

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **15 March 2022**

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 Second Request to Introduce Evidence Other than
Through a Witness**

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 Articles 64(2), 64(9) and 69 of the Rome Statute (the ‘Statute’) and Rules 63 and 64 of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Prosecution’s Second Request to Introduce Evidence Other than Through a Witness’.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 2 February 2022, the Office of the Prosecutor (the ‘Prosecution’) filed a request to submit 66 items of evidence (the ‘Tendered Evidence’) other than through a witness (the ‘Request’).¹ The Prosecution explains that it has grouped the Tendered Evidence into three categories: (i) ‘[d]ocuments associated with statements of Prosecution trial witnesses (including the *Ruto and Sang* case)’; (ii) ‘[l]egal documents’; and (iii) ‘([s]ocial) media articles and footage’.²

2. The Prosecution submits that the Tendered Evidence is ‘*prima facie* relevant and probative of material issues at trial’³ and that the ‘introduction of all items [...] does not cause any undue prejudice’⁴ with the ‘Tendered Evidence’s probative value outweigh[ing] any prejudicial effect to a fair trial’.⁵ The Prosecution further informs the Chamber that, save for six items, the Defence opposes the introduction of the Tendered Evidence.⁶

3. On 14 February 2022, the Defence filed its response to the Request (the ‘Response’).⁷ The Defence opposes the introduction of items 1-5, 8-10, 12-14, 16-32 and 36-65 of the Tendered Evidence.⁸ In addition to making specific submissions regarding the opposed items,⁹ which the Chamber will have regard to below, the

¹ Prosecution’s Second Bar Table Motion, 2 February 2022, ICC-01/09-01/20-274-Conf (the ‘Request’) with Confidential Annex A (ICC-01/09-01/20-274-Conf-AnxA). A public redacted version of the Request was filed on 3 February 2022 ([ICC-01/09-01/20-274-Red](#)).

² [Request](#), para. 2.

³ [Request](#), para. 3. *See also*, paras 17-23.

⁴ [Request](#), para. 24.

⁵ [Request](#), para. 24.

⁶ [Request](#), para. 5. *See also*, Annex A.

⁷ Response to the Prosecution’s Second Bar Table Motion, 14 February 2022, ICC-01/09-01/20-285-Conf (the ‘Response’). A public redacted version was filed on 18 February 2022 ([ICC-01/09-01/20-285-Red](#)).

⁸ [Response](#), page 11.

⁹ [Response](#), paras 4-44.

Defence submits generally that the Prosecution ‘fails to explain how the documents it seeks to admit are relevant to any material fact in the Confirmation Decision or how these items make any factual propositions more or less probable.’¹⁰ In addition, the Defence notes that it ‘will have no opportunity to examine the authors of the documents to test their authenticity and reliability’ and that the ‘probative value of these documents is substantially outweighed by their prejudicial effect.’¹¹

II. ANALYSIS

A. Preliminary Issue: Addendum to the First Request

4. At the outset, the Chamber takes note that on 25 February 2022, the Prosecution filed an addendum¹² to its first request to introduce evidence other than through a witness¹³ (the ‘Addendum to the First Request’ and ‘First Request to Introduce Evidence Other than Through a Witness’ respectively), the latter of which the Chamber ruled upon on 11 February 2022 (the ‘Decision on the First Request to Introduce Evidence Other than Through a Witness’).¹⁴ On 7 March 2022, the Defence informed the Chamber that it does not intend to file a response to the Addendum to the First Request and leaves the matter to the Chamber’s discretion.¹⁵

5. In the Addendum to the First Request the Prosecution seeks ‘to formally submit into the record of the case the portions of the audio-visual files and associated transcripts of the Accused’s statement that were originally excluded from the [First Request to Introduce Evidence Other than Through a Witness] as they concerned audio-recordings [...] which the Trial Chamber had not yet adjudicated.’¹⁶

¹⁰ [Response](#), para. 3.

