

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **12 May 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 Defence 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:

**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  
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**The Office of Public Counsel  
for the Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**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(2), 64(9) and 69 of the Rome Statute (the ‘Statute’) and Rules 63, 64 and 68 of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Defence Request to Introduce Evidence Other than through a Witness’.

## **I. PROCEDURAL HISTORY & SUBMISSIONS**

1. On 25 April 2022, the Defence for Mr Gicheru filed a motion requesting ‘the admission of 74 documents through the bar table’ (the ‘Request’).<sup>1</sup> The Request contains seven categories of submitted material which correlate to seven witnesses called to testify *viva voce* by the Office of the Prosecutor (the ‘Prosecution’).<sup>2</sup>
2. The Defence submits in a general manner that all items are *prima facie* relevant, and probative in the sense that they relate to the credibility of the witnesses called by the Prosecution. Further it avers that any prejudice is outweighed by the probative value of the items.<sup>3</sup>
3. The Defence further states that evidence can be admitted after the testimony of a person in case that the witness was given sufficient opportunity to pronounce him- or herself on the content of the item.<sup>4</sup> With regard to the prejudice caused by the submission of such items, it argues that ‘the probative value of a document is not outweighed by any prejudice even where ‘at least a part of the content of the document is put to a witness’.<sup>5</sup> Lastly, the Defence argues that none of the prior recorded statements contained in the Annex of the Request are submitted for the truth of their contents.<sup>6</sup>
4. The Defence explains for each of the seven categories why it considers the items contained therein; (i) to be of relevance and probative value,<sup>7</sup> (ii) to possess sufficient

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<sup>1</sup> Defence Bar Table Motion, ICC-01/09-01/20-325-Conf with a confidential annex (the ‘Annex’), ICC-01/09-01/20-325-Conf-AnxA. A public-redacted version of the Request was filed on 28 March 2022, [ICC-01/09-01/20-325-Red](#).

<sup>2</sup> P-0800, P-0341, P-0274, P-0738, P-0516 and P-0739. *See*, Request, ICC-01/09-01/20-325-Conf, paras 16-43.

<sup>3</sup> [Request](#), ICC-01/09-01/20-325-Red, para. 15.

<sup>4</sup> [Request](#), ICC-01/09-01/20-325-Red, para. 13.

<sup>5</sup> [Request](#), ICC-01/09-01/20-325-Red, para. 13.

<sup>6</sup> [Request](#), ICC-01/09-01/20-325-Red, para. 15.

<sup>7</sup> [Request](#), ICC-01/09-01/20-325-Red, paras 17, 21, 25, 29, 33, 37 and 41.

authenticity<sup>8</sup> and (iii) to not be overly prejudicial – when weighed against their probative value – should they be recognised as formally submitted.<sup>9</sup> Additionally, in its annex it makes individual item-by-item submissions on relevance and probative value, as well as authenticity.

5. On 6 May 2022, the Prosecution submitted its response to the Request (the ‘Response’).<sup>10</sup> It explains that it opposes the submission of all but six items put forward by the Defence.<sup>11</sup>

6. The Prosecution argues that the remainder of the submitted material consists of two type of documents. Items which were previously rejected by the Chamber, because they either constitute prior recorded testimony (and do not fulfil the requirements of Rule 68 of the Rules) or because the Defence tried to submit them on occasion of the testimony of a witness (without having put the item in question to the person during his or her testimony).<sup>12</sup> The second category, according to the Prosecution, are items which were not submitted via the ‘relevant witness’ despite the fact that Defence had them in its possession at the time of testimony.<sup>13</sup>

## II. ANALYSIS

7. The Chamber recalls its prior decisions on similar requests by the Prosecution<sup>14</sup> and the explanation it provided to the parties concerning the Chamber’s approach to the submission of evidence in the current case.<sup>15</sup> The Chamber further recalls its email ruling on the parties’ requests on items put forward to be recognised as formally

<sup>8</sup> [Request](#), ICC-01/09-01/20-325-Red, paras 18, 22, 26, 30, 34, 38 and 42.

<sup>9</sup> [Request](#), ICC-01/09-01/20-325-Red, paras 19, 23, 27, 31, 35, 39 and 43.

<sup>10</sup> Prosecution’s Response to “Defence Bar Table Motion”, ICC-01/09-01/20-327. With confidential annex A, ICC-01/09-01/20-327-Conf-AnxA.

<sup>11</sup> Response, ICC-01/09-01/20-327, paras 1 and 11.

<sup>12</sup> Response, ICC-01/09-01/20-327, para. 2,

<sup>13</sup> Response, ICC-01/09-01/20-327, paras 2 and 5.

