



Original: English

No.: ICC-01/09-01/20
Date: 29 November 2022

TRIAL CHAMBER III (ARTICLE 70)

Before: Judge Miatta Maria Samba

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. PAUL GICHERU***

Public

Lesser redacted version of “Paul Gicheru’s Submissions in preparation for the First Status Conference,” 10 September 2021, ICC-01/09-01/20-170-Conf

Source: Counsel for Paul Gicheru

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 the Victims**Legal Representatives of the Applicants****Unrepresented Victims****Unrepresented Applicants
(Participation/Reparation)****The Office of Public Counsel for Victims****The Office of Public Counsel for the
Defence****States' Representatives****Other****REGISTRY****Registrar**

Mr. Peter Lewis

Counsel Support Section**Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations
Section****Other**

Mr. Paul Gicheru, through his Counsel (“the Defence”), hereby files his Submissions in preparation for the First Status Conference as ordered by Trial Chamber III on 17 August 2021.¹ These Submissions are filed confidentially pursuant to Regulation 23bis(1) of the Regulations of the Court since they contain confidential material.

I. BACKGROUND

1. On 23 July 2021, endeavoring to resolve trial preparations *inter partes* and expeditiously, the Defence and Office of the Prosecutor (“OTP”) scheduled a meeting for 30 July 2021 to start discussing practical and logistical issues regarding the transition into the trial phase.²
2. On 30 July 2021, the Defence and OTP met to discuss various matters, including (a) the commencement date for trial; (b) whether there are any facts in the Confirmation Decision on which the OTP and Defence can reach an agreement; (c) trial protocols on handling confidential information and contact with witnesses; and (d) directions for the proceedings regarding the admissibility of evidence.
3. On 4 August 2021, the Defence wrote to the OTP to confirm the matters discussed.
4. On 10 August 2021, the OTP responded to the Defence’s letter, confirming that it accurately captured the main issues discussed, with one omission – witness preparation, with both the Defence and OTP agreeing to witness proofing subject to appropriate safeguards.³ Concerning the additional topics raised in the Defence’s letter, the OTP indicated that it:
 - a. “has already disclosed to [the Defence] the bulk of its incriminating evidence, with the exception of new evidence;”⁴
 - b. “has revised its disclosure guidelines and enlisted additional legal reviewers to ensure that the review and disclosure of any relevant material is completed within a reasonable time-frame, with 1 March 2022 as a possible trial date;”⁵
 - c. is not in a position to confirm the volume of Rule 77 or Article 67(3) material “that will be disclosed to [the Defence] as a result of the Prosecution’s ongoing reviews of the material in the Kenya Situation evidence collection;”⁶

¹ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-162](#), Order Scheduling the First Status Conference, 17 August 2021 (“Scheduling Order”).

² Email from the OTP entitled “RE: Notification,” 22 July 2021.

³ Letter from the OTP entitled “Re: Your letter dated 04 August 2021,” 10 August 2021, p. 1.

⁴ *Id.*

⁵ *Id.*, p. 2.

⁶ *Id.*

- d. estimates that it will have eight to twelve witnesses at trial, but “cannot exclude the possibility that this estimate will be revised as trial preparation progresses;”⁷
- e. [REDACTED]⁸
- f. [REDACTED], “this will be reviewed for disclosure and, if it is determined to be disclosable, provided to the Defence within the time limits determined by the Chamber;”⁹ and
- g. [REDACTED]¹⁰
5. On 10 August 2021, the Defence replied to the OTP’s response, confirming that it is in synch regarding witness preparation and in agreement that the Parties should abide by the letter and spirit of the Chambers Practice Manual regarding witness interviews.
6. On 17 August 2021, Trial Chamber III issued its “Order Scheduling the First Status Conference,” setting the date of the Status Conference for 17 September 2021, and requesting the OTP and Defence to make submissions on the following items:¹¹
- A. *The commencement date of the trial.*
 - B. *Anticipated evidence. This point is primarily addressed to the Office of the Prosecutor (‘the Prosecution’). The Defence is not required to provide information on this matter unless it wishes to do so....*
 - C. *Agreed facts under Rule 69 of the Rules.*
 - D. *Translation at trial: language to be used during the trial, including languages expected to be used by the witnesses the parties intend to call.*
 - E. *Disclosure of outstanding material in the Prosecution’s possession and related issues....*
 - F. *Disclosure by the Defence, including whether the Defence intends to advance a defence in accordance with Rules 79 and 80 of the Rules.*
 - G. *Provision of a trial brief by the Prosecutor.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*, p. 3 (emphasis in original).

¹¹ [Scheduling Order](#), para. 1.

H. Estimated length of opening statements.

7. On 20 August 2021, the Defence requested to reschedule the First Status Conference for 24 September 2021,¹² which was granted by Trial Chamber III on 25 August 2021.¹³

II. SUBMISSIONS

8. The Defence hereby provides the following information on the topics listed in the Scheduling Order that are directed to the Defence:
- a. *The commencement date of the trial.* The Defence considers reasonable and is in agreement with the OTP's estimated commencement date of March 2022.
 - b. *Anticipated evidence.* The Defence is not in a position to provide information on this matter.
 - c. *Agreed facts under Rule 69 of the Rules.* The Defence will give due consideration to any proposed agreed facts offered by the OTP.
 - d. *Translation at trial.* The Defence cannot at this time determine whether to call any witnesses – as normally no credible Defence Counsel can prognosticate prior to the OTP putting on its case and surviving any potential “No Case To Answer” challenge by meeting its burden of proof – and is thus not in a position to inform on the translation requirements of any witnesses it may call.
 - e. *Disclosure by the Defence.* The Defence has nothing to disclose at this time. If and when it does, it will strictly abide by the Rules and Protocols.

Respectfully submitted, 29 November 2022,

In The Hague, the Netherlands.



Michael G. Karnavas
Counsel for Mr. Paul Gicheru

¹² *Prosecutor v. Gicheru*, [ICC-01/09-01/20-164](#), Request to Reschedule the First Status Conference, 20 August 2021.

¹³ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-166](#), Decision on Request to Reschedule the First Status Conference, 25 August 2021.