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**International
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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**

Prosecution's Response to "Defence Bar Table Motion"

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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 Defence Bar Table Motion¹ seeks to introduce into the record 74 documents which relate to the evidence of seven of the eight Prosecution witnesses who testified before Trial Chamber III.² These items fall into one of two categories: (i) documents that the Defence previously sought to introduce through the relevant witnesses, but which the Chamber rejected;³ or (ii) documents that the Defence failed to seek introduction *via* the relevant witness, despite possessing the items at the relevant time.⁴ The Prosecution opposes the submission of all but six⁵ of these items, for the reasons set out below in this response, and further detailed in Annex A hereto.

2. The Chamber rejected the submission of the first category of these items either because they were not used during the questioning of the witness,⁶ or because they comprised prior recorded testimony and the requirements of rule 68 had not been met.⁷

3. In respect of the documents not used during questioning, the introduction of these items from the bar table for the purposes of impeachment should be rejected, since the witnesses in question have not had the opportunity to comment thereon and provide their explanations for the information relied upon by the Defence. As recognised by several Chambers of this Court, other international tribunals and many domestic jurisdictions, it is inherently unfair to a witness for a party to seek to impeach the witness without first confronting the witness with the relevant document or information and giving the witness this opportunity. Additionally, the probative value of these documents is significantly reduced, since the Chamber is deprived of the evidence of the

¹ ICC-01/09-01/20-325-Conf, “Bar Table Motion”.

² “Chamber”.

³ Items 1-6, 9, 15-20, 24-36, 38-40, 49, 52, 54, 56, 59, 60 and 62.

⁴ Items 7, 8, 10-14, 21-23, 37, 41-48, 50, 51, 53, 55, 57, 58, 61 and 63-74.

⁵ Items 37, 42, 45, 63, 64 and 65.

⁶ Items 1- 6 and 9.

⁷ Items 15-20, 24,-36, 38-40, 49, 52, 54, 56, 59, 60 and 62.

person best placed to explain the information in question. In sum, these documents should be rejected since the prejudice occasioned thereby outweighs their probative value.

4. In respect of the items previously rejected, the Defence attempts to circumvent the requirements of Rule 68 by adding the rider that these items are introduced for impeachment purposes and not for the truth of their contents. However, it was always the case that these documents were relied upon for impeachment purposes and the request in respect of these items amounts to an impermissible re-litigation of the issue, alternatively a request for reconsideration. Additionally, and contrary to this assertion, the Defence does in fact rely on the truth of the contents of many of the documents tendered, as explained below. Finally, to the extent that the Defence seeks to rely on portions of the prior recorded testimony for impeachment purposes that have not been put to the witnesses for comment, the prejudice to the witnesses and the Prosecution outweighs the probative value of the evidence, for the reasons outlined above.
5. In respect of the second category of items, the Defence belatedly seeks to introduce documents that have been in its possession for many months which it either omitted to, or chose not to, introduce through the relevant witnesses. The Defence now seeks to retroactively remedy its omission without even attempting to explain why these documents were not shown to, and introduced through, the relevant witnesses. Whatever the reasons, however, the prejudice of introducing these items without providing the witnesses the opportunity to comment or explain them again outweighs their probative value, for the reasons outlined above. Additionally, several of these items are prior recorded testimony, for which the requirements of Rule 68 have not been met.

II. Applicable Law

6. The Prosecution has set out the applicable law in the Prosecution's First Request for the Admission of Evidence from the Bar Table,⁸ the contents of which are incorporated by reference herein.
7. 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) relevant⁹ and (ii) probative to the issues at trial,¹⁰ and (iii) its potential prejudicial effect must be weighed against its probative value.¹¹
8. In its Directions on the Conduct of Proceedings,¹² 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 (...)"¹³
9. However, the Chamber also specified that it would make discrete determinations on the admissibility of specific evidence, or categories of evidence in accordance with the requirements of the Statute.¹⁴
10. Finally, the Chamber requires the Parties to raise admissibility issues – including on the standard evidentiary criteria – at the time of submission,¹⁵ and indicated that it may exercise its discretion to rule on such objections in advance

⁸ ICC-01/09-01/20-261-Conf.

⁹ 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.

¹⁰ 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.

¹¹ 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.

¹² ICC-01/09-01/20-189, "Conduct Decision".

¹³ Conduct Decision, para. 10.

