

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/20

Date: 14 April 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 Third Bar Table Motion and Ancillary Requests,” 13 April 2022, ICC-01/09-01/20-321-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
 Ms. Nazhat Shameem Khan
 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
 Mr. Peter Lewis

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 Third Bar Table Motion (“Third OTP Bar Table Motion”).¹ This Response and Annex A are filed confidentially pursuant to Regulation 23bis(2) of the Regulations of the Court since they respond to a filing bearing the same classification level.

I. BACKGROUND

1. In preparation for the commencement of the trial on 15 February 2022, the Trial Chamber ordered the OTP to: (a) file any Rule 68 requests by 22 October 2021; and (b) disclose all evidence and material it intended to rely on at trial by 15 November 2021 along with any remaining Rule 68 requests.² Eight witnesses testified during the OTP case-in-chief, including P-0800,³ P-0341,⁴ P-0738,⁵ and P-0730,⁶ whose evidence the OTP seeks to admit through the Third OTP Bar Table Motion.
2. During the trial, P-0800,⁷ P-0341,⁸ and P-0738⁹ testified, among other things, about their telephone communications, including contact information saved in their telephones and calls they received. At no point did the OTP show the witnesses the reports on the digital forensic examinations performed on their telephones (Items 1-3 in the Third OTP Bar Table Motion).¹⁰
3. P-0730 testified between 7 and 8 March 2022 about his role as the Kenya Article 70 investigation team leader, the obstacles he encountered, and his solemn declaration.¹¹ Prior to his testimony, five OTP members conducted a two-day, six-hour and 45-minute proofing session for him to confirm the accuracy of his solemn declaration and make any corrections and clarifications based on the material provided to him in advance of the session.¹²
4. During the second day of the Defence’s cross-examination on 8 March 2022, Defence Counsel put to P-0730 that many of the witnesses that he relied on in his solemn declaration

¹ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-319-Conf](#), Prosecution’s Third Bar Table Motion and Ancillary Requests, 5 April 2022 (“Third OTP Bar Table Motion”).

² *Prosecutor v. Gicheru*, [ICC-01/09-01/20-185](#), Decision Setting the Commencement Date of the Trial and Related Deadlines, 30 September 2021. See also *Prosecutor v. Gicheru*, [ICC-01/09-01/20-189](#), Directions on the Conduct of the Proceedings, 7 October 2021, paras. 30-1.

³ From 15 to 17 February 2022, T-050, T-051, and T-052.

⁴ From 21 to 22 February 2022, T-053 and T-054.

⁵ On 3 March 2022, T-060.

⁶ From 7 to 8 March 2022, T-061 and T-062.

⁷ T-050, p. 48, line 6 to p. 51, line 6.

⁸ T-053, p. 71, line 9 to p. 73, line 12.

⁹ T-060, p. 17, line 22 to p. 18, line 25.

¹⁰ Item 1 – P-0341 ([KEN-OTP- 0155-4966](#)); Item 2 – P-0800 ([KEN-OTP- 0108-0234](#)); Item 3 – P-0738 ([KEN-OTP- 0108-0269](#)).

¹¹ [KEN-OTP-0159-0884](#), paras. 1, 10. T-061 and T-062.

¹² [KEN-OTP-0160-1628](#).

were less than candid with the OTP.¹³ In response, P-0730 stated that he believed that the parts where witnesses were not truthful were “not problematic in relation to the case...”¹⁴ When asked whether this was his assessment, P-0730 agreed, providing a two-page explanation of the evidence on which he based his report, including “call data records ... from the Dutch authorities which show that Mr Gicheru [was] in touch with [P-0019] [REDACTED].”¹⁵ The Senior OTP Lawyer did not ask any questions concerning the [REDACTED] call data records during his 10-minute redirect examination, which ended during the morning session.¹⁶

