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**International
Criminal
Court**

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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*

Confidential

Prosecution's Regulation 35 Request for Variation of the Disclosure Deadline for a Limited Number of Transcriptions and Translations

Source: Office of the Prosecutor

Pursuant to TC III's instruction dated 05.05.2023, this document is reclassified as Public

Document to be notified in accordance with regulation 31 of the *Regulations of the*

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I. INTRODUCTION

1. In its “Decision Setting the Commencement Date of the Trial and Related Deadlines”¹, Trial Chamber III² set the deadline for disclosure of “all evidence and material on which the Prosecution intends to rely at trial” and to file the Prosecution List of Evidence for 15 November 2021. The Prosecution respectfully seeks the variation of this deadline until 15 December 2021 with regard to a limited number of items pursuant to Regulation 35 of the Regulations of the Court (RoC). This is due to the difficulties encountered by the Prosecution’s Language Services Unit (LSU) to secure the services of a qualified and security-vetted Kalenjin transcriber and translator.
2. The items concerned are pending revised transcriptions and translations of recorded calls related to P-0613 which are in part or in whole in Kalenjin.³ The expected revisions or corrections to the existing transcripts and translations arise from the recent audio enhancement of the original audio files and/or the incorporation of corrections to the transcripts made by the witness.⁴
3. The Prosecution submits that, despite its best efforts to meet the deadline set by the Chamber, it encountered delays that were beyond its control. The Prosecution stresses that previous versions of the items concerned have already been disclosed to the Defence, including the full unredacted original audio files, existing transcripts and translations, as well as transcripts containing the witness’s corrections. Thus, the outstanding material will be largely duplicative of material that has already been in the Defence’s possession for some time. Therefore, the

¹ ICC-01/09-01/20-185, p. 9.

² “Chamber”.

³ KEN-OTP-0111-0556 (28 tracks); KEN-OTP-0115-0241 (single track); KEN-OTP-0115-0243 (single track); KEN-OTP-0115-0248 (single track); KEN-OTP-0116-0112 (15 tracks); KEN-OTP-0115-0247 (2 tracks with content).

⁴ Of the audio items noted above in footnote 3, only KEN-OTP-0115-0247 did not require technical enhancement. With respect to 33 out of the 48 tracks, including KEN-OTP-0115-0247, the Language Services Unit was requested to consult corrections made by the witness to the transcripts and verify whether or not the proposed edits were accurate, with the benefit of the audio enhancements.

Prosecution submits that the requested extension will not unduly prejudice the rights of the Defence to have adequate time for a meaningful preparation of their defence. It will also ensure that the Parties and the Chamber have the benefit of the most complete and accurate record of the relevant evidence, which will assist the Chamber in its truth-seeking function.

4. The Prosecution submits that the reasons underlying this request constitute “good cause” pursuant to regulation 35(2) of the RoC warranting the extension of the disclosure deadline until 15 December 2021.

II. CONFIDENTIALITY

5. This filing is classified as *Confidential* pursuant to regulation 23bis(1) of the Regulations of the Court, as it contains confidential information that relates to Prosecution witnesses and to OTP investigative methods. The Prosecution will file a public redacted version simultaneously.

III. SUBMISSIONS

6. In order to present the most accurate and reliable evidence at trial, the Prosecution sought to technically enhance the quality of several audio files, particularly of certain recorded phone conversations with sub-optimal sound quality. On 30 April 2021, certain audio files pertaining to P-0536, P-0397 and P-0613 were sent to the Netherlands Forensic Institute (NFI) for audio enhancement, and received back on 28 May 2021. On 25 September 2021, the Defence raised the issue of the completeness of transcripts and translations, including inaudible portions, in *inter partes* correspondence with the Prosecution. The Prosecution commenced a review of the relevant material and, on 7 October 2021, referred a number of additional audio files to its Forensic Science Section⁵ for audio enhancement. The enhancement was completed and the material registered on 20 October 2021.

⁵ After an initial feasibility discussions and assessment from 4-6 October 2021.

