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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 Third Bar Table Motion and Ancillary Requests", ICC-01/09-01/20-319-Conf, filed on 5 April 2022

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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 requests² the formal submission into evidence of eight items of evidence from the bar table pursuant to articles 64(9)(a), 69(3) and 69(4) of the Statute, rule 63(2) of the Rules of Procedure and Evidence³, regulation 35(2) of the Regulations of the Court, and Trial Chamber III's⁴ Directions on the Conduct of Proceedings.⁵
2. Ancillary to this application and pursuant to regulation 35(2), the Prosecution respectfully requests a variation of the time limit⁶ to add five items to the list of items it plans to submit as evidence during the trial.⁷ The Prosecution submits that this request is justified as the reasons for filing this request at this stage were outside of the Prosecution's control and the need to add these items only arose as a result of (i) evidence elicited during the cross-examination of P-0730;⁸ and (ii) the Chamber's Decision on the Prosecution's Second Request to Introduce Evidence Other than through a Witness.⁹
3. The evidence tendered through this application¹⁰ consists of phone and call data records¹¹ and comprises evidence gathered in the ordinary course of the investigation.
4. 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

¹ "Prosecution" or "OTP".

² "RoC".

³ "Rules".

⁴ "Chamber".

⁵ ICC-01/09-01/20-189 ("Conduct Decision"), paras. 9-19, 37-38.

⁶ As per the Chamber's Decision Setting the Commencement Date of the Trial and Related Deadlines ICC-01/09-01/20-185 ("Deadlines Decision"), para. 18 and p. 9.

⁷ "List of Evidence".

⁸ In respect of items 4-7 on Annex A.

⁹ In respect of item 8 on Annex A; ICC-01/09-01/20-299 ("Second Bar Table Decision").

¹⁰ Altogether, the "Tendered Evidence".

¹¹ The Tendered Evidence is listed and hyperlinked in Annex A together with the following information: (i) Item #; (ii) Evidence Registration Number ("ERN"); (iii) Brief description of the document; (iv) Relevance; (v) Date; (vi) Related to witness; (vii) Probative value, including authenticity; (viii) Index of most relevant portion of lengthy document; (ix) Date of Disclosure; and (x) the Defence's position on the submission of each item.

corruptly influencing witnesses,¹² it is relevant *inter alia* to establish underlying facts or to corroborate other evidence relevant to the Charged Offence. The Tendered Evidence additionally bears sufficient indicia of reliability to justify its introduction into evidence for the Chamber's consideration.

5. Introducing the Tendered Evidence from the bar table is consistent with the rights of the Accused in this case. The Tendered Evidence will also assist in the Chamber's determination of the truth and will contribute to an expeditious trial.
6. The Defence was consulted and opposes the introduction of all eight items of the Tendered Evidence.¹³
7. Finally, the Prosecution respectfully requests the Chamber to render a decision with respect to the outstanding items from the Prosecution's application for the introduction of prior recorded testimony of Witness P-0397, pursuant to rule 68(2)(c).¹⁴

II. CONFIDENTIALITY

8. 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.¹⁵

III. SUBMISSIONS

A. Regulation 35(2) Request for Variation of the Time Limit

9. The Prosecution respectfully requests a variation of the time limit to add five items to its List of Evidence and to file an updated List of Evidence.

¹² "Charged Offences".

¹³ *Inter partes* e-mail communication dated 5 April 2022 at 10:38.

¹⁴ ICC-01/09-01/20-193-Conf ("Rule 68(2)(c) Request"), + Conf-AnxA-Corr.

¹⁵ ICC-01/09-01/20-189, para. 46.

10. On 30 September 2021, the Chamber directed the Prosecution to file its List of Evidence by 15 November 2021.¹⁶ On 15 November 2021, the Prosecution filed its List of Evidence¹⁷ and on 21 January 2022, the Prosecution filed an updated List of Evidence.¹⁸
11. The Prosecution respectfully seeks to add five additional items to its List of Evidence that were omitted for reasons outside the Prosecution's control.

