

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/20
Date: 17 December 2021

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

Defence Trial Brief

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**

Mr. James Stewart

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 files his Trial Brief.

1. Mr. Gicheru categorically rejects and contests everything contained within the four corners of the Decision on the Confirmation of Charges (“Confirmation Decision”).¹ He is not guilty of any of the confirmed charges.
2. The Confirmation Decision is not evidence. The Pre-Trial Chamber’s (“PTC”) objective in the confirmation process is merely to “ensure that there is a case worthy of trial,”² screening and weighing the Office of the Prosecutor’s (“OTP”) evidence only to ensure that it meets the very low threshold of “sufficient evidence to establish substantial grounds to believe.”³ Charges can be confirmed “even if the evidence as a whole relating to one charge lacks direct evidence, and is only supported by pieces of indirect evidence,”⁴ lending much truth to the adage that even a ham sandwich could be indicted.⁵
3. The very nature of the confirmation process precludes the PTC “from *conclusively* determining the probative value of evidence, including with respect to credibility of witnesses, whose statements are, generally, put before it in written form alone.”⁶ The PTC can, and in confirming the charges did, rely on specious evidence such as anonymous witness statements and summaries⁷ – even evidence that is inadmissible before the Trial Chamber⁸ – and its evaluation of witness credibility is “limited and ‘necessarily presumptive.’”⁹
4. Provisional Rule 165 whittles down the confirmation process even further. Having no hearing to air the evidence and a Single Judge – who, in 60 days,¹⁰ is expected to take a “qualitative analysis” of all the evidence disclosed between the parties and communicated

¹ [ICC-01/09-01/20-153](#).

² [ICC-01/09-01/20-153](#), para. 24 (internal citations omitted).

³ [Rome Statute](#), Art. 61(7).

⁴ [ICC-01/05-01/08-424](#), para. 54.

⁵ This expression famously originates from New York State Chief Judge Sol Watcher over how easy it is to indict under the Grand Jury procedure applicable in New York. *See United States v. Navarro-Vargas*, [408 F.3d 1184](#), 1195 (9th Cir. 2005): “[M]any criticize the modern grand jury as no more than a ‘rubber stamp’ for the prosecutor. ... ‘Day in and day out, the grand jury affirms what the prosecutor calls upon it to affirm—investigating as it is led, ignoring what it is never advised to notice, failing to indict or indicting as the prosecutor “submits” that it should.’ ... Or, as the Supreme Court of New York so colorfully put it: “[M]any lawyers and judges have expressed skepticism concerning the power of the Grand Jury. This skepticism was best summarized by the Chief Judge of this state in 1985 when he publicly stated that a Grand Jury would indict a “ham sandwich””).

⁶ [ICC-01/09-01/20-153](#), para. 32 (emphasis in original).

⁷ [ICC-01/05-01/08-424](#), para. 50.

⁸ [ICC-01/09-01/20-153](#), para. 36.

⁹ [ICC-01/09-01/20-153](#), para. 40.

¹⁰ [ICC Regulations of the Court](#), Regulation 53. *See also Chambers Practice Manual*, para. 55.

to the Chamber¹¹ – virtually ensures an erroneous and unsustainable confirmation predicated on unsound and erroneous findings of fact and a misapplication of the law.

5. Bluntly, and with no disrespect implied towards the PTC, the Confirmation Decision reflects a wholesale adoption of the OTP’s rendition of the events in its Document Containing the Charges – opportunistically reproduced, in no small measure, in the OTP Trial Brief. Flawed, flimsy, and fallacious, all findings and conclusions in the Confirmation Decision collapse when the evidence – much of which is untestable hearsay – is tested in court, diligently scrutinized, and weighed in context against the deficiencies of the OTP’s witness statements and testimony – individually and collectively.
6. Now that the case proceeds to trial, in determining whether the OTP has proved beyond all reasonable doubt all factual allegations and each and every element of each confirmed charge, this Trial Chamber must “carr[y] out ‘a holistic evaluation and weighing of *all* the evidence...,’”¹² guided by the following evidentiary principles:
 - a. The probative value of each piece of evidence must be assessed individually and holistically, considering: (a) the nature of the evidence; (b) its reliability and credibility; (c) its source and the context in which it was obtained; and (d) the nexus to the charges or suspect.¹³ Indicia of reliability such as voluntariness, truthfulness, and trustworthiness must also be considered.¹⁴
 - b. Uncorroborated evidence should be rejected. A conviction under Article 70 of the Statute “may not be based solely and mainly on untested evidence, such as a mere allegation by a witness whom the accused has not been able to question at any stage of the proceedings.”¹⁵
 - c. Hearsay evidence “is of low probative value” and should not be used to prove allegations to the beyond reasonable doubt standard unless corroborated by other reliable evidence.¹⁶ Anonymous hearsay evidence should only be relied on to the extent it corroborates other evidence or is corroborated by other evidence.¹⁷

