

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

Date: **19 January 2022**

Date of Submission: **15 June 2023**

**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**

**Lesser redacted version of "Prosecution's First Bar Table Motion", 19 January 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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**Detention Section**

**Victims Participation and Reparations  
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## I. Introduction

1. The Office of the Prosecutor<sup>1</sup> seeks to formally submit into the record of the case documentary evidence it collected and received from the Accused in the course of its investigations,<sup>2</sup> pursuant to article 69 of the Statute, rule 63(2) of the Rules of Procedure and Evidence<sup>3</sup>, and Trial Chamber III's Decision on the Conduct of Proceedings.<sup>4</sup>
2. The evidence tendered through this application<sup>5</sup> consists of four categories of material: (a) audio-visual records of the Accused's interview with the OTP and associated transcripts (together, "Accused's Statement"), collected pursuant to article 55(2) and rule 112; (b) items referred to and commented on by the Accused during this interview ("Associated Material"); (c) records of communications between the Accused and the OTP in connection with such interview ("Preparation Material"); and d) documents extracted from the Accused's mobile phone ("Phone Material").<sup>6</sup>
3. The Tendered Evidence is *prima facie* relevant and probative of material issues at trial. While it does not constitute direct evidence of the conduct charged, it corroborates other such evidence in the case.
4. Introducing the Tendered Evidence from the bar table is consistent with the rights of the Accused in this case as it was collected from GICHERU with his voluntarily consent in full knowledge of the applicable law and of the charges against him, or lawfully seized from the Accuse<sup>7</sup> pursuant to a search and seizure warrant<sup>8</sup> issued by Pre-Trial Chamber II.<sup>9</sup> It would also streamline the

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<sup>1</sup> "Prosecution" or "OTP".

<sup>2</sup> Alternatively "Gicheru".

<sup>3</sup> Of the Rules of Procedure and Evidence ("Rules").

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

<sup>5</sup> Altogether, the "Tendered Evidence".

<sup>6</sup> 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) Index of most relevant portion for lengthy items; (vi) Relevance; (vii) Probative Value; (viii) Date of disclosure to the Defence; and (ix) Defence's position.

<sup>7</sup> ICC-01/09-01/20-65-Conf., para. 13.

<sup>8</sup> ICC-01/09-01/20-1-Conf-Exp; ICC-01/09-01/20-1-Red.

presentation of evidence at trial, obviate the need to call witnesses merely to tender the records into evidence, and save valuable Court resources and time.

5. The Defence was consulted and, save for two items of Phone Material,<sup>10</sup> consented to the introduction of the Tendered Evidence.<sup>11</sup>

## II. Confidentiality

6. This filing and its annex are classified as “Confidential” as they refer to items 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.<sup>12</sup>

## III. Background

7. On 30 September 2021, Trial Chamber III<sup>13</sup> 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.<sup>14</sup>
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.<sup>15</sup>
9. On 15 November 2021, the Prosecution filed its List of Evidence, which included the Tendered Evidence.<sup>16</sup>
10. On 22 December 2021, the Prosecution inquired with the Defence whether they consented or objected to the introduction of the Tendered Evidence, as per the Conduct Decision.<sup>17</sup>

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<sup>9</sup> “PTC”.

<sup>10</sup> Annex A, Category D, items KEN-OTP-0160-0877 and KEN-OTP-0160-0885.

<sup>11</sup> *Inter partes* e-mail communication dated 22 December 2021 and 10 January 2022.

<sup>12</sup> ICC-01/09-01/20-189, para. 46.

<sup>13</sup> “Chamber”.

<sup>14</sup> ICC-01/09-01/20-185, para. 18 and p. 9.

<sup>15</sup> ICC-01/09-01/20-189, paras. 37-38.

<sup>16</sup> ICC-01/09-01/20-220-Conf-AnxA.

<sup>17</sup> ICC-01/09-01/20-189, para. 38.

11. On 10 January 2022, the Defence informed the Prosecution that it consented to the introduction of all items listed in Annex A except for two falling within the Phone Material category.<sup>18</sup> The Defence has not yet provided the reasons for opposing the admission of these two items. Should it do so in their response to this Request, the Prosecution may seek leave to reply.

#### IV. Applicable Law

12. Article 69(3) permits the parties to submit evidence relevant to the case, while Article 69(4) provides that “the Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rule of Procedure and Evidence”. Article 64(9)(a) of the Statute governs the Chamber’s determination of the “admissibility or relevance of evidence” and rule 63(2) of the Rules elaborates on this authority.
13. The Statute and the Rules do not expressly stipulate the manner in which documentary, digital or physical evidence must be introduced as evidence in the record of a case. In the *Lubanga* case, Trial Chamber I held that “notwithstanding the express reference to oral evidence from witnesses at trial, there is a clear recognition that a variety of other means of introducing evidence may be appropriate”.<sup>19</sup> In line with this approach, the same Chamber proceeded to admit evidence tendered by a party “from the bar” (i.e. *via* so-called “bar table motions”) rather than through the method of witnesses testifying in court under oath or affirmation.<sup>20</sup> Subsequently, the Trial Chambers in the *Katanga and Ngudjolo*,<sup>21</sup> *Ruto and Sang*,<sup>22</sup> *Bemba*,<sup>23</sup> *Yekatom and Ngaiissona*,<sup>24</sup> and *Al-Hassan*<sup>25</sup>

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<sup>18</sup> Annex A, Category D, items KEN-OTP-0160-0877 and KEN-OTP-0160-0885.