Items 4-7

12. With respect to items 4-7, the necessity of adding these documents to the Prosecution's List of Evidence arose as a result of the Defence's cross-examination of P-0730. These items comprise call data records¹⁹ of phone numbers attributed to GICHERU and SIMATWO respectively as well as an investigator's report and annex by P-0730 providing relevant contextual information regarding the CDR. The CDR were not previously relied upon by the Prosecution, but became relevant as a result of evidence elicited by the Defence during cross-examination of P-0730 on 8 March 2022.²⁰ During cross-examination, it was put to P-0730 that the witnesses who had provided evidence regarding attempts to corruptly influence them were dishonest and unreliable. In response, P-0730 listed various sources of objective evidence on the strength of which he concluded that the versions they provided were, in their essential details, truthful. One of the sources mentioned was the CDR of a phone attributed to the Accused.
13. After P-0730's testimony, the Defence enquired the basis for P-0730's recollection in relation to the CDR,²¹ and subsequently requested the Prosecution to disclose the relevant CDR and "correct the record pursuant to its Article 54 obligations to

¹⁶ ICC-01/09-01/20-185, para. 18 and p. 9.

¹⁷ ICC-01/09-01/20-220-Conf-AnxA.

¹⁸ ICC-01/09-01/20-262-Conf-AnxA.

¹⁹ "CDR".

²⁰ ICC-01/09-01/20-T-062-CONF-ENG, p. 8, lns. 8-10.

²¹ Email communication on 8 March 2022 at 11:32.

establish the truth”.²² This prompted the Prosecution to request P-0730 to clarify the basis for his recollections concerning the relevant CDR, which he then recorded in the form of an investigator’s report.²³ The Prosecution now wishes to tender this report into evidence, together with the underlying CDR.

14. The Prosecution submits that the Defence has, through its cross-examination of P-0730 and subsequent enquiries, placed the existence and significance of the CDR in issue. This development, which was outside the Prosecution’s control, now requires that the relevant evidence is placed before the Chamber in order to assist it to fulfil its truth seeking function.

Item 8

15. Item 8 is an investigator’s report of an interview of P-0028 relevant to the attribution of phone numbers. The necessity to add this document to the Prosecution’s List of Evidence only arose as a result of the Chamber’s Second Bar Table Decision. The Prosecution originally sought to establish the attribution of these phone numbers through the transcript of the interview with P-0028 (KEN-OTP-0028-1630), which it sought to submit through its Second Bar Table Motion.²⁴ However, when the Chamber rejected the submission of the relevant transcript as prior-recorded testimony on 15 March 2022,²⁵ the necessity arose to introduce the relevant evidence in an alternative form that did not fall foul of any exclusionary rule.
16. As a result, the Prosecution requested one of the investigators present during the interview of P-0028 to record in an investigator’s report her observations of the contents of the witnesses contact list. The investigator’s examination of the witness’s contact list is an objective fact discovered in the ordinary course of investigations and separate from the witness’s prior-recorded testimony in this

²² Email communication on 10 March 2022 at 11:21.

²³ Annex A, Item 4.

²⁴ ICC-01/09-01/20-274-Conf, +Conf-AnxA, item 1.

²⁵ ICC-01/09-01/20-299, paras. 11-12 and p. 11.

regard. Hence the Prosecution seeks leave to add item 8 to its List of Evidence in variation of the time limit set by the Chamber.

17. The Prosecution submits that the reasons underlying the request to add these five items to its List of Evidence constitute reasons beyond its control pursuant to regulation 35(2) warranting a variation of the time limit to add these items to its List of Evidence.

