰ [REDACTED].

35. Item 56: KEN-OTP-0159-1776. Media Article dated 20 January 2013 from The Standard stating that Issac MAIYO was in “RUTO’s” Constituency Development Fund. The OTP fails to explain this document’s relevance to any material fact in the Confirmation Decision. Also, considering that MAIYO is not testifying as a witness in the *Gicheru* case, the probative value of this document is substantially outweighed by its prejudicial effect.
36. Item 57: KEN-OTP-0159-1779. A media article from *TUKO* dated 3 November 2019,²¹ stating that RUTO was neither a shareholder nor director at AMACO Insurance “as widely rumoured.” Not only is this document irrelevant to any material fact in the Confirmation Decision, but contradicts Items 53 and 54, for which presumably, the OTP seeks to establish that RUTO was indeed a shareholder in AMACO Insurance.
37. Item 58: KEN-OTP-0159-1780. A media article from KDRTV published on 30 December 2019. Not only is this document irrelevant to the time frame of the charges, it is also impossible to verify the claims made.
38. Item 59: KEN-OTP-0159-1781. A screenshot of a [REDACTED] downloaded in 2021. Considering that no information is provided as to who created the [REDACTED], when it was created, and for what purpose, any probative value is substantially outweighed by its prejudicial effect.
39. Item 60: KEN-OTP-0160-0661. A screenshot form MZALENDO with RUTO’s contact information. The OTP fails to explain how this document is relevant to any fact in the Confirmation Decision. Not only is the document irrelevant to the time frame of the charges, but it also does not establish a relationship between Mr. Gicheru and RUTO that is relevant to the charges.
40. Item 61: KEN-OTP-0159-1625. A screenshot from the website of [REDACTED], taken in 2020. This document does not establish any relationship between Mr. Gicheru and [REDACTED] that is relevant to the time frame of the charges. Notably, the phone number for [REDACTED], was added to [REDACTED].²²
41. Item 62: KEN-OTP-0159-1628. A screenshot from MZALENDO with [REDACTED] contact details. The OTP fails to explain how this document is relevant to any fact in the Confirmation Decision. Not only is the document irrelevant to the time frame of the

²¹ See <https://www.tuko.co.ke/322587-firm-associated-william-ruto-defends-suspicious-ksh-34-million-payment-mike-sonko.html>.

²² [REDACTED].

charges, but it also does not establish a relationship between Mr. Gicheru and [REDACTED] that is relevant to the charges.

42. Item 63: KEN-OTP-0159-1634. A screenshot from MZALENDO with [REDACTED] contact details. The OTP fails to explain how this document is relevant to any fact in the Confirmation Decision. Not only is the document irrelevant to the time frame of the charges, but it also does not establish a relationship between Mr. Gicheru and [REDACTED] that is relevant to the charges.
43. Item 64: KEN-OTP-0160-0271. A YouTube clip of unknown origin reporting on the OTP's allegations in the *Gicheru* case juxtaposing photographs of Silas SIMATWO and Isaac MAIYO next to a photograph of Mr. Gicheru based on the OTP's allegations. Considering that this document does not establish any relationship between Mr. Gicheru and SIMATWO or MAIYO, any probative value is substantially outweighed by its prejudicial effect.
44. Item 65: KEN-OTP-0160-0658. A screenshot from MZALENDO obtained by the OTP in 2021 with [REDACTED]. The OTP fails to explain how this document is relevant to any fact in the Confirmation Decision. Not only is the document irrelevant to the time frame of the charges, but it also does not establish a relationship between Mr. Gicheru and [REDACTED] that is relevant to the charges.

WHEREFORE, for all the reasons above, Trial Chamber III should, in the interests of justice and fairness of the proceedings, **DENY** the admission of items 1-5, 8-10, 12-14, 16-32, 36-65.

Respectfully submitted, 18 February 2022,
In The Hague, the Netherlands.



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