

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/09-01/20**  
Date: **30 September 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 Setting the Commencement Date of the Trial and Related Deadlines**

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

**The Office of the Prosecutor**

Mr James Stewart  
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**

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**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*, pursuant to Article 64(3) of the Rome Statute (the ‘Statute’) and Rules 101 and 132 of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision Setting the Commencement Date of the Trial and Related Deadlines’.

## I. PROCEDURAL HISTORY

1. On 15 July 2021, Pre-Trial Chamber A confirmed the charges against Mr Gicheru.<sup>1</sup>
2. On 22 July 2021, the Presidency referred the case to Trial Chamber III.<sup>2</sup>
3. On 24 September 2021,<sup>3</sup> after having received written submissions from the Office of the Prosecutor (the ‘Prosecution’)<sup>4</sup>, the Defence<sup>5</sup> and the Registry,<sup>6</sup> the Chamber held a status conference in order to receive further oral submissions in relation to the starting date of the trial (the ‘Status Conference’).<sup>7</sup>
4. On 28 September 2021, the Defence sent an *ex parte* communication<sup>8</sup> in compliance with the Chamber’s instruction,<sup>9</sup> in which it informed the Chamber about its intentions to conduct specific investigations that need to be completed before the start of the trial.

<sup>1</sup> [Decision on the confirmation of charges against Paul Gicheru](#), 15 July 2021, ICC-01/09-01/20-153-Red.

<sup>2</sup> [Decision constituting Trial Chamber III and referring to it the case of \*The Prosecutor v. Paul Gicheru\*](#), 22 July 2021, ICC-01/09-01/20-157.

<sup>3</sup> The status conference was initially scheduled to take place on 17 September 2021. However, on 25 August 2021, upon request by the Defence, the Chamber rescheduled the status conference pursuant to Rule 132(1) of the Rules for 24 September 2021. [Decision on Request to Reschedule the First Status Conference](#), 25 August 2021, ICC-01/09-01/20-166.

<sup>4</sup> Public redacted version of “Prosecution’s submissions on issues for the First Status Conference”, 10 September 2021, ICC-01/09-01/20-171-Conf, 14 September 2021, ICC-01/09-01/20-171-Red (the ‘Prosecution’s Submissions’).

<sup>5</sup> [Public Redacted Version of “Paul Gicheru’s Submissions in preparation for the First Status Conference.”](#) 10 September 2021, ICC-01/09-01/20-170-Conf, 14 September 2021, ICC-01/09-01/20-170-Red (the ‘Defence’s Submissions’).

<sup>6</sup> [Registry Submissions in View of the Upcoming Status Conference in accordance with “Order Scheduling the First Status Conference” \(ICC-01/09-01/20-162\)](#), 10 September 2021, ICC-01/09-01/20-172.

<sup>7</sup> Transcript of hearing, 24 September 2021, ICC-01/09-01/20-T-048-CONF-ENG.

<sup>8</sup> Email from Daria Mascetti to Trial Chamber III Communications, 28 September 2021 at 13:35.

<sup>9</sup> Transcript of hearing, ICC-01/09-01/20-T-048-CONF-ENG, p. 11, line 20 to p. 12, line 2.

## II. ANALYSIS

5. In the present decision, the Chamber will discuss the main parameters which the Chamber has considered in determining when the trial can start in full respect of the parties' rights and set the commencement date and the attendant schedule for the intermediate procedural steps leading up to this date.

### A. Anticipated evidence

6. The Chamber notes that the Prosecution has provided information as regards the estimated number of witnesses to be called and number of hours of *viva voce* testimony, use of expert witnesses as well as an estimate as to the volume of documentary or other non-testimonial evidence to be relied upon at trial.<sup>10</sup> The Chamber notes, however, that according to the Prosecution the amount of evidence presented may be further reduced, depending on the extent of agreement between the parties as regards the statement of agreed facts, which is currently the subject of *inter partes* discussions. On the other hand, the Prosecution indicated that it is still conducting limited investigations. There is thus a possibility that the Prosecution may add a limited number of witnesses.<sup>11</sup> Nevertheless, the Chamber understands that the Prosecution is ready and prepared to start presenting its case on short notice. Given the uncertain outcome of the limited investigative steps that are still being envisaged, this cannot be grounds for delaying the start of the trial.

### B. Disclosure of outstanding material in the Prosecution's possession and related issues

7. The Chamber notes the Prosecution's submission that its investigations are largely complete, but for some limited investigative activities. The Prosecution submits that it anticipates to complete all outstanding investigative activities, with the exception of 'following up on several long outstanding requests for assistance to the Kenyan Authorities', in time to complete the disclosure of any outstanding incriminating evidence by 1 December 2021.<sup>12</sup>

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<sup>10</sup> [Prosecution's Submissions](#), ICC-01/09-01/20-171-Red, paras 10-22.

