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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*

Confidential

Prosecution response to the “Urgent Request for Trial Chamber III to Temporarily Stay the Proceedings Due to Mr. Gicheru’s Request for the Disqualification of Judge Miatta Maria Samba”

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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I. INTRODUCTION

1. As ordered by Trial Chamber III,¹ the Prosecution provides herewith its response to the Defence's "Urgent Request for Trial Chamber III to Temporarily Stay the Proceedings Due to Mr. Gicheru's Request for the Disqualification of Judge Miatta Maria Samba".²
2. The Defence seeks the exceptional remedy of the temporary stay of the proceedings based on alleged "jeopard[y]" to the Accused's fair trial rights.³ However, beyond the mere assertion of such a threat, the Defence makes no attempt to explain which rights are at stake or how they are threatened. Nor does it explain how any such threat would rise to the level that would justify the remedy sought. The Defence request should be rejected on this basis alone.
3. Neither the factual circumstances nor the prior practice of other chambers faced with similar requests justify the relief sought.

II. CONFIDENTIALITY

4. This filing is submitted as "confidential" under regulation 23*bis* (2) of the Regulations of the Court ("Regulations"), since it responds to a confidential Defence filing. However, the Prosecution does not consider that this filing contains any information of a confidential nature and accordingly requests the Chamber to re-classify it as "public".

III. SUBMISSIONS

A. There is a high threshold for imposing a stay of proceedings

5. The Prosecution does not dispute that the Chamber has the power to order a stay of proceedings in appropriate circumstances, but in order to justify such a drastic and exceptional remedy, the applicant must meet a high standard:

¹ "Chamber"; per email dated 17 September 2021.

² ICC-01/09-01/20-174-Conf, "Defence Request".

³ Defence Request, para. 3.

A stay of proceedings is a drastic remedy. It brings proceedings to a halt, potentially frustrating the objective of the trial of delivering justice in a particular case as well as affecting the broader purposes expressed in the preamble to the Rome Statute. It is an exceptional remedy. The Appeals Chamber has held that "[w]here a fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. [...] If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped". *This judgment sets a high threshold for a Trial Chamber to impose a stay of proceedings, requiring that it be "impossible to piece together the constituent elements of a fair trial".*⁴

6. As an exceptional remedy, it must be used sparingly⁵ and only in the most deserving circumstances:

A stay of proceedings is an exceptional remedy warranted only when breaches of the rights of the accused are such as to make it impossible to present a defence within the framework of their rights. Depending on whether a fair trial is possible at a later stage, a stay of proceedings can be temporary (i.e. conditional) or permanent.⁶

B. The Defence's Request does not meet the threshold

7. Faced with such a high threshold, the Defence must clearly demonstrate (i) which fair trial rights are implicated; (ii) how they are said to be infringed; and (iii) why such infringement is so severe that to continue with the proceedings would be "otiose" or "repugnant to the rule of law".⁷

⁴ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2582, para. 55 (emphasis added and footnotes omitted).

⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06-772 OA4, para. 31.

⁶ *Prosecutor v. Ongwen*, ICC-02/04-01/15-1147, para. 14.

⁷ *Prosecutor v. Lubanga*, ICC-01/04-01/06-772 OA4, para. 30.

8. However, the Defence Request falls at the first hurdle. Apart from a conclusory assertion that “the continuance of deliberations and rulings on submissions by Judge Samba, while the request for her disqualification is pending, jeopardises Mr. Gicheru’s fair trial rights”, it does not identify the rights implicated or explain how they would be infringed. Moreover, the Defence Request makes no attempt to show that it would be “impossible to piece together the constituent elements of a fair trial”⁸ if the stay is not granted and their request for recusal subsequently succeeds. The request should be rejected for this reason alone.

C. The factual circumstances do not justify a stay in proceedings

9. The trial proceedings against the Accused are at a very early stage. No trial date has been set and no issues pertaining to the guilt or innocence of the Accused – nor any other matters that would significantly impact upon his fair trial rights – are currently pending before the Chamber. The status conference scheduled for 24 September 2021 concerns scheduling matters and protocols, and provides an opportunity for the Chamber to receive the information it requires *inter alia* to set the trial date, to ensure timely disclosure, and to prepare for an eventual trial.⁹ Notably, the Parties appear to be *ad idem* on most of these issues.¹⁰ And in the event that the Defence request for recusal is upheld, any decisions on the issues under consideration could be reversed should this be necessary to protect the fair trial rights of the Accused.
10. In these circumstances, the Prosecution considers that there will be no breach of the Accused’s fair trial rights should the proceedings, including the status conference, continue while the Defence’s request for recusal is considered by the Plenary.

⁸ *Prosecutor v. Lubanga*, ICC-01/04-01/06-772 OA4, para. 31.

⁹ See ICC-01/09-01/20-162, para. 1.

¹⁰ See ICC-01/09-01/20-171-Conf, paras. 4, 6, 23, 51 and 52; ICC-01/09-01/20-170-Conf, para. 8.

D. Other chambers have denied similar requests

11. In considering the Defence request, it is also instructive to recall the practice of other chambers faced with similar requests:

- a. In *Al Hassan*, Pre-Trial Chamber I rejected a Defence request to postpone the confirmation proceedings pending a request for recusal.¹¹
- b. In *Ntaganda*, the Defence requested a temporary stay in proceedings "until it has had a reasonable opportunity to litigate whether Judge Ozaki should be disqualified".¹² Trial Chamber VI denied the request, noting that the Defence submissions were "mostly speculative, notably because they are premised on the scenario that the pending request for disqualification will, in fact, be granted".¹³

E. Alternative relief is not appropriate

12. Although the Defence request falls to be dismissed for the reasons enumerated above, the Chamber has the discretion to consider more limited relief, such as a postponement of the status conference until after the Plenary has ruled on the pending request for recusal.¹⁴
13. However, even against the lower threshold applicable for such relief, the Defence has failed to establish that an adjournment is necessary in the circumstances.
14. The Defence do not allege that their preparations for the status conference have been disrupted by the recusal request, nor that they will be unable to address any of the issues scheduled for discussion. In the interests of ensuring expeditious proceedings and facilitating ongoing preparations for the trial, the status conference should proceed as scheduled.

¹¹ *Prosecutor v. Al Hassan*, ICC-01/12-01/18-T-003-ENG ET WT 08-07-2019, p. 15, ln. 5 to p. 26, ln. 19 (defence request); *Prosecutor v. Al Hassan*, ICC-01/12-01/18-T-003-FRA ET WT 08-07-2019, p. 33, lns. 12-26 (chamber's ruling).

¹² *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2328, para. 1.

¹³ *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2335, para. 12. Note however that in that matter the intended request for recusal had not yet been filed at the time of the request for the temporary stay of proceedings.

¹⁴ See for instance *Prosecutor v. Ntaganda*, ICC-01/04-02/06-T-159, p. 3, lns. 14-24.

IV. CONCLUSION

15. The Prosecution accordingly submits that the Defence Request should be denied.



James Stewart, Deputy Prosecutor

Dated this 20th day of September 2021

At The Hague, The Netherlands