

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **7 October 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**

**Directions on the Conduct of the Proceedings**

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

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**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
for Participation/Reparations**

**The Office of Public Counsel  
for Victims**

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**Amicus Curiae**

**REGISTRY**

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**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 Articles 64(8)(b) of the Rome Statute (the ‘Statute’) issues this ‘Directions on the Conduct of the Proceedings’.

1. The present decision constitutes the Chamber’s directions for the conduct of proceedings. In issuing this decision, the Chamber has had regard to the practice of other trial chambers of this Court. The Chamber has also taken into account the submissions made by the parties in preparation of and during the status conference of 24 September 2021.<sup>1</sup>

2. Issues left unaddressed in the present decision and which require intervention by the Chamber will be dealt with in the course of the trial. In particular, the Chamber will not regulate the questioning of witnesses in the abstract. The necessity or propriety of any particular question will be dealt with on a case-by-case basis, noting the Chamber’s obligations under Rule 88(5) of the Rules and Regulations (the ‘Rules’) and the requirements of Regulation 43 of the Regulations of the Court (the ‘Regulations’).

## **I. READING OF THE CHARGES**

3. Article 64(8)(a) of the Statute mandates that the charges, as previously confirmed by the Pre-Trial Chamber, are read to the accused. The Chamber announces that this will be done at the commencement of the trial on 15 February 2022.

## **II. OPENING STATEMENTS**

4. The Chamber will hear the Office of the Prosecutor’s (the ‘Prosecution’) opening statement first, followed by the opening statement from the Defence. The parties will be given 1 hour to present their opening statements.

5. The Defence may make their opening statement either at the commencement of the trial or just prior to the presentation of their evidence, if any. The Defence is to

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<sup>1</sup> Paul Gicheru’s Submissions in preparation for the First Status Conference, 10 September 2021, ICC-01/09-01/20-170-Conf, a [public redacted version](#) was filed on 14 September 2021. Prosecution’s submissions on issues for the First Status Conference, 10 September 2021, ICC-01/09-01/20-171-Conf, a [public redacted version](#) of the submission was filed on 14 September 2021. Transcript of hearing, 24 September 2021, ICC-01/09-01/20-T-048-CONF-ENG.

inform the Chamber 15 days prior to the commencement of trial whether or not it intends to present an opening statement at the commencement of the trial.

6. The parties are directed to indicate by email any material they intend to use in the course of their opening statements to the Chamber and the other party eight days prior to the commencement of trial. Any objections to the use of such material shall be filed five days prior to the commencement of trial. The parties will be permitted to use audio/visual material during opening statements.

7. The opening statements shall be presented entirely in public session. The parties are therefore instructed to prepare accordingly.

### **III. PRESENTATION OF EVIDENCE**

8. Subject to Articles 64(6)(b) and 69(3) of the Statute, the trial will be organised into: (i) presentation of evidence by the Prosecution; and (ii) any presentation of evidence by the Defence. The Chamber might provide specific instructions should the parties decide to each call expert witnesses on the same issues.

### **IV. LENGTH AND TIMING OF THE PRESENTATION OF EVIDENCE BY THE PROSECUTION**

9. The Chamber will issue a separate decision on the length and timing of the presentation of evidence by the Prosecution after receipt of the Prosecution's final list of witnesses. The Chamber's leave must be sought in order for either party to present 'rebuttal'/'rejoinder' evidence. The Chamber may, at a later stage, issue further directions regarding the length and presentation of the Defence's evidence.

### **V. DOCUMENTARY, DIGITAL OR PHYSICAL EVIDENCE**

10. The parties shall formally submit documentary, digital or physical evidence to the Chamber in accordance with the procedure detailed below.

11. Generally, the Chamber will recognise the submission of such items without a prior ruling on the admissibility of the evidence. The Chamber will ultimately assess the relevance, probative value and potential prejudice of the evidence (the 'standard evidentiary criteria') as part of the holistic assessment of all evidence submitted when

deciding on the guilt or innocence of the accused in its judgment pursuant to Article 74 of the Statute. During its deliberations, the Chamber will consider all the standard evidentiary criteria for each item of evidence submitted, though it may not necessarily discuss in the judgment every submitted item.