B. Request for the Submission of Evidence from the Bar Table

(i) Background

18. 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.²⁶
19. On 24 March 2022, the last witness called by the Prosecution completed his live testimony.²⁷
20. On 25 March 2022, the Chamber instructed the Prosecution to file an official notice of completion of its presentation of evidence into the record of the case,²⁸ which the Prosecution did on 29 March 2022, requesting leave to file a further request to submit evidence from the bar table by 8 April 2022.²⁹
21. On 30 March 2022, the Chamber instructed the Prosecution to file their request by 5 April 2022.³⁰
22. On 4 April 2022, the Prosecution enquired with the Defence whether they consented or objected to the introduction of the Tendered Evidence, as per the Conduct Decision.³¹

²⁶ ICC-01/09-01/20-189, paras. 37-38.

²⁷ ICC-01/09-01/20-T-068-CONF-ENG.

²⁸ ICC-01/09-01/20-313.

²⁹ ICC-01/09-01/20-314.

³⁰ Email communication dated 30 March 2022 at 14:23.

³¹ ICC-01/09-01/20-189, para. 38.

23. On 5 April 2022, the Defence informed the Prosecution that it opposes the introduction of all items listed in Annex A. The Defence has not yet provided reasons for opposing the submission of the Tendered Evidence 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.

(ii) Applicable Law

24. The Prosecution has already set out the applicable law in the Prosecution's First Request for the Admission of Evidence from the Bar Table,³² the contents of which are incorporated by reference herein.
25. In accordance with the established practice, the introduction of evidence from the bar requires consideration of three standard evidentiary criteria: the evidence in question must be *prima facie* (i) relevant³³ and (ii) probative to the issues at trial,³⁴ and (iii) its potential prejudicial effect must be weighed against its probative value.³⁵
26. 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 (...)"³⁶

(iii) Submissions

³² ICC-01/09-01/20-261-Conf.

³³ 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.

³⁴ 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, 15; ICC-01/05-01/08-2299-Red, para. 8; ICC-01/09-01/11-1353, para. 15.

³⁵ 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.

³⁶ ICC-01/09-01/20-189, para. 11.

27. The Tendered Evidence and the standard evidentiary criteria are addressed in Annex A hereto, in accordance with the Conduct Decision,³⁷ 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 below.

The Tendered Evidence is prima facie relevant to the issues at trial

28. The Tendered Evidence contains material that is relevant for the attribution of phone numbers and probative of contacts between the managers, including the Accused, intermediaries and associates of the witness interference scheme. It is thus also relevant to, but not dispositive of, the individual criminal responsibility of the Accused. The CDR and the accompanying investigator's report and annex are further corroborative of P-0730's testimony during the Defence's cross-examination.³⁸

The Tendered Evidence has prima facie probative value

29. The Tendered Evidence is probative of issues at trial. All items contain sufficient indicia of reliability, including authenticity, to be submitted into evidence. In particular the Prosecution observes that:

- The forensics reports regarding the examining of phones belonging to Prosecution witnesses as well as the investigator's reports and relevant annex are official ICC-OTP documents bearing the OTP letterhead, the date they were filed, and the names of the forensics expert(s) or investigators who prepared them.³⁹

³⁷ ICC-01/09-01/20-189, para. 37.

³⁸ ICC-01/09-01/20-T-062-CONF-ENG, p. 8, lns. 8-10.

³⁹ Similar material has been recognised as formally submitted in the Chamber's Second Bar Table Decision, see ICC-01/09-01/20-299, para. 14 and p. 11; ICC-01/09-01/20-274-Conf-AnxA, items 18-20.

- The call data records were passed to the OTP in response to RFA [REDACTED] by the Government of the Netherlands, which obtained the records from the relevant service providers through the ordinary domestic processes.
- With respect to Item 8, this comprises the investigators own observations of the contents of P-0028's contact list made during the ordinary course of investigations and is *prima facie* probative of the data contained on his phone. As submitted above, the investigator's examination of the witness's contact list is an objective fact discovered in the ordinary course of investigations and separate from the witness's prior recorded testimony in this regard. Accordingly, the provisions of rule 68 do not apply to this item, and it may thus be submitted from the bar table.