¹¹ [Response](#), para. 3.

¹² [Addendum to Prosecution’s First Bar Table Motion](#), 25 February 2022, ICC-01/09-01/20-293 (the ‘Addendum to the First Request’).

¹³ Prosecution’s First Bar Table Motion, 19 January 2022, ICC-1/09-01/20-261-Conf (the ‘First Request to Introduce Evidence Other than Through a Witness’) with Confidential Annex A (ICC-01/09-01/20-261-Conf-AnxA). A public redacted version was filed simultaneously ([ICC-01/09-01/20-261-Red](#)).

¹⁴ Decision on the Prosecution’s First Request to Introduce Evidence Other than Through a Witness, 11 February 2022, ICC-01/09-01/20-282 (the ‘Decision on the First Request to Introduce Evidence Other than Through a Witness’). A public redacted version was filed simultaneously ([ICC-01/09-01/20-282-Red](#)).

¹⁵ Email from the Defence to the Chamber dated 7 March 2022, at 16:21.

¹⁶ [Addendum to the First Request](#), para. 1.

6. Although the Chamber observes that the Prosecution should have filed a new request since it cannot file an ‘addendum’ to a motion that has already been ruled upon, for the sake of consolidation, the Chamber will address the Addendum to the First Request in the present decision.

7. In light of the Chamber’s ruling in the Decision on the Request to Exclude Audio Recordings Pursuant to Article 69(7) of the Statute,¹⁷ combined with the fact that the Chamber has formally recognised the Accused’s statement and related material as submitted in the Decision on the First Request to Introduce Evidence Other than Through a Witness,¹⁸ and the lack of opposition from the Defence,¹⁹ the Chamber grants the motion. Accordingly, it recognises as formally submitted the portions of the audio visual files and associated transcripts of the Accused’s statement that form part of the Addendum to the First Request. These items submitted are: KEN-OTP-0159-0582 (Track 03) at 00:46:12 to 00:46:20, at 00:46:47 to 00:46:55, 00:47:50 to 00:47:58; 00:52:53 to 00:53:06; 00:54:29 to 00:54:43; and KEN-OTP-0159-0766, from p. 0788, ln. 722, to p. 0792, ln. 886; KEN-OTP-0159-0795, from p. 0796, ln. 20, to p. 0802, ln. 216; from p. 0803, lns. 253-262; from p. 0807, lns. 386-433.²⁰

B. Analysis of the Request

8. The Chamber recalls its approach on the submission of evidence as set out in the Directions on the Conduct of the Proceedings,²¹ as well as the Decision on the First Request to Introduce Evidence Other than Through a Witness.²² As set out in those filings, the reasoning of which the Chamber adopts for the purposes of adjudicating the Request, the Chamber will recognise the submission of items of evidence 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

¹⁷ Decision on the Request to Exclude Audio Recordings Pursuant to Article 69(7) of the Statute, 14 February 2022, ICC-01/09-01/20-284-Conf-Exp. A confidential redacted version was filed simultaneously (ICC-01/09-01/20-284-Conf-Red). A public redacted version was filed on 18 February 2022 ([ICC-01/09-01/20-284-Red2](#)).

¹⁸ [Decision on the First Request to Introduce Evidence Other than Through a Witness](#), disposition.

¹⁹ Email from the Defence to the Chamber dated 7 March 2022, at 16:21.

²⁰ [Addendum to the First Request](#), para. 1, fn 3.

²¹ [Directions on the Conduct of the Proceedings](#), 7 October 2021, ICC-01/09-01/20-189, paras 11-13, 37.

²² [Decision on the First Request to Introduce Evidence Other than Through a Witness](#), paras 2-5.

deciding on the guilt or innocence of the accused in its judgment pursuant to Article 74 of the Statute.

