

**Cour
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**International
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Court**

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Date: **25 April 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 Third Request to Introduce Evidence Other than
Through a Witness and Ancillary Requests**

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’), Rules 63, 64 and 68 of the Rules of Procedure and Evidence (the ‘Rules’) and Regulation 35 of the Regulation of the Court (the ‘Regulations’), issues this ‘Decision on the Prosecution’s Third Request to Introduce Evidence Other than Through a Witness and Ancillary Requests’.

I. PROCEDURAL HISTORY

1. On 29 March 2022, the Office of the Prosecutor (the ‘Prosecution’) filed its official notice of the completion of its presentation of evidence.¹ Therein, it notified the Chamber that it intended to file a ‘further request to submit evidence from the Bar Table’.²

2. On 5 April 2022, the Prosecution filed its request (the ‘Request’).³ The Prosecution requests: (i) ‘a variation of the time limit to add five items to the list of items it plans to submit as evidence during the trial’ (the ‘First Sub-Request’);⁴ (ii) ‘the formal submission into evidence of eight items of evidence’ (the ‘Second Sub-Request’);⁵ and (iii) that the Chamber render a decision with respect to ‘outstanding items from the Prosecution’s application for the introduction of prior recorded testimony of Witness P-0397’ (the ‘Third Sub-Request’).⁶

3. On 13 April 2022, the Defence filed its response to the Request (the ‘Response’).⁷ With regard to the First Sub-Request, the Defence argues that ‘[n]o good cause has been shown to vary the time limits to add these late-disclosed materials to the [Prosecution] list of evidence’.⁸ Concerning the Second Sub-Request, it requests that the Chamber

¹ [Prosecution’s notice of completion of its presentation of evidence](#), 29 March 2022, ICC-01/09-01/20-314 (‘Prosecution notice of completion of evidence’).

² [Prosecution notice of completion of evidence](#), ICC-01/09-01/20-314, para. 2.

³ Prosecution’s Third Bar Table Motion and Ancillary Requests, with Confidential Annex A, 5 April 2022, ICC-01/09-01/20-319-Conf. A public redacted version was filed on 7 April 2022 ([ICC-01/09-01/20-319-Red](#)).

⁴ [Request](#), paras 1, 18-30.

⁵ [Request](#), paras 2, 9-17.

⁶ [Request](#), paras 7, 31-34.

⁷ Response to Prosecution’s Third Bar Table Motion and Ancillary Requests, 13 April 2022, ICC-01/09-01/20-321-Conf. A public redacted version was filed on 14 April 2022 ([ICC-01/09-01/20-321-Red](#)).

⁸ [Response](#), para. 11.

‘[deny] the admission of all items contained in the [Request]’.⁹ In respect of the Third Sub-Request, the Defence requests the Chamber to ‘be circumspect in according [the items forming part of the Third Sub-Request] any weight so as not to offend Mr. Gicheru’s fair trial right of confrontation.’¹⁰

II. ANALYSIS

A. Analysis of the First Sub-Request

4. In the First Sub-Request, the Prosecution ‘requests a variation of the time limit to add five items to its List of Evidence and to file an updated List of Evidence.’¹¹ Specifically, the relevant items comprise items 4-8 of Annex A of the Request.¹²

5. The Chamber recalls that pursuant to Regulation 35(2) of the Regulations, the Chamber may only grant an extension of time limit after the lapse of a time limit if the party seeking the extension can demonstrate that it was unable to file the application within the time limit for reasons outside his or her control.

6. In respect of items 4-7, the Prosecution submits that the necessity of adding these documents ‘arose as a result of the Defence’s cross-examination of P-0730’¹³ and comprise ‘call data records of phone numbers attributed to [Mr Gicheru] and SIMATWO respectively as well as an investigator’s report and annex by P-0730 providing relevant contextual information regarding the [call data records]’.¹⁴

7. The Prosecution submits that, during his cross-examination, it was put to P-0730 that ‘witnesses who had provided evidence regarding attempts to corruptly influence them were dishonest and unreliable.’¹⁵ In response, P-0730 referenced the call data records.¹⁶ Following P-0730’s testimony, the Prosecution explains that the Defence requested disclosure of the call data records.¹⁷ This prompted a request from the Prosecution for ‘P-0730 to clarify the basis for his recollections concerning the relevant

⁹ [Response](#), p. 9.

¹⁰ [Response](#), para. 23.

¹¹ [Request](#), para. 9.

