

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/09-01/20**
Date: **10 November 2021**

TRIAL CHAMBER III

Before: Judge Miatta Maria Samba

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. PAUL GICHERU***

Public

**Decision on the Prosecution Request for Extension of Time To Disclose Certain
Transcripts and Translations**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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**Unrepresented Applicants
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TRIAL CHAMBER III of the International Criminal Court, in the case of *The Prosecutor v. Paul Gicheru*, having regard to Article 67(1)(b) of the Rome Statute (the ‘Statute’) and Regulation 35 of the Regulations of the Court (the ‘Regulations’), issues this ‘Decision on the Prosecution Request for Extension of Time To Disclose Certain Transcripts and Translations’.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 30 September 2021, the Chamber issued a decision on the commencement date of trial and set a series of deadlines in the run-up to the start of the trial.¹ Therein, the Chamber fixed the deadline for the disclosure of all evidence and material on which the Office of the Prosecutor (the ‘Prosecution’) intends to rely on at trial (the ‘Disclosure Deadline’) and the list of all items it plans to submit as evidence during the trial (the ‘List of Evidence’) for 15 November 2021.²
2. On 8 November 2021, the Prosecution filed a request seeking an extension of time to disclose a certain number of items after the above-mentioned deadline (the ‘Request’).³ The Prosecution explains that, after *inter partes* communication with the Defence, it had requested outside experts to enhance several audio files. The Prosecution received the enhanced versions by the end of October 2021.⁴
3. A number of these audio files contain utterances spoken in a language that is not a working language of the Court (the ‘Source Language’). 46 of the enhanced audio tracks containing this Source Language still need to be translated and transcribed.⁵ Additionally, these tracks were also put to a witness in order for the witness to provide comments on the basis of the enhanced versions.⁶
4. The same witness also provided comments and edits to another audio record which was not enhanced (together with the 46 enhanced audio recordings, the

¹ Decision Setting the Commencement Date of the Trial and Related Deadlines, [ICC-01/09-01/20-185](#).

² [ICC-01/09-01/20-185](#), p. 9.

³ Prosecution’s Regulation 35 Request for Variation of the Disclosure Deadline for a Limited Number of Transcriptions and Translations, ICC-01/09-01/20-212-Conf. A public-redacted version was filed on the same day, [ICC-01/09-01/20-212-Red](#).

⁴ Request, [ICC-01/09-01/20-212-Red](#), para. 6.

⁵ The Chamber understands from the submissions of the Prosecution that there already exist translations and transcriptions of these items on the basis of the original, not-enhanced, audio files.

⁶ Request, [ICC-01/09-01/20-212-Red](#), paras 7 and 8.

‘Remaining Audio Recordings’).⁷ For this additional item the Prosecution wishes to verify whether these edits were accurate before disclosing it to the Defence.⁸

5. Furthermore, one of the 46 items⁹ is currently considered by the Prosecution as irrelevant and/or intelligible on the basis of the original recording. However, the Prosecution wishes to reassess this evaluation on the basis of a summary of the enhanced version of the audio that is currently being produced. If, upon receiving this further information, it turns out that the recording does contain relevant information, the Prosecution will then produce a full transcription and translation.¹⁰

6. The Prosecution explains that the OTP-internal Language Services Unit (the ‘LSU’) was not able to provide an expert in the Source Language, since the person who was previously assigned to such tasks is unavailable. The replacement of this person, a person formerly working for the LSU, only received security clearance on 8 November 2021.¹¹ Accordingly, it requests an extension of the Disclosure Deadline of one month, until 15 December 2021, for the Remaining Audio Recordings and any new translations and transcriptions based thereon.¹² Consequently, it also requests authorisation to add any new items of evidence produced during this process to its List of Evidence.¹³

7. On 9 November 2021, the Defence responded to the Request.¹⁴ It submits that the Prosecution should have foreseen that the audio enhancements needed to be done and that the necessity to produce these additional enhancements cannot be imputed to the Defence. Further, the Defence claims that prejudice is caused by the delayed disclosure. However, the Defence leaves the decision on the Request to the Chamber’s discretion.

II. ANALYSIS

8. The Chamber notes that pursuant to Regulation 35(2) of the Regulations a chamber may extend a time limit if good cause is shown.

⁷ KEN-OTP-0115-0247 (containing two tracks with content).

⁸ ICC-01/09-01/20-212-Conf, para. 10.

⁹ KEN-OTP-0116-0112, track 15.

¹⁰ Request, [ICC-01/09-01/20-212-Red](#), para. 9.

¹¹ Request, [ICC-01/09-01/20-212-Red](#), para. 11.

¹² Request, [ICC-01/09-01/20-212-Red](#), para. 14.

¹³ Request, [ICC-01/09-01/20-212-Red](#), para. 14.

