

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: **ICC-01/09-01/20**
Date: **16 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-redacted

**Reasons for the Decision on Prosecution Request for Variation of Time Limits
related to a Prosecution Witness**

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 Articles 67(1)(b) and 68(1) of the Rome Statute (the ‘Statute’), Rule 68 of the Rules of Procedure and Evidence (the ‘Rules’) and Regulation 35 of the Regulations of the Court (the ‘Regulations’) issues this ‘Reasons for the Decision on Prosecution Request for Variation of Time Limits related to a Prosecution Witness’.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 30 September 2021, the Chamber issued a decision setting the date for the commencement of trial and a series of deadlines in the run-up to the start of 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’), the list of all items it plans to submit as evidence during the trial and the list of Prosecution witnesses (the ‘List of Witnesses’) for 15 November 2021.²

2. On 12 November 2021, the Prosecution filed a request seeking an extension of time, until 1 December 2021, to add [REDACTED] (the ‘Witness’) to its List of Witnesses (the ‘Request’).³ The Prosecution submits that it has relied upon the evidence of the Witness since filing its Document Containing the Charges on 12 March 2021.⁴ Further, the Prosecution avers that, since the confirmation of charges, it has sought to meet with the Witness in order to, *inter alia*, [REDACTED].⁵

3. Despite the foregoing, the Prosecution notes that on [REDACTED], the Witness agreed to meet with the Prosecution after the Disclosure Deadline. In this regard, the

¹ Decision Setting the Commencement Date of the Trial and Related Deadlines, 30 September 2021, [ICC-01/09-01/20-185](#).

² [ICC-01/09-01/20-185](#), p. 9.

³ Prosecution’s Request pursuant to article 68 and regulation 35 for variation of time limits related to Prosecution Witness [REDACTED], 11 November 2021, ICC-01/09-01/20-217-Conf-Exp. A confidential redacted version was notified on 21 November 2021 (ICC-01/09-01/20-217-Conf-Red).

⁴ Request, para. 11.

⁵ Request, para. 12.

Prosecution submits that it is only after having met with the Witness that they will be in a position [REDACTED]⁶ [REDACTED].⁷

4. The Prosecution further submits that any prejudice to the Defence is limited because the Witness' identity and evidence have been disclosed to the Defence since the beginning of 2021, that the Defence is already on notice that the Prosecution intends to rely upon the Witness' evidence and that the 'Defence will know the precise place of [the Witness'] evidence within the legal architecture of the Prosecutor's case-in-chief as the Prosecution will file its Trial Brief, which will contain specific references to [the Witness'] evidence'.⁸

5. On 12 November 2021, the Defence provided its response to the Request.⁹ The Defence submits that given that the identity of this Witness and their evidence have already been disclosed to the Defence that 'there is no reason why the [Prosecution] cannot now disclose [the Witness'] identity'. However, the Defence leaves the matter to the Chamber's discretion to dispense with the matter as it sees fit.

6. On 12 November 2021, the Chamber notified the Prosecution and Defence, via email, that the Request was granted, with reasons to follow.¹⁰

7. On 15 November 2021, the Prosecution filed its Trial Brief, including, *inter alia*, its List of Witnesses.¹¹

II. ANALYSIS

8. At the outset, the Chamber notes that no public-redacted version of the Request has been filed. Recalling its statements made in the Decision on the Conduct of the Proceedings,¹² the Chamber hereby orders the Prosecution to file a public-redacted version of the Request forthwith.

⁶ Request, para. 21.

⁷ Request, para. 21.

⁸ Request, para. 24.

⁹ Email from the Defence to the Chamber, dated 12 November 2021 at 11:54.

¹⁰ Email from the Chamber to the Parties, dated 12 November 2021 at 15:06.

¹¹ See Prosecution Trial Brief, 15 November 2021, ICC-01/09-01/20-220-Conf and related annexes.

¹² Directions on the Conduct of the Proceedings, 7 October 2021, [ICC-01/09-01/20-189](#), para. 46.

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

10. At the outset the Chamber reiterates that the timing of the Request – one day before the deadline – was not a diligent handling of the issue. That being said, the Chamber recognises that the reason for the delay, as described by the Prosecution, was not directly caused by the Prosecution, nor was it immediately within its power to overcome. In this regard, the Chamber notes that the Witness has formed part of the Prosecution’s case since the confirmation stage of proceedings and, until very recently, the Prosecution was not able to get in contact with the Witness in order to ascertain, *inter alia*, whether the Witness was willing to testify at trial.

11. In the present instance, the Chamber finds that good cause for an extension of time has been shown. The Chamber observes that the overarching matter at issue is how the Prosecution will seek to present the Witness’ evidence at trial, namely whether they will testify in person before the Chamber or whether the Prosecution will seek introduction of their evidence pursuant to Rule 68(2)(c) or (d) of the Rules. In this regard, the Chamber is mindful of the requirements of the aforementioned rules and the tendering party’s obligations with regards to efforts to secure the attendance of the witness. Accordingly, for this reason, combined with the fact that the delay cannot be attributed to the Prosecution itself, the Chamber finds that the Prosecution should be afforded time to meet with the Witness.

12. With respect to prejudice to the Defence, the Chamber finds that any prejudice caused by a short extension of time is limited given the fact that: (i) the Witness is not a new witness; (ii) their identity and evidence have been disclosed to the Defence since the beginning of 2021; and (iii) the Defence have been on notice that the Prosecution would seek to rely on their evidence.¹³

13. Last, the Chamber finds, despite the granting of the extension of time, that there is no reason why it cannot be disclosed to the Defence that the Witness is the subject of the Request. The Chamber is fully aware of the need to ensure the protection of

¹³ [REDACTED].

witnesses in this case and the obligations arising from Article 68(1) of the Statute.
[REDACTED].¹⁴ [REDACTED],¹⁵ [REDACTED].¹⁶ [REDACTED].

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the Request; and

EXTENDS the deadline to add the Witness to its List of Witnesses (as well as any request for a summons for their attendance, should the Prosecution deem that necessary), or seek to admit their prior recorded testimony pursuant to Rule 68 of the Rules to 1 December 2021.

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



Judge Miatta Maria Samba

Dated 16 November 2021

At The Hague, The Netherlands

¹⁴ Request, para. 24.

¹⁵ [REDACTED].

¹⁶ [REDACTED].