

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/20
Date: 12 November 2021

TRIAL CHAMBER III

Before: Judge Miatta Maria Samba

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR v. PAUL GICHERU

Public

**With Confidential *EX PARTE*, only available to the Prosecution and VWU
Annexes A and B**

**Public redacted version of "Prosecution's Request pursuant to article 68 and
regulation 35 for delayed disclosure and variation of time limits related to
Prosecution Witness P-0729", ICC-01/09-01/20-216-Conf-Exp, 11 November 2021**

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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**Unrepresented Applicants
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I. INTRODUCTION

1. In its “Decision Setting the Commencement Date of the Trial and Related Deadlines”,¹ Trial Chamber III² directed the Prosecution to disclose “all evidence and material on which the Prosecution intends to rely at trial”³ and to file its List of Witnesses⁴ by the deadline of 15 November 2021.⁵
2. Pursuant to regulation 35 of the Regulations of the Court,⁶ the Prosecution⁷ hereby seeks a variation of this deadline until 15 December 2021, at the latest, with regard to:
 - i) The disclosure of the written statement, associated evidence and identity of Witness P-0729 to the Defence; and
 - ii) the addition of Witness P-0729 to the Prosecution List of Witnesses.
3. In the circumstances described below, this request is justified in accordance with article 68 of the Rome Statute⁸ to protect the safety and well-being of the witness. It is also proportionate and necessary [REDACTED], which the Prosecution is making its best efforts to resolve.
4. This request is also not unduly prejudicing the rights of the Defence to have adequate time for a meaningful preparation of their defence. In fact, P-0729’s evidence is limited in volume, scope and nature, and is largely [REDACTED] of other evidence that has already been in the Defence’s possession for some time. Additionally, if allowed, the Prosecution will call this witness to testify [REDACTED] so as to provide the Defence with ample time to prepare for the witness’ examination. Moreover, in the eventuality that the witness’ situation is not

¹ ICC-01/09-01/20-185.

² “Chamber”.

³ ICC-01/09-01/20-185, p. 9.

⁴ “LoW”.

⁵ ICC-01/09-01/20-185, para. 30.

⁶ “RoC”.

⁷ “Prosecution” or “OTP”.

⁸ “Statute”.

properly resolved by [REDACTED], the Prosecution will not rely upon P-0729's evidence at all. At that point, the Prosecution will evaluate whether disclosure of the witness' identity and material is still warranted pursuant to rule 77 or article 67(2), and proceed accordingly.

5. The Prosecution submits the withholding of the witness' identity from the Defence for a limited period is justified under article 68 and that good cause under regulation 35(2) exists to vary the relevant deadlines in the circumstances.

II. CONFIDENTIALITY

6. Under regulation 23*bis* (2) of the RoC, this filing is submitted as "confidential, *ex parte*", available to the Prosecution and the Victims and Witnesses Section ("VWU") only, as it contains sensitive information pertaining to the witness' identity and evidence. A confidential redacted version of this request is being filed simultaneously and a public redacted version will be filed within five days from today.

III. BACKGROUND

7. On 10 September 2021, the Prosecution informed the Chamber and the Defence about the witnesses it intended to call to testify at trial.⁹ Among these witnesses, the Prosecution included [REDACTED] evidence had not yet been collected, but which the Prosecution believed to be useful [REDACTED] in support of the charges against the Accused, as confirmed by the Pre-Trial Chamber.¹⁰ The Prosecution further advised that it would ensure timely disclosure of the evidence [REDACTED] and, if not possible, that it would approach the Chamber [REDACTED].¹¹

⁹ ICC-01/09-01/20-171-Conf, para. 12.

¹⁰ ICC-01/09-01/20-171-Conf, [REDACTED].

¹¹ [REDACTED].