¹⁴ *Ibid.*, para. 12.

¹⁵ *Ibid.*, para. 13.

of the judgement, particularly where it is necessary for a fair and expeditious trial.¹⁶

III. Submissions

11. The Bar Table Motion seeks to introduce into the record 74 documents for the purposes of impeaching the evidence of seven of the eight Prosecution witnesses who testified before the Chamber. These items fall into one of two categories: (i) documents that the Defence previously sought to introduce through the relevant witnesses, but which the Chamber rejected;¹⁷ or (ii) documents that the Defence failed to seek introduction via the relevant witness, despite possessing the items at the relevant time.¹⁸ The Prosecution submits that the introduction of all but six of these documents should be rejected because they either they comprise prior recorded testimony that does not meet the requirements for admission under Rule 68, or the prejudice to the fair evaluation of the evidence of the relevant witnesses occasioned by their introduction would outweigh their probative value, as required by article 69(4). Alternatively, if recognised as formally submitted, little or no weight should be given to these items for this reason.

(i) Documents previously rejected

12. Of the 74 items listed in Defence Annex A, 36 were previously tendered for introduction through the relevant witnesses, but rejected by the Chamber for one of two reasons, either because they were not used during the questioning of the witness,¹⁹ or because they comprised prior recorded testimony and the requirements of rule 68 had not been met.²⁰

Documents not used during questioning

¹⁶ *Ibid.*, para. 14.

¹⁷ Items 1-6, 9, 15-20, 24-36, 38-40, 49, 52, 54, 56, 59, 60 and 62.

¹⁸ Items 7, 8, 10-14, 21-23, 37, 41-48, 50, 51, 53, 55, 57, 58, 61 and 63-74.

¹⁹ Items 1- 6 and 9.

²⁰ Items 15-20, 24,-36, 38-40, 49, 52, 54, 56, 59, 60 and 62.

13. Notwithstanding the fact that the documents in question²¹ had been in the Defence's possession for several months and had been included on its lists of documents intended to be used during the questioning of P-0800, the Defence failed to show these documents to the witness or question him on their content. Accordingly, their submission *via* the relevant witnesses was rejected by the Chamber²² since these did not meet the requirements set out in the Conduct Decision.²³
14. The Defence now seeks to introduce these documents from the bar table. While the Prosecution acknowledges that the Chambers previous rejection of these documents is not in itself a bar to their introduction from the bar table,²⁴ the Prosecution submits that it is fundamentally unfair to the witness and prejudicial to the fair evaluation of his evidence to permit the witness to be impeached on the strength of documents that were not shown to him for comment.²⁵ This is a fundamental principle of fairness that has been widely recognised in adversarial systems across the world²⁶ and is equally applicable to proceedings at the ICC, regardless of whether the "submission" or "admission" regime applies.
15. While the Prosecution acknowledges that the duty to put facts or evidence to a witnesses upon which a Party wishes to rely for the purposes of impeachment has not specifically been included in the Conduct Decision in this case, the Prosecution submits that the *principle* underlying this practice has been

²¹ Items 1- 6 and 9.

²² Email decision 08/03/2022 at 15:20.

²³ Para 17 i), pertaining to "evidence used during a hearing".

²⁴ Email decision of 8 March 2022 at 15:20.

²⁵ According to the long established and widely followed principle known as the "Rule in *Browne v. Dunn*", *Browne v. Dunn* (1894) 6, R 67 [H L.]. (Available at <http://www.brownevdudd.com/read-the-decision/?csspreview=true>). At p. 70 *per* Lord Herschell, L.C "[...] it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination [...] if you intend to impeach a witness you are bound, whilst he is still in the box, to give him an opportunity of making any explanation which is open to him."

²⁶ Including the United Kingdom, Canada, Australia, New Zealand, South Africa, Fiji and Kenya.

recognised by several Chambers of this Court²⁷ and the ICTY.²⁸ A necessary corollary of this principle is that a party should not be permitted to tender documents for the purpose of impeaching a witness, unless the witness has first been confronted with the relevant documents, or the *specific* allegation relied on therein, and given the opportunity to comment on or explain it. Merely questioning the witness in general terms on matters relating to his or her credibility will not suffice, since the witness' attention is not thereby directed to the specific fact in question in a manner that would enable him or her to provide the necessary information. Accordingly, the Prosecution submits that the introduction of the relevant items for the purposes of impeachment is seriously prejudicial to the witnesses concerned.