<sup>19</sup> ICC-01/04-01/06-1399-Corr, para. 22.

<sup>20</sup> ICC-01/04-01/06-1399-Corr and ICC-01/04-01/06-1981.

<sup>21</sup> ICC-01/04-01/07-2635.

<sup>22</sup> ICC-01/09-01/11-1353.

<sup>23</sup> ICC-01/05-01/08-2012-Red and ICC-01/05-01/08-2299-Red.

<sup>24</sup> ICC-01/14-01/18-631.

cases followed the same approach and admitted evidence from the bar. In the *Ruto and Sang* case, Trial Chamber V(A) pertinently acknowledged that “the admission of evidence through a bar table is a practice established in the jurisprudence of the Court.”<sup>26</sup>

14. In accordance with this practice, the introduction of evidence from the bar requires consideration of three standard evidentiary criteria: the evidence in question must be *prima facie* (i) relevant<sup>27</sup> and (ii) probative to the issues at trial,<sup>28</sup> and (iii) its potential prejudicial effect must be weighed against its probative value.<sup>29</sup>
15. 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 [...]”.<sup>30</sup>

## V. Submissions

16. As noted above, the Tendered Evidence consists of four categories of material:
  - a. The Accused’s Statement, which comprises: (i) seven audio-visual files of the interview between the Accused and the OTP on 20 October 2018, recorded pursuant to rule 112;<sup>31</sup> (ii) six sets of English transcriptions

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<sup>25</sup> ICC-01/12-01/18-789-AnxA.

<sup>26</sup> ICC-01/09-01/11-1353, para. 13. *See also*, ICC-01/05-01/08-2012-Conf, para. 13; ICC-01/04-01/06-1399-Corr, paras. 27-32; ICC-01/04-01/06-2595-Red-Corr, para. 39; ICC-01/04-01/07-2289-Corr-Red, para. 13.

<sup>27</sup> 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.

<sup>28</sup> 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.

<sup>29</sup> 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.

<sup>30</sup> ICC-01/09-01/20-189, para. 10.

<sup>31</sup> KEN-OTP-0159-0582, a CD-rom, contains six audio-visual files (Track01 to Track06); and KEN-OTP-0159-0589, a separate CD-rom, contains one audio-visual file, which is merely a clearer version of KEN-OTP-0159-0582/Track05.

associated to these audio-visual files;<sup>32</sup> (iii) the Accused's Waiver of Rights, which he signed on video during his 20 October 2018 interview and subsequently submitted to the OTP by e-mail on 23 October 2018.<sup>33</sup>

- b. Associated Material referred to and commented on by the Accused during his 20 October 2018 interview with the OTP, which comprises: (i) the Accused's Business Card;<sup>34</sup> and (iii) two Affidavits<sup>35</sup> and other formal correspondence that the Accused submitted to the OTP electronically on behalf of [REDACTED],<sup>36</sup> a former Prosecution witness in the *Ruto and Sang* case.<sup>37</sup>
- c. Preparation Material consisting of communications between the OTP and the Accused before and after the latter's interview with the OTP on 20 October 2018, comprising: (i) two Investigator's Reports setting out the date and content of telephone and e-mail exchanges with the Accused;<sup>38</sup> (ii) two sets of e-mail communications confirming the Accused's willingness to be interviewed by the OTP;<sup>39</sup> (iii) two audio-recordings<sup>40</sup> and four transcriptions of telephone conversations between the OTP and the Accused confirming the latter's willingness to be interviewed, the modalities of such interview, and relevant contact details;<sup>41</sup> (iv) one e-mail communication sent by the OTP to the Accused following the latter's

<sup>32</sup> KEN-OTP-0159-0723 (Track01), KEN-OTP-0159-0763 (Track02), KEN-OTP-0159-0766 (Track03), KEN-OTP-0159-0795 (Track04), KEN-OTP-0159-0815 (Track05), KEN-OTP-0159-0841 (Track06). The content of the seventh audio-visual files, contained in KEN-OTP-0159-0589, is identical to KEN-OTP-0159-0582/Track05, and as such has not been separately transcribed. KEN-OTP-0159-0815 is the transcription associated with both audio-visual files KEN-OTP-0159-0589 and KEN-OTP-0159-0582/Track05.

<sup>33</sup> KEN-OTP-0159-0578 and KEN-OTP-0159-0579.

<sup>34</sup> KEN-OTP-0159-0585, discussed in KEN-OTP-0159-0796 at 0739, lns.87-284.

<sup>35</sup> KEN-OTP-0093-1199; KEN-OTP-0095-0741.

<sup>36</sup> KEN-OTP-0093-1195 (Cover e-mail to KEN-OTP-0093-1199) and KEN-OTP-0093-1191; KEN-OTP-0095-0738 (Cover e-mail to KEN-OTP-0095-0741), KEN-OTP-0095-0739 (Cover Letter to KEN-OTP-0095-0741) and KEN-OTP-0095-0743 (Letter of Instruction); and KEN-OTP-0096-0079, referred to in KEN-OTP-0159-0766 at 0769, lns. 88-104 and KEN-OTP-0159-0815 at 0825, lns. 311-343.

<sup>37</sup> Also identified by his Witness code P-0015.