9. In respect of the six items²³ set out in Annex A to the Request, to which the Prosecution indicates that the Defence consents to submission,²⁴ the Chamber recognises these items as formally submitted. In addition, the Chamber recognises as formally submitted items 6²⁵ and 7²⁶ of the Tendered Evidence as the Defence has not made submissions with respect to relevance, probative value or prejudice, nor has it formally requested in the Response that they be excluded.

1. Category A: Documents associated with Statements of Prosecution Trial witnesses (including Ruto and Sang witnesses) (Items 1 to 30 of the Annex)

10. In Category A the Defence makes specific reference to 4 items of evidence²⁷ which, in its view, should be introduced through the witnesses appearing at trial.²⁸ The Chamber notes that the witnesses in question have now testified and neither party sought submission of these items of evidence through the relevant witnesses. In any event, the Chamber recalls that at this stage of the proceedings evidence is only deemed submitted and questions of probative value will be determined as part of its 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. Accordingly, the Chamber takes note of the Defence's submissions and recognises these 4 items of evidence as formally submitted.

11. Turning to the other items in this category, first, the Chamber notes that item 1 appears to constitute prior recorded testimony for the purposes of Rule 68 of the Rules. The Chamber recalls that the definition of prior recorded testimony is broad.²⁹ When

²³ KEN-OTP-0150-0345 (Item 11 of Annex A); KEN-OTP-0147-1590-R01 (Item 15 of Annex A); KEN-OTP-0093-0871 (Item 33 of Annex A); KEN-OTP-0093-1308 (Item 34 of Annex A); KEN-OTP-0001-0364 (Item 35 of Annex A); KEN-OTP-0033-0002 (Item 66 of Annex A).

²⁴ The Chamber notes that the Defence in the Response does not take issue with the Prosecution's indication in this regard.

²⁵ KEN-OTP-0047-0273.

²⁶ KEN-OTP-0145-0550.

²⁷ KEN-OTP-0082-0262 (Item 8 of Annex A); KEN-OTP-0124-0293 (Item 9 of Annex A); KEN-OTP-0107-0287 (Item 10 of Annex A); and KEN-OTP-0108-0180 (Item 18 of Annex A).

²⁸ [Response](#), paras 3, 8, 9, 15.

²⁹ See, Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on Prosecution Rule

discussing the question of whether a statement can be considered prior recorded testimony ‘the person must understand, when providing his or her statement, “that he or she is providing information which may be relied upon in the context of legal proceedings.”’³⁰ In connection with this, the Chamber notes that not every conversation a person has or every communication provided by the person qualifies as ‘testimony’ - it is rather only those where persons are questioned in their capacity as witnesses in the context of or in anticipation of legal proceedings.³¹ That being said, the Chamber considers that Rule 68 of the Rules is only applicable in cases where the tendering party wishes to adduce the prior recorded testimony for the truth of its contents.³²

12. The Chamber observes that the Prosecution seeks to submit item 1 for the purpose of demonstrating a source of attribution for certain telephone numbers.³³ Accordingly, the Prosecution seeks to submit this statement for the truth of its contents. As a result, this document must be submitted through the procedures set out in Rule 68 of the Rules and therefore the Chamber does not recognise this document as formally submitted.

13. In respect of the remaining items in this category, the Chamber notes that the Defence makes a number of submissions in respect to items 2, 3, 4, 5, 13, 14, 16 and 21-30 to the effect that these items relate to witnesses who are not testifying in the present case and that the probative value of these items of evidence is outweighed by their prejudicial effect.³⁴ Furthermore, the Defence makes submissions as to relevance in respect of items 2, 3, 12, 14, 17, noting, *inter alia*, that the Prosecution fails to explain how these documents are relevant to charges in the present case.³⁵ As to items 5, 12, 14 and 17 the Chamber notes that the Defence makes submissions contesting the factual inferences the Prosecution seeks to draw from these particular items.³⁶

14. In respect of items 19-20, these items relate to reports and analyses of P-0397’s mobile phone.³⁷ The Defence argues that the probative value of these items is

68(2) and (3) Requests, 11 November 2015, ICC-01/05-01/13-1478-Conf, (*Bemba et al* Rule 68 Decision), para. 31 and references therein. A corrected public redacted version was filed on 12 November 2015 ([ICC-01/05-01/13-1478-Red-Corr](#)).