<sup>11</sup> [Prosecution's Submissions](#), ICC-01/09-01/20-171-Red, para. 10.

<sup>12</sup> [Prosecution's Submissions](#), ICC-01/09-01/20-171-Red, paras 26-27.

8. The Chamber notes that the Prosecution has already disclosed what it considers to be the bulk of the most relevant evidence in relation to the charges.<sup>13</sup> The Prosecution further submits that the disclosure of evidence under Rule 76 of the Rules has largely been completed and that it anticipates that it will be able to disclose the remainder of such material by 1 December 2021.

9. The Chamber further notes that the Prosecution has indicated that the security situation of all of the witnesses it currently plans to call has already been taken care of by the relevant units. For the limited number of potentially additional witnesses, the Prosecution stated that no security measures have as yet been put in place. However, the Prosecution indicated that it would start liaising with the Victims and Witnesses Unit as soon as possible.<sup>14</sup>

10. As regards the Prosecution's disclosure obligations under Article 67(2) of the Statute and Rule 77 of the Rules, the Chamber notes the Prosecution's submission that it has already disclosed what it assesses to be the most relevant evidence. However, the Prosecution submitted that it must still finalise its review of the entire evidence collection of the Kenya Situation, which it anticipates to be in a position to do by 1 February 2022.<sup>15</sup> Nevertheless, the Chamber understands that the Defence has already received the most significant materials and that any additional disclosure under Article 67(2) of the Statute or Rule 77 of the Rules is expected to be limited, both in terms of volume and significance. Given its limited anticipated significance, the ongoing evidence review of the Kenya Situation database should not unduly delay the start of the trial and the Chamber orders the Prosecution to finalise it by 14 January 2022.

**C. Disclosure by the Defence, including whether the Defence intends to advance a defence in accordance with Rules 79 and 80 of the Rules**

11. There are no indications that the Defence will invoke any alibi or grounds for excluding criminal responsibility.<sup>16</sup> Accordingly, there is no need for any potential additional disclosure on the part of the Defence which could influence the starting date of the trial.

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<sup>13</sup> [Prosecution's Submissions](#), ICC-01/09-01/20-171-Red, para. 28.

<sup>14</sup> Transcript of hearing, ICC-01/09-01/20-T-048-CONF-ENG, p. 20, lines 14-15.

<sup>15</sup> [Prosecution's Submissions](#), ICC-01/09-01/20-171-Red, paras 6-9.

<sup>16</sup> [Defence's Submissions](#), ICC-01/09-01/20-170-Red, para. 8(e).

#### **D. Agreed facts**

12. The Chamber asked the Prosecution and the Defence to liaise with a view to reaching agreements about non-contentious issues.<sup>17</sup> The Chamber notes that discussions between the parties are ongoing and that the Defence assured the Chamber that it was going to do its 'level best to agree to as many facts as possible'.<sup>18</sup> The Chamber welcomes this constructive attitude and encourages the filing of regular joint submissions on agreed facts, as discussions between the parties progress. More generally, the Chamber expects the parties to continue liaising throughout the trial to continue exploring possible agreements as to evidence. In particular, the Chamber instructs the parties to indicate for each witness which parts of the anticipated testimony they contest and which facts they accept.

#### **E. Defence investigation prior to commencement of trial**

13. During the Status Conference, the Defence indicated that it did not expect that its pre-trial investigations would be cause for delaying the start of the trial.<sup>19</sup> The Defence subsequently confirmed in writing that it expects to complete any investigations it may wish to conduct by the end of the year, with the understanding that this assessment may change once the Prosecution has fully complied with its disclosure obligations.

#### **F. Commencement date of the trial**

14. The Chamber has considered all the above information and notes the parties' agreement to start the trial on 1 March 2022.<sup>20</sup>

15. Nevertheless, in light of the submissions made by the parties during the Status Conference and bearing in mind certain logistical constraints, the Chamber considers it both feasible and desirable to commence the trial two weeks earlier. In making this determination, the Chamber took into account its obligations with regard to the protection of witnesses pursuant to Article 68(1) of the Statute as well as its duty to ensure that the accused has adequate time and facilities for the preparation of his

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<sup>17</sup> Transcript of hearing, ICC-01/09-01/20-T-048-CONF-ENG, p. 22, lines 11-15.

<sup>18</sup> Transcript of hearing, ICC-01/09-01/20-T-048-CONF-ENG, p. 23, line 6.

<sup>19</sup> Transcript of hearing, ICC-01/09-01/20-T-048-CONF-ENG, p. 11, lines 11-19.