<sup>38</sup> KEN-OTP-0159-0510, KEN-OTP-0159-0568.

<sup>39</sup> KEN-OTP-0159-0574; KEN-OTP-0159-0576.

<sup>40</sup> KEN-OTP-0159-0572; KEN-OTP-0159-0573.

<sup>41</sup> KEN-OTP-0159-0666-R01, KEN-OTP-0159-0678-R01; KEN-OTP-0159-0695-R01; KEN-OTP-0159-0712-R01.

interview in which the OTP records that it is awaiting submission of further material that the Accused had offered to provide.<sup>42</sup>

- d. Phone Material extracted from the Accused's cell phone seized upon his surrender,<sup>43</sup> consisting of: (i) an insurance contract signed by the Accused on 18 August 2020 containing a note the Accused's contact details, including of his offices in Eldoret and Nairobi;<sup>44</sup> (ii) a Word document about the Kenyan Export Processing Zones Authorities and the Accused's appointment date to the position of Board Chairman;<sup>45</sup> (iii) a legal note dated 16 October 2020, KINOTI & KIBE Co. Advocates, containing their address and contact details;<sup>46</sup> (iv) a blank letter-head bearing the Accused's law firm logo and contact details;<sup>47</sup> (v) a copy of a page of the Accused's current passport;<sup>48</sup> (vi) a photo of a printed letter dated 28 May 2020 addressed to the Accused, referring to the lease of office space for the Accused's law firm at Victoria Towers in Nairobi.<sup>49</sup>

17. The standard evidentiary criteria for each category of Tendered Evidence are addressed below.

Category A: Accused's Statement<sup>50</sup>

18. The Accused was interviewed by the OTP on 20 October 2018, three years after he had been made aware of the Court's warrant of arrest.<sup>51</sup> Given his then-status as a suspect, the interview was conducted pursuant to the provision of article

<sup>42</sup> KEN-OTP-0159-0577. The Prosecution notes for the record that it received no reply from the Accused to the e-mail communication in question and the material referred to therein was never provided by the Accused.

<sup>43</sup> Details of this phone and data forensically extracted from it and relevant sim card are set out in the OTP technical report KEN-OTP-0160-0045, which the Chamber has accepted as submitted under rule 68(2)(b), ICC-01/09-01/20-250-Conf, para. 22; *See also* ICC-01/09-01/20-198-Conf, paras. 22-30 + Conf-AnxD.

<sup>44</sup> KEN-OTP-0160-0877.

<sup>45</sup> KEN-OTP-0160-0882.

<sup>46</sup> KEN-OTP-0160-0885.

<sup>47</sup> KEN-OTP-0160-0892.

<sup>48</sup> KEN-OTP-0160-0897.

<sup>49</sup> KEN-OTP-0160-0898.

<sup>50</sup> Annex A, p. 1.

<sup>51</sup> ICC-01/09-01/15-10-Red, paras. 1 and 4, and ICC-01/09-01/15-11. *See also*, KEN-OTP-0159-0815 at 0819, Ins.122-135.



55(1) and (2), and of rule 112 and as such audio-video recorded.<sup>52</sup> The interview took place remotely, [REDACTED], with OTP representatives located in the ICC premises in The Hague and the Accused, who was then at large, in Kenya.<sup>53</sup>

19. The questioning was conducted in English, a language the Accused fully spoke and understood,<sup>54</sup> and later transcribed. For the purpose of the interview, the Accused elected to waive his right to be represented by counsel and signed a Waiver confirming this. Since the interview was conducted remotely, the Accused was recorded signing the Waiver on video and the OTP investigator then read it out loud, the Accused confirming.<sup>55</sup> After the interview, the Accused e-mailed the signed Waiver to the OTP.<sup>56</sup>
20. In the course of the interview, the Prosecution played three recordings of phone conversations between two individuals (“Recordings”)<sup>57</sup> – one alleged to be GICHERU and other Witness P-0397 – and sought the Accused’s comment on their content. The Recordings are audible in the audio-video files of the interview only,<sup>58</sup> their content was not subsequently reflected in the transcripts of the interview itself<sup>59</sup> to avoid duplication, since the Recordings had been transcribed<sup>60</sup> and translated<sup>61</sup> separately. The Recordings, their associates transcripts and translations are among those which the Prosecution sought to introduce *via* its rule 68 application for Witness P-0397,<sup>62</sup> and that the Chamber

<sup>52</sup> KEN-OTP-0159-0582 (Tracks 01-06).

<sup>53</sup> KEN-OTP-0159-0723 at 0724, lns. 6-18, and 0725, lns. 39-100.

<sup>54</sup> KEN-OTP-0159-0723 at 0728, lns. 152-163, and 0730, lns. 246-248.

<sup>55</sup> KEN-OTP-0159-0582 (Track01) at 00:14:42:09 to 00:20:00; KEN-OTP-0159-0723 at 0730, lns. 251-322. *See also*, KEN-OTP-0159-0695-R01 at 0697-R01, lns. 62-72; KEN-OTP-0159-0712-R01 at 0714, lns. 42-63.

<sup>56</sup> KEN-OTP-0159-0578 and KEN-OTP-0159-0579.

<sup>57</sup> KEN-OTP-0124-0018 (Track01/Enhanced01 and Track04/Enhanced01) and KEN-OTP-0124-0019 (Track08). These audio-recordings were saved on a separate CD-Rom, KEN-OTP-0159-0586.

