

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: **21 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 on Defence Request for a Temporary Stay of Proceedings

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

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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 64(2) and (7) of the Rome Statute (the ‘Statute’) and Regulation 23 *bis*(3) of the Regulations of the Court issues this ‘Decision on the Defence Request for a Temporary Stay of Proceedings’.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 25 August 2021, upon request by the Defence,¹ the Chamber rescheduled the first status conference pursuant to 132(1) of the Rules of Procedure and Evidence (the ‘Status Conference’) for 24 September 2021.²
2. On 27 August 2021, the Chamber issued a decision on the Defence’s request to provide further information on Judge Samba’s prior employment.³ Therein, Judge Samba provided information on her prior employment with the Office of the Prosecutor (‘Prosecution’) in between 2006 and 2010.
3. On 17 September 2021, the Defence filed a request to temporarily stay the proceedings (the ‘Request’).⁴ The Defence informs the Chamber that it has filed a request for disqualification of Judge Samba with the Presidency.⁵ It submits that further rulings by Judge Samba would jeopardise the fair trial rights of the Defence and therefore requests that the Status Conference and all proceedings are suspended until a decision by the Plenary on the pending disqualification request.⁶
4. On 20 September 2021, upon instruction by the Chamber,⁷ the Prosecution filed its response (the ‘Response’).⁸ It argues that the Request should be rejected since a stay of proceedings is an exceptional remedy⁹ and the Request does not meet the high

¹ [Defence’s Request to Reschedule the First Status Conference](#), ICC-01/09-01/20-164.

² [Decision on Request to Reschedule the First Status Conference](#), ICC-01/09-01/20-166.

³ [Decision on Defence Request for Information concerning Judge Samba’s Prior Employment](#), ICC-01/09-01/20-168.

⁴ Urgent Request for Trial Chamber III to Temporarily Stay the Proceedings Due to Mr. Gicheru’s Request for the Disqualification of Judge Miatta Maria Samba, ICC-01/09-01/20-174-Conf.

⁵ Request, ICC-01/09-01/20-174-Conf, page 3.

⁶ Request, ICC-01/09-01/20-174-Conf, para, 3.

⁷ Email by the Chamber to the parties on 17 September 2021, at 16:25.

⁸ Prosecution response to the “Urgent Request for Trial Chamber III to Temporarily Stay the Proceedings Due to Mr. Gicheru’s Request for the Disqualification of Judge Miatta Maria Samba”, ICC-01/09-01/20-175-Conf.

⁹ Response, ICC-01/09-01/20-175-Conf, para. 8.

threshold for such a measure.¹⁰ Additionally, it submits that even the mere postponement of the Status Conference without a temporary stay of proceedings should also not be granted.¹¹

5. Additionally, also on 20 September 2021, the Defence raised in an email communication the subject of *ex parte* communications between the Prosecution and the Chamber (the ‘Defence Email’).¹² The Defence ‘objects’ to such communication while its Request is still pending, makes further explanatory statements with regard to its Request and argues that there is no prejudice to the Prosecution or delay to the proceedings if such *ex parte* communication were to be prohibited.

6. The Prosecution replied to the Defence Email on the same day.¹³

II. ANALYSIS

7. As a preliminary matter, the Chamber notes that the Defence Email attempts to continue litigation on the Request by making submissions on the *de facto* effect of the Request and what would be the practical consequences in case its disqualification request were to be granted.

8. The Chamber will not permit that parties use email communication in order to continue litigating requests that are already pending with the Chamber. Further, the Defence does not provide any statutory basis or formulate a clear and specific request. While, under specific circumstances, email communication is efficient and appropriate, this is not the case in the current instance.

9. Accordingly, the Chamber will not address the Defence Email. Further, considering how the Request is resolved below, it does not consider that a formal filing on this matter is necessary.

10. The Chamber issues this decision publicly, despite the Request and Response being filed as ‘confidential’. First, it reminds the parties of the principle of publicity of the proceedings, which mandates that there needs to be a specific justification to file

¹⁰ Response, ICC-01/09-01/20-175-Conf, paras 8-9.

¹¹ Response, ICC-01/09-01/20-175-Conf, paras 12-14.

¹² Email by the Defence to the Chamber and the Prosecutor on 20 September 2021, at 17:02.

¹³ Email by the Prosecution to the Chamber and the Defence on 20 September 2021, at 17:32.

submissions as confidential. Second, it reminds the parties that the mere fact that a filing makes reference to non-public documents does not mean that it has to have the same level of classification. Only if mentioning the filing would defeat the purpose as to why the other document was classified as ‘confidential’, should result in the filing not being public.

