

**Cour
Pénale
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**International
Criminal
Court**

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Date: **15 March 2022**

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 Response to the "Notice of the Defence's inability to declare its intent to present a case prior to the conclusion of the OTP's case-in-chief, prior to assessing the evidence adduced, and prior to conducting any relevant investigation"

Source: Office of the Prosecutor

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

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I. Introduction

1. Citing fair trial rights and the ethical duties of counsel, the Defence disregards the Chamber's order to "to formally indicate by 10 March 2022 whether it intends to present evidence".¹ Instead, the Defence – ignoring the provisions of Regulation 35 of the Regulations of the Court² – proposes its own date to do so some nine weeks hence.³
2. The Defence Notice purports to take the form of a "notice", but is in effect a request for a variation of a time limit under Regulation 35(2) ROC and should be treated as such.
3. While the Prosecution defers to the discretion of the Chamber to determine whether the Defence should be required to declare its intent to present a case prior to the finalisation of the testimony of the Prosecution witnesses, the Defence Notice fails to show good cause for an extension of over nine weeks.⁴
4. Should the Chamber consider that a limited extension is justified in the circumstances, the Prosecution has no objection to a variation of the time limits as proposed in paragraph 28 below.

II. Confidentiality

5. Pursuant to Regulation 23*bis*(2) of the Regulations of the Court, this filing and its annex is "Confidential" as it responds to a filing similarly classified. A public redacted version will be filed within 5 days.

¹ ICC-01/09-01/20-292, "Chamber's Directions".

² "ROC".

³ ICC-01/09-01/20-298-Conf,"Defence Notice".

⁴ From 10 March to 16 May 2022.

III. Procedural Background

6. On 25 February 2022, Trial Chamber III issued its “Directions for the Defence Evidence Presentation” directing the Defence, *inter alia*, “to formally indicate by 10 March 2022 whether it intends to present evidence”.⁵
7. On 10 March 2022, the Defence emailed the Chamber to advise that it was unable to comply with this order and proposed an eight week extension.⁶ On the same day the Chamber instructed the Defence to file a formal written submission.
8. On 11 March, the Defence filed the Defence Notice and on the same day the Chamber ordered the Prosecution to provide its response no later than 4pm on Thursday 17 March 2022.

IV. Applicable Law

9. Regulation 35(1) provides that “[a]pplications to extend or reduce any time limit [...] as ordered by the Chamber shall be made in writing or orally to the Chamber seized of the matter setting out the grounds on which the variation is sought”.
10. Regulation 35(2) vests the Chamber with a discretion to “extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard”.
11. The granting of such request is discretionary and the assessment must be made on a case-by-case basis.

⁵ ICC-01/09-01/20-292, “Chamber’s Directions”.

⁶ Defence email; received at 11:43 on 10 March 2022.

V. Submissions

The Defence Notice disregards the Chamber's order

12. The Prosecution observes that the Chamber bears the responsibility of ensuring that proceedings are both fair *and* expeditious. In setting time limits for the Defence to indicate whether it intends to present evidence, the Chamber was exercising its legitimate authority to ensure that the proceedings are conducted in an orderly and expeditious manner. Expeditiousness is more than just a component of a fair trial, but an instrument for a proper administration of justice.⁷
13. The Defence Notice purports to “notify” the Chamber of its “inability to declare its intent to present a case”,⁸ and instead “proposes” to inform the Chamber of its decision by 16 May 2022, over nine weeks after the date it was ordered to do so. In doing so the Defence effectively disregards the Chamber's order and makes itself the sole arbiter as to whether and when it can and should provide the information ordered.
14. The Defence adopts the fundamental position that “only after hearing the OTP's case and assessing the quality of the OTP's evidence can the Defence intelligently decide whether and to what extent it should present a case”.⁹ However this must already have been apparent to the Defence on 25 February when the Chamber issued its Directions and the Defence provides no explanation as to why it was not able to notify the Chamber of its “inability” to comply with the order prior to the date of expiry of the time limit.

⁷ “Expeditiousness is [...] an independent and important value in the Statute to ensure the proper administration of justice, and is therefore more than a component of the fair trial rights of the accused. For this reason, article 64(2) enjoins the Trial Chamber to ensure that the trial is both fair and expeditious.” *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-2259 OA10, paras. 46-47.

⁸ Defence Request, introduction.

⁹ Defence Notice, para. 6.

The Defence Notice should be treated as a request to vary time limits

15. Despite these shortcomings, however, the Prosecution considers that the Defence Notice is in essence a request to vary a time limit imposed by the Chamber and assessed under the provisions of regulation 35(2) ROC and responds accordingly.
16. In deciding whether the Defence has shown good cause for the requested variation, the following questions must be answered: (i) has the Defence shown good cause to postpone the time limit until after the finalisation of the Prosecution's witness testimony?; if so, (ii) has the Defence shown good cause to postpone the time limit until after the resolution of a possible "no case to answer" request?; and if so, (iii) has the Defence shown good cause to postpone the time limits for over nine weeks?

(i) Has the Defence shown good cause to postpone the time limit until after the finalisation of the Prosecution's witness testimony?