8. On 30 September 2021, the Chamber directed the Prosecution to file its final list of witnesses by 15 November 2021.¹² On 7 October 2021, the Chamber confirmed this deadline¹³ and ordered the Prosecution to complete disclosure of all evidence and material on which the Prosecution intends to rely at trial by the same date, 15 November 2021,¹⁴ adding that “[w]itnesses and evidence may be added to these lists after the deadline only with leave of the Chamber”.¹⁵
9. On [REDACTED], the Prosecution interviewed [REDACTED], P-0729, and collected a written statement from the witness pursuant to rule 111.¹⁶
10. As a precursor to this interview, the Prosecution explained P-0729 *inter alia* the nature and extent of the Prosecution’s disclosure obligations vis-à-vis the Accused under the Statute, including that regarding the identity of witnesses the Prosecution intends to call to testify at trial. P-0729 understood those explanations, and agreed to be interviewed and testify at trial. [REDACTED]. [REDACTED].
11. On [REDACTED] October 2021, however, P-0729 informed the Prosecution that [REDACTED].¹⁷ [REDACTED] then asked the OTP not to contact [REDACTED] anymore.
12. On 3 and 4 November 2021, the Prosecution managed to re-establish contact with P-0729 and [REDACTED] agreed [REDACTED] to discuss a range of topics related to [REDACTED] decision [REDACTED]; the Prosecution’s disclosure obligations vis-à-vis the Accused; the witness’ security situation as a result of these obligations and potential mitigating measures, [REDACTED]; and to explore any other concerns the witness might have. These topics were not discussed with P-0729 [REDACTED] for security reasons [REDACTED].

¹² ICC-01/09-01/20-185, para. 17.

¹³ ICC-01/09-01/20-189, para. 30.

¹⁴ ICC-01/09-01/20-189, p. 9.

¹⁵ ICC-01/09-01/20-189, para. 19.

¹⁶ Annex A, KEN-OTP-0160-0593 and KEN-OTP-0160-0607. These and the item in Annex B could not be hyperlinked as they have not been disclosed and uploaded in e-Court yet.

¹⁷ Annex B, KEN-OTP-0160-0704.

13. Due to P-0729's [REDACTED], [REDACTED], after the deadline set by the Chamber to disclose all evidence and material on which the Prosecution intends to rely at trial.

IV. SUBMISSIONS

Good cause exists to delay disclosure of P-0729's identity and statement to the Defence

14. [REDACTED]¹⁸ [REDACTED].¹⁹

15. [REDACTED]²⁰ [REDACTED].²¹

16. [REDACTED].²²

17. P-0729 was not a direct victim of or witness to the PEV. [REDACTED]. The witness does not form the basis of any charge against the Accused in this proceedings and, as explained below, provided corroborating evidence [REDACTED].

18. The Prosecution first spoke to P-0729 [REDACTED] in the context of its then on-going investigations, after the charges against the Accused had been confirmed.²³ P-0729 was formally interviewed [REDACTED]. After having assessed the evidence of P-0729 to be relevant and probative and secured the witness's consent to testify at trial, the Prosecution [REDACTED] in anticipation of the witness's further participation in the proceedings, including through disclosure of [REDACTED] identity and statement. [REDACTED].

19. On [REDACTED] 2021, the witness informed investigators that [REDACTED]. The witness then broke off communication with the Prosecution. On [REDACTED], the Prosecution re-established contact with P-0729 [REDACTED]. The Prosecution intended to discuss with P-0729 a range of issues stemming from the witness's

¹⁸ Annex A, KEN-OTP-0160-0593, paras. 15-23.

¹⁹ Annex A, KEN-OTP-0160-0593, para. 23.

²⁰ ICC-01/09-30-Red.

²¹ ICC-01/09-01/11-373.

²² Annex A, KEN-OTP-0160-0593, para. 51.

²³ ICC-01/09-01/20-153-Conf.

decision [REDACTED], [REDACTED], as well as explain the implications of such decision, including on [REDACTED]. Most significantly, the Prosecution intended to discuss with the witness [REDACTED] security situation and [REDACTED], particularly given the possibility that the witness's statement may nevertheless be assessed as disclosable. Due to the complexity of the topics to address, and the security risks attendant on discussing sensitive security matters [REDACTED]. Only on [REDACTED] 2021, P-0729 confirmed [REDACTED].

20. Given the uncertainty surrounding the witness' [REDACTED], the Prosecution has not yet disclosed [REDACTED] statement and identity to the Defence. The Prosecution considers that prior to involving the witness further in complex judicial proceedings before this Court and bearing in mind the Prosecution's obligations to protect witnesses' well-being under article 68(1), it must discharge its best efforts to attempt and establish the witness' current standing and circumstances vis-à-vis the proceedings in this case. [REDACTED] all the above-mentioned issues, will the Prosecution be in a position to determine with finality whether it can rely upon the cooperation of this witness at trial and add [REDACTED] to its LoW,²⁴ provided the Chamber permits.

21. In the circumstances, the Prosecution has done everything in its power to react promptly to the witness' concerns as soon as they arose. However, the Prosecution submits that in order to fulfil its statutory protection responsibilities meaningfully, it must [REDACTED] P-0729 [REDACTED] and for this reason seeks a discrete variation of the 15 November 2021 deadlines.

