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TRIAL CHAMBER III

Before: Judge Miatta Maria Samba

SITUATION IN THE REPUBLIC OF KENYA

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

Public

Public lesser redacted version of “Prosecution’s submissions on issues for the First Status Conference’, ICC-01/09-01/20-171-Conf, 10 September 2021”, ICC-01/09-01/20-171-Red, 14 September 2021

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I. INTRODUCTION

1. As ordered by the Trial Chamber III¹ in its Order Scheduling the First Status Conference,² the Prosecution provides herewith its submissions on the issues to be addressed and suggestions as to further items for the agenda.

II. CONFIDENTIALITY

2. This filing is submitted as confidential since it contains confidential information relating to witnesses and evidence. The Prosecution notes that it may also request limited private sessions during the status conference to discuss such matters. A public redacted version of this filing will be submitted as soon as practicable.

III. SUBMISSIONS

3. At the outset, the Prosecution records that several of the issues raised for discussion at the First Status Conference have already been the subject of constructive *inter partes* discussions between the Prosecution and Defence. While agreement has been reached on certain issues – subject to the ultimate decision of the Chamber – others are still under discussion.
4. Since certain issues were discussed on a “without prejudice” basis, it is not appropriate to share the minutes of such discussions with the Chamber at this stage, but the Prosecution will refer to these discussions, as appropriate, in discussing the issues below.
5. The Prosecution will address the issues on which the Chamber requested submissions under the same headings used in the Order.

¹ “Chamber”.

² ICC-01/09-01/20-162, “Order”.

A. The commencement date of the trial

6. The proposed commencement date for the trial was discussed between the parties in anticipation of the status conference. The parties agreed that a mutually suitable date would be 1 March 2022. This date was proposed by the Prosecution based, *inter alia*, on its assessment of the time needed to complete outstanding investigations, the disclosure of evidence that it intends to rely on at trial, which it estimates it will be in a position to do by 1 December 2021, and the disclosure of all outstanding material under article 67(2) of the Statute and rule 77 of the Rules of Procedure and Evidence (“Rules”).³
7. Accordingly, by 1 December 2021, the Prosecution intends to, *inter alia*: (i) complete its investigations; (ii) complete the disclosure of all material it intends to rely upon at trial and file its list of evidence; (iii) file its list of witnesses; (vi) submit requests for admission of prior recorded testimony under rule 68; (vii) submit bar table motions seeking the admission of non-testimonial evidence; (viii) provide a trial brief; and (ix) finalise discussions with the Defence regarding agreed facts under rule 69.
8. The Prosecution has completed its analysis of the review required in order to meet its obligations under article 67(2) and rule 77, as discussed in more detail under Section E below. The Prosecution has already disclosed what is assessed to be the most relevant evidence disclosable under these provisions prior to confirmation of charges. However, it must still finalise its review of all the potentially relevant information in its possession, including the entire Kenya Situation evidence collection,⁴ in order to ensure that it is disclosed as soon as possible, but no later than the commencement of the trial.

³ I.e., the usual deadline of three months prior to the proposed trial date, *see* Chambers Practice Manual, 2019, para. 76 (i).

⁴ However, the great majority of this collection is likely to be irrelevant to the present case, as explained further in Section E below.

9. Based on currently available resources and the experience and practice in previous cases before this Court, the Prosecution estimates that the review of material in its possession would be completed by 1 February 2022, one month prior to the agreed starting date.

B. Anticipated evidence

10. As detailed further in Section C below, the Prosecution and Defence are in discussion as to a statement of agreed facts under rule 69. Depending on the extent of such agreement the scope of the evidence presented may be narrowed, but it is difficult to estimate to what extent at this point. Additionally, certain outstanding investigations remain to be finalised which might impact upon, *inter alia*, the number of witnesses the Prosecution may wish to call. Accordingly, the estimates below are only preliminary predictions. Additionally, as discussed further under Section B(3) below, time needed for direct evidence of certain witnesses may be reduced if their prior recorded testimony is admitted under rule 68(3). Finally, the efficiency of leading the witnesses' evidence may be enhanced if the Chamber permits witness preparation, as discussed in Section G(3) below.

(1) *Estimated number of witnesses to be called and number of hours of in-court testimony*

11. At present, the Prosecution plans to call approximately 12 to 13 witnesses to give oral testimony at trial, comprised as follows:
- i. Six witnesses who will testify as to how they were corruptly influenced by the Accused and his associates: P-0800, P-0536, P-0613, P-0341, P-0274 and P-0516;⁵
 - ii. Up to three Prosecution investigators who will testify as to discrete aspects of the investigation;

⁵ "Corrupted Witnesses".