<sup>20</sup> [Prosecution's Submissions](#), ICC-01/09-01/20-171-Red, para. 6; [Defence's Submissions](#), ICC-01/09-01/20-170-Red, para. 8(a).

defence. Accordingly, the Chamber sets the commencement date of trial on 15 February 2022.

### **G. Trial Brief and related documents**

16. The Chamber notes that the Prosecution proposes to file its Trial Brief on 1 December 2021, three months before its proposed start date for the trial.<sup>21</sup> The Chamber deems it is indeed necessary for the Prosecution to file a detailed Trial Brief and that this should be done, as suggested and as is common practice, three months before the commencement of the trial. In light of the Chamber's decision to advance the start of the trial by two weeks, the deadline for filing the Prosecution Trial Brief is 15 November 2021.

17. The Prosecution is further instructed to file a list of Prosecution witnesses no later than 15 November 2021. The list of witnesses should include the following information:

- the witness pseudonym and identity (including different spellings if applicable);
- known kinship or other relationship to other witnesses or other relevant persons in this case;
- summary of anticipated testimony;
- projected order of calling;
- estimated length of questioning by the Prosecution;
- anticipated in-court protective measures to be sought, if any; and
- anticipated requests under Rule 74 of the Rules.

18. The Prosecution must also file a list of all items it plans to submit as evidence during the trial (the 'List of Evidence').

19. Witnesses and evidence may be added to these lists after the deadline only with leave of the Chamber.

20. The Defence is ordered to file its Trial Brief by 17 December 2021.<sup>22</sup>

### **H. Rule 68 requests**

The Chamber has considered the parties' submissions with regard to the timing of potential Prosecution motions under Rule 68 of the Rules. In particular, the Chamber

<sup>21</sup> [Prosecution's Submissions](#), ICC-01/09-01/20-171-Red, para. 42.

<sup>22</sup> See Transcript of hearing, 8 September 2021, ICC-02/05-01/20-T-013-ENG, p. 78, line 18.

has noted the Prosecution's indication during the Status Conference that there is no reason why Rule 68 requests pertaining to witnesses upon whose testimony the Prosecution is already certain to rely on cannot be filed ahead of the disclosure deadline.<sup>23</sup> The Chamber agrees with the Defence that it would be preferable for any requests pursuant to Rule 68 of the Rules to be filed as soon as possible. Accordingly, the Chamber instructs the Prosecution to file its applications pursuant to Rule 68 of the Rules which can already be finalised by then, no later than 22 October 2021. Any application which cannot be finalised by this date, due to ongoing investigations or other exceptional circumstances, must be filed by 15 November 2021.

### **I. Motions requiring resolution prior to the commencement of trial**

21. As has been the practice in previous cases,<sup>24</sup> and in order to ensure that no issues affecting the commencement of the trial are left until the final moment, the Chamber considers it appropriate to set a deadline for the filing of all motions which require resolution prior to the commencement of trial pursuant to Rule 134 of the Rules. The parties are hereby instructed to file such motion, if any, no later than 21 January 2022.

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<sup>23</sup> Transcript of hearing, ICC-01/09-01/20-T-048-CONF-ENG, p. 17, lines 12-21.

<sup>24</sup> See e.g. Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Decision Setting the Commencement Date of the Trial](#), 6 January 2020, ICC-01/12-01/18-548, para. 19; Trial Chamber IX, *Ongwen case*, [Decision Setting the Commencement Date of the Trial](#), 30 May 2016, ICC-02/04-01/15-449, para. 11; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Order setting the commencement date for trial](#), 7 May 2015, ICC-02/11-01/15-58, para. 28; Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Order setting the commencement date for trial](#), 22 May 2015, ICC-01/05-01/13-960, para. 14; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, [Decision on the conduct of proceedings](#), 2 June 2015, ICC-01/04-02/06-619, para. 8.



**FOR THESE REASONS, THE CHAMBER HEREBY**

**DECIDES** that the trial will commence on Tuesday, **15 February 2022**; and

**SETS** the following deadlines leading up to the trial commencement:

**22 October 2021:** Prosecution requests pursuant to Rule 68 of the Rules;

**15 November 2021:** (i) Disclosure of all evidence and material on which the Prosecution intends to rely at trial, (ii) list of Prosecution witnesses, (iii) Prosecution List of Evidence, (iv) any remaining applications pursuant to Rule 68 of the Rules and (v) Prosecution Trial Brief;

**17 December 2021:** Defence Trial Brief;

**14 January 2022:** Disclosure of all evidence and material pursuant to Article 67(2) of the Statute and Rule 77 of the Rules; and

**21 January 2022:** Motions requiring resolution prior to the commencement of trial.

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



**Judge Miatta Maria Samba**

Dated 30 September 2021

At The Hague, The Netherlands