¹² See [Request](#), Annex A.

¹³ [Request](#), para. 12. *P-0730 was questioned by the Defence on 7 and 8 March 2022.*

¹⁴ [Request](#), para. 12.

¹⁵ [Request](#), para. 12.

¹⁶ [Request](#), para. 13.

¹⁷ [Request](#), para. 13.

[call data records], which he then recorded in the form of an investigator’s report’.¹⁸ The Prosecution now requests to add this report along with the underlying call data records to its List of Evidence.¹⁹

8. In respect of item 8, the Prosecution notes that this is ‘an investigator’s report of an interview of P-0028 relevant to the attribution of phone numbers.’²⁰ The Prosecution submits that the addition of this item to its List of Evidence is necessary in light of a decision by the Chamber²¹ wherein the Chamber rejected the submission of a transcript which constituted prior recorded testimony.²² Consequently, the Prosecution requested one of the investigators who was present during the interview with the witness to produce a report on the interview and the information relevant to the Prosecution, which the Prosecution now seeks to add to its List of Evidence.²³

9. In the Response, the Defence submits, in respect of items 4-7, that the Prosecution ‘was or should have been aware that the call data records would be an issue likely to arise in cross-examination, yet failed to be due diligent in its disclosure obligations and preparing its list of evidence.’²⁴ In relation specifically to P-0730’s investigation report of 2 April 2022 (item 4)²⁵ and its corresponding annex (item 5)²⁶, the Defence submits that these documents are ‘highly prejudicial’ and is an attempt by P-0730 ‘to fill in gaps in his testimony’.²⁷ Furthermore, the Defence avers that item 8 constitutes ‘prior recorded testimony and must be submitted through Rule 68’.²⁸

10. First, the Chamber notes that the underlying call data records (items 6 and 7) date back to 2014 and relate to the Accused and an alleged member of the common plan. The Chamber is not persuaded that only following the cross-examination of P-0730 the ‘existence and significance of the [call data records]’ have been placed in issue.²⁹ In this regard, the Chamber finds, given the content of this material, that the Prosecution

¹⁸ [Request](#), para. 13.

¹⁹ [Request](#), para. 13.

²⁰ [Request](#), para. 15.

²¹ [Decision on the Prosecution’s Second Request to Introduce Evidence Other than Through a Witness](#), 15 March 2022, ICC-01/09-01/20-299, paras 11-12 and p. 11

²² [Request](#), para. 15.

²³ [Request](#), para. 16.

²⁴ [Request](#), para. 12.

²⁵ KEN-OTP-0160-1764 (item 4)

²⁶ KEN-OTP-0160-1770 (item 5)

²⁷ [Response](#), para. 15.

²⁸ [Response](#), para. 19.

²⁹ [Request](#), para. 14.

should have anticipated that this issue would have arisen during the course of cross-examination. Furthermore, the Chamber notes the late date of disclosure of these items to the Defence, which date back to 2014. Accordingly, the Chamber finds that the reasons for the late application for addition to the List of Evidence were not outside of the Prosecution's control. The request to add items 6 and 7 to the Prosecution's List of Evidence is therefore rejected.

11. In respect of items 4, 5 and 8, as will be discussed below, the Chamber finds that these items constitute prior recorded testimony for the purposes of Rule 68 of the Rules. Therefore – irrespective of whether a belated addition to the Prosecution's List of Evidence would be permitted – they cannot be introduced other than through a witness.

12. However, to avoid ambiguity, the Chamber clarifies that the criteria of Regulation 35(2) of the Regulations are also not fulfilled. Items 4 and 5 were created at the behest of the Prosecution³⁰ and – as discussed below – are meant to supplement P-0370's testimony. Equally, item 8 was also created at the Prosecution's request in order to replace an item which was rejected by the Chamber in a previous decision.³¹ Accordingly, these items do not constitute 'evidence gathered in the normal course of the investigation', as submitted by the Prosecution.³² Instead, these items were specifically requested and produced for the furtherance of its case strategy. The Chamber finds, considering the specific circumstances of the present case, that the choice of the Prosecution to produce these items does not constitute a reason outside of its control and does not justify an extension of the deadline.

B. Analysis of the Second Sub-Requests

13. In the Second Sub-Request, the Prosecution requests to submit 8 items of evidence other than through a witness (the 'Tendered Evidence').³³ It submits that the Tendered Evidence is *prima facie* relevant to issues at trial as it contains material that is 'relevant for the attribution of phone numbers and probative of contacts between the managers, including the Accused, intermediaries and associates of the witness

³⁰ [Request](#), para. 13.

