

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 10 December 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

Prosecution's supplementary request under regulation 35 to add updated transcriptions and translations to its List of Evidence and to amend its rule 68(2)(d) request related to Witness P-0495

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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**Victims Participation and Reparations
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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 Chamber also set the deadline for any remaining applications pursuant to Rule 68 of the Rules of Procedure and Evidence³ that “cannot be finalised by [22 October 2021], due to ongoing investigations or other exceptional circumstances” for 15 November 2021.⁴
2. Pursuant to regulation 35 of the Regulations of the Court,⁵ the Office of the Prosecutor⁶ seeks the variation of this deadline until 13 December 2021, at the latest, with regards to:
 - i) The addition of a limited number of revised transcriptions and translations of recently enhanced audio recordings⁷ to the Prosecution’s List of Evidence;⁸ and
 - ii) the substitution of these items for the previous versions listed as “associated material” in Annex A of the Prosecution’s Request for the introduction of the prior recorded testimony of Witness P-0495 pursuant to rule 68(2)(d).⁹
3. This request is justified since the Additional Material falls into the same category of material for which the Chamber has previously granted an extension of time limits, since it is very limited in scope and volume and since the addition of this

¹ ICC-01/09-01/20-185.

² “Chamber”.

³ “Rules”.

⁴ ICC-01 /09-01/20-185, p. 9.

⁵ “RoC”.

⁶ “Prosecution”.

⁷ Together “Additional Material”.

⁸ “LoE”.

⁹ ICC-01/09-01/20-196-Conf, “Rule 68(2)(d) Request”.

material would cause minimal prejudice to the defence and assist the Chamber in its determination of the truth.

II. BACKGROUND AND RELEVANT PROCEDURAL HISTORY

4. As already indicated to the Chamber in its Rule 68(2)(d) Request¹⁰ and in its Regulation 35 Request for Variation of the Disclosure Deadline for a Limited Number of Transcriptions and Translations,¹¹ in order to present the most accurate and reliable evidence at trial, on 7 October 2021 the Prosecution sought the assistance of its Forensic Science Section¹² to technically improve the quality of several audio files with sub-optimal sound quality. These included recorded phone calls between P-0495 and P-0800 conducted during P-0495's article 55(2) interview.¹³ FSS has subsequently succeeded in significantly improving the audio quality of the recordings.¹⁴ On 20 October 2021, FSS registered the Enhanced Recordings under the same ERN as the original recordings and on 10 November 2021 these were disclosed to the Defence via a metadata update.¹⁵
5. On 25 and 26 October 2021, requests for revised transcriptions and translation of the Enhanced Recordings were submitted to LSU. However, due to an oversight, one item of Enhanced Recording¹⁶ was omitted from the material transmitted to LSU on 25 and 26 October 2021. This oversight was discovered on 26 November 2021 and the Omitted Item was referred to LSU for urgent processing. The resulting revised transcriptions and translations, which were registered on 6 December 2021, are the subject of the present request.
6. On 8 November 2021, the Prosecution requested a variation of the deadline in respect of a limited number of transcriptions and translations relating to Enhanced

¹⁰ ICC-01/09-01/20-196-Conf, fn. 15; ICC-01/09-01/20-196-Conf-AnxA, fn. 1.

¹¹ ICC-01/09-01/20-212-Conf.

¹² "FSS".

¹³ KEN-OTP-0114-0472.

¹⁴ "Enhanced Recordings".

¹⁵ Per email to the Defence of 10 November 2021 at 18:04.

¹⁶ KEN-OTP-0114-0472, "Omitted Item".

Recordings that were in the Kalenjin language.¹⁷ However, due to the oversight described above, the Omitted Item was not included in the request.¹⁸

7. On 10 November 2021, the Chamber granted an extension of the deadline to add the relevant material, noting that that the prejudice to the Defence was minimal.¹⁹

III. SUBMISSIONS

8. The Prosecution acknowledges that the Additional Material ought to have been included in the First Variation Request and regrets that it was unable to do so due to the oversight mentioned above. Since the oversight was discovered, the Prosecution has acted diligently to ensure that the Omitted Item was processed and the Additional Material registered and disclosed as expeditiously as possible.
9. The Additional Material is very limited in scope and content. It comprises six items of revised transcription and translation which relate to one technically enhanced audio item (with three tracks totalling approximately seven minutes) of recorded one-party consent calls between P-0495 and P-0800. For each track, a revised Kalenjin transcription and English translation was produced, which supersede the versions previously disclosed and included in the LoE and Rule 68(2)(d) request.²⁰ The combined pages of the Additional Material (excluding cover pages) total four pages of transcription and four pages of translation.
10. The Prosecution stresses that the original audio item relevant to the current request and all existing transcripts and translations were disclosed in full to the Defence in January 2021 and the Enhanced Recording was disclosed on 10 November 2021. The original language is Kalenjin, a language understood by the Accused. The

¹⁷ ICC-01/09-01/20-212-Conf “First Variation Request”.

¹⁸ *Id.* fn. 3.

¹⁹ ICC-01/09-01/20-215, para. 10.

²⁰ KEN-OTP-0145-0581 and KEN-OTP-0145-0594. Note that in the original versions, all three tracks were included in a single transcript and translation, whereas the revised versions comprise separate transcripts and translations for each track.

Additional Material will be disclosed to the Defence no later than 13 December 2021.

11. The 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, since it is largely duplicative of material already in the Defence's possession for nearly a year.
12. Further, the interests of all Parties, the interests of justice and fairness to the witnesses who may be questioned on the basis of the material, will all be best served if the revised versions of the transcripts and translations are used in evidence, since this will ensure that the Parties and the Chamber have the benefit of the most complete and accurate record available of the relevant evidence, which will in turn assist the Chamber in its determination of the truth.
13. Therefore, good cause exists warranting the extension of the deadline to permit the Prosecution to add the Additional Material to its LoE and update its Rule 68(2)(d) request accordingly. Should leave be granted, the Prosecution will file the updated annex to its Rule 68(2)(d) request by no later than 13 December 2021.

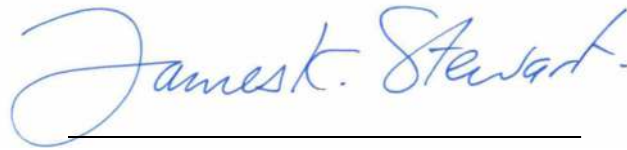
IV. RELIEF SOUGHT

14. For the foregoing reasons, the Prosecution respectfully requests the Chamber to grant:

(a) leave to add the following material to its List of Evidence:

- i. KEN-OTP-0160-1413 (transcript of KEN-OTP-0114-0472 track 1, enhanced in Kalenjin);
- ii. KEN-OTP-0160-1415 (transcript of KEN-OTP-0114-0472 track 2, enhanced in Kalenjin);
- iii. KEN-OTP-0160-1417 (transcript of KEN-OTP-0114-0472 track 3, enhanced in Kalenjin);

- iv. KEN-OTP-0160-1423 (English translation of KEN-OTP-0160-1413);
 - v. KEN-OTP-0160-1426 (English translation of KEN-OTP-0160-1415);
 - vi. KEN-OTP-0160-1429 (English translation of KEN-OTP-0160-1417); and
- (b) a variation of the deadline until 13 December 2021 to substitute these items for the previous versions listed as “associated material” in Annex A of the Rule 68(2)(d) request.



James Stewart, Deputy Prosecutor

Dated this 10th day of December 2021

At The Hague, The Netherlands