

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: 21 March 2022

TRIAL CHAMBER III (ARTICLE 70)

Before: Judge Miatta Maria Samba

SITUATION IN THE REPUBLIC OF KENYA

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

Public

**Public redacted version of 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,” 11 March 2022,
ICC-01/09-01/20-298-Conf**

Source: Counsel for Paul Gicheru

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

The Office of the Prosecutor
Ms. Nazhat Shameem Khan
Mr. Anton Steynberg

Counsel for the Defence
Mr. Michael G. Karnavas
Ms. Suzana Tomanović

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

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

States' Representatives

Other

REGISTRY

Registrar
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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Mr. Paul Gicheru, through his Counsel (“the Defence”), pursuant to Trial Chamber III’s Directions for the Defence Evidence Presentation,¹ hereby gives notice of the Defence’s inability to declare its intent to present a case. This notice is necessary because the Defence is being instructed to “formally indicate ... whether it intends to present evidence ... [and] make an opening statement”² prior to the conclusion of the Office of the Prosecutor’s (“OTP”) case-in-chief, prior to assessing the evidence adduced, and prior to conducting any relevant investigation. This notice is filed confidentially pursuant to Regulation 23*bis*(1) since it contains confidential information.

I. BACKGROUND

1. After [REDACTED] of investigation,³ the OTP submitted 58 annexes of evidence in support of its application for an arrest warrant against Mr. Gicheru.⁴ After the arrest warrant was issued on 10 March 2015,⁵ the OTP interviewed Mr. Gicheru three times in 2018⁶ [REDACTED].⁷ [REDACTED], Mr. Gicheru travelled to the Netherlands at his own expense, voluntarily surrendering to the ICC on 2 November 2020.⁸
2. Once the charges against Mr. Gicheru were confirmed,⁹ Trial Chamber III convened a status conference to set a date for the commencement of the trial, seeking submissions in advance on a number of items, including any anticipated evidence, translation requirements, and disclosure by the Defence.¹⁰ In response, the Defence informed that it was not in a position to provide information on these items since “no credible Defence Counsel can prognosticate prior to the OTP putting on its case and surviving any potential ‘No Case To Answer’ challenge by meeting its burden of proof.”¹¹
3. On 30 September 2021, Trial Chamber III set the commencement date of the trial for 15 February 2022, along with a number of deadlines leading up to the trial.¹² By 17 December 2021, the Defence was to provide a trial brief.¹³ In the trial brief, the Defence explained that given that the OTP bears the burden of proof, there is no obligation under the Rome Statute

¹ [ICC-01/09-01/20-292](#).

² [ICC-01/09-01/20-292](#), para. 6.

³ The OTP began investigating the case against Mr. Gicheru on [REDACTED]. [REDACTED].

⁴ [REDACTED]; [ICC-01/09-01/20-1-Red](#), para. 10.

⁵ [ICC-01/09-01/20-1-Red](#).

⁶ [KEN-OTP-0159-0659-R01](#); [KEN-OTP-0159-0693-R01](#); [KEN-OTP-0159-0712-R01](#).

⁷ [REDACTED].

⁸ [ICC-01/09-01/20-34](#), para. 2.

⁹ [ICC-01/09-01/20-153](#).

¹⁰ [ICC-01/09-01/20-166](#), para. 1.

¹¹ [ICC-01/09-01/20-170](#), para. 8(d).

¹² [ICC-01/09-01/20-185](#), p. 9.

¹³ [ICC-01/09-01/20-185](#), p. 9.

to submit a trial brief laying out, in detail, how the Defence intends to challenge the evidence “so as to assist the OTP in mounting a rebuttal to the Defence during its case-in-chief.”¹⁴

4. 10 days into the trial, and after hearing the testimony of three OTP witnesses, Trial Chamber III ordered the Defence to “formally indicate by 10 March 2022 whether it intends to present evidence ... [and] make an opening statement.”¹⁵ After providing notice of its inability to declare its intent to present a case by e-mail, the Defence was ordered “to file a formal written submission on the record as soon as possible.”¹⁶