- iii. If necessary, an analyst who will testify *inter alia* as to the analysis of the content of the Accused's cell phone and the attribution of certain phone numbers recovered; and
- iv. If necessary, two to three expert witnesses,⁶ who will testify as to the recovery of data from the Accused's cell phone and the enhancement of certain audio recordings obtained in the course of the Prosecution's investigations.
12. The Prosecution is also presently investigating the possibility of interviewing and calling three further potential witnesses who are believed to be able to provide corroborative evidence relevant to the charges confirmed by the Pre-Trial Chamber. If successful, this would bring the total number of Prosecution witnesses to approximately 16.
13. As regards the total number of hours required for the presentation of the Prosecution evidence, the Prosecution estimates that it would require a total of just over 57 hours⁷ for the direct examination of the witnesses it intends to call. Assuming a similar time is permitted for cross examination by the Defence, and making a limited provision for any necessary and permissible re-examination, this would bring the total duration of the Prosecution case to 122 hours, or approximately 27 court days. This estimate is calculated as follows:

Witness	Direct Examination	Cross-Examination	Re-Examination	Total (Hours)
P-0800	6.00	6.00	0.50	12.50
P-0613	6.00	6.00	0.50	12.50
P-0536	4.50	4.50	0.50	9.50

⁶ [REDACTED].

⁷ Excluding any time taken up by Defence objections, legal arguments regarding the admission of documents (if applicable) and any explanations or questions to the witness by the Chamber.

P-0341	4.50	4.50	0.50	9.50
P-0274	4.50	4.50	0.50	9.50
P-0516	4.50	4.50	0.50	9.50
Investigator 1	4.50	4.50	0.50	9.50
Investigator 2	4.50	4.50	0.50	9.50
Investigator 3	1.50	1.50	0.50	3.50
Analyst	1.50	1.50	0.50	3.50
Expert 1	1.50	1.50	0.50	3.50
Expert 2	1.50	1.50	0.50	3.50
Expert 3	1.50	1.50	0.50	3.50
Corroborating Witness 1	4.50	4.50	0.50	9.50
Corroborating Witness 2	3.00	3.00	0.50	6.50
Corroborating Witness 3	3.00	3.00	0.50	6.50
TOTAL	57.00	57.00	8.00	122.00

14. However, the Prosecution believes that the above estimates for direct examination may be significantly reduced with appropriate use of rule 68(3) to introduce into evidence the prior recorded testimony of certain witnesses. This is particularly

appropriate for witnesses whose evidence would require them to recount details of numerous conversations and meetings – many of which do not involve the Accused – the specifics of which would be difficult for the witness to recollect without recourse to contemporaneous records. In particular, the evidence of Witnesses P-0800, P-0613 and P-0536 and the investigators could be curtailed by approximately half to two thirds if their relevant prior recorded testimony were admitted.

(2) Use of expert witnesses

15. Apart from the three expert witnesses mentioned above, the Prosecution does not foresee the need to call further expert evidence, nor to jointly brief experts with the Defence.

(3) Use of Rule 68 of the Rules

16. As foreshadowed above, the Prosecution anticipates requesting the introduction of prior recorded testimony of certain witnesses under rule 68(3), as appropriate.
17. Additionally, the Prosecution will request the introduction of the relevant prior recorded testimony and associated evidence of witness [REDACTED].⁸ The Prosecution will demonstrate that this witness, who was the target of witness interference by the Accused, [REDACTED]. The Prosecution will argue that the available facts establish that the witness [REDACTED].
18. Finally, the Prosecution will seek to introduce under rule 68(2)(d) the prior recorded testimony and associated evidence of certain witnesses who are alleged to have been the subjects of witness interference, including P-0495 and P-0604, in particular their evidence given under summons before TC V(A) in the *Ruto and Sang* case and whose prior recorded testimony was admitted by TC V(A) on the same basis.

⁸ As it was admitted in the *Ruto and Sang* case by Trial Chamber (“TC”) V(A); [REDACTED]. Although this decision was set aside on appeal due to concerns regarding the retroactive application of the amended rule, no such considerations arise in this case.

(4) Testimony provided by audio or video links

19. Absent any Covid-19 restrictions or other unforeseen impediments, the Prosecution does not currently anticipate the need to request testimony by way of audio or video link and would prefer that the witnesses it intends to call testify in person at the seat of the Court. However, it does not rule out the possibility that certain witnesses may testify via audio or video link should their circumstances so require. Should this situation arise, the Prosecution will inform the Chamber accordingly.