5. Immediately after P-0730’s testimony, the Defence checked its databases and informed the OTP that it could not locate any transcripts of conversations between P-0019 and Mr. Gicheru.¹⁷ The Senior OTP Trial Lawyer responded the following day that “the witness referred to call data records, not intercepts, and accordingly there are no transcripts of any conversation between P-0019 and your client.”¹⁸ After conducting another due-diligence check, the Defence replied that the OTP never disclosed *any* call data records concerning P-0019, requesting the OTP to either disclose the call data records or correct the record.¹⁹
6. On 23 March and 1 April 2022, the Defence received disclosure of two spreadsheets of call data records, with no information on where, how, or from whom these call data records were obtained (Items 6 and 7 in the Third OTP Bar Table Motion).²⁰ In the package received on 1 April 2022, the OTP also disclosed an investigation report prepared on 15 March 2022 based on P-0028’s [REDACTED] interview with the OTP (Item 8 in the Third OTP Bar Table Motion), which the Trial Chamber declined to recognize as formally submitted in its Decision on the Second OTP Bar Table Motion because it constituted prior recorded testimony.²¹
7. On 5 April 2022, the date of the Third OTP Bar Table Motion, the OTP disclosed: (a) an investigation report prepared by P-0730 on 2 April 2022 “explaining call data records for

¹³ T-062, p. 4, line 19 to p. 5, line 1.

¹⁴ T-062, p. 5, lines 10-13.

¹⁵ T-062, p. 5, line 25 to p. 8, line 20.

¹⁶ T-062, p. 35, line 14 to p. 40, line 11.

¹⁷ Annex A, p. 2.

¹⁸ Annex A, p. 3 (underline emphasis in original).

¹⁹ Annex A, p. 5.

²⁰ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-311](#), Prosecution’s 39th Communication of the Disclosure of Evidence, 24 March 2022; *Prosecutor v. Gicheru*, [ICC-01/09-01/20-316](#), Prosecution’s 40th Communication of the Disclosure of Evidence, 1 April 2022.

²¹ [KEN-OTP-0160-1677](#) based on [KEN-OTP-0028-1630](#); *Prosecutor v. Gicheru*, [ICC-01/09-01/20-299](#), Decision on the Prosecution’s Second Request to Introduce Evidence Other than Through a Witness, 15 March 2022, para. 12.

GICHERU and SIMATWO's phones" (Item 4 in the Third OTP Bar Table Motion); (b) the annex to P-0730's report (an excel spreadsheet compiled by P-0730 based on [REDACTED] call data records and OTP information) (Item 5 in the Third OTP Bar Table Motion); and (c) the OTP Request for Assistance to the Dutch Authorities.²²

8. Through its Third Bar Table Motion, the OTP seeks to introduce:

- a. Items 1-3: forensic reports on the examination of P-0341's, P-0800's, and P-0738's telephones.²³
- b. Items 4-7: P-0730's investigation report of 2 April 2022,²⁴ its annex,²⁵ and two excel spreadsheets of call data records obtained from the Dutch authorities detailing calls made to and from telephone numbers located in [REDACTED].²⁶
- c. Item 8: an investigation report dated 15 March 2022 based on P-0028's [REDACTED] interview with the OTP concerning numbers found in P-0028's telephone.²⁷

9. The OTP also requests ancillary relief: (a) to vary the time limit to add Items 4-8 to its list of evidence; and (b) to render a decision on outstanding items from the OTP's request to introduce P-0397's prior recorded testimony.²⁸

II. RESPONSE

A. Response to the Third OTP Bar Table Motion and Request to Vary Time Limits

10. 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."²⁹ Prejudice to the Defence is evident when: (a) the documents can and should be submitted through a witness;³⁰ and (b) when the Defence has no opportunity to examine the author or source during the trial.³¹

²² [KEN-OTP-0160-1764](#); [KEN-OTP-0160-1770](#); and [KEN-OTP-0129-0081](#); *Prosecutor v. Gicheru*, [ICC-01/09-01/20-318](#), Prosecution's 41st Communication of the Disclosure of Evidence, 5 April 2022.

²³ [KEN-OTP-0155-4982](#); [KEN-OTP-0108-0234](#); [KEN-OTP-0108-0269](#).

²⁴ [KEN-OTP-0160-1764](#).