³¹ [Request](#), paras 15-16.

³² [Request](#), para. 3.

³³ [Request](#), paras 1, 27-30; *See also*, Request, Annex A.

interference scheme.³⁴ Furthermore, the Prosecution avers that the Tendered Evidence has *prima facie* probative value as ‘[a]ll items contain sufficient indicia of reliability’³⁵ and that the introduction of the Tendered Evidence ‘does not cause any undue prejudice’ with the ‘probative value of these items outweigh[ing] any prejudicial effect’.³⁶

14. In the Response, the Defence opposes the introduction of the Tendered Evidence. Specifically, it submits that items 1-3 ‘should have been shown to the witnesses, or alternatively, submitted as prior recorded testimony under Rule 68(2)(b).’³⁷ The Defence makes similar submissions in respect of item 8, which it also argues constitutes prior recorded testimony and must be submitted through Rule 68 of the Rules.³⁸

15. As the Chamber has rejected the First Sub-Request in respect of items 6 and 7, the Chamber finds that Second Sub-Request in respect of these items must also be rejected. Accordingly, the Chamber does not recognise items 6 and 7 as formally submitted.³⁹

16. Turning to items 1-3, the Chamber is of the view that these constitute prior recorded testimony for the purposes of Rule 68 of the Rules. The Chamber notes that these forensic reports fall into a similar category as a report submitted as part of the Prosecution’s request pursuant to Rule 68(2)(b) of the Rules.⁴⁰ Specifically, the Chamber observes that these reports go further than just detailing the results of the extraction of the relevant mobile phones, and thus can be distinguished from another report previously deemed formally submitted by the Chamber.⁴¹ Rather, these reports have testimonial content in that they describe the methodology utilised and analyse the results of the extraction. Similarly, the Chamber notes that the reports are signed by the authors.

³⁴ [Request](#), para. 28.

³⁵ [Request](#), para. 29.

³⁶ [Request](#), para. 30.

³⁷ [Response](#), para. 21.

³⁸ [Response](#), para. 19.

³⁹ The same applies for items 4, 5 and 8. However, the Chamber finds it important to also clarify why these items cannot be tendered in the manner requested by the Prosecution – irrespective of Regulation 35 of the Regulations – and will therefore discuss them in more detail below.

⁴⁰ See KEN-OTP-0160-0045; [Decision on the Prosecution’s Request to Admit Prior Recorded Testimony under Rule 68\(2\)\(b\)](#), 15 December 2021, ICC-01/09-01/20-250-Red, paras 17-22.

⁴¹ See KEN-OTP-0130-0165-R01; [Decision on the Prosecution’s Second Request to Introduce Evidence Other than Through a Witness](#), 15 March 2022, ICC-01/09-01/20-299, para. 14.

17. Accordingly, the Chamber finds that Prosecution is barred from submitting items 1-3 other than through the procedures set out in Rule 68 of the Rules. Accordingly, items 1-3 are not recognised as formally submitted.

18. Furthermore, as alluded to above, the Chamber is of the view that items 4, 5 and 8 also constitute prior recorded testimony for the purposes of Rule 68 of the Rules.

19. In respect of items 4 and 5 the Prosecution notes that P-0730 produced his report (item 4) at the Prosecution's request in order 'to clarify the basis for his recollections'.⁴² The Chamber recalls its previous explanations as to what constitutes prior recorded testimony.⁴³ It was understood by P-0730 that the report authored by him may be relied upon in the context of legal proceedings (which is a determining factor for its qualification as prior recorded testimony) – this was the report's only purpose. This report is intended to supplement P-0730's in-court testimony. It clearly constitutes prior recorded testimony. The Prosecution cannot circumvent the end of the in-court testimony by requesting the witness to further elaborate on aspects of his or her testimony in a written filing and then subsequently tender those documents into evidence. Similarly, P-0730 created the annex of the report (item 5) during the production of the main report (item 4). It serves no purpose other than to complement the main report (item 4) by providing further explanation. Its admission would, therefore, also represent further elaboration on P-0730's in-court testimony. Therefore, it cannot be admitted.

20. Considering the above, the Chamber rejects the tendering of these two items as they are required to be submitted through the procedures set out in Rule 68 of the Rules. Accordingly, items 4 and 5 are not recognised as formally submitted.