¹¹ [ICC-01/09-01/11-2027](#), Reasons of Judge Eboe-Osuji, para. 121; [ICC-01/09-01/11-373](#), para. 43.

¹² [ICC-01/05-01/13-1989](#), para. 188 citing [ICC-01/04-01/06-3121](#), para. 22; [ICC-01/04-01/07-3436](#), para. 79; [ICC-01/05-01/08-3343](#), para. 218.

¹³ [ICC-01/09-01/11-373](#), para. 68.

¹⁴ [ICC-01/09-01/11-373](#), para. 68.

¹⁵ [ICC-01/05-01/13-1989](#), para. 25.

¹⁶ [ICC-01/09-01/11-373](#), para. 75; [ICC-01/04-02/12-271](#), para. 226.

¹⁷ [ICC-01/04-01/07-717](#), para. 140.

- d. In assessing the reliability of witness testimony, the Trial Chamber should consider a number of factors, including the witness’s “demeanour when testifying, willingness to respond to questions, spontaneity when responding, coherence, chronological pattern, structure, use of particular vocabulary, attempt at accuracy, coherence with prior recorded statements and complications in the account which are otherwise unnecessary.”¹⁸
- e. The Chamber should also consider: (a) “whether and to what extent the witness is (or is not) in a position to provide certain information as well as the basis of knowledge on which a particular statement is made;” and (b) the individual circumstances of the witness, “including his or her relationship to the accused, age, the provision of assurances against self-incrimination, indication of bias against the accused – or the lack of such – and/or motives for telling the truth.”¹⁹
- f. “Inconsistencies, contradictions and inaccuracies, if present, are equally important when assessing the reliability of a witness’s statement,” and while they do not automatically render a witness’s evidence unreliable in its entirety, they “may in fact speak in favour of the truthfulness of the witness’s account.”²⁰ Certain “inconsistencies in a piece of evidence might be so significant as to bar the Chamber from using it to prove a specific issue.”²¹
- g. When the Trial Chamber has reservations about a witness’s credibility, his or her evidence should only be relied on “to the extent that it is corroborated by other reliable evidence.”²² Also, “[t]here may witnesses whose credibility is impugned to such an extent that he or she cannot be relied upon even if other evidence appears to corroborate parts of his or her testimony,”²³ such as corruptly influenced witnesses, who are presumptively, if not irreparably, unreliable.²⁴
7. The OTP Trial Brief is not evidence. The charges and allegations prove nothing. No opinions should be formed, or conclusions drawn from the OTP’s representations therein, or any claims made of lack of objections to the OTP’s story based on its version of the facts. Mr. Gicheru is under no obligation under the Rome Statute and the fair trial rights afforded

¹⁸ [ICC-01/05-01/13-1989](#), para. 203.

¹⁹ [ICC-02/04-01/15-1762](#), paras. 257-8.

²⁰ [ICC-01/05-01/13-1989](#), para. 204.

²¹ [ICC-01/09-02/11-382](#), para. 92.

²² [ICC-01/05-01/13-1989](#), para. 204.

²³ [ICC-01/05-01/13-1989](#), para. 204.

²⁴ *Contra* [ICC-01/09-01/20-220](#), para. 14.

to him²⁵ to submit a Trial Brief that lays out, in detail, how he intends to challenge the charges against him so as to assist the OTP in mounting a rebuttal to the Defence case during its case-in-chief.