12. At the same time, while in general it will defer to the judgment assessments of the evidence on the basis of standard evidentiary criteria, it will make discrete determinations on the admissibility of specific evidence or categories of evidence in accordance with requirements of the Statute.

13. On this point, the Chamber observes that Rule 64(1) of the Rules requires the parties to raise issues as to admissibility of evidence, including on any of the standard evidentiary criteria, at the time when the evidence is submitted to the Chamber or immediately after such an issue becomes known.<sup>2</sup>

14. The Chamber in its discretion may decide to rule on any such specific objection in advance of the judgment, particularly when it is necessary for a fair and expeditious trial as mandated by Article 64(2) of the Statute.

15. In this regard, the Chamber recalls that the legal framework of the Court contains a number of exclusionary rules which mandate that certain evidence is inadmissible in the proceedings. Rulings on the potential application of any such rule must be rendered separately from, and preliminarily to, the assessment of evidence for a decision under Article 74 of the Statute.<sup>3</sup>

16. Further, the Chamber recognises that specific issues may arise where it will be necessary to rule on an evidentiary challenge at the time it is raised in order to provide

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<sup>2</sup> Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the Decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 3 May 2011, ICC-01/05-01/08-1386, para. 48.

<sup>3</sup> For example, Rule 63(3) of the Rules mandates that rulings on admissibility shall be made by the Chamber when an application is made by a party or the Chamber by its own motion under Article 69(7) of the Statute. (This Article sets out procedural bars to the admission of evidence obtained in violation of the Statute or of internationally recognised human rights under specified circumstances.) The Chamber will rule on these issues, as appropriate, in the course of the trial or at the end of the proceedings. The Chamber will take a similar approach to other procedural requirements, including those arising under Rules 68 (prior recorded testimony of a witness), 71 (evidence of the prior or subsequent sexual conduct of a victim or witness) and 72 (evidence in cases of sexual violence) of the Rules.

clarity to the parties, to avoid the calling of irrelevant evidence or to otherwise advance the fairness or efficiency of the trial proceedings.

17. For clarity, the following is a summary of the procedure to be followed with respect to the formal submission of documentary evidence:

- i) The parties will formally request the submission of evidence either via the applicable procedures as specified in the relevant sections of the present decision or, for items of evidence used during a hearing, by sending an email to the Chamber and the other party clearly identifying these items of evidence no later than one working day after the conclusion of the testimony of the relevant witness;
- ii) no later than three working days following receipt of the email in item (i) above, the other party may send emails in response, raising issues related to the relevance or admissibility of the items of evidence submitted;
- iii) no later than one working day following receipt of any response emails in item (ii) above, the tendering party may send a second email indicating its position on the arguments raised by the other party. The Chamber will then send a final email identifying which items are recognised as being formally submitted evidence; and
- iv) the Registry will then reflect all formally submitted items in the eCourt metadata. The Registry must also submit reports for each witness who testifies, indicating which items of evidence have been formally submitted by the parties in relation to that witness. The email exchanges referenced in items (i) to (iii) above are to be annexed to this filing, applying redactions as appropriate.

18. Through this process each item of evidence which is submitted (in batches or otherwise) will be formally recognised as submitted. Its status as submitted will accordingly be reflected in the eCourt metadata of each item of evidence.<sup>4</sup>

19. In principle, recognising the formal submission of audio-visual material automatically includes recognising the formal submission of any associated transcripts or translations which were duly disclosed. This would be the case irrespective of

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<sup>4</sup> Similarly see *Bemba et al.* Appeals Judgment, ICC-01/05-01/13-2275-Red, para. 600.

whether these transcripts/translations were on the list of evidence or formally submitted, though it is clearly preferable to do both so there is no confusion as to their status.

## **VI. WITNESSES**

### ***(1) Order of questioning***

20. The calling party will conduct its questioning of the witness first, followed by the questioning by the non-calling party.