<sup>14</sup> Decision on the Prosecution’s First Request to Introduce Evidence Other than Through a Witness, 11 February 2022, ICC-01/09-01/20-282-Conf, a public-redacted version was filed on the same day, [ICC-01/09-01/20-282-Red](#); Decision on the Prosecution’s Second Request to Introduce Evidence Other than Through a Witness, 15 March 2022, [ICC-01/09-01/20-299](#); Decision on the Prosecution’s Third Request to Introduce Evidence Other than Through a Witness and Ancillary Requests, 25 April 2022, ICC-01/09-01/20-324.

<sup>15</sup> [ICC-01/09-01/20-282-Red](#), paras 2-5 and [ICC-01/09-01/20-299](#), para. 8. *See*, more generally : Directions on the Conduct of the Proceedings, 7 October 2022, ICC-01/09-01/20-189, paras 10-19.

submitted in relation to the witnesses who testified before the Chamber.<sup>16</sup> In these email decisions, the Chamber provided further explanations and guidance as to when items can be submitted and when – for instance – Rule 68 of the Rules bars the recognition as formally submitted.

*1. Unopposed items*

8. With regard to the six items put forward by the Defence to which the Prosecution does not object,<sup>17</sup> specifically the Chamber notes that the Prosecution agreed to the recognition as formally submitted of items 37<sup>18</sup> and 65<sup>19</sup> of the Annex.

9. These items are ‘witness clarification logs’<sup>20</sup> in which witnesses made comments on their prior recorded testimony appearing to testify before the Chamber. The documents contain statements made by a witness which were intended for legal proceedings. Since the whole purpose of this type of document is to complement and, where necessary, correct prior recorded testimony it needs to be viewed in connection with the relevant witness’s testimony.<sup>21</sup> As a result, these items constitute prior recorded testimony and will be discussed below with the remaining items falling under Rule 68 of the Rules.

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<sup>16</sup> Email from the Chamber to the parties, Decision on Submitted Materials for P-0800, 8 March 2022, at 15:20; Email from the Chamber to the parties, Decision on Submitted Materials for P-0341, 25 March 2022, at 11:08; Email from the Chamber to the parties, Decision on Submitted Materials for P-0613, 25 March 2022, at 11:17; Email from the Chamber to the parties, Decision on Submitted Materials for P-0274, 28 March 2022, at 15:05; Email from the Chamber to the parties, Decision on Submitted Materials for P-0738, 28 March 2022, at 15:06; Email from the Chamber to the parties, Decision on Submitted Materials for P-0730, 29 March 2022, at 13:55; Email from the Chamber to the parties, Decision on Submitted Materials for P-0516, 30 March 2022, at 14:36; Email from the Chamber to the parties, Decision on Submitted Materials for P-0739, 1 April 2022, at 9:22. These emails will be made public via a filing by the Registry, in due course, ICC-01/09-01/20-189, para. 17 iv).

<sup>17</sup> Items 37, 42, 45, and 63-65 of the Annex, ICC-01/09-01/20-325-Conf-AnxA.

<sup>18</sup> KEN-OTP-0160-1658.

<sup>19</sup> KEN-OTP-0160-1703.

<sup>20</sup> This is different from the ‘witness reading log’, item 63 which does not contain any substantial submission by the witness in question.

<sup>21</sup> The Chamber does not understand why the Prosecution does not oppose items 37 and 65, but objects to the recognition of the items to which these documents provide clarifications on. Additionally, in respect of item 48 – which is of similar nature – the Prosecution submits that it should be rejected since it constitutes prior recorded testimony.

10. For the remaining four items,<sup>22</sup> the Chamber finds that no provision in the Court’s statutory framework bars their submission. Accordingly, the Chamber recognises these documents as formally submitted.

## 2. *Prior recorded testimonies*

11. The Chamber notes that the Prosecution submits that item 41 of the Annex<sup>23</sup> constitutes prior recorded testimony.<sup>24</sup> The item in question is a ‘verbal complaint form’ in which a person submits to a national authority that he feels threatened and that he ‘would like to be protected’. While the person makes factual allegations, these submissions were not made by the person with the intention that they might be used or presented in legal proceedings. Rather, it constitutes a form of administrative or procedural document, where the person requesting assistance on matters concerning his security. Accordingly, the Chamber considers that item 41 does not constitute prior recorded testimony

12. With regard to the remainder of the items contained in the Request, the Chamber remarks, first, that a substantial number constitute prior recorded testimony.<sup>25</sup> The Chamber takes notes of the general explanation by the Defence that these items are not submitted ‘for the truth of its content’ and the further explanations in its Annex in the item-by-item comments, that the documents are ‘submitted for impeachment purposes, not for the truth of [their] contents’.<sup>26</sup>

13. The Chamber notes that the statutory framework of the Court does not explicitly recognise the notion of ‘impeachment purposes’, used by the Defence. Having considered the Request and the explanations provided in the Annex, the Chamber understands the Defence’s argument to be that – since the Defence intends to use an item of evidence in relation to the credibility of a witness – the item does not fall under the requirements of Rule 68 of the Rules. The Chamber notes that the statutory

<sup>22</sup> Item 42 (KEN-OTP-0086-0048), item 45 (KEN-OTP-0108-0192), item 63 (KEN-OTP-0148-0108-R01) and item 64 (KEN-OTP-0160-1699).