(5) Estimated volume of documentary or other non-testimonial evidence to be relied upon at trial

20. As detailed below, the Prosecution intends to rely on a significant amount of documentary and other non-testimonial evidence comprising *inter alia*:

- i. Records of investigators' communications with witnesses;
- ii. Statements and records of communication between OTP investigators and [REDACTED];
- iii. Transcripts, translations and audio recordings of [REDACTED] witnesses and members of the Common Plan;
- iv. Transcripts, translations, audio recordings [REDACTED] of Witnesses P-0800 and P-0613 [REDACTED];
- v. Telephone data, including cell phone contacts, text messages and address book entries;
- vi. Bank records of Witnesses P-0397 [REDACTED];
- vii. Recanting affidavits;
- viii. Expert and analytical reports; and
- ix. Public source material.

21. The Prosecution is currently reviewing the approximately 420 non-testimonial items already disclosed and recorded in its pre-confirmation list of evidence⁹ to determine more accurately which items of evidence it will seek to rely on at trial and the means by which they will be tendered into evidence. The number of items may be further reduced depending on the pending statement of agreed facts.
22. It is anticipated that a limited number of additional documents will be added to the Prosecution's list of evidence for trial.

C. Agreed facts under Rule 69 of the Rules

23. As foreshadowed above, the Prosecution and Defence are in discussions regarding agreement on a statement of agreed facts. To date, the discussions have been constructive. The Prosecution has provided the Defence with a proposed list of admissions, which the latter is presently reviewing. Unfortunately, this may not be completed prior to the First Status Conference. Should agreement be reached in the interim, however, the Parties will inform the Chamber at the status conference hearing.

D. Translation at trial

24. As presently advised, the Prosecution expects that all the witnesses it intends to call will testify in either English or Swahili. Thus the Prosecution does not presently foresee the need for courtroom interpretation for any non-court language other than Swahili. The Prosecution may wish to refer to certain audio recordings in its examination of witnesses that contain Kalenjin, however English translations of all such recordings are available.
25. Due to difficulties¹⁰ experienced during the *Ruto and Sang* trial, in which Swahili evidence was first translated into French and then from French into English (and

⁹ Excluding 160 witness statements, transcripts of interviews and other testimonial evidence that will be the subject of oral testimony or, if necessary, introduced via rule 68.

¹⁰ Including additional delays in interpreting evidence and frequent misinterpretation that required time consuming corrections, both during examination and in subsequent review of the transcripts.

vice versa), the Prosecution requests that the Registry be directed to ensure the availability of sufficient suitably qualified English/Swahili interpreters.

E. Disclosure and related issues

(1) *Whether the Prosecution's investigations are still ongoing*

26. The Prosecution's investigations are largely complete, but for some limited investigative activities comprising mainly of the following:

- i. Re-interviewing certain Corrupted Witnesses;
- ii. Attempting to obtain further corroborative witness evidence, as discussed above;
- iii. Completing the review and analysis of the data retrieved from the Accused's mobile phone;¹¹ and
- iv. Following up on several long outstanding requests for assistance to the Kenyan Authorities.

27. The Prosecution anticipates that, with the likely exception of 26.(iv) above,¹² all other outstanding investigations will be concluded in time to complete the disclosure of any resulting incriminating evidence by 1 December 2021.

(2) *Timing and volume of outstanding disclosure pursuant to Article 67(2) of the Statute and Rules 76 and 77 of the Rules*

28. To date, the Prosecution has disclosed 589 items of incriminating evidence (including rule 76 material), 18 items under article 67(2) and 110 items under rule 77. The Prosecution considers these to be the bulk of the most relevant evidence in relation to the charges under article 70(1)(c) against the Accused.

29. As foreshadowed above, the disclosure of evidence under rule 76 and other evidence upon which the Prosecution intends to rely on at trial, has largely been

¹¹ [REDACTED].

¹² Based on the history of cooperation to date. *See* ICC-01/09-01/20-125-Conf-AnxA-Corr3, paras. 26-28. However, the Prosecution does not anticipate that this will necessitate any delay in the commencement of the trial.

completed. The Prosecution does not presently foresee any significant obstacles to disclosing the remainder of such material by 1 December 2021.

