

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/09-01/20**

Date: **18 March 2022**

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

**Order in respect of the Defence's Notice of its Inability to Declare its Intent to
Present a Case**

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

The Office of the Prosecutor

Ms Nazhat Khan
Mr Anton Steynberg

Counsel for the Defence

Mr Michael G. Karnavas
Ms Suzana Tomanović

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
for Participation/Reparations**

**The Office of Public Counsel
for Victims**

**The Office of Public Counsel
for the Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

TRIAL CHAMBER III of the International Criminal Court, in the case of *The Prosecutor v. Paul Gicheru*, having regard to Article 64(2) and 67(1)(b), (e) and (g) of the Rome Statute (the ‘Statute’) and Regulation 35 of the Regulations of the Court (the ‘Regulations’), issues this ‘Order in respect of the Defence’s Notice of its Inability to Declare its Intent to Present a Case’.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 25 February 2022, the Chamber issued its Directions for the Defence Evidence Presentation.¹ Therein the Chamber instructed the Defence to indicate by 10 March 2022 whether it intends to present any evidence,² and, should it intend to present any evidence, to provide specific information in respect of its case ten days after the Office of the Prosecutor (the ‘Prosecution’) has formally declared its presentation of evidence to be closed.³

2. On 11 March 2022,⁴ the Defence filed a notice indicating that it was unable to declare any intent to present a case at this stage (the ‘Notice’).⁵ In the Notice, the Defence submits that: (i) ‘[o]nly after hearing the [Prosecution’s] case and assessing the quality of the [Prosecution’s] evidence can the Defence intelligently decide whether and to what extent it should present a case’;⁶ and (ii) it ‘needs eight weeks from the conclusion of the [Prosecution’s] case-in-chief scheduled for 24 March 2022 to declare its intent to present a case.’⁷

¹ [Directions for the Defence Evidence Presentation](#), 25 February 2022, ICC-01/09-01/20-292 (‘Directions for the Defence Evidence Presentation’).

² [Directions for the Defence Evidence Presentation](#), para. 6.

³ [Directions for the Defence Evidence Presentation](#), para. 7.

⁴ Following an email sent by the Defence to the Chamber on 10 March 2022 the Chamber ordered the Defence to formally file a written submission on the record – *See*, Email from the Defence to the Chamber dated 10 March 2022 at 11:43; Email from the Chamber to the Defence dated 10 March 2022 at 14:30.

⁵ Notice of the Defence’s inability to declare its intent to present a case prior to the conclusion of the OTP’s case-in-chief, prior to assessing the evidence adduced, and prior to conducting any relevant investigation, 11 March 2022, ICC-01/09-01/20-298-Conf (the ‘Notice’).

⁶ Notice, para. 6.

⁷ Notice, para. 8.

3. In support of this latter submission, the Defence indicates, *inter alia*, that [REDACTED] '[REDACTED]' to carry out further investigative activities.⁸ The Defence notes that [REDACTED], '[REDACTED]' [REDACTED].⁹

4. In light of this the Defence ultimately proposes that it will inform the Chamber and the Prosecution by 16 May 2022 whether it intends to present a case, and if in the affirmative will start presenting its case on 30 May 2022.¹⁰

5. On 15 March 2022, the Prosecution responded to the Notice (the 'Response').¹¹ The Prosecution submits that the Defence has 'disregard[ed] the Chamber's order' and that it has provided 'no explanation as to why it was not able to notify the Chamber of its "inability" to comply with the order prior to the date of expiry of the time limit.'¹² The Prosecution observes that the Notice is 'in essence a request to vary a time limit imposed by the Chamber' and should be 'assessed under the provisions of [Regulation 35(2) of the Regulations]'.¹³ In this regard, the Prosecution 'defers to the Chamber's discretion as to whether the Defence has shown good cause for a limited extension of the time limit to formally indicate whether it intends to present evidence.'¹⁴ That being said, the Prosecution submits that 'the Defence has not shown good cause for a nine week postponement of the time limit to notify the Chamber of its intention to present [a Defence case]'.¹⁵ The Prosecution proposes an alternative date of 13 April 2022 for the Defence notification of the presentation of a Defence case.¹⁶

II. ANALYSIS

6. As a preliminary matter, the Chamber notes that public redacted versions of the Notice and Response have not yet been filed. The Parties are ordered to file public redacted versions as soon as possible.