21. Questioning by the non-calling party is not limited to issues raised during the questioning by the calling party. Indeed, the Chamber will allow inquiry into additional matters. During this questioning the non-calling party may, for example, seek to ask questions related to the credibility of a witness, the reliability of the evidence presented, as well as mitigating and/or aggravating circumstances. However, the questioning by the non-calling party is not without limitation, notably in that the questions posed must be demonstrably relevant to the issues in the case or to the credibility or the testimony of the witness. Further, the Chamber will ensure that the questioning by the non-calling party is conducted in accordance with its responsibility for the protection of victims and witnesses under Article 68 of the Statute.

22. The calling party may re-examine the witness after questioning by the non-calling party has concluded provided the questions are limited to issues which arose from the examination by the non-calling party.

23. The Chamber may pose questions to the witness at any time including after the conclusion of the questioning by the parties.

24. The Defence has the right to be the last to question a witness, if necessary.

### ***(2) Use of materials during the questioning***

25. As a rule, parties can only use, during their questioning, materials which have been previously disclosed. The party intending to use any documents shall ensure that

electronic, searchable copies of the documents have been uploaded into eCourt prior to their use, in accordance with the eCourt Protocol.<sup>5</sup>

26. The calling party will provide by email to the Chamber and the other party, at least five days before a witness commences testifying, a list (hereinafter: ‘List of Materials’) setting out:

- i) the materials it intends to use during the questioning of the witness;
- ii) any passages intended to be used within any lengthy document; and
- iii) whether the materials are intended to be tendered as evidence, including under Rule 68 of the Rules, where appropriate.

27. The non-calling party shall, by way of email, no later than two days prior to the start of the witness’s testimony, provide notice of its objection to the use of any material with the witness. This is without prejudice to the possibility to object, during the testimony, to the manner in which the material is presented to the witness.

28. The non-calling party will provide, by way of email to the Chamber and the other party, at least one day before they commence their questioning of the witness, a list of any materials they intend to use during questioning. Exceptionally, if the materials were not already disclosed, copies shall be attached to the email. Objections to the use of any material by the non-calling party shall be raised orally, prior to the start of the examination by the non-calling party.

29. The Registry shall inform the parties of the relevant procedure in relation to the use of audio-visual recordings during hearings. In principle, video or audio recordings may only be used in court if a transcript, and translation if applicable, are available. The party intending to use a video or audio recording shall indicate in its List of Materials the sections of the transcript, if any, corresponding to the excerpts of the material it intends to use; as well as, if applicable, the corresponding sections of the translation. To avoid taking up hearing time to address these matters, the parties shall consult to try and resolve any disagreement as to the transcription or translation of the excerpts. If the disagreement cannot be resolved, the parties shall notify the Chamber by email.

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<sup>5</sup> The parties are expected to provide the ERN of the material when indicating them in accordance with the following paragraph. Should the item exceptionally not have been uploaded into the eCourt system yet, the parties are expected to indicate this fact in the procedure set out in the following paragraph.



***(3) Prior recorded testimony under Rule 68 of the Rules***

30. The Chamber recalls that the Prosecution has been ordered to file its final list of witnesses it intends to call by 15 November 2021 and file any application to introduce any prior recorded testimony of a witness under Rule 68(2) and (3) of the Rules by the same date.<sup>6</sup> The applications shall be filed together with:

- i) copies of the prior recorded testimony or hyperlink to same;
- ii) other material referred to in the previously recorded testimony, without which the testimony would not be understandable, if this material is available to the Prosecution; and
- iii) a specification as to whether the Prosecution seeks to ask further questions to the witness and the specific time sought for such examination, and an indication of the topics to be addressed orally with the witness.

31. Concerning applications pursuant to Rule 68(3) of the Rules, the Chamber will issue preliminary rulings ahead of the relevant in-court testimony. The final determination will be made at the time of the appearance of the witness before the Chamber and when all conditions of Rule 68(3) have been fulfilled. The Chamber expects the calling party to streamline its questioning considerably if and when the introduction of the previously recorded testimony is allowed.

***(4) Expert witnesses***

32. The Chamber recalls that the Prosecution has been ordered to file its final list of witnesses it intends to call by 15 November 2021.<sup>7</sup> By the same date at the latest the Prosecution must indicate whether it intends to call a witness as an expert.