17. Notwithstanding the deficiencies in the Defence Notice, the Prosecution defers to the Chamber's discretion as to whether the Defence has shown good cause for a limited extension of the time limit to formally indicate whether it intends to present evidence.
18. The Prosecution notes, however, that all that is required by the Chamber's Directions is to notify the Chamber that it *intends* to lead evidence. The Chamber specifically stresses the Accused's right to remain silent and should the Defence subsequently decide that it does not wish to lead any evidence, it cannot be compelled to do so. The Prosecution would have expected that, by this stage in the proceedings, the Defence would be in a position to at least form a *prima facie* view on this issue.

(ii) Has the Defence shown good cause to postpone the time limit until after the resolution of a possible “no case to answer” request?

19. The Defence additionally asserts that it cannot indicate its intention to present evidence prior to the adjudication of a possible “no case to answer” request.¹⁰
20. Leaving aside the issue of whether the Chamber would exercise its discretion¹¹ in favour of permitting recourse to such procedure in a case of such limited scope and duration, the Defence’s logic is inherently flawed. Unless the Defence envisages presenting evidence, a no case to answer request is superfluous and there is no reason not to proceed directly to final arguments.
21. Accordingly this assertion is speculative and unsupported and should be rejected.

(iii) Has the Defence shown good cause to postpone the time limits for over nine weeks?

22. The Defence seeks to postpone the time limit to indicate whether it intends to present evidence for over nine weeks until 16 May 2022.¹² In support, the Defence cites the need to conduct “any requisite investigations” and the need “for meaningful consultation with Mr Gicheru”¹³, but fails to explain why it has not been able to do so either in the eight months that have elapsed since the confirmation of charges on 15 July 2021.¹⁴
23. The Prosecution’s case has remained unchanged in its essence since the confirmation stage, as reflected by the Prosecution’s Trial Brief.¹⁵ The evidence led to date has not deviated from the case pleaded. Accordingly, the Defence has been on notice of the case it needs to meet and has been in possession of the

¹⁰ Defence Notice, paras. 2, 6-7.

¹¹ “A decision on whether or not to conduct a ‘no case to answer’ procedure is thus discretionary in nature and must be exercised on a case-by-case basis in a manner that ensures that the trial proceedings are fair and expeditious pursuant to article 64 (2) and 64 (3) (a) of the Statute [...].”, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2026, para. 44.

¹² Defence Notice, para. 11.

¹³ Defence Notice, para. 10.

¹⁴ Decision on the confirmation of charges against Paul Gicheru, ICC-01/09-01/20-153-Conf.

¹⁵ ICC-01/09-01/20-220-Conf.

bulk of the relevant evidence since March 2021. The Defence presents no reasons as to why, had it acted with the necessary diligence, it did not commence its investigations immediately after the confirmation of charges, at the latest, rather than waiting until the conclusion of the Prosecution's case.

24. Additionally, the Accused – a qualified lawyer himself – has been at liberty in Kenya until the commencement of the trial. He has been able to freely consult with counsel and was best placed to provide instructions as to the nature and location of any exculpatory evidence or potential Defence witnesses.
25. As regards the planned mission, the Defence baldly states that “a decision was made to postpone the trip due to a change in circumstances to ensure the most efficient and appropriate expenditure in light of available funds”. This tactical decision should not be used as a ground to justify why such a lengthy postponement is necessary, to the detriment of “the efficient and appropriate expenditure” of the funds of the Prosecution and the Court.
26. Even allowing for the planned mission, however, the Defence should be in a position to make an informed decision on the available information by no later than two weeks after the finalisation of the Prosecution's in-court evidence.
27. Accordingly, the Prosecution submits that the Defence has not shown good cause for a nine week postponement of the time limit to notify the Chamber of its intention to present.
28. Should the Chamber decide to exercise its discretion to extend the time limit until after the finalisation of the testimony of the Prosecution witnesses, the Prosecution respectfully submits that the following would be reasonable schedule given the limited nature and scope of the case and the need for the expeditious conduct of proceedings:

- 24 March 2022 – Finalisation of witness testimony (planned);

- 08 April 2021 – Submission of any further evidence and formal closure of the Prosecution case;
- 13 April 2022 – Defence notification of the presentation of a Defence case;
- 19 April 2022 – Defence provision of information required by the Chamber's Directions, para. 7 [10 days after closure of Prosecution case]; and
- 03 May 2022 – Commencement of Defence case (if any).¹⁶

VI. Conclusion and Relief Requested

29. For the aforementioned reasons, the Prosecution defers to the Chamber's discretion to permit a limited variation of the time limit to declare its intent to present a until after the finalisation of the testimony of the Prosecution witnesses, but opposes the Defence request for a nine weeks postponement.
30. Should the Chamber consider that a limited extension is justified in the circumstances, the Prosecution has no objection to a variation of the time limits as proposed in paragraph 28 above.



Ms Nazhat Khan, Deputy Prosecutor

Dated this 15th day of March 2022
At The Hague, The Netherlands

¹⁶ The Prosecution notes that submissions on the commencement of any Defence date are premature, since the Chamber indicated that it would decide on this only after receiving the information that the Defence was ordered to provide (*per* Chamber's Directions, para. 10), but since the Defence has suggested a starting date, the Prosecution deems it appropriate to provide its input too.