21. In respect of item 8, the Chamber notes that this is an investigator's report about a witness interview which contains information relevant to the attribution of phone numbers. The Prosecution requested the author to produce the report, in order to replace

⁴² [Request](#), para. 13.

⁴³ Decision on the Prosecution's Second Request to Introduce Evidence Other than Through a Witness, 15 March 2022, ICC-01/09-01/20-299, para. 11.

the witness interview, the recognition of which as formally submitted, was rejected since it did not fulfil the necessary criteria of Rule 68 of the Rules.⁴⁴

22. As stated above,⁴⁵ the report was not produced in the ‘normal’ course of an investigation. Instead, it was created by the Prosecution for the sole purpose of being used in the current proceedings. In other words, to replace an item of evidence – the recognition of which was already rejected by this Chamber. By asking the author to ‘record [...] her observations of the contents of the witnesses contact list’⁴⁶ the Prosecution tries to replace one piece of prior recorded testimony with another. Therefore, this item must also be submitted through the procedures set out in Rule 68 of the Rules. Accordingly, item 8 is not recognised as formally submitted.

C. Analysis of the Third Sub-Request

23. In respect of the Third Sub-Request, the Prosecution notes that on 26 November 2021, ‘the Chamber partially granted the Prosecution’s Rule 68(2)(c) Request noting the ambiguity about the status of audio recordings of calls [...] and deferring its ruling on the admissibility of these items.’⁴⁷ Furthermore, the Prosecution avers that, whilst on 14 February 2022 ‘the Chamber rejected the Defence[’s] request to exclude the relevant audio recordings’, it did not rule on the submission of the ‘Outstanding Rule 68(2)(c) Request Items’.⁴⁸

24. In the Response, the Defence submits that ‘these items may be admissible pursuant to the decision on the Defence request to exclude audio-recordings’ but requests that the Chamber be ‘circumspect in according these items any weight so as not to offend Mr. Gicheru’s fair trial right of confrontation.’⁴⁹

25. The Chamber rejects the Prosecution’s submissions to the effect that it has not ruled on the relevant items that were originally deferred in its decision on the introduction of P-0397’s prior recorded testimony and associated material.⁵⁰ The

⁴⁴ [Request](#), paras 15 and 16.

⁴⁵ Para. 12 above.

⁴⁶ [Request](#), para. 16.

⁴⁷ [Request](#), para. 32.

⁴⁸ [Request](#), para. 33.

⁴⁹ [Response](#), para. 23.

⁵⁰ [Decision on the Prosecution’s Request to Admit Prior Recorded Testimony under Rule 68\(2\)\(c\)](#), 26 November 2021, ICC-01/09-01/20-235-Red, para. 32.

Chamber recalls the precise wording of its ‘Decision on the Request to Exclude Audio Recordings Pursuant to Article 69(7) of the Statute’ (the ‘Article 69(7) Decision’),⁵¹ which reads as follows: ‘[a]ccordingly, the Chamber therefore finds that the material sought to be excluded by the Defence is admissible.’⁵² The material sought to be excluded by the Defence, which comprised part of the subject matter of the Article 69(7) Decision, included the material to which the Prosecution now refers in relation to P-0397.⁵³ Accordingly, the Chamber has already ruled on the ‘Outstanding Rule 68(2)(c) Request Items’ and a further ruling is not required.

26. However, for the avoidance of doubt, in line with the Article 69(7) Decision, the relevant items⁵⁴ are recognised as formally submitted. In respect of the Defence’s submissions as to the weight to be afforded to this evidence, the Chamber takes note of the submissions but recalls that determinations as to weight will be made 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.

⁵¹ [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-Red2 (‘Article 69(7) Decision’). The public redacted version was filed on 18 February 2022.

⁵² [Article 69\(7\) Decision](#), para. 103.

⁵³ *See*, Confidential Annex A to Request to Exclude Audio-Recordings Collected in Violation of Part 9 of the Statute, 15 December 2021, ICC-01/09-01/20-249-AnxA, items 25, 111, 94, 26, 116, 99.

⁵⁴ KEN-OTP-0124-0018; KEN-OTP-0143-0173; KEN-OTP-0143-0185; KEN-OTP-0124-0019; KEN-OTP-0125-0045; KEN-OTP-0125-0248.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request.

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

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

Judge Miatta Maria Samba

Dated 25 April 2022

At The Hague, The Netherlands