<sup>58</sup> KEN-OTP-0159-0582 (Track03) at 00:46:12 to 00:46:20, at 00:46:47 to 00:46:55, 00:47:50 to 00:47:58; 00:52:53 to 00:53:06; 00:54:29 to 00:54:43.

<sup>59</sup> KEN-OTP-0159-0766 at 0788, lns. 722-727, 736-738, 750-751; 826-027; 852-854.

<sup>60</sup> Transcripts of KEN-OTP-0124-0018/Track01: KEN-OTP-0160-0796; Transcripts of KEN-OTP-0124-0018/Track04: KEN-OTP-0160-0802.

<sup>61</sup> Translation of KEN-OTP-0124-0018/Track01: KEN-OTP-0160-0824; Transcripts of KEN-OTP-0124-0018/Track04: KEN-OTP-0160-0833.

<sup>62</sup> ICC-01/09-01/20-193-Red and ICC-01/09-01/20-193-Conf-AnxA, items 10-15, pp. 5-6.

deferred ruling upon due to a pending Defence Challenge to their admissibility.<sup>63</sup>

21. Since the admissibility of the Recordings is still undetermined,<sup>64</sup> the Prosecution excludes from the present application the following evidence, as set out in Annex A: (i) portions of the audio-visual files of the Accused's Statement where the Recordings are played and audible,<sup>65</sup> and (ii) portions of the transcripts of the Accused's Statement where the Recordings are discussed.<sup>66</sup> The Prosecution may file an addendum to this application once the status of the Recordings is adjudicated by the Chamber.
22. The Prosecution submits that the Accused's Statement can be formally submitted through an application under article 69 as opposed to rule 68, which applies to the prior recorded testimony of a *witness*.<sup>67</sup> Since GICHERU is not a witness in this case, but the Accused, his Statement is not the prior recorded testimony of a witness and as such rule 68 does not apply.
23. Consequently, the Accused's Statement is governed by the general admissibility requirements set out in article 69, as recognized by other ICC Trial Chambers that have admitted accused's statements pursuant to this provision.<sup>68</sup> While the specific circumstances pertaining to the admission or introduction of these statements may differ from case to case, the crux of each Chamber's decision is that this evidence can be admitted *via* the bar table and that the Statute confers upon the Chamber the power to assess and rule on their admission or introduction freely—provided that these statements meet the standard

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<sup>63</sup> ICC-01/09-01/20-235-Red, para. 32. *See also*, ICC-01/09-01/20-249-Red, ICC-01/09-01/20-249-Conf-AnxA and Conf-AnxB.

<sup>64</sup> On 15 December the Defence filed the Request to Exclude Audio-Recordings Collected in Violation of Part 9 of the Statute (*see* ICC-01/09-01/20-249-Conf + Conf-AnxA and Conf-AnxB), which the Prosecution responded to on 14 January 2022 (*see* ICC-01/09-01/20-258-Conf-Exp+ Conf-AnxA).

<sup>65</sup> KEN-OTP-0159-0582 (Track03) at 00:46:12 to 00:46:20, at 00:46:47 to 00:46:55, 00:47:50 to 00:47:58; 00:52:53 to 00:53:06; 00:54:29 to 00:54:43.

<sup>66</sup> KEN-OTP-0159-0766, from p. 0788, ln.722, to p. 0792, ln. 886; KEN-OTP-0159-0795, from p. 0796, ln. 20, to p. 0802, ln. 216; from p. 0803, lns. 253-262; from p. 0807, lns. 386-433.

<sup>67</sup> ICC-01/05-01/13-1432, para. 22.

<sup>68</sup> ICC-01/05-01/13-1432; ICC-01/12-01/18-1475-Red.

evidentiary criteria. The Prosecution submits that the Accused's Statement meets these criteria.

(i) *The Accused's Statement is prima facie relevant to the issues at trial*

24. The Statement is relevant and probative of the contested issues in the case. It was taken further to a request of the Accused after he contacted the Prosecution *sua sponte* some three years after he had been made aware of the Warrant of Arrest against him. It contains admissions made by the Accused in relation to information relevant to the charged events. For example, GICHERU admits that he (i) is a lawyer qualified to practice law with offices in Eldoret and Nairobi, including at the relevant times;<sup>69</sup> (ii) knew and spoke to Witness P-0397, both in person and by phone, in 2013,<sup>70</sup> and that the latter visited his office in Eldoret;<sup>71</sup> (iii) spoke to [REDACTED] GICHERU's associate,<sup>72</sup> on behalf of P-0397,<sup>73</sup> a fact also reported by P-0397;<sup>74</sup> (iv) went to Kapsabet High School<sup>75</sup>—an institution also attended by William Samoei RUTO ("RUTO");<sup>76</sup> (v) acted for P-0015<sup>77</sup> in the latter's withdrawal as a witness from the *Ruto and Sang* case;<sup>78</sup> (vi) knew and met Meshack YEBEI – an alleged member of the common plan<sup>79</sup> – at GICHERU's office in Eldoret;<sup>80</sup> (vii) knew RUTO<sup>81</sup> and Silas SIMATWO<sup>82</sup> –

<sup>69</sup> KEN-OTP-0159-0723 at 0726, ln. 102; KEN-OTP-0159-0736 at 0738, lns. 64-65, at 0742, ln. 172, at 0743, ln. 235, at 0749, lns. 435-436. *See also* Annex A, p. 1 (Index of most relevant portion of the document).