⁸ Notice, para. 9.

⁹ Notice, para. 9.

¹⁰ Notice, para. 11.

¹¹ Prosecution's Response to the "Notice of the Defence's inability to declare its intent to present a case prior to the conclusion of the OTP's case-in-chief, prior to assessing the evidence adduced, and prior to conducting any relevant investigation", 15 March 2022, ICC-01/09-01/20-300-Conf (the 'Response').

¹² Response, para. 14.

¹³ Response, para. 15.

¹⁴ Response, para. 17.

¹⁵ Response, para. 27.

¹⁶ Response, para. 28.

7. At the outset, while no specific relief is sought, the Chamber agrees with the Prosecution¹⁷ that the Notice is *de facto* a request for extension of time, wherein the Defence seeks an extension of time to notify the Chamber whether it intends to present a case or not.

8. Regulation 35(1) of the Regulations provides that an application to extend a time limit shall be made in writing to the Chamber setting out the grounds on which the variation is sought. Similarly, Regulation 35(2) of the Regulations provides that the Chamber may extend a time limit if good cause is shown. While the Defence does not make specific reference to Regulation 35, the Chamber notes that the Defence ultimately requests an extension of time to the deadline as to when it can inform the Chamber as to whether it intends to present a case or not. In this regard, the Defence presents three grounds: (i) it must hear all of the Prosecution's case;¹⁸ (ii) it must assess the quality of the Prosecution's evidence;¹⁹ and (iii) it must carry out further investigations.²⁰

9. Before the Chamber addresses these grounds in turn, the Chamber notes the lack of diligence on the part of the Defence by only informing the Chamber on the date of expiry of the deadline of its inability to comply with the Chamber's instruction. The Chamber sees no reason why the Defence could not have informed it at a much earlier date that it was unable to comply, nor does the Chamber see any reason why the Defence could not have raised the aforementioned grounds sooner.

10. Turning to the grounds set out by the Defence, first, the Chamber is not persuaded by the Defence's submissions to the effect that it must hear all of the Prosecution's case and assess the quality of the Prosecution's evidence before it can inform the Chamber as to whether it intends to present a case or not. As of 10 March 2022, six out of the eight *viva voce* Prosecution witnesses had been heard by the Chamber, with the latest witness completing his testimony on 8 March 2022. In this regard, the Chamber observes that the Prosecution's case is now largely complete. The Chamber therefore finds that the Defence cannot argue that it is not in a position to know, at this late stage of the proceedings, whether it intends to present evidence or not. Rather the Chamber

¹⁷ Response, paras 2, 15

¹⁸ Notice, para. 6.

¹⁹ Notice, para. 6.

²⁰ Notice, paras 8-10.

observes that the Defence has heard the majority of the Prosecution witnesses in this case, has been on notice for some time regarding the case it faces, and should be in a position to make an assessment as to whether it wishes to present evidence itself.

11. Similarly, in this regard, the Chamber is equally unpersuaded by the Defence's submission that it must still assess the quality of the Prosecution's evidence. Disclosure of all the evidence upon which the Prosecution intends to rely upon at trial was predominantly completed on 15 November 2021, over four months ago, and the Defence has been in possession of the vast majority of the relevant evidence since March 2021.²¹ The Defence has therefore been in possession of the Prosecution's evidence for a considerable period of time and cannot reasonably argue that it has not conducted any assessment of the strength of that evidence in that time.