²⁵ [KEN-OTP-0160-1770](#).

²⁶ [KEN-OTP-0129-0243](#).

²⁷ [KEN-OTP-0160-1677](#).

²⁸ [Third OTP Bar Table Motion](#), paras. 2, 7.

²⁹ *Prosecutor v. Ongwen*, [ICC-02/04-01/15-615](#), Decision on Prosecution Request to Submit Interception Related Evidence, 1 December 2016, para. 10.

³⁰ *Prosecutor v. Ntaganda*, [ICC-01/04-02/06-1838](#), Decision on Prosecution's request for admission of documentary evidence, 28 March 2017, para. 46.

³¹ *Prosecutor v. Ongwen*, [ICC-02/04-01/15-615](#), Decision on Prosecution Request to Submit Interception Related Evidence, 1 December 2016, para. 10.

11. Considering that the Defence will have no opportunity to examine the author of Items 4-7 to test their authenticity and reliability, the probative value of these documents is substantially outweighed by their prejudicial effect. Items 1-3 and 8 should have been introduced through a witness or as prior recorded testimony under Rule 68. No good cause has been shown to vary the time limits to add these late-disclosed materials to the OTP list of evidence.

P-0730's investigation report and underlying call data records (Items 4-7)

12. The OTP falsely claims that since the Defence “placed the existence and significance of the [call data records] in issue,” this development was outside the OTP’s control, requiring it to submit P-0730’s investigation report and underlying call data records.³² The OTP was or should have been aware that the call data records would be an issue likely to arise in cross-examination, yet failed to be due diligent in its disclosure obligations and preparing its list of evidence.
13. The OTP could and should have anticipated the use of the call data records. The OTP obtained the call data records in April 2014.³³ Having been provided an opportunity to review his solemn declaration and supporting material and having been extensively proofed, P-0730 came prepared for cross-examination with a pre-loaded answer explaining the evidential basis of his report, including the call data records.³⁴ Five OTP team members³⁵ were present during P-0730’s testimony and could have located the call data records, requested to amend the OTP list of evidence, and questioned him on the call data records in redirect examination.³⁶ Instead, the OTP waited until after the conclusion of its case-in chief to disclose the call data records and have P-0730 draft an investigation report to supplement his testimony.³⁷
14. Before formally closing its case-in-chief on 29 March 2022,³⁸ the OTP could have sought the Trial Chamber’s leave to request that P-0730 return for additional examination. The OTP chose not to. Nonetheless, the Trial Chamber would have been hard pressed to grant such a request considering that the call data records mentioned by P-0730 were not newly

³² [Third OTP Bar Table Motion](#), para. 14.

³³ See metadata of [KEN-OTP-0129-0178](#) and [KEN-OTP-0129-0243](#).

³⁴ T-062, p. 5, line 25 to p. 8, line 20.

³⁵ The Senior Trial Lawyer, trial lawyer, associate trial lawyer, associate legal officer, and case manager.

³⁶ T-061, p. 1, lines 20-4. The same composition of the team was maintained during the remainder of P-0730’s testimony. T-062, p. 1, lines 20-1.

³⁷ [KEN-OTP-0160-1764](#), p. 6.

³⁸ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-314](#), Prosecution’s notice of completion of its presentation of evidence, 29 March 2022.

discovered evidence but evidence which, due to a lack of diligence, the OTP failed to disclose to the Defence.