8. Incorporating the factual and legal arguments raised in the Defence pleadings,²⁶ Mr. Gicheru submits the following, reserving his objections to the OTP's recitation of legal principles in its Trial Brief, as it is neither ripe nor productive to address them at this time:
 - a. The OTP Trial Brief is unsupported. The pre-trial disclosure material supports neither the OTP's version of the events, nor its purported legal conclusions. As the OTP's case is scrutinized through the confrontation process pursuant to Article 67(1)(e) of the Rome Statute, the facts will attest to a lack of any legal wrongdoing by Mr. Gicheru regarding the events as phantasmagorically recounted in the OTP Trial Brief.
 - b. The OTP Trial Brief contains no evidence which the Trial Chamber may or should rely on in making its findings of fact and conclusions of law. Only evidence admitted and adduced at trial – having been tested for authenticity, reliability, and relevancy – can be relied upon in determining what weight, if any, to give it.²⁷
 - c. The OTP Trial Brief is rife with contradictory and inconsistent evidence from unreliable witnesses. Claiming that these witnesses corroborate each other, the OTP provides no substantiation or independent indicia of reliability for virtually any of this evidence, nor did it make any meaningful efforts to verify the veracity of this evidence, knowing the witnesses' unreliability.
9. The question that remains is to what extent there will be sufficient sunlight in court to disinfect so the facts can breathe, and the truth can emerge.²⁸ Unsurprisingly, the OTP is attempting to try this case essentially through prior recorded testimony and to limit the confrontation process – the greatest legal engine to get to the truth, something which was not available to the PTC in confirming the charges – to the maximum extent possible.

²⁵ [Rome Statute](#), Arts. 66, 67. The burden of proof is on the OTP. Before an accused may be convicted of any offence, the OTP must convince the Trial Chamber beyond any reasonable doubt of the accused's guilt. Except when special defences are raised such as incapacity, intoxication, self-defence, and duress or coercion ([Rome Statute](#), Art. 31), an accused bears no burden of even going forward with evidence.

²⁶ Including those contained in Mr. Gicheru's Written Submissions on the Confirmation of Charges. *Prosecutor v. Gicheru*, [ICC-01/09-01/20-141](#), Paul Gicheru's Written Submissions on the Confirmation of Charges, 30 April 2021; *Prosecutor v. Gicheru*, [ICC-01/09-01/20-147](#), Reply to the Prosecution's Response to Paul Gicheru's Written Submissions, 18 May 2021.

²⁷ [Rome Statute](#), Art. 69(4).

²⁸ To quote former US Supreme Court Justice Louis Brandeis, "*Sunlight is said to be the best of disinfectants.*" Louis D. Brandeis, *What Publicity Can Do*, [HARPER'S WEEKLY](#), 20 December 1913, p. 10.

10. Predicting with any degree of exactitude how much time will be required for the Defence's examination of witnesses appearing under Rule 68(3), considering how many documents have been admitted, is unrealistic. With trial proceedings being dynamic, the best that can be offered is a guesstimation. As a general benchmark, the Defence estimates needing *at least* the amount of time the OTP estimated it would require if its Rule 68 applications were not granted – 9 hours for P-0613, 9 hours for P-0800, 6 hours for P-0536, and 4.5 hours for P-0730.²⁹ In all likelihood, however, the time required by the Defence could be as long as five trial days for each material witness. So long as the evidence is relevant and non-repetitive, there should be no strict time limitations.
11. When all the reliably relevant facts are exposed to sunlight and given the space to breathe, and when the evidence is qualitatively assessed, individually and holistically, the inevitable conclusion the Trial Chamber will have to reach is that Mr. Gicheru is not criminally responsible for the offences of corruptly influencing witnesses: (a) under Article 25(3)(a) as a direct perpetrator (Counts 1, 2, 4, 7, and 8) or as a direct co-perpetrator (Counts 3, 5, 6); (b) under Article 25(3)(d) for contributing in any other way to the commission of the charged offences by a group of persons acting pursuant to a common plan; (c) under Article 25(3)(b) for soliciting or inducing the direct perpetrators to commit the charged offences; or (d) under Article 25(3)(c) for aiding, abetting, or otherwise assisting the direct perpetrators in the commission of the charged offences.³⁰

Respectfully submitted, 17 December 2021,

In The Hague, the Netherlands.



Michael G. Karnavas
Counsel for Mr. Paul Gicheru

²⁹ [ICC-01/09-01/20-197](#), paras. 29-30 (9 hours for P-0613), 42-3 (9 hours for P-0800), 52-3 (6 hours for P-0536); [ICC-01/09-01/20-194](#), para. 6 (4.5 hours for P-0730).

³⁰ [ICC-01/09-01/20-153](#), para. 218, Disposition, pp. 78-81.