11. In respect of the justification provided by the Defence to file its request to disqualify Judge Samba as ‘confidential’, the Chamber finds that the mere fact that the Defence requested disqualification can be public. Accordingly, this decision is issued publicly. Consequently, the Defence is ordered to either request reclassification of its Request as ‘public’ or file a public-redacted version forthwith. Noting the submission of the Prosecution,¹⁴ the Chamber hereby reclassifies the Response as ‘public’.

12. The Chamber notes that, while not expressly mentioned in the statutory framework of the Court, the power of a chamber to stay – temporarily or permanently – the proceedings has been confirmed by several chambers of this Court and the Appeals Chamber.¹⁵ Accordingly, the Chamber considers it established jurisprudence

¹⁴ Response, ICC-01/09-01/20-175-Conf, para. 4.

¹⁵ See, Appeals Chamber, *The Prosecutor v. Laurent Gbagbo*, [Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings](#), 12 December 2012, ICC-02/11-01/11-321 (OA2); Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultation with the VWU”](#), 8 October 2010, ICC-01/04-01/06-2582 (OA18) (the ‘Lubanga OA18 Appeals Judgment’); Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”](#), 12 July 2010, ICC-01/04-01/07-2259 (OA10); Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19\(2\)\(a\) of the Statute of 3 October 2006](#), 14 December 2006, ICC-01/04-01/06-772 (OA4) (the ‘Lubanga OA4 Appeals Judgment’); Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, [Decision on Defence request for temporary stay of proceedings](#), 18 April 2019, ICC-01/04-02/06-2335; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, [Decision on Defence Request for Findings on Fair Trial Violations Related to the Acholi Translation of the Confirmation Decision](#), 24 January 2018, ICC-02/04-01/15-1147; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, [Decision on Defence request for stay of proceedings with prejudice to the Prosecution](#), 28 April 2017, ICC-01/04-02/06-1883; Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, 8 July 2010, [ICC-01/04-01/06-2517-Red](#); Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, [Decision on the “Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12\(3\), 19\(2\), 21\(3\), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo \(ICC-02/11-01/11-129\)”](#), 15 August 2012, ICC-02/11-01/11-212.

of the Court that, in principle, it has the power to stay the proceedings under certain circumstances.

13. In accordance with the established jurisprudence of the Court, the Chamber finds that a stay of proceedings, be it temporary or permanent, is an exceptional measure or, as formulated by the Appeals Chamber, a ‘drastic remedy’.¹⁶ Such a measure can only be imposed when it has become impossible to continue the proceedings without infringing the fundamental rights of the accused.¹⁷ Accordingly, the threshold for a chamber to order a temporary stay of proceedings is high.¹⁸

14. The arguments presented by the Defence fail to meet this high threshold. It argues that a stay is necessary “in the interests of justice”, without any further substantiation.¹⁹ A request for disqualification does not automatically justify a temporary stay of proceedings.

15. The Chamber further notes that the trial is still in the preparatory phase. During this phase, the Chamber will not evaluate any evidence which will form the basis of its judgement pursuant to Article 74(2) of the Rome Statute. The planned Status Conference and any decision taken in relation to its purpose (for example, setting the start date of trial) are procedural in nature. The Defence does not explain why these steps cannot be taken while waiting for the outcome of its request for disqualification. Indeed, the Defence fails to explain how the prior employment of Judge Samba with the Office of the Prosecutor or her limited and purely logistical involvement in the Kenya situation would risk prejudicing the Defence when it comes to matters of trial management.

16. In any event, if the request for disqualification is granted, the Defence may file a request to amend any decision issued by Judge Samba with the new chamber. No prejudice to the Defence – permanent or otherwise – is caused by continuing the preparation of the proceedings, let alone any prejudice which would justify a temporary stay of proceedings. To the contrary, the Chamber considers it necessary to take

¹⁶ Lubanga OA18 Appeals Judgment, ICC-01/04-01/06-2582, para. 55.

¹⁷ Lubanga OA4 Appeals Judgment, ICC-01/04-01/06-772, para. 37

¹⁸ Lubanga OA18 Appeals Judgment, ICC-01/04-01/06-2582, para. 55.

¹⁹ Request, ICC-01/09-01/20-174-Conf, para. 3.

preparatory measures and advance the proceedings and the preparation of the trial, in order to ensure that the trial can start in an expeditious manner.

17. Considering the above, the Chamber finds that the Defence has not presented any argument which warrants a temporary stay of proceedings. Accordingly, the Chamber rejects the Request.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request;

ORDERS that the Response (ICC-01/09-01/20-175-Conf) be reclassified as ‘public’;
and

ORDERS the Defence to request reclassification of its Request (ICC-01/09-01/20-174-Conf) as ‘public’ or file a public-redacted version forthwith.

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

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

Judge Miatta Maria Samba

Dated 21 September 2021

At The Hague, The Netherlands