

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/20

Date: 11 November 2021

Date of submission: 17 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

Public redacted version of "Prosecution's Request pursuant to article 68 and regulation 35 for variation of time limits related to Prosecution Witness [REDACTED]", ICC-01/09-01/20-217-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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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Victims**

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Mr Peter Lewis

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Detention Section

**Victims Participation and Reparations
Section**

Other

1. In its “Decision Setting the Commencement Date of the Trial and Related Deadlines”,¹ Trial Chamber III² directed the Prosecution to file its List of Witnesses by the deadline of 15 November 2021.³
2. Pursuant to regulation 35 of the Regulations of the Court,⁴ the Prosecution⁵ hereby seeks a variation of this deadline until 1 December 2021, at the latest, with regard to adding Witness [REDACTED] to the Prosecution List of Witnesses.⁶
3. In the circumstances described below, this request is justified in accordance with article 68 of the Rome Statute⁷ to protect the safety and well-being of the witness.
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, [REDACTED] evidence has already been in the Defence’s possession since [REDACTED]. Additionally, if allowed, the Prosecution will call this witness to testify among the last so as to provide the Defence with ample time to prepare for his examination
5. In the eventuality that the witness becomes unavailable by 1 December 2021 and provided that the Chamber grants this request, the Prosecution intends to request that [REDACTED] evidence be introduced into the record of this case *via* rule 68 [REDACTED] and/or that [REDACTED] be summonsed to testify before the Chamber.⁸
6. The Prosecution submits that good cause under regulation 35(2) exists to vary the relevant deadline in the circumstances.

¹ ICC-01/09-01/20-185.

² “Chamber”.

³ ICC-01/09-01/20-185, para. 30.

⁴ “RoC”.

⁵ “Prosecution” or “OTP”.

⁶ “LoW”.

⁷ “Statute”.

⁸ ICC-01/09-01/20-171-Conf, para. 18.

I. CONFIDENTIALITY

7. 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 (“VWS”) only, as it contains sensitive information pertaining to the witness’s status and current circumstances. A confidential redacted version of this request is being filed simultaneously and a public redacted version will be filed within five days from today.
8. Good cause exists to redact the witness code and identifying details from the confidential redacted version, since revealing this to the Defence would defeat the purpose of the filing.
9. The Prosecution notes the Defence’s assertion in its email to the Chamber of 11 November at 11:24 that “[t]he Prosecution cannot point to a single instance where *this* Defence has in any way breached its ethical obligations.” The Prosecution emphasises that it has no reason to doubt the integrity of the Defence team, but observes that it is disclosure to the *Accused* – not Defence counsel – that is of concern. Given the fact that the entire case against the Accused concerns allegations of witness interference – charges that have been established already to the confirmation of charges threshold – the Prosecution submits that an objectively justifiable risk exists that if witness details are disclosed to the Accused [REDACTED]
[REDACTED]
[REDACTED]
10. Moreover, it is not only the Accused who must be considered. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

II. BACKGROUND

11. On 12 March 2021, the Prosecution filed its Document Containing the Charges (“DCC”) relying upon the evidence of [REDACTED].⁹
12. On 15 July 2021, the Pre-Trial Chamber confirmed the charges against the Accused. Since then, in preparation for trial, the Prosecution attempted to meet [REDACTED] in person [REDACTED]. Despite the Prosecution’s assiduous efforts to accomplish these tasks timeously, it has been unable to do so to date.
13. On 10 September 2021, the Prosecution informed the Chamber and the Defence about the witnesses it intended to call to testify at trial.¹⁰ [REDACTED].¹¹
14. On 30 September 2021, the Chamber directed the Prosecution to file its final LoW by 15 November 2021.¹² On 7 October 2021, the Chamber confirmed this deadline,¹³ adding that “[w]itnesses and evidence may be added to these list[s] after the deadline only with leave of the Chamber”.¹⁴
15. Only on [REDACTED] [REDACTED], did [REDACTED] finally agreed to meet with OTP representatives [REDACTED], after the deadline set by the Chamber to submit the LoW.