¹⁴ Email by the Defence to the Chamber, 9 November 2021 at 12:25.

9. First, the Chamber assures the Defence that it does not consider that the additional enhancement of the 46 items has been caused by the Defence. It further notes that, according to the Request, the Prosecution team in this case seems not to have been aware of the resources of the LSU, with regard to the Source Language. Since the LSU is also part of the Office of the Prosecutor, the Chamber expects that the Prosecution will improve its internal communication to act more swiftly in addressing any need arising during the proceedings.

10. Further, the Chamber notes that the Request does not concern material which is completely new. The original audio recordings as well as any transcription and translation based thereon are already available to the Defence.¹⁵ Accordingly, the Defence will be able to quickly discern any new information after the disclosure of any revised transcription or translation. Therefore, the Chamber is of the view that the prejudice to the Defence is minimal.

11. Taking into account the submission by the Prosecution and the minimal prejudice to the Defence, the Chamber considers that good cause is shown for an extension of the Disclosure Deadline. However, the Chamber also remains vigilant to the rights of the Defence and considers that any delay in the disclosure should be kept to a minimum. In this regard, the Chamber still expects the Prosecution to disclose, to the extent possible, all the evidence and material on which it intends to rely at trial and file List of Evidence by 15 November 2021.¹⁶

12. In addition, the Chamber clarifies that this extension only concerns any transcription and translation arising from the Remaining Audio Recordings, not the audio records themselves. Based upon the submissions of the Prosecution, the Chamber does not see any reason why the recordings themselves cannot be disclosed to the Defence by the Disclosure Deadline. Further, the Chamber does not find that a general extension of one month is necessary for all transcription and translation arising from the Remaining Audio Recordings.

¹⁵ Request, [ICC-01/09-01/20-212-Red](#), para. 12.

¹⁶ Together with the other items to be filed by 15 November 2021 in accordance with [ICC-01/09-01/20-185](#), p. 9.

13. With regard to KEN-OTP-0115-0247 it notes that the Prosecution wishes to merely verify any edits made by a witness. The item contains two tracks with content which are both of very short duration.¹⁷ The Chamber considers that one week is sufficient for the Prosecution to verify the comments or edits made by the witness and prepare any new transcription and translation, if necessary. Accordingly, it extends the deadline for disclosure of any new transcription and translation arising from KEN-OTP-0115-0247 until 22 November 2021.

14. With regard to the five items listed under paragraph 14 a. of the Request,¹⁸ the Chamber extends the deadline for disclosure of any new transcription and translation arising from the 45 tracks specified by the Prosecution until 6 December 2021.

15. With regard to the track specified in paragraph 14 b. of the Request,¹⁹ the Chamber notes that no previous transcription or translation exists and that the track is of long duration.²⁰ Accordingly, should there be need to produce a complete transcription and translation of this item, it is justified to extend the deadline to disclose these items – and the summary – until 15 December 2021. However, should the Prosecution, after having received the summary, confirm its previous assessment that the item is not relevant, it shall inform the Defence and the Chamber at once.

16. Furthermore, in order to help the Defence to assess quickly any new information, the Prosecution is instructed to clearly indicate any changes it has made to the previously existing transcriptions and translations when disclosing the new ones. Once all new items have been disclosed, the Prosecution is to file an updated version of its List of Evidence.

¹⁷ 1:05 minute and 27 seconds respectively.

¹⁸ KEN-OTP-0111-0556; KEN-OTP-0115-0241; KEN-OTP-0115-0243; KEN-OTP-0115-0248 and KEN-OTP-0116-0112 (the first 14 tracks).

¹⁹ KEN-OTP-0116-0112 (track 15)

²⁰ 55:48 minutes.

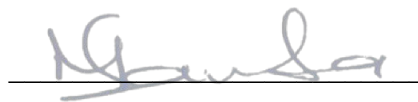
FOR THESE REASONS, THE CHAMBER HEREBY

EXTENDS the deadline for disclosure of any new transcription and translation arising from the verification of KEN-OTP-0115-0247 and the existing transcripts and translations to **22 November 2021**;

EXTENDS the deadline for disclosure of any new transcription and translation arising from KEN-OTP-0111-0556; KEN-OTP-0115-0241; KEN-OTP-0115-0243; KEN-OTP-0115-0248 and KEN-OTP-0116-0112 (the first 14 tracks) to **6 December 2021**; and

EXTENDS the deadline for disclosure of the summary of KEN-OTP-0116-0112 (track 15) and any transcription and translation of the entire track, if necessary, to **15 December 2021**, as specified in paragraph 15 above.

Done in both English and French, the English version being authoritative.

A handwritten signature in blue ink, appearing to read 'Miatta', is written over a horizontal line.

Judge Miatta Maria Samba

Dated 10 November 2021

At The Hague, The Netherlands