<sup>23</sup> KEN-OTP-0087-0098-R01.

<sup>24</sup> ICC-01/09-01/20-327-Conf-AnxA, page 32 and 33.

<sup>25</sup> As explained in paragraph 9 above, items 37 and 65 of the Annex also constitute prior recorded testimony and are therefore, despite the consent by the Prosecution, included in this discussion.

<sup>26</sup> [Request](#), ICC-01/09-01/20-325-Red, para. 15; Column 3 of items 15-20, 24-40, 48-49, 52-62 and 65-74 of the Annex, ICC-01/09-01/20-325-Conf-AnxA.

framework does not distinguish between the purpose for which an item of evidence is submitted by a party; neither Article 69 of the Statute nor Chapter 4, section 1 of the Rules<sup>27</sup> make such distinction.

14. In any case, the explanations provided in the Request by the Defence clearly show that the items are submitted in order to rely on the documents for their content. For instance, in respect of the first item in the Annex constituting prior recorded testimony, item 15, the Defence makes first reference to the specific aspects of the content of the testimony and explains then that it is relevant to the witness's credibility since it is 'probative of her motivations for providing statements' to the Prosecution.<sup>28</sup> In order to be probative, it is axiomatic that content of the statement is taken into account. The Defence makes the same submissions for all prior recorded statements put forward.<sup>29</sup>

15. Considering the above, the Chamber rejects the recognition as formally submitted of all items constituting prior recorded testimony.<sup>30</sup>

16. By way of further explanation, the Chamber notes that for some of the items which constitute prior recorded testimony the Defence only requests submission of specific parts (which it considers to be important for the witness's credibility). The Chamber notes that, in numerous instances, these parts were also put to the witness during his or her testimony before the Chamber. By way of example, for item 16 of the Annex, the Defence seeks submission of p. 63, line 8 to p. 64, line 14, which it considers as probative. During the witness's in court testimony, the Defence read out p. 63, line 23 to p. 64, line 7 verbatim and questioned the witness about it.<sup>31</sup> As previously explained to the Defence,<sup>32</sup> this information is therefore already in the record of the case.

### 3. *Remaining items*

<sup>27</sup> Section entitled 'Evidence', Rules 63 to 75 of the Rules.

<sup>28</sup> Annex, ICC-01/09-01/20-325-Conf-AnxA, pages 11 and 12.

<sup>29</sup> *See*, Annex of the Request, column 'relevance and probative value'. The Defence submits that the information contained in the documents is probative for: interactions with other witnesses and 'their relationships', motivations to provide statements to the Prosecution or even more generally for the 'reliability of [the witness's] testimony'.

<sup>30</sup> Items 15-20, 24-40, 48-49, 52-62 and 65-74 of the Annex.

<sup>31</sup> Transcript of hearing, 22 February 2022, ICC-01/09-01/20-T-057-CONF-Eng, p. 27, lines 2-19.

<sup>32</sup> Email from the Chamber to the parties, Decision on Submitted Materials for P-0613, 25 March 2022, at 11:17.

17. With regards to the items that do not constitute prior recorded testimony<sup>33</sup> the Chamber notes the submission by the Prosecution that some items were previously rejected by the Chamber and all items are related to witnesses to whom these items were not put during their testimony.<sup>34</sup> Specifically, the Prosecution argues two points. First, since the items were not put to the relevant witnesses for comments, their probative value are significantly reduced.<sup>35</sup> Second, because of this circumstance, the prejudice of admitting the items outweighs their probative value.<sup>36</sup>

18. The Chamber notes that for the items it previously rejected and which do not constitute prior recorded testimony, it specifically indicated that the Defence may request their submissions in a different manner<sup>37</sup> - which the Defence does now. The Chamber takes note of the Prosecution's submissions regarding the probative value and potential prejudice of the items. However, the Chamber recalls its prior jurisprudence in that it 'will only make a separate ruling on the admissibility of an item where there is a requirement within the statutory framework that mandates a decision on admissibility or when it considers it necessary for a fair and expeditious trial.'<sup>38</sup>

19. In the current circumstances the Chamber does not consider such a ruling necessary. Therefore, it will conduct the assessment of the relevance, probative value and potential prejudice of each item in its judgment pursuant to Article 74 of the Statute. Accordingly, the Chamber recognises these item<sup>39</sup> as formally submitted.