³⁰ [Bemba et al Rule 68 Decision](#), para. 32.

³¹ [Bemba et al Rule 68 Decision](#), para. 32.

³² [Bemba et al Rule 68 Decision](#), para. 34.

³³ [Request](#), Annex A, item 1.

³⁴ [Response](#), paras 5-7, 11-13, 18.

³⁵ [Response](#), paras 5, 10, 12, 14.

³⁶ [Response](#), paras 7, 10, 12, 14.

³⁷ [Response](#), paras 16-17.

substantially outweighed by their prejudicial effect because it will not have an opportunity to examine P-0397.³⁸ Similarly, the Defence avers that item 19, which is a forensic report on the extraction of P-0397's mobile phone, was submitted late because it should have been submitted with the Rule 68 application for the admission of P-0397's prior recorded testimony.³⁹ The Chamber is of the view that this report does not constitute prior recorded testimony for the purposes of Rule 68 of the Rules. This is due to the fact that this report has no testimonial content and merely details the results of the extraction of P-0397's mobile phone, the latter of which the Chamber has already recognised as submitted in its decision allowing the introduction of P-0397's prior recorded testimony under Rule 68(2)(c) of the Rules.

15. In any event, the Chamber takes full notice of both Parties' submissions in respect of all the contested items in this category of material. The Chamber sees no reason to exceptionally consider these submissions and objections at this point in time and, in line with the approach detailed above, defers their consideration until the judgment. Indeed the Chamber is convinced that consideration thereof will be better rendered in light of the entirety of the evidence brought before it.⁴⁰ Accordingly, the Chamber recognises items 2-30 as formally submitted.

2. Category B: Legal Documents (Items 31 to 43 of the Annex)

16. In Category B the Prosecution seeks the submission of 10 contested items.⁴¹ First, in relation to item 31, the Chamber notes that this document is a witness's 'record of evidence taken before the commission of inquiry into post-election violence (CIPEV)'.⁴² The Chamber agrees with the Defence that this constitutes this witness's testimony before the commission of inquiry,⁴³ which the Prosecution seeks to adduce for the truth of its contents.⁴⁴ This item therefore falls under the category of prior recorded testimony, and the Chamber finds that the Prosecution is barred from

³⁸ [Response](#), paras 16-17.

³⁹ [Response](#), para. 16.

⁴⁰ See, Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Decision on the Prosecution's fourth, fifth and sixth requests for the admission of evidence from the bar table](#), 23 February 2022, ICC-01/12-01/18-2127, para. 24.

⁴¹ [Request](#), Annex A, items 31-32, 36-43.

⁴² KEN-OTP-0007-0852.

⁴³ See, [Response](#), para. 19.

⁴⁴ See, [Request](#), Annex A, item 31.

submitting this document other than through the procedures set out in Rule 68 of the Rules. No application under Rule 68 of the Rules was submitted for this witness's prior recorded testimony, accordingly, the Chamber does not recognise item 31 as formally submitted.

17. In respect of item 42, while the Chamber agrees with the Defence that this item appears to be a copy of KEN-OTP-0145-0566,⁴⁵ item 42 appears to have different chain of custody, originating directly from the organisation in question rather than second hand through a witness. The Chamber will therefore recognise the submission of item 42.

18. The Chamber notes that in relation to item 43, the Defence has requested itself that it be recognised as formally submitted following P-0341's testimony.⁴⁶ It therefore considers the objections made in the Response to be moot.