16. The Defence itself recognises, but then misapplies, this principle.²⁹ It is not sufficient that *some information* contained in the document is put to the witness, or that the witness is questioned in general terms on the subject in question. Unless the specific portion that the Defence seeks to rely upon, or the specific information contained therein is put to the witness, the introduction of the document for impeachment will be prejudicial. The ultimate question is

²⁷ See for instance ICC-01/04-01/06-1140 para. 32 [*"The parties are under an obligation to put such part of their case as is relevant to the testimony of a witness, inter alia, to avoid recalling witnesses unnecessarily."*]; ICC-01/04-01/07-1665-Corr, para. 73, [*"Cross-examination allows the party not calling the witness to elicit all further relevant evidence as may be useful for the case of that party or necessary for the determination of the truth. It is therefore incumbent upon the cross-examining party to put all questions it may have for the witness during this occasion. In principle, the Chamber will not allow a party to re-call a witness if it already had the opportunity to cross-examine him or her."*]; ICC-01/09-01/11-900, para. 19 [*"The Chamber appreciates the need to explore with witnesses during cross-examination all issues relating to their credibility. A basic rule of fairness requires that such questions be put to the witness by any cross-examiner inclined to make an issue out of them later in the case. The Chamber will therefore expect the cross-examining party to confront a witness with all questions relating to his or her credibility at first opportunity when the witness is on the stand."*]; see also Article 69 (4), which recognizes the value of the "fair evaluation of the testimony of a witness."; ICC-01/04-01/06-T-122, pp. 44-46 [*"given that this is something potentially within your client's own knowledge, on the face of it something within your client's own knowledge, this ought to be put directly now, and it would be unfair on this witness for a suggestion to be made that he is lying about that when the allegation is never put to him"*]; ICC-01/04-01/06-T-337, pp. 47-48 [*"if during the course of submissions to come, robust suggestions are to be made, either to the detriment of 0316 or to the detriment of this witness, which, in fairness, should have been put to this witness, you have a duty to do so whilst he is before the court."*].

²⁸ See Rule 90 (H) (ii) of the ICTY Rules of Procedure and Evidence, as explained in *Prosecutor v. Stanišić* IT-03-69-T, 19 October 2011 "Guidance on rule 90 (H)(ii) and Decision on Stanisic defence submissions on rule 90 (H)(ii)", paras. 17-18 (available at https://www.icty.org/x/cases/stanistic_simatovic/tdec/en/111019a.pdf).

²⁹ See Bar Table Motion, para. 13 and footnotes 42-43.

whether or not the witness has been given a *fair opportunity* to explain the document or issue used to impeach him or her. The Prosecution is also deprived of the opportunity to re-examine on these issues, if appropriate.

17. On the other side of the equation, the probative value of the documents *for the purposes of impeachment* is significantly reduced, since the Chamber is deprived of the opportunity to hear the explanation, context, or additional information that the relevant witness – who is best placed to provide such information – might be able to provide, making it unsafe to draw adverse inferences from the documents in question. Further, the Chamber is deprived of the opportunity to observe the demeanour of the witness when challenged with the relevant document or fact, which has been recognised as an important tool in assessing credibility,³⁰ or itself to seek clarification on aspects of the witness' testimony that may be unclear.
18. In these circumstances, the prejudice to the fair evaluation of the evidence of the relevant witnesses far exceeds probative value of the documents and the Chamber should exercise its discretion not to recognise them as formally submitted to ensure the fairness of the trial. Alternatively, should the Chamber decide not to rule on the Prosecution's objection at this time, the Chamber should decline to take these documents into consideration for the purposes of impeachment, or accord them no weight, when deciding on the guilt or innocence of the accused in its judgment pursuant to article 74.

Prior recorded testimony

19. The remaining documents in this category were rejected by the Chamber as they comprise prior recorded testimony, for which the requirements of rule 68 had not been met.³¹ Notwithstanding these prior rulings of the Chamber, the Defence now seeks to introduce these same documents from the bar table, only

³⁰ See for instance ICC-01/05-01/13-1989-Red, para. 203.