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<sup>33</sup> Items 1-14, 21-23, 41-47, 50-51 and 63-64 of the Annex.

<sup>34</sup> Response, ICC-01/09-01/20-327, paras 5

<sup>35</sup> Response, ICC-01/09-01/20-327, para. 17.

<sup>36</sup> Response, ICC-01/09-01/20-327, paras 14, 18, 24.

<sup>37</sup> *See only*, Email from the Chamber to the parties, Decision on Submitted Materials for P-0800, 8 March 2022, at 15:20

<sup>38</sup> ICC-01/09-01/20-282-Conf, para. 11.

<sup>39</sup> Items 1-14, 21-23, 41-47, 50-51 and 63-64 of the Annex.



**FOR THESE REASONS, THE CHAMBER HEREBY**

**REJECTS** the Request with regard to the following documents:

ICC-01/09-01/20-T-015-Conf-Red-ENG, ICC-01/09-01/20-T-016-Conf-Red-ENG, ICC-01/09-01/20-T-042-Conf-ENG, ICC-01/09-01/20-T-043-Conf, ICC-01/09-01/20-T-046-Conf-ENG, KEN-OTP-0159-0986-R01, ICC-01/09-01/20-T-003-Conf-Red-ENG, ICC-01/09-01/20-T-004-Conf-Red-ENG, ICC-01/09-01/20-T-005-Conf-Red-ENG. ICC-01/09-01/20-T-006-Conf-Red-ENG, KEN-OTP-0087-0031-R05, KEN-OTP-0150-0684-R01, KEN-OTP-0150-0706-R01, KEN-OTP-0150-0734-R01, KEN-OTP-0150-0837-R01, KEN-OTP-0160-0078, KEN-OTP-0160-0107, KEN-OTP-0160-0149, KEN-OTP-0160-0188, KEN-OTP-0160-1658, KEN-OTP-0038-0212-R02, KEN-OTP-0005-0221-R01, KEN-OTP-0135-0458-R01, KEN-OTP-0148-0098-R01, KEN-OTP-0029-0131-R04, KEN-OTP-0141-0251-R01, KEN-OTP-0141-0271-R01, KEN-OTP-0141-0307-R01, KEN-OTP-0141-0339-R01, KEN-OTP-0142-0379-R01, KEN-OTP-0142-0408-R01, KEN-OTP-0142-0440-R01, KEN-OTP-0142-0490-R01, KEN-OTP-0142-0618-R01, KEN-OTP-0142-0649-R01, KEN-OTP-0144-0011-R01, KEN-OTP-0160-1703, ICC-01/09-01/20-T-031-Conf-ENG, ICC-01/09-01/20-T-032-Conf-ENG, ICC-01/09-01/20-T-033-Conf-ENG, ICC-01/09-01/20-T-034-Conf-ENG, ICC-01/09-01/20-T-035-Conf-ENG, ICC-01/09-01/20-T-036-Conf-ENG, ICC-01/09-01/20-T-037, ICC-01/09-01/20-T-038-Conf-ENG and ICC-01/09-01/20-T-021-Conf-Red-ENG;

**RECOGNISES** the following documents as formally submitted:

KEN-OTP-0141-0026-R01, KEN-OTP-0106-0530, KEN-OTP-0129-0699-R01, KEN-OTP-0145-0434, KEN-OTP-0116-0497-R01, KEN-OTP-0129-0575, KEN-OTP-0143-0199-R01, KEN-OTP-0138-0002-R01, KEN-D32-0001-0005, KEN-OTP-0159-1384; KEN-OTP-0159-1853; KEN-OTP-0160-1441, KEN-OTP-0134-0210, KEN-OTP-0157-3522-R01, KEN-OTP-0104-0679, KEN-OTP-0140-0273-R01, KEN-OTP-0153-0093, KEN-OTP-0087-0098-R01, KEN-OTP-0086-0048, KEN-OTP-0129-0524, KEN-OTP-0129-0525-R01, KEN-OTP-0108-0192, KEN-OTP-0117-0917, KEN-OTP-0134-0196-R01, KEN-OTP-0160-1713-R01, KEN-OTP-0160-1715, KEN-OTP-0148-0108-R01, KEN-OTP-0160-1699; and

**INSTRUCTS** the Registry to ensure that the e-Court metadata reflects that the items in question have been recognised as formally submitted to the Chamber.

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 May 2022

At The Hague, The Netherlands