19. In respect of items 36, 37-38, 39 the Defence submits that these documents relate to witnesses that are not Prosecution witnesses in the present case and are irrelevant to any material fact in the Confirmation Decision.⁴⁷ In respect of items 32, 40-41 the Defence submits that these items are irrelevant to the charges against the Accused.⁴⁸ Further, in respect of items 36 and 43 the Defence submits that the probative value of these items is substantially outweighed by their prejudicial effect.⁴⁹

20. As noted above, the Chamber takes full notice of both Parties' submissions and objections in respect of all the contested items in this category of material. However, in line with the Chamber's approach to the submission of evidence, full consideration of this material will be deferred until the judgment. Accordingly, the Chamber recognises contested items 32, 36-43 as formally submitted.

3. Category C: (Social) media articles and footage (Items 44 to 65 of the Annex)

21. In Category C the Prosecution seeks to submit 21 contested items.⁵⁰ In respect of items 45, 46, 48-51, 52, 55, 56, 57, 58, 60, 61, 62, 63 and 65 the Defence makes various

⁴⁵ See, [Response](#), para. 25.

⁴⁶ Email from the Defence to the Chamber dated 23 February 2022, at 18:26.

⁴⁷ [Response](#), paras 21-23.

⁴⁸ [Response](#), paras 20, 24.

⁴⁹ [Response](#), paras 21, 26.

⁵⁰ [Request](#), Annex A, items 44-65.

submissions to the effect that the Prosecution has failed to explain how these items are relevant to any material fact in the Confirmation Decision and/or relates to facts that fall outside the time frame of the charges.⁵¹ As to items 47, 48-51, 56, 59 and 64, the Defence avers that the probative value of these items is substantially outweighed by their prejudicial effect.⁵² Furthermore, in respect of items 44 and 55 the Defence argues that these items are unnecessarily cumulative of other evidence on the record of the case.⁵³ Finally, in respect of items 53-54 the Defence makes submissions contesting the inferences to be drawn from this particular material and the facts that the Prosecution seeks to establish from this evidence.⁵⁴

22. The Chamber takes full notice of the Parties' submissions in respect of all the contested items in this category of material. However, as with the above categories of material the Chamber considers that the submissions by the Parties relate to the standard evidentiary criteria which the Chamber will consider in the judgment. As a result, the Chamber recognises contested items 45-65 as formally submitted.

⁵¹ [Response](#), paras 28-29, 31-32, 34-37, 39-42, 44.

⁵² [Response](#), paras 30, 31, 35, 38, 43.

⁵³ [Response](#), paras 27, 34.

⁵⁴ [Response](#), para. 33.

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the Request in part;

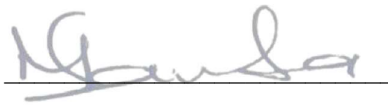
RECOGNISES as formally submitted all the items listed in ICC-01/09-01/20-274-Conf-AnxA, with the exception of items 1 (KEN-OTP-0028-1630), and 31 (KEN-OTP-0007-0852);

RECOGNISES as formally submitted the portions of the audio visual files and associated transcripts of the Accused's statement which are subject of [Addendum to the First Request](#), specifically: KEN-OTP-0159-0582 (Track 03) at 00:46:12 to 00:46:20, at 00:46:47 to 00:46:55, 00:47:50 to 00:47:58; 00:52:53 to 00:53:06; 00:54:29 to 00:54:43; and KEN-OTP-0159-0766, from p. 0788, ln. 722, to p. 0792, ln. 886; KEN-OTP-0159-0795, from p. 0796, ln. 20, to p. 0802, ln. 216; from p. 0803, lns. 253-262; from p. 0807, lns. 386-433; and

INSTRUCTS the Registry to ensure that the e-Court metadata reflects that the items recognised have been formally submitted to the Chamber;

REJECTS the remainder of the Request.

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



Judge Miatta Maria Samba

Dated 15 March 2022

At The Hague, The Netherlands