30. As for the disclosure of any other outstanding article 67(2) and rule 77, the Prosecution must complete the review of the material in its possession, including the entire Kenya Situation evidence collection, in accordance with its legal obligations. This collection comprises over 43,524 items of evidence totalling over 221,110 pages. To accelerate the process of review of these items, which on a preliminary analysis of their metadata appear largely irrelevant to this case, the Prosecution has applied case-specific search criteria and identified a pool of 8,639 items totalling 97,843 pages, the content of which may *potentially* be relevant to the present case. The Prosecution has also prioritized categories of material that it assesses to be most likely to contain relevant material, particularly potentially exonerating material, and will focus on reviewing and disclosing any relevant material from these categories on a rolling basis.
31. Finally, the Prosecution has invited the Defence to indicate particular lines of defence or relevant key-words or themes that would assist the Prosecution to further focus its disclosure review.

(3) *Transcription and translation issues*

32. The Prosecution does not foresee any delays due to transcription and translation issues, particularly given the fact that the Accused fully speaks and understands English.

(4) *Protective measures of witnesses (including additional need for redactions, delayed disclosure or referrals to the Court's protection programme)*

33. All of the Corrupted Witnesses [REDACTED] identities have been disclosed to the Defence.
34. Subject to VWS recommendations, the only additional protective measures currently envisaged by the Prosecution for these witnesses would be the standard

in-court protective measures (ICPMs) [REDACTED], such as the use of pseudonyms, voice and face distortion and limited use of private sessions. Additionally, four of these witnesses who previously testified in the *Ruto and Sang* case were granted ICPMs by TC V(A), which continue to have full force and effect in subsequent proceedings.¹³

35. In the event that one or more of the additional corroboration witnesses agree to testify, the Prosecution will liaise with VWS to ensure that any necessary protective measures are put in place as swiftly as possible [REDACTED]. In the event that it becomes apparent that this will not be possible prior to 1 December 2021,¹⁴ the Prosecution will approach the Chamber with a motivated request to delay disclosure, as necessary.
36. Finally, in respect of those Prosecution staff members whose duties require them to operate in the field, the Prosecution will request the ICPMs of pseudonyms and face distortion in order to protect the integrity of future missions, their own security and the security of the witnesses and other individuals with whom they interact.
37. In respect of any witnesses for whom ICPMs are sought, the Prosecution will submit motivated requests prior to their anticipated testimony, or as ordered by the Chamber. The Prosecution also underscores the importance of seeking independent assessment from the VWS on these issues, which will assist the Chamber in making its determination.

(5) *Disclosure of witness identities which have not been disclosed to the Defence*

38. The identities of all of the Corrupted Witnesses listed above have already been disclosed to the Defence.

¹³ Regulation 42(1) RoC. *See also* ICC-01/04-02/06-774-Red, paras. 1-5.

¹⁴ Or such other deadline as the Chamber may determine.

39. [REDACTED], their identities will be disclosed as soon as the necessary protective measures are put in place, as noted above.¹⁵

40. As regards the identities of OTP staff and expert witnesses, these will be communicated to the Defence once a final decision is taken on who will be called to testify, but in any event prior to the filing of the Prosecution's list of evidence. This, in turn, will depend on the outcome of the agreement of facts under rule 69.

(6) Disclosure of material obtained pursuant to Article 54(3)(e) of the Statute

41. The Prosecution has already reviewed the article 54(3)(e) material in the Kenya Situation evidence collection and can confirm that it does not contain information relevant to the present case.

F. Provision of a trial brief by the Prosecutor

42. The Prosecution notes that the filing of a trial brief has become standard practice in most cases before the Court¹⁶ and accordingly proposes to file its brief on 1 December 2021, or such other date determined by the Chamber for the filing of the Prosecution's list of evidence.

43. Given the fact that its DCC was confirmed in nearly all material respects and that its investigations are largely complete,¹⁷ the Prosecution expects that the trial brief will largely correspond to Part B of the DCC filed with the Pre-Trial Chamber.¹⁸

G. Estimated length of opening statements

44. The Prosecution considers that it will require no more than two hours for its opening statement. Should the Defence elect to make its opening statement at the commencement of the case and be granted a similar time to make it, the Prosecution requests a further 30 minutes to respond. Accordingly, in the Prosecution's view, opening statements may be completed in one day.

¹⁵ Section E (5)(c).

¹⁶ See Chambers Practice Manual, 2019, para. 75.

¹⁷ As detailed under Section E(1) above.

¹⁸ ICC-01/09-01/20-125-Conf-AnxA-Corr3.