15. P-0730's report is highly prejudicial and there is no opportunity to cross-examine him. His report is not based solely on operative facts; it makes conclusions on Mr. Gicheru's guilt or innocence. While the report concludes that call data records "[REDACTED],"³⁹ he attempts to fill in gaps in his testimony with unreliable hearsay evidence to support his claim that a contact between a number the OTP claims is Mr. Gicheru's and an unattributed number "[REDACTED]."⁴⁰
16. There is no objective evidence linking Mr. Gicheru to the number P-0730 claims is his [REDACTED]. In attributing this number to Mr. Gicheru, P-0730 relies on a number saved on [REDACTED]⁴¹ and information received from [REDACTED].⁴² Yet unlike the other numbers the OTP attributes to Mr. Gicheru, the OTP never attempted to verify this number with [REDACTED]⁴³ or with [REDACTED].⁴⁴ Conversely, the [REDACTED] numbers that P-0730 claims Mr. Gicheru was in contact with cannot be attributed to [REDACTED].⁴⁵
17. P-0730's report is speculative and based on innuendo. In the report, he develops his claim that Mr. Gicheru was in contact with P-0019 [REDACTED].⁴⁶ No independently reliable evidence corroborates [REDACTED]. Moreover, the majority of the information [REDACTED] is based on hearsay or double-hearsay: [REDACTED].⁴⁷
18. No good cause has been shown to vary the time limits to add these items to the OTP list of evidence. The late disclosure of these items after the OTP case-in-chief violates Mr. Gicheru's fair trial right of confrontation.⁴⁸ Were these materials to be admitted, the

³⁹ [KEN-OTP-0160-1764](#), p. 6.

⁴⁰ [KEN-OTP-0160-1764](#), p. 6.

⁴¹ In [KEN-OTP-0160-1764](#), P-0730 cites to [KEN-OTP-0153-0054](#) in which the number found in P-0397's phone is attributed to "Gicheru." However, in the extraction report, the number is saved as belonging to "Paulo." [KEN-OTP-0130-0165-R01](#), p. 12.

⁴² [KEN-OTP-0160-1764](#), p. 1 referring to [KEN-OTP-0116-0482](#).

⁴³ [KEN-OTP-0159-1338-R01](#), lines 681-707; [KEN-OTP-0159-1365-R01](#), lines 57 and 83; [KEN-OTP-0159-1420-R01](#), lines 486-514; [KEN-OTP-0159-1514-R01](#), lines 28-94.

⁴⁴ [KEN-OTP-0159-0736](#), lines 228-68; [KEN-OTP-0159-0766](#), lines 77-87, lines 790-97; [KEN-OTP-0159-0795](#), lines 52-54, lines 217-224.

⁴⁵ [REDACTED]. [KEN-OTP-0160-1764](#), p. 2.

⁴⁶ [KEN-OTP-0160-1764](#), p. 4-6.

⁴⁷ Compare [KEN-OTP-0160-1764](#), p. 5 with [KEN-OTP-0102-0205](#), paras. 29-30, 57 and [KEN-OTP-0100-0339-R01](#).

⁴⁸ See *Prosecutor v. Bemba et al.*, [ICC-01/05-01/13-1524](#), Decision on 'Prosecution's Fifth request for the Admission of Evidence from the Bar Table,' 14 December 2015, para. 6 (finding that the OTP's failure to include four annexes on its list of evidence submitted contemporaneously with the OTP closing its evidence presentation "create[d] an unacceptable risk that the accused were unprepared for these items during the Prosecution's evidence presentation"); *Prosecutor v. Katanga and Ngudjolo*, [ICC-01/04-01/07-2635](#), Decision on the Prosecutor's Bar

Defence must be provided an opportunity to confront P-0730 [REDACTED], was in contact with Silas SIMATWO⁴⁹ – one of the so-called managers in the interference scheme.

The investigation report concerning numbers found in P-0028's phone (Item 8)

19. The OTP misleadingly claims that since the Trial Chamber denied the admission of P-0028's 2010 interview with the OTP through the bar table because it is prior recorded testimony, it requested one of its investigators present during P-0028's interview to "[REDACTED]"⁵⁰ The investigation report (Item 8) is also prior recorded testimony and must be submitted through Rule 68 because it merely summarizes information contained in P-0028's interview.
20. Circumventing the Trial Chamber's ruling, the OTP investigator who prepared Item 8 consulted the transcripts of P-0028's interview and summarized the names and numbers P-0028 provided.⁵¹ Her report was not drafted on the basis of "objective evidence" such as call data records or even her own memory. It is akin to "screening notes" – summaries of interviews with prospective OTP witnesses – which are considered to be prior recorded testimony.⁵²