<sup>70</sup> KEN-OTP-0159-0815 at 0821, ln. 186. *See also* Annex A, p. 1, Index of most relevant portion of the document.

<sup>71</sup> KEN-OTP-0159-0815 at 0817, lns. 63-116; at 0819, lns. 142-159. *See also* Annex A, p. 1, Index of most relevant portion of the document.

<sup>72</sup> [REDACTED].

<sup>73</sup> KEN-OTP-0159-0795 at 0804, lns. 303-353. *See also* Annex A, p. 1, Index of most relevant portion of the document.

<sup>74</sup> ICC-01/09-01/20-220-Conf, para. 86.

<sup>75</sup> KEN-OTP-0159-0736 at 0739, ln. 78. *See also* Annex A, p. 1, Index of most relevant portion of the document.

<sup>76</sup> ICC-01/09-01/20-220-Conf, paras. 37(2), 75.

<sup>77</sup> Hereinafter "P-0015".

<sup>78</sup> KEN-OTP-0159-0766 at 0769, lns. 88-104; KEN-OTP-0159-0815 at 0825, lns. 311-343. *See also* Annex A, p. 1, Index of most relevant portion of the document.

<sup>79</sup> ICC-01/09-01/20-220-Conf, para. 36(i).

<sup>80</sup> KEN-OTP-0159-0815 at 0825, lns. 344-405. *See also* Annex A, p. 1, Index of most relevant portion of the document.

<sup>81</sup> KEN-OTP-0159-0766 at 0771-0772, lns. 160-190. *See also* Annex A, p. 1, Index of most relevant portion of the document.

<sup>82</sup> KEN-OTP-0159-0766 at 0777-0778, lns. 346-380, 396-397. *See also* Annex A, p. 1, Index of most relevant portion of the document.

another alleged member of the charged common plan<sup>83</sup> – and that the latter visited GICHERU's office in Eldoret;<sup>84</sup> (viii) knew a NJUGUNA and Co. Advocates in Eldoret<sup>85</sup> and an advocate KIBE of the KIBE and KINOTI Advocates in Nairobi<sup>86</sup> – two law firms involved in drafting an affidavit for GICHERU;<sup>87</sup> and (ix) knew [REDACTED]<sup>88</sup> – the location where Witness P-0800 allegedly met GICHERU.<sup>89</sup>

25. Additionally, while the Accused denies most of the allegations put to him in the interview, this too is relevant to the case, since it represents the first account provided by the Accused of his version of relevant events. This provides an important benchmark against which any subsequent evidence or statement may be compared and reduces the risk of the Accused tailoring his version to fit the evidence, assisting the truth finding function of the Chamber.

(ii) *The Accused's Statement is prima facie reliable<sup>90</sup> and authentic*

26. The Statement has all formal indicia of reliability. As is clear from the records tendered, the Statements was obtained by the OTP in accordance with the applicable provisions under the Statute and the Rules and in the ordinary course of its investigations in full respect of the Accused's rights. The interview was conducted by official OTP representatives, audio-video recorded, and transcribed pursuant to article 55 and rule 112. The Accused was informed of his procedural rights on repeated occasions before<sup>91</sup> and during the interview.

<sup>83</sup> ICC-01/09-01/20-220-Conf, para. 36.

<sup>84</sup> KEN-OTP-0159-0766 at 0779, Ins. 425-459. *See also* Annex A, p. 1, Index of most relevant portion of the document.

<sup>85</sup> KEN-OTP-0159-0815 at 0830-0831, Ins. 501-530. *See also* Annex A, p. 1, Index of most relevant portion of the document.

<sup>86</sup> KEN-OTP-0159-0841 at 0851-0852, Ins. 347-362. *See also* Annex A, p. 2, Index of most relevant portion of the document.

<sup>87</sup> ICC-01/09-01/20-220-Conf, paras. 79-80, 92, 197, 281, 298.

<sup>88</sup> KEN-OTP-0159-0841 at 0846, Ins. 167-193. *See also* Annex A, p. 2, Index of most relevant portion of the document.

<sup>89</sup> ICC-01/09-01/20-220-Conf, paras. 227, 232(b).

<sup>90</sup> In the sense that it is an accurate and reliable record of the interview, not that the version presented by the Accused is the truth. The Prosecution disputes the truth of much of the information provided by the Accused during the interview, but the fact that he provided this version remains relevant to the case.

<sup>91</sup> KEN-OTP-0159-0695-R01 at 0697-R01, Ins. 62-72; KEN-OTP-0159-0712-R01 at 0714, Ins. 42-63, 103-143.

He was also informed of the charges against him<sup>92</sup> and of the intended scope of the interview itself.<sup>93</sup> The Accused, who is also a practicing lawyer, understood such rights, waived his right to be represented by counsel, and proceeded to give the Statement voluntarily.<sup>94</sup>

27. At the beginning of the interview, the Accused identified himself on the record.<sup>95</sup> At the end, he was afforded the opportunity to comment upon the conduct of the interview and confirmed that he “didn’t see anything untoward”.<sup>96</sup> The records of the Statement were then sealed by the lead OTP investigator in an official evidence bag, registered in the OTP evidence vault, and later processed in the OTP evidence management system (Ringtail) where each record received a unique evidence registration number (“ERN”). Full and faithful transcripts of the audio-recordings of the interview were later produced by the OTP Language Support Unit.

