

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/09-01/20**
Date: **11 February 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-redacted

**Decision on the Prosecution's First 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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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
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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 First Request to Introduce Evidence Other than Through a Witness’.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 7 October 2021, the Chamber issued its Directions on the Conduct of the Proceedings.¹

2. Therein, the Chamber explained its approach as to the submission of evidence: the Chamber will recognise the submission of such items 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 deciding on the guilt or innocence of the accused in its judgment pursuant to Article 74 of the Statute.²

3. Only when mandated by the legal framework of the Court or when it considers it necessary for a fair and expeditious trial will the Chamber take separate, preliminary decisions on the admissibility of individual items of evidence or rule on specific objections.³

4. Pursuant to Rule 64(1) of the Rules, any submission concerning the admissibility, relevance or probative value of an item needs to be made at the time of the items’ submission to the Chamber.⁴

5. With regard to the introduction of evidence other than through a witness, the Directions on the Conduct of the Proceedings provide that the tendering party has to provide for each item: (i) a short description of the content of each item in question; (ii)

¹ Directions on the Conduct of the Proceedings, [ICC-01/09-01/20-189](#).

² [Directions on the Conduct of the Proceedings](#), para. 11.

³ [Directions on the Conduct of the Proceedings](#), paras 12, 15-16.

⁴ [Directions on the Conduct of the Proceedings](#), para. 13.

an index of the most relevant parts and portions, if necessary; and (iii) a short explanation of the item's relevance and *prima facie* probative value.⁵

6. On 19 January 2022, the Office of the Prosecutor (the 'Prosecution') filed a request to submit 35 items other than through a witness (the 'Request').⁶ The Prosecution explains that it has grouped the items in question into four categories: (i) audio-visual records of the Accused's interview with the Prosecution and associated transcripts; (ii) items referred to by the Accused during the interview; (iii) communication between the Prosecution and the Accused in preparation of the interview; and (iv) documents extracted from [REDACTED] mobile phone.⁷

7. The Prosecution submits that all items in all four categories are *prima facie* relevant,⁸ probative⁹ and that there is no prejudice to the Accused which outweighs the material's probative value.¹⁰ It further informs the Chamber that the Defence does not oppose 33 of the 35 items included in the Request.¹¹

8. On 28 January 2022, the Defence filed its response to the Request (the 'Response').¹² Indirectly, the Defence confirms the statement made by the Prosecution by making objections to the submission of two items of evidence: KEN-OTP-0160-0877 and KEN-OTP-0160-0885. With regard to these two items, the Defence argues that the Prosecution has not shown that the items are relevant or of probative value¹³ and requests the Chamber to deny 'the admission of the two documents'.¹⁴

9. Further, the Defence specifies that its consent to the submission of the remaining items does not signify that it equally agrees with the Prosecution's understanding of the substance of an item or the conclusion(s) drawn from it.¹⁵ Specifically, the Defence makes submissions on how it disagrees with the Prosecution's interpretation of items

⁵ [Directions on the Conduct of the Proceedings](#), para. 37.

⁶ Prosecution's First Bar Table Motion, ICC01/09-01/20-261-Conf, with confidential annex A, ICC-01/09-01/20-261-Conf-AnxA. A public-redacted version of the request was filed on the same day, [ICC-01/09-01/20-261-Red](#).

⁷ Request, [ICC-01/09-01/20-261-Red](#), para. 2.

⁸ Request, [ICC-01/09-01/20-261-Red](#), paras 24, 32-34, 39 and 44-45.

⁹ Request, [ICC-01/09-01/20-261-Red](#), paras 26-27, 35-36, 40 and 46-47.

¹⁰ Request, [ICC-01/09-01/20-261-Red](#), paras 28, 37, 41 and

¹¹ Request, [ICC-01/09-01/20-261-Red](#), para. 43.

¹² Response to Prosecution's First Bar Table Motion, ICC-01/09-01/20-266-Conf. A public-redacted version of the response was filed on 28 January 2022, [ICC-01/09-01/20-266-Red](#).

¹³ Response, [ICC-01/09-01/20-266-Red](#), para. 2.

¹⁴ Response, [ICC-01/09-01/20-266-Red](#), page 4.

¹⁵ Response, [ICC-01/09-01/20-266-Red](#), para. 3.

KEN-OTP-0159-0582, KEN-OTP-0159-0766, KEN-OTP-0159-0585 and KEN-OTP-0093-1199.¹⁶

II. ANALYSIS

10. In line with the approach laid out in the Directions on the Conduct of the Proceedings, the Chamber recognises the 33 items to which the Defence does not object as formally submitted. In particular, it notes that Rule 68 of the Rules does not apply to the statements submitted in the first category of the Request. In this regard, the Chamber is in agreement with the Prosecution that it follows from the unambiguous wording of Rule 68 that it does not apply to statements made by the accused him - or herself.¹⁷ The Chamber takes note of the comments made as to the relevance and probative value of certain of these items.

11. With regard to items KEN-OTP-0160-0877 and KEN-OTP-0160-0885, the Chamber notes the request by the Defence to ‘deny their admission’. In accordance with the system explained above, the Chamber 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.

12. In the current situation, no provision mandates an immediate decision on admissibility. The Chamber also does not consider that such a decision is necessary for a fair and expeditious trial. The Defence merely argues that the items are cumulative and, in one case, that the Prosecution ‘insinuates a relationship’ between the Accused and someone else ‘that is not relevant to the timeframe of the charges’.¹⁸ As explained above, the Chamber will conduct the assessment of the relevance, probative value and potential prejudice of each item when making its decision pursuant to Article 74 of the Statute. Accordingly, the Chamber will not take a separate decision on the Defence’s objections concerning the two items at this point in time.

¹⁶ Response, [ICC-01/09-01/20-266-Red](#), para. 3 a., b. and c..

¹⁷ See also, Trial Chamber VII, *Prosecutor v. Bemba et al.*, Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible, 24 September 2015, ICC-01/05-01/13-1285.

¹⁸ Response, [ICC-01/09-01/20-266-Red](#), para. 2 a. and b..

FOR THESE REASONS, THE CHAMBER HEREBY

RECOGNISES the following documents as formally submitted:

KEN-OTP-0159-0582; KEN-OTP-0159-0589; KEN-OTP-0159-0723; KEN-OTP-0159-0736; KEN-OTP-0159-0766; KEN-OTP-0159-0795; KEN-OTP-0159-0815; KEN-OTP-0159-0841; KEN-OTP-0159-0578; KEN-OTP-0159-0579; KEN-OTP-0159-0585; KEN-OTP-0093-1195; KEN-OTP-0093-1191; KEN-OTP-0093-1199; KEN-OTP-0095-0738; KEN-OTP-0099-0739; KEN-OTP-0095-0741; KEN-OTP-0095-0743; KEN-OTP-0159-0666-R01; KEN-OTP-0159-0678-R01; KEN-OTP-0159-0695-R01; KEN-OTP-0159-0712-R01; KEN-OTP-0159-0510; KEN-OTP-0159-0568; KEN-OTP-0159-0574; KEN-OTP-0159-0576; KEN-OTP-0159-0572; KEN-OTP-0159-0573; KEN-OTP-0159-0577; KEN-OTP-0160-0877; KEN-OTP-0160-0882; KEN-OTP-0160-0885; KEN-OTP-0160-0892; KEN-OTP-0160-0897 and KEN-OTP-0160-0898; and

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

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



Judge Miatta Maria Samba

Dated 11 February 2022

At The Hague, The Netherlands