Forensic examination reports (Items 1-3)

21. The OTP hypocritically seeks to admit three forensic examination reports that were not shown to the witnesses when it previously objected to the Defence's submission of one of the reports (Item 2) for impeachment purposes because it was not shown to P-0800.⁵³ These items should have been shown to the witnesses, or alternatively, submitted as prior recorded testimony under Rule 68(2)(b).
22. While the Chamber was of the view that a forensic examination report of [REDACTED] did not constitute prior recorded testimony for the purposes of Rule 68 because it "[REDACTED],"⁵⁴ it previously admitted an examination report of [REDACTED] telephone under Rule 68(2)(b), finding similarly that it "merely describes the process or

Table Motions, 17 December 2010, para. 46 (finding that due to their late submission, the Defence was deprived of the opportunity to question witnesses on findings contained in reports and that the prejudicial effect of their admission would outweigh their probative value).

⁴⁹ [KEN-OTP-0129-0178](#), lines 181, 182, 186, 187, 188, 189, 190.

⁵⁰ [Third OTP Bar Table Motion](#), para. 15.

⁵¹ [KEN-OTP-0160-1677](#), footnote 1.

⁵² *Prosecutor v. Ongwen*, [ICC-02-04-01/15-1670](#), Decision on Defence Request to Submit 470 Items of Evidence, 14 November 2019, para. 15

⁵³ Annex, p. 7.

⁵⁴ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-299](#), Decision on the Prosecution's Second Request to Introduce Evidence Other than Through a Witness, 15 March 2022, para. 14.

methodology applied ... and reporting the outcome of such investigation.”⁵⁵ Considering that the OTP could and should have had the forensic examination reports admitted through Rule 68(2)(b), it makes no sense to award it for its lack of diligence in its late submission of these items through the bar table.

B. Response to OTP Request for a Ruling on the Submission of P-0397’s Material

23. The OTP requests the Trial 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”⁵⁶ and admit transcripts and translations of telephone conversations [REDACTED].⁵⁷ Recognizing that these items may be admissible pursuant to the decision on the Defence request to exclude audio-recordings,⁵⁸ the Trial Chamber should be circumspect in according these items any weight so as not to offend Mr. Gicheru’s fair trial right of confrontation.
24. Considering P-0397’s and YEBEI’s unavailability, the admission of these items not only offends Mr. Gicheru’s full enjoyment of his fair trial right of confrontation but denies the Trial Chamber the opportunity to meaningfully assess these witnesses for motive, bias, memory, perception, and demeanor, which, undoubtedly are critical factors in deciding the credibility of any witness. Not to put too fine a point on the matter, but cross-examination, as explained by Professor John Henry Wigmore, “is beyond any doubt the greatest legal engine ever invented for the discovery of the truth.”⁵⁹

WHEREFORE, for all the reasons stated herein, Trial Chamber III should, in the interests of justice and fairness of the proceedings, **DENY** the admission of all the items contained in the Third OTP Bar Table Motion.

⁵⁵ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-250](#), Decision on the Prosecution’s Request to Admit Prior Recorded Testimony under Rule 68(2)(b), 16 December 2021, para. 21.

⁵⁶ [Third OTP Bar Table Motion](#), para. 31.

⁵⁷ Items 10-15 of Annex A to *Prosecutor v. Gicheru*, [ICC-01/09-01/20-193](#), Prosecution application for the introduction of prior recorded testimony of Witness P-0397 pursuant to rule 68(2)(c), and alternatively 68(2)(d), 22 October 2021.

⁵⁸ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-284](#), Decision on the Request to Exclude Audio Recordings Pursuant to Article 69(7) of the Statute, 14 February 2022.

⁵⁹ John Henry Wigmore, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (MICROFORM): INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES, ENGLAND, AND CANADA, (Vol. II, 1905), p. 1697 available at https://archive.org/details/cihm_73412/page/n735/mode/2up?view=theater.

Respectfully submitted, 14 April 2022,
In The Hague, the Netherlands.



Michael G. Karnavas
Counsel for Mr. Paul Gicheru