II. LAW AND ARGUMENT

5. Mr. Gicheru is presumed innocent and has the right to remain silent.¹⁷ Before he may be convicted of any offence, the OTP must convince Trial Chamber III beyond any reasonable doubt of his guilt.¹⁸ Unless Mr. Gicheru raises affirmative defences – such as incapacity, intoxication, self-defence, and duress or coercion – he has no burden of proof of even going forward with evidence.¹⁹
6. Based on the practice of the ICC Chambers,²⁰ after the conclusion of the OTP’s case-in-chief, Mr. Gicheru is entitled to seek a judgment of acquittal through a No Case to Answer motion. Considering that in adversarial (party-driven) proceedings such as the ICC’s the OTP bears the burden of proof, it makes perfect sense that the OTP first adduce sufficient evidence that *could* lead to a conviction before the Defence decides whether to present a case. Only after hearing the OTP’s case and assessing the quality of the OTP’s evidence can the Defence intelligently decide whether and to what extent it should present a case.
7. Even if Mr. Gicheru does not prevail on a No Case to Answer motion, he could still opt not to present a case and yet still achieve an acquittal based on the evidence being evaluated at the highest level in determining whether the OTP proved the charges beyond a reasonable doubt.
8. Be that as it may, the Defence needs eight weeks from the conclusion of the OTP’s case-in-chief scheduled for 24 March 2022 to declare its intent to present a case. This eight-week

¹⁴ [ICC-01/09-01/20-253](#), para. 7.

¹⁵ [ICC-01/09-01/20-292](#), para. 6.

¹⁶ Email from Trial Chamber III entitled “Defence Response to Directions on Defence Presentation of Evidence,” 10 March 2022.

¹⁷ [Rome Statute](#), Art. 66(1), 76(1)(g).

¹⁸ [Rome Statute](#), Art. 66(2)-(3).

¹⁹ See [Rome Statute](#), Art. 31.

²⁰ [ICC-01/09-01/11-2027-Red-Corr](#); [ICC-02/11-01/15-1263](#); in particular, the Appeals Chamber’s confirmation of the No Case to Answer procedure in [ICC-02/11-01/15-1400](#).

period is necessary to provide Mr. Gicheru an *effective* defence:²¹ i.e., to have adequate time and facilities to carry out further investigative activity,²² to consult with and take instruction from Mr. Gicheru,²³ and above all, to provide Counsel with the ability to act diligently and zealously in protecting his fair trial rights.²⁴

9. As part of the Defence's ethical and professional duties of diligence and zealousness in protecting Mr. Gicheru's fair trial rights and providing him a robust and effective defence,²⁵ [REDACTED]. [REDACTED]. [REDACTED]. Nonetheless, investigative efforts are required [REDACTED]. In light of the current scheduling, [REDACTED].
10. Failure [REDACTED] as requested would amount to nothing short of ineffective assistance of Counsel and lack of due diligence. Absent full appreciation of the witnesses' testimonies and disclosure material, absent conducting any requisite investigation, and absent meaningful consultation with Mr. Gicheru, the Defence's ability to make sound strategic decisions would be circumscribed and Mr. Gicheru's fair trial rights would be seriously compromised, thus rendering the proceedings unfair.
11. Accordingly, the Defence proposes the following schedule: (a) by 16 May 2022, the Defence will inform the Trial Chamber and the OTP whether it intends to present a case; and (b) in the affirmative, the Defence will start presenting its case on 30 May 2022. This proposed schedule will neither prejudice the OTP nor unreasonably delay the proceedings.
12. Should the Defence decide to present a case, it will strictly comply with the instructions in paragraph 7 of the Directions for the Defence Evidence Presentation, namely, prompt provision of: (i) Defence lists of witnesses and evidence; (ii) all necessary witness information forms; (iii) summaries of anticipated evidence; (iv) disclosure material intended to be used during the presentation of evidence; and (v) any requests for protective

²¹ [Rome Statute](#), Art. 67(1)(b), (d). *See also* [ICC-01/04-01/07-149](#), p. 5.

²² [Rome Statute](#), Art. 67(1)(b); [ICCPR](#), Art. 14(1)(b).

²³ [Rome Statute](#), Art. 67(1)(d); [ICCPR](#), Art. 14(1)(d).

²⁴ Defence counsel's ethical and professional duties of zealousness and diligence are overarching duties central to and connected with other ethical duties of independence, loyalty, confidentiality, lack of conflicts of interest, and communication. The duties of zealousness and diligence require Defence counsel to do anything and everything to ensure that all fair trial rights are fully accorded to the client, including making legal challenges through written and oral submissions, checking the veracity and accuracy of evidence that may be used against the client, objecting to the admissibility of evidence, confronting witnesses, consulting with experts when necessary and relevant, and so on. Although the ICC Code of Professional Conduct for Counsel does not explicitly mention zealousness as being part of counsel's duties, it is an integral part of their professional responsibilities, generally requiring Counsel to press for every conceivable advantage of a client's case. Doing anything less *could* amount to ineffective legal assistance. ICC Code of Professional Conduct for Counsel, [ICC-ASP/4/Res.1](#), 2 December 2005, Art. 5.

²⁵ *See supra* fn. 24.

measures. The Defence does not anticipate bringing any motions pursuant to Rule 68. Any other requests that arise will be brought to the Trial Chamber's attention immediately.

Respectfully submitted, 21 March 2022,
In The Hague, the Netherlands.



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