12. Turning to the Defence's submission that it intends to carry out further investigative activities and [REDACTED], the Chamber notes that this submission deviates from prior information given to the Chamber earlier, wherein the Defence informed the Chamber that it 'expect[ed] to complete its investigations by the end of the year [2021]'.²² The Chamber is dissatisfied that it was not informed until this late stage that this was no longer the case and that investigations are still yet to be completed. The Defence should have informed the Chamber that investigations were still to be carried out and not wait till the final hour to inform the Chamber otherwise.

13. The Chamber therefore finds that good cause within the meaning of Regulation 35 of the Regulations has not been shown which would warrant an extension of time.

14. However, the Chamber is mindful of Mr Gicheru's rights under Article 67(1)(b) and (e) of the Statute in that he must have adequate time and facilities for the preparation of his defence and be able to obtain the attendance and examination of witnesses on his behalf. Accordingly, on this occasion, and in light of [REDACTED], the Chamber will

²¹ See, Annex A to the Prosecution Trial Brief, 15 November 2021, ICC-01/09-01/20-220-Conf-AnxA; Annex B to the Prosecution Trial Brief, 15 November 2021, ICC-01/09-01/20-220-Conf-AnxB. See also, Response, para. 23.

²² Email from the Defence to the Chamber dated 28 September 2021 at 13:35. See further, [Decision Setting the Commencement Date of the Trial and Related Deadline](#), 30 September 2021, ICC-01/09-01/20-185, para. 13.

grant an extension of time for the Defence to notify the Chamber and the Prosecution as to whether it intends to present a case or not.

15. That being said, the Chamber does not agree with the Defence that it should be granted a full month extension after [REDACTED] to simply notify the Chamber and the Prosecution as to whether it intends to present evidence or not. The Chamber finds this to be excessive in the circumstances. Accordingly, the Chamber will only grant a modest extension and orders the Defence to inform the Chamber and the Prosecution no later than Monday 25 April 2022 whether it intends to present a case or not and, should it answer in the affirmative, how many trial days it anticipates needing.

16. Should the Defence decide to present a case, the Defence must provide the Chamber and the Prosecution, in line with the Directions for the Defence Evidence Presentation,²³ with the following information no later than 16 May 2022: (i) the list of witnesses the Defence intends to call and the list of evidence the Defence intends to use; (ii) certification that all necessary witness information forms have been completed and provided to the Victims and Witnesses Unit; (iii) summaries of the anticipated evidence to be provided by the witnesses; (iv) disclosure of all items intended to be used during the presentation of the evidence; (v) any requests for protective measures and motions pursuant to Rule 68 of the Rules of Procedure and Evidence;²⁴ and (vi) any further request the Defence considers necessary for the presentation of its evidence.

17. As noted in the Directions for the Defence Evidence Presentation,²⁵ once the Chamber receives the information as to whether the Defence intends to present a case or not, it will issue further instructions as to the timing of the presentation of evidence by the Defence.

²³ [Directions for the Defence Evidence Presentation](#), para. 7.

²⁴ Paragraphs 30-31 and 39-40 of the Directions on the Conduct of the Proceedings, ICC-01/09-01/20-189, shall apply *mutatis mutandis*.

²⁵ [Directions for the Defence Evidence Presentation](#), para. 10.

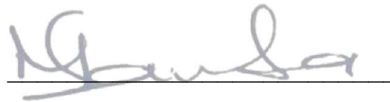
FOR THESE REASONS, THE CHAMBER HEREBY

ORDERS the Parties to file public redacted versions of the Notice and Response as soon as possible;

ORDERS the Defence to inform the Chamber and the Prosecution whether it intends to present evidence or not and, should it answer in the affirmative, how many trial days it anticipates needing, no later than Monday 25 April 2022; and

ORDERS the Defence, should it intend to present any evidence, to provide the information specified in paragraph 16 no later than Monday 16 May 2022.

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 18 March 2022

At The Hague, The Netherlands