33. As a general rule, challenges to a witness's expertise should be made in writing so that they can be resolved prior to the start of testimony. No later than 30 days before the anticipated testimony of an expert witness, the non-calling party may file a notice indicating whether it challenges the qualifications of the witness as an expert.

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<sup>6</sup> The Chamber also recalls that a deadline of 22 October is set for any Rule 68 application which can be finalised by that date. [Decision Setting the Commencement Date of the Trial and Related Deadlines](#), ICC-01/09-01/20-185, p. 9.

<sup>7</sup> [Decision Setting the Commencement Date of the Trial and Related Deadlines](#), ICC-01/09-01/20-185, p. 9.

34. Submitted expert reports must satisfy the procedural prerequisites of Rule 68 of the Rules.

35. Where parties wish to introduce expert evidence on the same issue at trial, the Chamber will hear this evidence grouped together, if possible, in order to enhance the expeditiousness of the proceedings. The Chamber will determine at what stage in the proceedings it will hear such evidence. Alternatively, in accordance with Regulation 44 of the Regulations, the Chamber may itself identify and instruct experts on the issue after seeking submissions.

## **VII. WITNESS PREPARATION**

36. The Chamber takes note of the submissions of the parties on this matter. Taking into account the fairness and expeditiousness of the proceedings, it will permit witness preparation in accordance with the protocol attached as Annex A.

## **VIII. INTRODUCTION OF EVIDENCE OTHER THAN THROUGH A WITNESS**

37. A party wishing to tender evidence without it being introduced through a witness shall file a written application containing:

- i) a short description of the content of each item;
- ii) in the case of a lengthy document, an index of the most relevant portions of the document or recording; and
- iii) a short description of its relevance, and *prima facie* probative value.

38. Before submitting the application, the tendering party shall first inquire whether the opposing party consents or objects to the tendering of the items and include this information in the application. The opposing party's reasons do not need to be included in the application.

## **IX. IN-COURT PROTECTIVE MEASURES AND SPECIAL MEASURES**

39. Applications for in-court protective or special measures pursuant to Rules 87 and 88 of the Rules shall be made as soon as possible.

40. The Prosecution shall file a motivated application seeking relevant in-court protective measures pursuant to Rule 87 of the Rules for all Prosecution witnesses for whom it is reasonably foreseeable that protective measures are required no later than 22 October 2021. This will allow the Chamber to receive submissions on any request and the VWU to fulfil its mandate in due time. The Chamber will rule on these applications, to the extent possible, in advance of the witnesses' appearance, with the possibility to modify any determination on protective measures subject to further information provided by the VWU immediately prior to the testimony as necessary.

#### **X. USE OF PRIVATE AND/OR CLOSED SESSION<sup>8</sup>**

41. In so far as possible, witness testimony shall be given in public. If in-court protective measures are in place for a witness, parties shall at all times be cautious and ensure that questions asked during public sessions do not compromise these measures.

42. Requests for private and/or closed sessions shall be made in a neutral and objective way and, if possible, referring to the topics that will be covered.

43. It is the responsibility of examining counsel to ensure that the use of private and/or closed sessions is limited to what is strictly necessary. As such, the examining counsel shall immediately request moving back to open session when the reasons that motivated the use of private and/or closed session are no longer present.

44. To the extent possible, the parties are directed to group identifying questions together and to ask these questions at the beginning of the testimony in order to avoid unnecessary recourse to private and/or closed sessions during the court hearings. Similarly, other questions necessitating recourse to private and/or closed session are to be grouped as much as possible. The Chamber further encourages the parties to consider, in appropriate cases, the use of codes, which may further avoid recourse to private and/or closed sessions.

45. In case the calling party anticipates that a private and/or closed session will be needed, it shall, when submitting the List of Materials for a witness, indicate the

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<sup>8</sup> For private sessions, the public in the gallery is not removed, but no audio-visual broadcast is made to the gallery or outside the Court. Closed sessions are held entirely *in camera*.

information which it considers cannot be discussed in open session (topics, names, places, etc.). The calling party may supplement this information upon receipt of the emails containing the documents of the non-calling party.<sup>9</sup>

## **XI. PUBLIC VERSIONS OF FILINGS**

46. Pursuant to Regulation 23 *bis* of the Regulations, filings shall be, in principle, public and only marked as confidential, or *ex parte*, if duly justified. The parties shall file public- and confidential redacted versions together with any confidential or *ex parte* filing (if possible simultaneously and, in any case, no later than five days after the filing). Where the basis for the original classification no longer exists, the parties shall request reclassification or file lesser redacted versions, to ensure that their respective filings are as publicly available as possible.