(iii) *The Accused Statement’s probative value outweighs any prejudicial effect to a fair trial*

28. The introduction of the Accused’s Statement does not cause any undue prejudice.<sup>97</sup> The following factors cumulatively establish that the probative value of the tendered Statement outweighs any prejudicial effect: (a) the Statement is highly relevant to the charges; (b) the Statement was obtained in accordance with the ICC legal framework; (c) the rights of the Accused were fully respected at the taking of the Statement; (d) the Statement will assist the Chamber in the determination of the truth; (e) the Statement has been in the Defence’s possession since 31 December 2020, a substantial period of time;<sup>98</sup> (f)

<sup>92</sup> KEN-OTP-0159-0723 at 0730, lns. 240-322, 323-341.

<sup>93</sup> KEN-OTP-0159-0695-R01 at 0699-R01, lns. 133-150.

<sup>94</sup> KEN-OTP-0159-0723 at 0729, lns. 204 – 213.

<sup>95</sup> KEN-OTP-0159-0723 at 0726, lns. 74-107.

<sup>96</sup> KEN-OTP-0159-0841 at 0861, lns. 676-680.

<sup>97</sup> ICC-01/05-01/13-1013-Conf, para. 29.

<sup>98</sup> Pre-confirmation INCRIM package 01.

the Defence have been put on notice that the Prosecution would be relying on it;<sup>99</sup> and (g) the Defence does not object to its introduction.

29. GICHERU was informed of the right against self-incrimination before making the Statement, among others, in accordance with article 55(2)(b). He nevertheless waived this right and cannot now complain that he is prejudiced by the result of his decision to proceed with the interview, either at all or without counsel.
30. Moreover, as mentioned above, GICHERU was given proper notice of the charges against him at the time – namely of corruptly influencing witnesses – on at least two separate occasions: when he was first arrested by Kenyan authorities in 2015 and before being questioned by the Prosecution, as required by article 55(2)(a).

Category B: Associated Material referred to and commented on by the Accused during his interview<sup>100</sup>

31. Under this category, the Prosecution tenders material referred to and commented on by the Accused in his Statement, which comprises: (i) the Accused's Business Card;<sup>101</sup> and (ii) Affidavits<sup>102</sup> and other correspondence the Accused submitted electronically to the OTP on behalf of P-0015,<sup>103</sup> a former Prosecution witness in the *Ruto and Sang* case.

(i) *The Associated Material is prima facie relevant to the issues at trial*

32. The Prosecution submits that the Associated Material forms an integral part of the Accused's Statement as these items were referred to during the interview of the Accused, who commented thereon. The fact that the items in question were

<sup>99</sup> ICC-01/09-01/20-220-Conf-AnxA.

<sup>100</sup> Annex A, pp. 1-2.

<sup>101</sup> KEN-OTP-0159-0585, discussed in KEN-OTP-0159-0796 at 0739, lns. 87-284.

<sup>102</sup> KEN-OTP-0093-1199; KEN-OTP-0095-0741, KEN-OTP-0096-0079.

<sup>103</sup> KEN-OTP-0093-1195 (Cover e-mail to KEN-OTP-0093-1199) and KEN-OTP-0093-1191; KEN-OTP-0095-0738 (Cover e-mail to KEN-OTP-0095-0741) and KEN-OTP-0095-0743; KEN-OTP-0096-0084 (Cover letter to KEN-OTP-0096-0079), referred to in KEN-OTP-0159-0766 at 0769, lns. 88-104 and KEN-OTP-0159-0815 at 0825, lns. 311-343.

obtained and registered by the OTP separately from the Statement, is immaterial to the determination of their relevance to the contested issues in this case and thus to their admissibility.

33. With respect to the Accused's Business Card, it contains the Accused's full name and titles as well as the name, address, and contact details of his law firm in Eldoret, Kenya. All the information in the Business Card, which the Accused confirmed to be accurate, is relevant and probative of the contested issues in the case. For example, in examining the Business Card the Accused admitted that: (i) he started practicing law in 2005 and continued to do so in 2013,<sup>104</sup> at the relevant time; (ii) his law firm was created in 2005 and since then it has been located at Veecam House<sup>105</sup>—the location used by the Accused to direct the activities of the members of the Common Plan and advance its aims;<sup>106</sup> and (iii) he used the mobile number phone ~725973666 until at least 2013<sup>107</sup>—the same number P-0341<sup>108</sup> and P-0397<sup>109</sup> attribute to GICHERU, and which also appears in the latter's official letter head.<sup>110</sup>
34. With respect to the Affidavits, the Accused confirmed that P-0015 had instructed him to prepare them in 2013 for the purpose of withdrawing as a witness from the *Ruto and Sang* case.<sup>111</sup> The Prosecution does not seek to introduce these Affidavits as evidence for the truth of their content, but submits they are relevant and probative in this case as they confirm that the Accused was directly involved in arranging for the withdrawal of a Prosecution witness

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<sup>104</sup> KEN-OTP-0159-0736 at 0470, Ins. 125-159.

<sup>105</sup> KEN-OTP-0159-0736 at 0743, Ins. 221-227.

<sup>106</sup> ICC-01/09-01/20-220-Conf, paras. 123(b), 142, 273, 298.