³¹ Email decisions of 25/03/2022 at 11:17 (P-0613), 28/03/2022 at 15:05 (P-0274), 30/03/2022 at 14:36 (P-0516), and 01/04/2022 at 09:22 (P-0739).

adding the rider that they are introduced only for impeachment, and not for the truth of their contents. But this was always the case. When the Prosecution responded that it did not object to the submission of such prior recorded testimony, this elicited a terse reply from the Defence arguing that these should not be recognised for the truth of their contents.³² In effect, the Defence now seeks to impermissibly re-litigate the submission of these documents, or at best seeks reconsideration, without having satisfied the requirements for this remedy.

20. Additionally, the Defence's explanations as to the relevance of the documents and the portions identified as particularly relevant³³ therein are at odds with its claim that it does not seek to rely on the truth of their contents. The Defence does not, for instance, simply rely on the documents to establish the fact of previous inconsistent testimony by the relevant witnesses. Rather, the Defence seeks to rely upon the information provided in the prior recorded testimony. This is illustrated by the very first item in this category,³⁴ where the portion relied upon by the Defence pertains to the confirmation by P-0613 that the ICC was paying the school fees of her dependants.³⁵ Clearly reliance upon this fact to establish the witness' "motivation for providing statements to the OTP" implies relying on the truth of the statement.
21. Finally to the extent that the witnesses were questioned upon the information contained in the relevant document upon which the Defence seeks to rely for impeachment, this evidence is already on the record of the case.³⁶ However, to the extent that Defence seeks to introduce information contained in these documents was *not* put to the relevant witnesses, this too is prejudicial to the fair assessment of the evidence of the witnesses for the reasons set out above.

³² Defence email of 26/02/2022 at 14:07.

³³ As per Annex A to the Bar Table Motion.

³⁴ Item 15, ICC-01/09- 01/20-T-015-CONF-ENG.

³⁵ p. 95, lines 1-4.

³⁶ As confirmed in email decision of 25/03/2022 at 11:17 (P-0613).

22. For all these reasons the Chamber should exercise its discretion not to recognise these documents as formally submitted to ensure the fairness of the trial. Alternatively, the Chamber should decline to take these documents into consideration for the purposes of impeachment, or accord them no weight, when deciding on the guilt or innocence of the accused in its judgment pursuant to article 74.

(ii) Documents not previously introduced through witnesses

23. The Defence seeks to introduce a further 38 items of evidence for the purposes of impeachment that were not used in questioning and which they did not seek to introduce through the relevant witnesses. The Defence provides no explanation as to why it did not do so, despite the fact that all of these documents were in its possession at the relevant time – most for many months – and several of these items were included in the lists of material intended for use in the questioning of the witnesses in question. It is also notable that the Chamber placed no artificial limits on the length of the Defence’s cross examination of the Prosecution witnesses, so the failure to put these documents to the relevant witnesses for comment was entirely the Defence’s own choice.
24. These documents too should be rejected on the basis that the prejudice to the fair evaluation of the witnesses’ evidence outweighs their probative value, for the same reasons outlined in paragraphs 14-18 above. Particularly egregious, however, is the Defence’s attempt to introduce documents for the purposes of impeaching the credibility of P-0738.³⁷ Having wisely elected not to challenge the credibility of the witness through cross examination,³⁸ it is grossly unfair and improper to now attempt to impeach her credibility, particularly on the basis of documents that were not shown to her for explanation or clarification.

³⁷ Items 21-23.

³⁸ Presumably since the Defence recognised that this would be – at best – a fruitless exercise and, at worst for the Defence, would only serve to further bolster the credibility of the witness.

25. Additionally, several of the documents tendered amount to prior recorded testimony, for which the requirements of rule 68 are not met.³⁹

IV. Conclusion and Relief Requested

26. For the aforementioned reasons, the Prosecution requests the Chamber to exercise its discretion to reject the submission of all of the items listed in Annex A to the Bar Table Motion,⁴⁰ with the exception of items 37, 42, 45, and 63-65.
27. Alternatively, if recognised as formally submitted, the Chamber should decline to take these documents into consideration for the purposes of impeachment, or accord them no weight, when deciding on the guilt or innocence of the accused in its judgment pursuant to article 74.



Ms Nazhat Khan, Deputy Prosecutor

Dated this 06th day of May 2022
At The Hague, The Netherlands

³⁹ Items 41, 48, 53, 55, 57, 58, 61 and 66-74.

⁴⁰ As per para. 14 of the Conduct Decision.