

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/09-01/20**  
Date: **12 November 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-redacted**

**Decision on the Prosecution Request for Delayed Disclosure and Variation of  
Time Limits with Regard to a Prosecution Witness**

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

**The Office of the Prosecutor**

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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**

**The Office of Public Counsel  
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**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

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**Victims and Witnesses Unit**

Mr Nigel Verrill

**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 67(1)(b) of the Rome Statute (the ‘Statute’) and Regulation 35 of the Regulations of the Court (the ‘Regulations’), issues this ‘Decision on the Prosecution Request for Delayed Disclosure and Variation of Time Limits with Regard to a Prosecution Witness’.

## **I. PROCEDURAL HISTORY AND SUBMISSIONS**

1. On 30 September 2021, the Chamber issued a decision setting the date for the commencement of trial and set a series of deadlines in the run-up to the start of the trial.<sup>1</sup> Therein, the Chamber fixed the deadline for the disclosure of all evidence and material on which the Office of the Prosecutor (the ‘Prosecution’) intends to rely on at trial (the ‘Disclosure Deadline’), the list of all items it plans to submit as evidence during the trial and the list of Prosecution witnesses (the ‘List of Witnesses’) for 15 November 2021 (the ‘15 November Deadline’).<sup>2</sup>

2. On 10 November 2021, the Prosecution filed a request seeking an extension of time of one month, to 15 December 2021, to disclose the identity of a Prosecution witness (the ‘Witness’), to disclose the Witness’s written statement to the Defence and add the Witness to the List of Witnesses, if circumstances permit (the ‘Request’).<sup>3</sup>

3. The Prosecution explains that it interviewed the Witness [REDACTED]. After initially agreeing to appear as a Prosecution witness, the person informed the Prosecution on [REDACTED], that the Witness no longer wishes to cooperate with the Prosecution.<sup>4</sup>

4. The Prosecution re-established contact with the Witness and managed to agree to meet with the Witness in [REDACTED], however after the expiration of the 15 November Deadline. Only after having talked to the Witness, will the Prosecution be in a position to determine whether the Witness will cooperate and whether it wants to

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<sup>1</sup> Decision Setting the Commencement Date of the Trial and Related Deadlines, [ICC-01/09-01/20-185](#).

<sup>2</sup> [ICC-01/09-01/20-185](#), p. 9.

<sup>3</sup> Prosecution’s Request pursuant to article 68 and regulation 35 for delayed disclosure and variation of time limits related to Prosecution Witness P-0729, ICC-01/09-01/20-216-Conf-Exp with confidential *ex parte*, Prosecution and VWU only, annexes A and B, ICC-01/09-01/20-216-Conf-Exp-AnxA and ICC-01/09-01/20-216-Conf-Exp-AnxB. A confidential redacted version was filed on the same day, ICC-01/09-01/20-216-Conf-Red. A public-redacted version was filed on 12 November 2021, ICC-01/09-01/20-216-Red2.

<sup>4</sup> Request, ICC-01/09-01/20-216-Conf-Red, para. 11.

add the Witness to its List of Witnesses. Accordingly, the Prosecution requests that the deadline to put the Witness on the List of Witnesses, the Disclosure Deadline for the items related to the Witness and the disclosure of the identity of the Witness to the Defence is extended to 15 December 2021.<sup>5</sup>

5. On 11 November 2021, the Defence provided its response to the Request.<sup>6</sup> The Defence submits that it leaves it to the discretion of the Chamber whether to grant the Request and, if so, for how long.

## II. ANALYSIS

6. The Chamber notes that pursuant to Regulation 35(2) of the Regulations a chamber may extend a time limit if good cause is shown.

7. As the first consideration, the Chamber notes that the Prosecution first spoke to the Witness in September 2021 and conducted the interview several weeks later.<sup>7</sup>

8. The Chamber is aware that the Prosecution has the possibility to continue its investigations, even after the confirmation of the charges.<sup>8</sup> However, when doing so, the Prosecution must take into consideration that the possibility of adding new evidence is limited by the start date of the trial and the necessary related deadlines concerning disclosure, revelation of the identities of its witnesses to the Defence or submissions of the items it intends to rely on at trial.

9. The Chamber recognises that the reason for the delay, as described by the Prosecution,<sup>9</sup> was not directly caused by the Prosecution, nor was it within its power to immediately overcome the problems it encountered. However, when witnesses are only contacted for the first time during the preparatory phase of the trial proceedings and the Prosecution therefore attempts to follow completely new investigative leads, it must accept the risk that there may not be sufficient time to deal with all eventualities that could delay its investigations. Whilst the Prosecution has the right to continue

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<sup>5</sup> Request, ICC-01/09-01/20-216-Conf-Red, para. 28.

<sup>6</sup> Email of the Defence to the Chamber, 11 November 2021 at 11:24.

<sup>7</sup> Request, ICC-01/09-01/20-216-Conf-Exp, para. 18.

<sup>8</sup> Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 \(2\) and \(4\) of the Rules of Procedure and Evidence"](#), 13 October 2006, ICC-01/04-01/06-568, paras 49-56.

<sup>9</sup> Request, ICC-01/09-01/20-216-Conf-Red, para. 19.

investigating post-confirmation and even to undertake new investigative steps, it is not entitled to complete all investigations that were commenced before the start of the trial.

10. This is not to say that an extension of the time limit can never be granted to allow the Prosecution to finalise specific investigative measures. However, the Prosecution fails to submit any explanation as to why it contacted the Witness so late in the proceedings or why it was not possible to do so earlier. Nor does the Prosecution provide any other ground that could justify an extension despite the fact that the current obstacles it faces are almost entirely due to the fact that it initiated contact with the Witness at such a late stage.

11. The Chamber's second consideration relates to the specific reasons the Prosecution invokes for seeking an extension of time. At this point in time, the Prosecution decision on whether to rely on evidence provided by the Witness is uncertain and relies on several factors. The Prosecution states that it is scheduled to meet the Witness after the disclosure deadline. The purpose for this meeting is that the Witness is currently unwilling to continue cooperating with the Prosecution and the Prosecution wishes to make a final attempt to change the Witness's mind. However, even if this succeeds, the Prosecution does not seem to be in a position to guarantee that the necessary protective measures can be implemented by 15 December 2021, in which case the Prosecution concedes that it would not be able to rely on the Witness in this case either.<sup>10</sup> In other words, even if the Chamber were to grant the extension, it would still be entirely speculative whether this would allow the Prosecution to call the Witness.

12. In sum, taking into account the Prosecution's own contribution to the problem it now faces as well as the entirely speculative nature of the proposed potential solution, the Chamber is of the view that the Prosecution has failed to show good cause to extend the deadlines. Accordingly, the Chamber rejects the Request.

13. Irrespective of the denial to grant the Request, the Chamber notes that the obligations arising from Article 68(1) of the Statute continue to exist. The Prosecution

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<sup>10</sup> Request, ICC-01/09-01/20-216-Conf-Red, para. 26.


is instructed to continue liaising and cooperating with the Victim and Witnesses Unit in order to ensure the Witness's safety and well-being.

**FOR THESE REASONS, THE CHAMBER HEREBY**

**REJECTS** the Request; and

**INSTRUCTS** the Prosecution to proceed in accordance with paragraph 13 above.

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

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

**Judge Miatta Maria Samba**

Dated 12 November 2021

At The Hague, The Netherlands