<sup>107</sup> KEN-OTP-0159-0736 at 0743, Ins. 171-215, 238-241.

<sup>108</sup> ICC-01/09-01/20-220-Conf, para. 277.

<sup>109</sup> KEN-OTP-0158-1514-R01 at 1779, Ins. 28-29, 50-58, 88-97.

<sup>110</sup> KEN-OTP-0095-0739.

<sup>111</sup> KEN-OTP-0159-0766 at 0769, Ins. 88-104; KEN-OTP-0159-0815 at 0825, Ins. 311-343.

from the *Ruto and Sang* case.<sup>112</sup> P-0015 is in turn implicated in allegedly influencing other witnesses to do the same.<sup>113</sup>

(ii) *The Associated Material are prima facie reliable and authentic*

35. The Accused's Business Card is what it purports to be. In his Statement, the Accused confirmed its authenticity and the accuracy of the details contained therein.<sup>114</sup> The OTP had originally obtained the business card from P-0397 at the time of his interview in January 2014.<sup>115</sup> In that context, P-0397 explained to OTP investigators how he had obtained the business card from the Accused.<sup>116</sup> After the interview, the business card was registered in the OTP evidence management system together with P-0397's statement and an exact copy of it shown to the Accused during his interview.

36. The Affidavits too are *prima facie* reliable. They were received electronically by the OTP Information Desk on 19 February and 18 March 2013 respectively,<sup>117</sup> and subsequently registered in the OTP evidence management system together with their respective cover e-mails<sup>118</sup> and cover letters,<sup>119</sup> and assigned ERNs. The author of these Affidavits, P-0015, is identified therein by his full name and official identity documentation. P-0015's fingerprint, signature and the date appear on each page of the Affidavits. In each Affidavit, P-0015 affirms making them under oath before a licenced commissioner – the Accused – whose signature, seal and business address appear on the last page. Moreover, each Affidavit was submitted to the OTP together with an official cover letter signed by the Accused and carrying his law firm's business name and other relevant

<sup>112</sup> ICC-01/09-01/20-220-Conf, para. 37(a).

<sup>113</sup> ICC-01/09-01/20-220-Conf, paras. 90, 295.

<sup>114</sup> KEN-OTP-0159-0736 at 0739, lns. 87-92.

<sup>115</sup> KEN-OTP-0124-0028. The Chamber recognised this document as formally submitted under rule 68(2)(c) in its decision ICC-01/09-01/20-235-Conf. *See also* ICC-01/09-01/20-193-Conf-AnxA, items no. 8, p. 4.

<sup>116</sup> KEN-OTP-0159-1309-R01 at 1328, lns. 627-633.

<sup>117</sup> For sake of completeness, the Accused forwarded to the OTP one additional statement by P-0015, KEN-OTP-0096-0079. The Prosecution has disclosed this item to the Defence, but does not seek to introduce it as evidence in the case.

<sup>118</sup> KEN-OTP-0093-1195, KEN-OTP-0095-0738.

<sup>119</sup> KEN-OTP-0093-1191, KEN-OTP-0095-0739.



details, including e-mail address, the reference number of the file, and the date of its creation. Each Affidavit and cover letter was then submitted electronically by the Accused through the same e-mail address listed in the cover letters and reflected on the Accused's business card.<sup>120</sup> Finally, the Accused confirmed having prepared and submitted the Affidavits to the OTP on behalf of P-0015.<sup>121</sup>

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

37. The probative value of the Associated Material outweighs any prejudicial effect due to the following factors: (a) the Associated Material is relevant to the charges; (b) the Associated Material are reliable and authentic because the Business Card was collected in the ordinary course of the OTP investigation, and the Affidavits and cover letters were prepared by the Accused, ostensibly in the ordinary course of his business as a licensed lawyer and notary public; (c) the Affidavits and cover letters emanate from the Accused himself, and his possession of the material is indisputable, as is the authenticity thereof; (d) the Associated Material will assist the Chamber in the determination of the truth; (e) the Defence has been put on sufficient notice of the content of the items and that the Prosecution would be relying on these documents; (f) the Defence does not object to its introduction; and (g) the information contained in the Associated Material is independently corroborated by other evidence in the case.

Category C: Preparation Material<sup>122</sup>

38. Under this category of material, the Prosecution tenders communications between the OTP and the Accused before and after the latter's interview on 20 October 2018, consisting of: (i) two Investigator's Reports setting out the date

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<sup>120</sup> KEN-OTP-0159-0585.

<sup>121</sup> KEN-OTP-0093-1199; KEN-OTP-0095-0741. The latter was accompanied by P-0015's Letter of Instruction to the Accused, KEN-OTP-0095-0743.

<sup>122</sup> Annex A, pp. 2-3.

and content of telephone and e-mail exchanges with the Accused;<sup>123</sup> (ii) a set of e-mail communications confirming the Accused's willingness to be interviewed by the OTP;<sup>124</sup> (iii) two audio-recordings and four transcripts of telephone conversations between the OTP and the Accused confirming the latter's willingness to be interviewed, modalities of such interview, and relevant contact details;<sup>125</sup> (iv) one e-mail communication sent by the OTP to the Accused following the latter's interview in which the OTP notes the anticipated submission of further material from the Accused.<sup>126</sup>

(i) *The Preparation Material is prima facie relevant to the issues at trial*

39. The Preparation Material is *prima facie* relevant because these items record the investigative process that led to the Accused making a voluntary Statement to the OTP. As indicated above, the Statement is relevant to the contested issues in the case.