H. Additional Agenda items

45. The Prosecution requests that the following items be added to the agenda:
- (1) *The Accused's attendance at trial*
46. The Prosecution notes that article 63(1) provides that an accused shall be present during trial. In the present case, the Accused has been granted conditional release and would thus be required to travel to the seat of the Court to attend trial.
47. Rules 134*bis* and 134*ter* make provision upon written request to the Trial Chamber for an accused who is "subject to a summons to appear" either to be present through the use of video technology or in exceptional circumstances to be excused from attendance. However, in both alternatives, this may only be *for part or parts of the trial*. These provisions do not appear to apply to accused who are arrested pursuant to a warrant of arrest, but subsequently granted provisional release. Regardless, even if *arguendo* these provisions would apply to the present Accused, attendance in person remains the rule.
48. Notwithstanding the Accused's voluntary surrender and subsequent conditional release, the Prosecution considers that the attendance of the Accused at trial in person is vital to ensure the continued ability of the Court to exercise its jurisdiction over him and to enforce its orders. Indeed, it is one of the conditions of his release that the Accused "shall appear before the Chamber at the date, time, place, and in the manner ordered by the Chamber and shall remain in attendance until excused".¹⁹
49. [REDACTED].²⁰
50. [REDACTED].²¹ However, it does not fall within the purview of the Prosecution to resolve this issue. Rather, the Prosecution wishes to bring this issue to the attention

¹⁹ ICC-01/09-01/20-90-Conf, para. 47, bullet 3.

²⁰ ICC-01/09-01/20-54-AnxII.

²¹ See for instance article 5 of the European Convention of Human Rights and Article 9 of the International Covenant on Civil and Political Rights.

of the Chamber at the earliest opportunity to afford sufficient time for the Chamber to gather the necessary information and, through the good offices of the Registry, to address the matter as it deems fit.

(2) *Protocols necessary for secure disclosure*

51. As already communicated to the Chamber,²² the Parties have agreed to comply with the pre-confirmation E-court Protocol (ICC-01/09-01/20-67-AnxI) and the Protocol on Handling of Confidential Information [...] (ICC-01/09-01/20-67-AnxII), until and unless these protocols are adopted or modified by the Trial Chamber. However, the Prosecution considers that confirmation by the Chamber of the continued applicability of these protocols, alternatively their replacement, is necessary for the expeditious and secure completion of disclosure.

(3) *Witness preparation*

52. The Prosecution notes that various trial chambers of the Court have taken different views on the permissibility of witness preparation by the calling party prior to the their testimony. The Prosecution and Defence are in agreement that witness preparation should be permitted in this case, subject to appropriate regulation and oversight by the Chamber.

53. The Prosecution notes that witness preparation was permitted in the *Ruto and Sang* case, from which this case flows, and indeed several of the witnesses in the present case have previously participated in witness preparation sessions.²³ No significant issues were experienced in this regard in the *Ruto and Sang* case.

54. The Prosecution draws the Chamber's attention to the witness preparation protocols in the *Al Hassan* and *Ntaganda* cases,²⁴ which adopted and built on that applied in the *Ruto and Sang* case, and proposes that the same protocol is adopted in the present case.

²² Prosecution email sent at 17:15 on 27 August 2021.

²³ *To wit* Witnesses P-0536, P-0613 and P-0800.

²⁴ ICC-01/12-01/18-666-Anx and ICC-01/04-02/06-652-Anx respectively.

(4) *Submission/Admission of evidence regime*

55. The Prosecution also notes that previous trial chambers have recently applied one of two regimes of evidence admission: the so-called “admission regime” or “submission regime” and that the Appeals Chamber has recognised that trial chambers are afforded a certain discretion in this regard.²⁵ During *inter partes* discussions, the Prosecution and Defence have discussed these regimes and neither party expressed a particular preference for either of the two.
56. The Prosecution notes that in the *Ruto and Sang* case the admission regime was adopted, however does not consider this to be a decisive factor. Given the significant volume of documentary evidence likely to be relied upon by the Prosecution and the relatively short duration of the Prosecution case, it may be more efficient to adopt the submission regime. This would avoid devoting a disproportionate amount of court time to debating the admissibility of individual items of evidence.
57. While this status conference may not be the appropriate forum to determine this issue, the Prosecution requests that the Chamber clarifies the applicable evidentiary regime as soon as possible, since this may affect its planning regarding the tendering of documentary evidence at or prior to trial.

²⁵ See for instance ICC-01/05-01/13-2275-Red, paras. 573, 575, 576.

IV. CONCLUSION

58. The Prosecution hereby provides its written submissions as ordered and will stand ready to supplement them orally and answer any further question from the Chamber during the status conference.



Nazhat Shameen Khan, Deputy Prosecutor

Dated this 8th day of February 2023
At The Hague, The Netherlands