Delaying disclosure of P-0729's identity and statement to the Defence is appropriate in the circumstances

22. The Prosecution acknowledges that under the Protocol on handling confidential information, the parties are bound to the confidentiality of the material disclosed

²⁴ Or, alternatively, disclose [REDACTED] identity and statement under rule 77 or article 67(2), if appropriate.

in the proceedings and that parties are under a general obligation not to disclose to third parties any confidential document or information, including the identity of witnesses and their material to third parties.²⁵ However, the Prosecution submits that prior to subjecting the witness to all the legal and personal implications of disclosing [REDACTED] identity and statement in formal internal judicial criminal proceedings, which include divulging privacy details, it should attempt to discuss the matter in person with the witness again and confirm [REDACTED] status vis-à-vis the proceedings. This is even more so when the witness [REDACTED], [REDACTED].

23. In order to minimize the impact of the present situation on the current proceedings, the Prosecution considered alternative avenues to requesting delayed disclosure of P-0729's identity and evidence, but concluded that those would be inadequate. In this regards, the Prosecution assessed the possibility of providing the Defence with a redacted statement of this witness or a summary thereof. However, the Prosecutor determined that given the specific nature [REDACTED] in P-0729's statement, [REDACTED], the extent of redactions required to protect P-0729's identity would be so important as to render the statement unintelligible. Similarly, an anonymized summary of the statement itself would be unhelpful to the Defence as it could only be formulated in the same generic terms as those already provided by the Prosecution in its previous submissions about the nature of the witness' evidence.²⁶

Delaying disclosure of P-0729's identity and statement to the Defence is not prejudicial to their rights

24. The Prosecution is seeking to delay disclosure of a single written statement made of 14 pages only,²⁷ an annotated Google-map [REDACTED],²⁸ and other non-

²⁵ ICC-01/09-01/20-67-AnxII, paras. 6-14.

²⁶ ICC-01/09-01/20-171-Conf, para. 12.

²⁷ Annex A, KEN-OTP-0160-0593. The Prosecution notes that the actual length of this statement is further reduced when considering that its first three pages and the last page contain no substantive information.

²⁸ Annex A, KEN-OTP-0160-0607.

substantive items such as justified witness expenses and relevant communications.²⁹ There are no other materials related to this witness. The relevant content of the statement is limited to [REDACTED]. As such, the witness's evidence is [REDACTED] already disclosed to the Accused in this case in relation to the charges as confirmed by the Pre-Trial Chamber.

25. The Prosecution further undertakes to call this witness to testify last as to minimize the impact of [REDACTED] delayed disclosure and provide the Defence with ample time to prepare for [REDACTED] examination of the witness.

26. Moreover, in the eventuality that any additional protection measures, [REDACTED], cannot be implemented by [REDACTED], the OTP will not rely upon [REDACTED] evidence as incriminating and elect not to not call [REDACTED] to testify at trial.³⁰ At that point, the Prosecution will still assess any remaining disclosure obligations under rule 77 or article 67(2) and proceed accordingly.

Urgency

27. This request is urgent because the deadline set by the Chamber to disclose all evidence and material the Prosecution intends to rely upon at trial and submit the Prosecution's LoW is 15 November 2021. This request could not be completed before on 9 November 2021 [REDACTED].

V. RELIEF

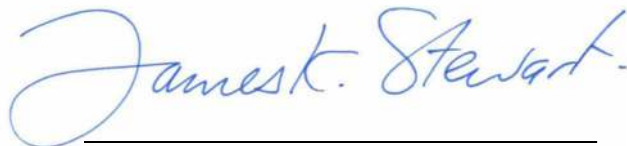
28. The Prosecution accordingly requests the Chamber to grant a variation of this deadline until 15 December 2021, at the latest, with regard to:

- i) the disclosure of the written statement, associated evidence and identity of Witness P-0729 to the Defence; and

²⁹ At the time of this filing, these associated materials are being prepared for registration in the evidence collection database in view of their anticipated disclosure and should not amount to more than 5 pages.

³⁰ As previously indicated, should the circumstances arise, the Prosecution will evaluate whether disclosure of the witness' identity and material is still warranted pursuant to rule 77 or article 67(2) and proceed accordingly.

- iii) should the circumstances permit, the addition of Witness P-0729 to the Prosecution List of Witnesses.



Mr James Stewart, Deputy Prosecutor

Dated this 12th day of November 2021
At The Hague, The Netherlands