7. Once the enhanced versions were produced, appropriate requests for revised transcriptions and translation were submitted to LSU on 25 and 26 October 2021. Most of these revised transcriptions and translations have already been completed and registered, or will be registered in the coming days, and are expected to be disclosed to the Defence within the deadline set by the Chamber. This request for the extension of the deadline specifically concerns a limited number of items containing Kalenjin as one of the spoken languages in the recorded call.
8. The affected items include five technically enhanced quality audio items (containing a total of 46 tracks) of recorded one-party consent calls of P-0613.⁶ While working on these revised transcriptions, LSU was further requested to consult corrections made by the witness on the existing transcripts and to verify whether or not the proposed edits were accurate, with the benefit of the audio enhancements.
9. One of these 46 enhanced audio tracks⁷ was so far assessed by the Prosecution as a recording of irrelevant conversations and unintelligible sounds. Within the scope of the current transcription project, the Prosecution sought to verify this past assessment by asking a Kalenjin transcriber and translator to produce a summary of the content of this track. On the basis of such summary, the Prosecution could then determine whether a full transcription and translation of this track is necessary. The Prosecution notes that this is the only track within the current request for which a transcript and translation do not already exist and thus were not provided to the Defence. The Defence was, however, provided with the full unredacted audio file.

⁶ KEN-OTP-0111-0556 (28 tracks); KEN-OTP-0115-0241 (single track); KEN-OTP-0115-0243 (single track); KEN-OTP-0115-0248 (single track); KEN-OTP-0116-0112 (15 tracks).

⁷ KEN-OTP-0116-0112, track 15 (55 minutes and 48 seconds).

10. In addition, with respect to one item,⁸ transcription and translation were requested also where quality enhancement was not necessary, for the purpose verifying whether or not the witness's proposed edits were accurate.
11. On 29 October 2021, LSU informed the Prosecution team that the Kalenjin expert who worked on such assignments until recently is unavailable until the end of the year, and they were experiencing difficulties in securing the services of another qualified and security-vetted Kalenjin expert for the transcription and translation assignment. LSU has requested urgent security accreditation by the Registry's Security Vetting Section for another Kalenjin expert who worked with LSU in 2015, which has just been completed today, on 8 November 2021. If no unexpected issues arise, the Prosecution should be in a position to disclose the revised transcripts and translations by 15 December 2021.
12. The Prosecution stresses that the audio items relevant to the current request were disclosed in full to the Defence early in 2021. Furthermore, all existing transcripts and translations of these items have been also disclosed to the Defence, including any transcripts containing corrections made by the witness.
13. The Prosecution submits that, despite its best efforts to meet the deadline set by the Chamber, the circumstances leading to the delay in producing and disclosing the revised transcriptions and translations were beyond its control. The Prosecution further submits that the requested extension will not unduly prejudice the rights of the Defence to have adequate time for a meaningful preparation of their defence. Therefore, good cause warranting the extension of the disclosure deadline until 15 December 2021 with respect to the transcripts and translations containing Kalenjin exists.

⁸ KEN-OTP-0115-0247 (containing two tracks with content).

IV. RELIEF SOUGHT

14. For the foregoing reasons, the Prosecution respectfully requests the Chamber to grant (i) a variation of the deadline for the disclosure Prosecution Evidence until 15 December 2021; and (ii) leave to add material to its List of Evidence; in respect of pending revised transcriptions and translations of the following recorded calls related to P-0613, which are in part or in whole in Kalenjin:

- a. Enhanced audios and corrections made by the witness to the existing transcripts where applicable:
 - i. KEN-OTP-0111-0556 (28 tracks);
 - ii. KEN-OTP-0115-0241 (one track);
 - iii. KEN-OTP-0115-0243 (one track);
 - iv. KEN-OTP-0115-0248 (one track);
 - v. KEN-OTP-0116-0112 (14 tracks).
- b. Summary of content and, if necessary, production of transcript and translation: KEN-OTP-0116-0112 (track 15).
- c. Verification of corrections made by the witness to the existing transcripts: KEN-OTP-0115-0247 (two tracks).



James Stewart, Deputy Prosecutor

Dated this 8th day of November 2021
At The Hague, The Netherlands