## **XII. TRANSCRIPTS**

### ***(1) Public redacted versions of transcripts***

47. The Registry shall make public the redacted version of the transcripts within two working days of the notification of the edited confidential version. This public redacted version will exclude the private and/or closed sessions, as well as the passages for which the Chamber ordered that redactions be applied.

48. Thereafter, the calling party shall review the public redacted version of the transcript and propose a lesser redacted version within 21 days of notification by the Registry.<sup>10</sup> Discrete requests for additional redactions may also exceptionally be proposed in the context of this review.

49. Within 10 days of receiving the proposed lesser-redacted version or additional redactions, the other party may raise any objections. Should no objections to the proposed lesser-redacted version or additional redactions be made, the Registry shall file it into the record of the case with the appropriate document number designation.

### ***(2) Corrections to transcripts***

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<sup>9</sup> See paragraphs 27-28 above.

<sup>10</sup> When the English and French versions of a transcript are notified on different days, the English version of the two notification dates triggers this timeline.

50. The Registry shall inform the parties of the relevant procedure for preparing requests for verification of the transcripts. The Registry shall apply eventual corrections to the transcripts in accordance with its transcript verification methods.

### **XIII. IN-COURT REDACTIONS**

51. Requests for redactions pursuant to Regulation 21(8) of the Regulations shall be sent via email so as not to attract undue attention to any confidential information. The email should be sent to the Chamber's legal staff in the courtroom, copying the Court Officer and the other party. The request must clearly identify the word(s) to be redacted and the timestamps of the real-time transcript. Such requests must be made as soon as possible, and no later than 15 minutes after the information was revealed.

52. The other party has five minutes to object. In the absence of any objections, the redaction is presumed to have been approved and can be applied without an extra signature of the Presiding Judge. In case of disagreement, the Presiding Judge will rule on the request during the hearing or shortly thereafter.

53. This procedure applies unless otherwise ordered. The parties' agreement on any redaction is not binding on the Chamber. Moreover, due to the impracticability of making a detailed assessment within 30 minutes of an ongoing hearing, such redactions are also without prejudice to a revised assessment.

54. The Registry is instructed to publish uncontested redactions in periodic reports.

### **XIV. EMAIL DECISIONS**

55. The Chamber notes that, to expedite decisions or in order to react to urgent circumstances, the Chamber may issue rulings by way of email sent to the parties. In order to ensure that the principles of fairness and publicity are respected, the Chamber finds it appropriate to adopt a system whereby these email decisions are systematically put on the record of the case.

56. The Chamber therefore directs the Registry to file all email decisions on the case record in quarterly reports starting on 1 January 2022. The Registry shall simultaneously file public and confidential versions of these reports. When a decision includes a chain of emails, these emails shall also be filed into the record of the case.

57. Parties are also instructed to frame their email submissions in a way that makes their publication possible. In exceptional circumstances, when emails cannot be made public at all, the sender shall indicate this clearly in the subject line of the email.<sup>11</sup> Further, the Registry is instructed to apply the following redactions: i) names of Chambers staff members, where applicable; ii) names of Registry staff members, if deemed necessary by the Registry; and iii) any personal email address or other private or personal information. The Registry shall consult the parties on the redactions applied. In case of disagreement, the Chamber will rule.

58. The Chamber will provide the Registry with the email decisions issued up to this day so that they can be put on the case record. Going forward, the Chamber will copy the Registry in any email decision to be published.

**FOR THESE REASONS, THE CHAMBER HEREBY**

**ADOPTS** the aforementioned directions concerning the conduct of proceedings; and

**ADOPTS** the protocol on witness preparation as attached in Annex A.

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



**Judge Miatta Maria Samba**

Dated 7 October 2021

At The Hague, The Netherlands

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<sup>11</sup> In this case, the sender should indicate in the email 'Not for public record'.