

**Cour
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**International
Criminal
Court**

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Date: **14 December 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 the Prosecution's Supplementary Request under Regulation 35 to
add Updated Transcripts and Translations**

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 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’s Supplementary Request under Regulation 35 to add Updated Transcripts and Translations’.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 30 September 2021, the Chamber issued a decision on the commencement of trial and set a series of deadlines.¹ 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 at trial (the ‘Disclosure Deadline’) and the list of all items it plans to submit as evidence during the trial (the ‘List of Evidence’) for 15 November 2021.²

2. On 8 November 2021, the Prosecution filed a request seeking an extension of time to disclose a certain number of items after the Disclosure Deadline (the ‘First Extension Request’).³ The First Extension Request related to, *inter alia*, the Prosecution’s efforts to technically improve the quality of several audio files.⁴ On 10 November 2021, the Chamber granted the First Extension Request.⁵

3. On 10 December 2021, the Prosecution filed a supplementary request seeking a further variation of the Disclosure Deadline until 13 December 2021 (the ‘Supplementary Request’).⁶ Specifically, the Supplementary Request seeks: (i) the addition of a limited number of revised transcriptions and translations of recently enhanced audio recordings to the List of Evidence (the ‘Additional Material’); and (ii)

¹ [Decision Setting the Commencement Date of the Trial and Related Deadlines](#), 30 September 2021, ICC-01/09-01/20-185.

² [Decision Setting the Commencement Date of the Trial and Related Deadlines](#), 30 September 2021, ICC-01/09-01/20-185, p. 9.

³ Prosecution’s Regulation 35 Request for Variation of the Disclosure Deadline for a Limited Number of Transcriptions and Translations, 8 November 2021, ICC-01/09-01/20-212-Conf (the ‘First Extension Request’). A public-redacted version was filed on the same day ([ICC-01/09-01/20-212-Red](#)).

⁴ First Extension Request, para 2.

⁵ [Decision on the Prosecution Request for Extension of Time To Disclose Certain Transcripts and Translations](#), 10 December 2021, ICC-01/09-01/20-215.

⁶ [Prosecution’s supplementary request under regulation 35 to add updated transcriptions and translations to its List of Evidence and to amend its rule 68\(2\)\(d\) request related to Witness P-0495](#), 10 December 2021, ICC-01-09-01/20-244, para. 2 (the ‘Supplementary Request’).

the substitution of the Additional Material for the previous versions listed as ‘associated material’ in Annex A of the Prosecution’s Request for the introduction of the prior recorded testimony of Witness P-0495 pursuant to Rule 68(2)(d) (the ‘Rule 68(2)(d) Request’⁷).⁸

4. In the Supplementary Request, the Prosecution explains that one item of enhanced recording (the ‘Omitted Item’) was omitted from the original transmission to the Language Services Unit (the ‘LSU’) and thus was not included in the First Extension Request.⁹ The Omitted Item was identified on 26 November 2021 and sent to the LSU for urgent processing.¹⁰ The resulting revised transcriptions and translations were subsequently registered on 6 December 2021.¹¹

5. The Prosecution submits that the Omitted Item and resultant Additional Material were the result of an ‘oversight’ and ought to have been included in the First Extension Request.¹² The Prosecution notes that the Additional Material which forms the subject of its Supplementary Request ‘is very limited in scope and content’ with the relevant original audio item and all existing transcripts and translations having been disclosed in full to the Defence in January 2021 (with the enhanced recording disclosed on 10 November 2021).¹³

6. The Prosecution further submits that the duplicative nature of the Additional Material means an extension to the Disclosure Deadline will not unduly prejudice the rights of the Defence to have adequate preparation time for their defence.¹⁴ Further, the Prosecution avers that ensuring the most complete and accurate record of the relevant evidence is available is in the ‘interests of all Parties’ and ‘the interests of justice and fairness to the witnesses who may be questioned on the basis of the material’.¹⁵

⁷ Prosecution’s request for the introduction of the prior recorded testimony of Witness P-0495 pursuant to rule 68(2)(d), 22 October 2021, ICC-01/09-01/20-196-Conf (the ‘Rule 68(2)(d) Request’). A public redacted version was notified on 27 October 2021 ([ICC-01/09-01/20-196-Red](#)).