(ii) *The Preparation Material are prima facie reliable and authentic*

40. The items in this category bear sufficient indicia of reliability and authenticity for admission from the bar table, as they were prepared by the OTP in the ordinary course of the investigation and in accordance to the relevant statutory provisions.

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

41. The probative value of the Preparation Material outweighs any prejudicial effect due to the following factors: (a) the items are reliable and authentic because they emanate from the OTP, which acted diligently in the ordinary course of the investigation and in compliance with relevant statutory

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<sup>123</sup> KEN-OTP-0159-0510, KEN-OTP-0159-0568.

<sup>124</sup> KEN-OTP-0159-0574; KEN-OTP-0159-0576.

<sup>125</sup> KEN-OTP-0159-0572, KEN-OTP-0159-0573, KEN-OTP-0159-0666-R01, KEN-OTP-0159-0678-R01; KEN-OTP-0159-0696-R01; KEN-OTP-0159-0712-R01.

<sup>126</sup> KEN-OTP-0159-0577.

provisions; (b) the material is not tendered as proof of the charges against the accused, but will assist the Chamber in the determination of the admissibility of the Statement; (c) the Defence have been put on sufficient notice of the content of the items and that the Prosecution would be relying on these documents; (d) the Defence does not object to its introduction; and (e) the telephone conversations involve the Accused and the authenticity of their content is not contestable.

Category D: Phone Material

42. Finally, under this category the Prosecution tenders six items of evidence extracted from the Accused's mobile phone which provide evidence of information relevant to the case.

43. The Defence objects to two items in this category, as specified in paragraph 45(a) and (c) below.

(i) *The materials are prima facie relevant to the issues at trial*

44. Given the inability of the Parties to reach agreement under rule 69 of even the most basic personal details of the Accused,<sup>127</sup> it is incumbent upon the Prosecution to establish these facts. Accordingly, documents found in the Accused's own possession provide a convenient and reliable means of establishing these facts.

45. The Phone Material provides such evidence, as follows:

- a. An insurance contract signed by the Accused on 18 August 2020 contains information regarding the Accused's contact details, including of his offices in Eldoret and Nairobi;<sup>128</sup>

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<sup>127</sup> See e-mail communication from the OTP to Trial Chamber III dated 10 November 2021 at 16:41.

<sup>128</sup> KEN-OTP-0160-0877.

- b. A document relating to the Kenyan Export Processing Zones Authorities confirms the Accused's appointment date to the position of Board Chairman;<sup>129</sup>
- c. A legal note dated 16 October 2020 and prepared by KINOTI & KIBE Co. Advocates, upon instructions of the Accused as the "CEO" of the Export Processing Zones Authorities, establishes a relationship with this firm of lawyers and reflects their address and contact details;<sup>130</sup>
- d. A blank letter-head of the Accused's law firm reflects its logo and contact details;<sup>131</sup>
- e. A copy of a page of the Accused's current passport confirms his identity;<sup>132</sup> and
- f. A photo of a printed letter dated 28 May 2020 addressed to the Accused, refers to the lease of office space for the Accused's law firm at Victoria Towers in Nairobi, confirming that address.<sup>133</sup>

(ii) *The materials are prima facie reliable and authentic*

46. The Phone Material was recovered from the Accused's own mobile phone. There is no indication or reason to suppose that any of it has been falsified. The phone itself was recovered from the Accused's possession upon his arrest by the Dutch authorities,<sup>134</sup> pursuant to a search and seizure order issued by the PTC.<sup>135</sup> The phone was then transferred to the Registry, who in turn handed it to the Prosecution for examination, upon order of PTC A (Article 70).<sup>136</sup>
47. The chain of custody details and report on the extraction process provide *prima facie* evidence of the authenticity and integrity of the documents.

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<sup>129</sup> KEN-OTP-0160-0882.

<sup>130</sup> KEN-OTP-0160-0885.

<sup>131</sup> KEN-OTP-0160-0892.

<sup>132</sup> KEN-OTP-0160-0897.

<sup>133</sup> KEN-OTP-0160-0898.

<sup>134</sup> ICC-01/09-01/20-35-Conf, paras. 11-13.

<sup>135</sup> ICC-01/09-01/15-1-Conf-Exp, disposition, para. d).

<sup>136</sup> ICC-01/09-01/20-65-Conf, paras. 15-16 and disposition; *see also* ICC-01/09-01/20-105-Conf.

(iii) *Probative value outweighs any undue prejudice*

48. The admission of these materials is not prejudicial to the Defence. The following factors establish that the probative value of the proposed material outweighs any prejudicial effect: (a) the items are relevant to the confirmed charges; (b) the items bear sufficient indicia of reliability for what they purport to show; (c) the materials emanate from a phone seized from the Accused; (d) the materials will assist the Chamber in the determination of the truth; (e) the Defence have been put on sufficient notice of these items and that the Prosecution would be relying on these documents; and (f) the reliability, veracity, and weight of this material is independently corroborated by other evidence in the case.

#### **VI. Relief Requested**

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



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**Ms Nazhat Shameen Khan, Deputy Prosecutor**

Dated this 15<sup>th</sup> day of June 2023  
At The Hague, The Netherlands