The Tendered Evidence's probative value outweighs any prejudicial effect to a fair trial

30. The introduction of the items listed in Annex A does not cause any undue prejudice.⁴⁰ 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;
- each of the items proposed in Annex A 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;
- with respect to items 1-3, the Accused had sufficient notice of the content of the items as well as the Prosecution's intention to rely on them because they have been disclosed to the Defence for some time now – the most

⁴⁰ ICC-01/05-01/13-1013-Conf, para. 29.

recent disclosure occurred on 8 November 2021 – and included in the Prosecution’s List of Evidence, which was filed on 15 November 2021;

- with respect to items 4-7, the Prosecution submits that the issue of the CDR became relevant as a result of evidence elicited during the cross-examination of P-0730 by the Defence as explained in paras. 12-14 above. The Prosecution submits that the information provided in the investigator’s report together with the underlying CDR will provide the Chamber with the necessary information to determine the truth in respect of the Accused’s telephone contact with persons located in [REDACTED] at the relevant time. The CDR information is objective evidence of high probative value. Although disclosed late in the Prosecution’s case, for the reasons explained above, the Defence will still have the opportunity to submit evidence explaining the Accused’s telephone contacts and/or rebutting P-0730’s interpretation thereof. For these reasons, the Prosecution submits that the probative value of these items outweighs any prejudice occasioned by their submission into evidence;
- with respect to item 8, the Accused had sufficient notice of the content the Prosecution wishes to rely upon. This information is contained in transcript KEN-OTP-0028-1630 which the Prosecution originally sought to submit and which it now seeks to substitute with item 8. This transcript was disclosed to the Defence on 21 October 2021 and included in the Prosecution’s List of Evidence;
- the Tendered Evidence is not dispositive of the essential elements of the Charged Offences. Rather it relates to corroborative 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.

C. Request for a Ruling on the Submission of the Outstanding Material of the Prosecution's Rule 68(2)(c) Request

31. The Prosecution respectfully request the Chamber to rule on the submission of the outstanding material from its Rule 68(2)(c) Request prior to the closure of the Prosecution's case.
32. On 22 October 2021, the Prosecution submitted its Rule 68(2)(c) Request for the introduction of prior recorded testimony of Witness P-0397.⁴¹ On 26 November 2021, the Chamber partially granted the Prosecution's Rule 68(2)(c) Request noting the ambiguity about the status of audio recordings of [REDACTED]⁴² and deferring its ruling on the admissibility of these items.⁴³
33. However, on 14 February 2022, the Chamber rejected⁴⁴ the Defence request⁴⁵ to exclude the relevant audio recordings, without ruling on the submission of the Outstanding Rule 68(2)(c) Request Items.
34. Therefore, the Prosecution respectfully requests the Chamber to rule on the submission of the Outstanding Rule 68(2)(c) Request Items.

IV. Relief Requested

35. For the foregoing reasons, the Prosecution requests the Chamber
 - (i) to grant its Regulation 35(2) Request;
 - (ii) to recognize the Tendered Evidence as formally submitted into the record of the case; and
 - (iii) to rule on the submission of the Outstanding Rule 68(2)(c) Request Items.

⁴¹ ICC-01/09-01/20-193-Conf, +Conf-AnxA-Corr.

⁴² ICC-01/09-01/20-193-Conf-AnxA-Corr, items 10-15 of P-0397's Associated Material ("Outstanding Rule 68(2)(c) Request Items").

⁴³ ICC-01/09-01/20-235-Conf, para. 32, referring to the Chamber's instructions to the Defence to make its submissions as to why these recordings are inadmissible in ICC-01/09-01/20-223, para. 27.

⁴⁴ ICC-01/09-01/20-284-Conf-Red.

⁴⁵ ICC-01/09-01/20-249-Conf, +Conf-AnxA, +Conf-AnxB.



Ms Nazhat Khan, Deputy Prosecutor

Dated this 7th day of April 2022
At The Hague, The Netherlands