III. SUBMISSIONS

Good cause exists to add [REDACTED] to the LoW

16. [REDACTED].¹⁵

⁹ [REDACTED].

¹⁰ ICC-01/09-01/20-171-Conf, para. 12.

¹¹ [REDACTED].

¹² ICC-01/09-01/20-185, para. 17. The Chamber shortened by two weeks the 1 December 2021 deadline originally proposed by the Parties.

¹³ ICC-01/09-01/20-189, para. 30.

¹⁴ ICC-01/09-01/20-189, para. 19.

¹⁵ Alternatively “Main Case”.

17. On [REDACTED] was interviewed by the OTP [REDACTED].¹⁶ The records of these interviews were disclosed to the Accused in this case [REDACTED] and relied upon by the Prosecution in its DCC [REDACTED] [REDACTED].¹⁷ [REDACTED].

18. *Delaying adding [REDACTED] to the LoW is appropriate in the circumstances*

19. On [REDACTED] 2020, the Prosecution resumed contact with [REDACTED].

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁸ [REDACTED]
[REDACTED]

20. The Prosecution wished to meet [REDACTED] in person [REDACTED] [REDACTED]. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Only
on [REDACTED] November 2021, did [REDACTED] agree to attend such a meeting, [REDACTED].

21. Given the uncertainty surrounding the witness's voluntary participation in the proceedings, the Prosecution considers it prudent to not include [REDACTED] on its LoW before meeting the witness

[REDACTED] [REDACTED]. Accordingly, and bearing in mind the Prosecution's obligations to protect witnesses' well-being under article 68(1), it considers that it must first discharge its best efforts to establish the witness's

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

current circumstances [REDACTED]. Only after having met the witness in person and addressed with [REDACTED] all the above-mentioned issues, will the Prosecution be in a position to determine with finality whether it can [REDACTED] add [REDACTED] to its LoW,¹⁹ if the Chamber permits. [REDACTED].

22. In the circumstances, the Prosecution has done everything in its power to meet the witness earlier than [REDACTED]. However, the Prosecution submits that in order to fulfil its statutory protection responsibilities meaningfully, it must meet [REDACTED] again and for this reason seeks a short variation of the 15 November 2021 deadline regarding the LoW.

Delaying adding [REDACTED] to the LoW is not prejudicial to the rights of the Defence

23. The Prosecution is seeking to delay adding [REDACTED] to his LoW until no later than 1 December 2021, less than three weeks after the current deadline.
24. [REDACTED] identity and evidence have been disclosed to the Defence since [REDACTED]. The Defence is also already on notice that the Prosecution intends to rely upon the evidence of this witness [REDACTED].²⁰ Moreover, by 15 November 2021, the Defence will know the precise place of [REDACTED] evidence within the legal architecture of the Prosecutor's case-in-chief as the Prosecution will file its Trial Brief, [REDACTED].
25. The Prosecution further undertakes to call this witness among the last to testify – either voluntarily or pursuant to a summons - as to minimize the impact of his delayed inclusion in the LoW, providing the Defence with more than three months' notice and ample time to prepare for [REDACTED] examination.

¹⁹ [REDACTED].

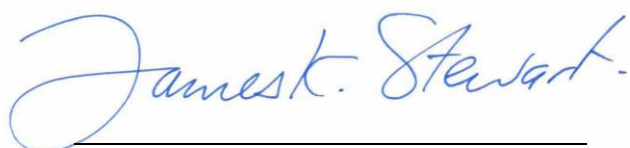
²⁰ [REDACTED]

Urgency

26. This request is urgent because the deadline set by the Chamber to submit the Prosecution's LoW is 15 November 2021. This request could not be completed before on [REDACTED] November 2021 since [REDACTED] confirmed only then [REDACTED] ability to meet the Prosecution again on the dates indicated above.

IV. RELIEF

27. The Prosecution accordingly requests the Chamber to grant a variation of this deadline until no later than 1 December 2021, at the latest, to add [REDACTED] to the Prosecution List of Witnesses.



Mr James Stewart, Deputy Prosecutor

Dated this 11th day of November 2021
At The Hague, The Netherlands