

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/09-01/20
Date: 28 January 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 submission of further information and evidence supporting its ‘Response to the Defence Request to Exclude Audio-Recordings Collected in Violation of Part 9 of the Statute’”, 26 January 2022, ICC-01/09-01/20-265-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
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
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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 (“OTP”) submission of further information and evidence – requested by Trial Chamber III¹ – supporting its ‘Response to the Defence Request to Exclude Audio- Recordings Collected in Violation of Part 9 of the Statute.’² Having provided no evidence or articulable reasons why during its investigations members of the OTP knowingly and consciously violated Part 9 of the Rome Statute, the impugned audio-recordings must be excluded. This Response is filed confidentially pursuant to Regulation 23bis(2) of the Regulations of the Court since it responds to a filing bearing the same classification level.

Supplemental information requested by Trial Chamber III

1. On 18 January 2022, Trial Chamber III requested the following information from the OTP in light of its response to the Defence’s Request to Exclude Audio-Recordings Collected in Violation of Part 9 of the Statute:
 - [REDACTED]. [REDACTED].
 - [REDACTED]. [REDACTED].
 - [REDACTED]. [REDACTED]. [REDACTED].
 - [REDACTED].³

Response to OTP’s supplemental information

2. The OTP acknowledges that [REDACTED],⁴ [REDACTED],⁵ [REDACTED].⁶
3. The OTP concedes that [REDACTED].⁷
4. The OTP erroneously claims that there is no requirement to notify a State Party that it is conducting Article 70 investigations for the purpose of Article 99(4) measures.⁸ “The fact that eventually the negotiators agreed to insert the provision on site investigations [Article

¹ Email from Trial Chamber III entitled, “Instructions concerning Prosecution filing ICC-01/09-01/20-258-Conf-Red,” 18 January 2022.

² [REDACTED].

³ Email from Trial Chamber III entitled, “Instructions concerning Prosecution filing ICC-01/09-01/20-258-Conf-Red,” 18 January 2022.

⁴ [REDACTED].

⁵ [REDACTED].

⁶ [REDACTED].

⁷ [REDACTED].

⁸ [REDACTED].

99(4)], within the framework of international cooperation and legal assistance, emphasizes that the Prosecutor may exercise those powers, *only after a request has been presented.*⁹

5. The OTP demonstrates a lackadaisical approach to determining when and to what extent it will abide by provisions of Part 9 of the Statute. As explained in the Defence Request, these provisions were designed to assuage the concerns of States of an unrestricted OTP by providing checks and balances on the OTP's investigative means and methods, especially when conducting investigations in the territories of States Parties.¹⁰
6. Fearing that they would not have an opportunity to protect their sovereign interests or those of their citizens if wide-ranging investigative power was given to the OTP without any requirement for State consent, the States Parties jealously guarded their sovereignty and jurisdiction, acquiescing to the OTP being able to conduct on site investigations only in limited, regulated circumstances.¹¹ Countenancing blatant statutory violations by the OTP that directly infringe on State Parties' sovereignty interests trivializes, if not vitiates, the safeguards adopted by the State Parties, which, not to put too fine a point on it, served as incentives for singing the Rome Statute.
7. Admitting the impugned audio-recordings despite the knowing and conscious violation of Part 9 of the Statute would effectively nullify the checks and balances in Part 9 of the Statute, thus greenlighting the OTP to willy-nilly transgress its provisions according to its whims and predilections.

WHEREFORE, considering the OTP's acknowledgement that it knowingly and ineluctably Part 9 of the Rome Statute, Trial Chamber III should **GRANT** the Defence Request and **EXCLUDE** all audio-recordings collected in violation of Part 9 of the Statute.

Respectfully submitted, 28 January 2022,
In The Hague, the Netherlands.



Michael G. Karnavas
Counsel for Mr. Paul Gicheru

⁹ Claus Kreß and Kimberly Prost, *Article 99* in KAI AMBOS AND OTTO TRIFFTERER, [ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, A COMMENTARY](#) (3d ed. 2016) ("Kreß and Prost, Article 99), p. 2152 (emphasis added).

¹⁰ [REDACTED].

¹¹ Kreß and Prost, [Article 99](#), p. 2148; [REDACTED].