⁸ Supplementary Request, para. 2.

⁹ Supplementary Request, para. 5.

¹⁰ Supplementary Request, para. 5.

¹¹ Supplementary Request, para. 5.

¹² Supplementary Request, paras 5 and 8.

¹³ Supplementary Request paras 9-10.

¹⁴ Supplementary Request para. 11.

¹⁵ Supplementary Request para. 12.

7. On 13 December 2021, the Defence notified the Chamber that it defers to the Chamber's discretion to rule on the Supplementary Request.¹⁶

II. ANALYSIS

8. Pursuant to Regulation 35(2) of the Regulations, the Chamber may extend a time limit if good cause is shown. The Chamber notes that the Supplementary Request was filed after the lapse of the Disclosure Deadline. In such circumstances where a time limit has lapsed, Regulation 35(2) permits an extension only if the party seeking the extension can 'demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control'.

9. In assessing whether to grant an extension after a time limit has elapsed, the Chamber finds that the Prosecution is required to demonstrate the 'exceptional circumstances'¹⁷ which prevented it from filing its application on time pursuant to Regulation 35(2) of the Regulations. It should be emphasised that the last sentence of Regulation 35(2) 'provides a strict standard affording only a few exceptions.'¹⁸

10. Notwithstanding the above, even in circumstances where the criteria of Regulation 35 are not met, the Chamber is cognisant that it may still grant an extension of time if it is in the interests of justice to do so.¹⁹

11. The Prosecution's error was discovered on 26 November 2021 and the relevant material was sent for urgent processing by the LSU. The resulting revised transcriptions and translations were registered on 6 December 2021 and the Prosecution filed its Supplementary Request four days later on 10 December 2021. The Chamber notes the Prosecution's submission that it acted 'as expeditiously as possible' upon discovery of the error.²⁰ Although the Chamber is of the view that the Prosecution's inability to file

¹⁶ Email from the Defence to the Chamber, dated 13 December 2021 at 17:07.

¹⁷ See Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Reasons for the "Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007" issued on 16 February 2007](#), 21 February 2007, ICC-01/04-01/06-834, para. 9.

¹⁸ Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Decision on the Prosecution requests for variation of the time limit for disclosure of certain documents](#), 18 August 2015, ICC-02/11-01/15-183-Red, para. 19.

¹⁹ Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, [Decision on in-court protective measures for Witness D-0243](#), 1 December 2017, ICC-01/04-02/06-2136, para. 7.

²⁰ Supplementary Request, para. 8.

the request for variation of the time limit is entirely due to its own lack of diligence, it accepts the Prosecution's explanation that the oversight was only discovered after the lapsing of the Disclosure Deadline. The Chamber also has no reason to question the Prosecution's submission that it acted 'as expeditiously as possible' upon discovery of the error.²¹

12. The Chamber further acknowledges that the Supplementary Request does not concern completely new material and that the original audio recording as well as previous versions of the transcription and translation are already available to the Defence.²² The Chamber further notes that the Additional Material in question amounts to a total of four pages of transcription and four pages of translation (excluding cover pages).²³ Therefore, the Chamber is of the view that any prejudice to the Defence is minimal and, in any event, the scope of the Additional Material is limited enough to enable a relatively quick analysis of any new information following its disclosure.

13. The Chamber further agrees that the interests of justice are best served through the availability of the most accurate and complete record of the evidence. Accordingly, in this instance, the Chamber finds it is in the interests of justice to grant the Supplementary Request notwithstanding the lapse in the time limit.

²¹ Supplementary Request, para. 8.

²² Supplementary Request, para. 10.

²³ Supplementary Request, para. 9.

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the Supplementary Request; and

VARIES the deadline to substitute the Associated Material for the previous versions listed as ‘associated material’ in Annex A of the Rule 68(2)(d) Request until 15 December 2021.

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 14 December 2021

At The Hague, The Netherlands