

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: ICC-01/09-01/20
Date: 9 February 2021

PRE-TRIAL CHAMBER A (ARTICLE 70)

Before: Judge Reine Adélaïde Sophie Alapini-Gansou

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 Annexes A and B**

Public Redacted Version of Prosecution's Response to the Defence "Request for Extension of Time Limits to File the Defence List of Evidence and Response to the Document Containing the Charges", 8 February 2021, ICC-01/09-01/20-97-Conf-Exp

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. The Defence for Mr Paul Gicheru¹ requests a five month postponement of the deadlines² to file its list of evidence for the confirmation of charges and its Response to the Prosecutor's Document Containing the Charges³ respectively. The Defence submits that "the Single Judge's tentative schedule falls appreciably short of according Mr. Gicheru an effective defence during the confirmation proceedings", citing *inter alia* the volume of disclosure, inadequate resources and logistical issues in consulting with Gicheru.⁴
2. The Prosecution does not consider that the Defence has shown good cause for a postponement of five months, particularly given the relatively limited volume of material disclosed. The Prosecution also disputes the Defence's assessment of the resources at its disposal.
3. However, given the limited resources available to the Defence and the logistical difficulties in consulting with its client, the Prosecution does not oppose a more reasonable postponement of the confirmation schedule, provided that the Prosecution's deadlines for the filing of the document containing the charges and the list of evidence⁵ and for the final disclosure of evidence are also adjusted accordingly.
4. The Prosecution submits that a **six week** postponement of the Defence disclosure deadline would be reasonable in the circumstances, with written submissions to follow after a further **two weeks**. Since the Chamber has clarified⁶ that the Prosecution's written submissions are intended to provide it with an opportunity to respond to any evidence disclosed by the Defence, the deadline for the Prosecution's submissions should be similarly postponed.

¹ "Gicheru".

² ICC-01/09-01/15-T-001-CONF-ENG ET, pp. 10-11.

³ "DCC".

⁴ ICC-01/09-01/20-96-Conf, Introductory paragraph, ("Defence Request").

⁵ "LoE".

⁶ *Per* email received from the Chamber at 16:28 on 01 February 2021.

5. Independently of the Defence Request, and as set out in more detail below, the Prosecution requests a limited postponement of its disclosure and filing deadline for the DCC and LoE due to difficulties beyond its control [REDACTED]. These circumstances make the [REDACTED] 12 February inadvisable. [REDACTED] In the circumstances, good cause exists for a limited **four week** postponement of the disclosure deadline and, concomitantly, the deadline to file the DCC and LoE.

II. CONFIDENTIALITY

6. Under regulation 23bis (2) of the Regulations of the Court,⁷ this filing is submitted as confidential *ex parte*, only available to the Prosecution, since it contains confidential information pertaining to [REDACTED] A confidential redacted version will be filed simultaneously.

III. SUBMISSIONS

No good cause for a five month postponement

7. Regulation 35(2) of the Regulations permits a chamber to extend time limits “if good cause is shown”. The Defence has not shown good cause why a postponement of “at least five months” is necessary.
8. The Defence asserts that the postponement is necessary to mount an effective defence in the confirmation proceedings, given the voluminous nature of the disclosed evidence, the inequality of resources vis-à-vis the Prosecution and obstacles in consulting effectively with their client.
9. However, the Prosecution disputes the Defence’s assessment of its resources, in particular that it has “an armada of lawyers, legal officers [and] investigators” at its disposal. The Prosecution also disputes it that has a significant resource advantage *vis-à-vis* the Defence, particularly when considering the respective

⁷ “Regulations”.

disclosure burdens of the Parties and the incidence of proof. In any event, the disparity is certainly no greater than in other similar cases before the Court and must have been considered when the time limits in rule 121 were determined.

10. As regards the volume of evidence disclosed, while not insignificant, it is modest compared to most cases before this Court and certainly does not justify a five month postponement. The Defence's reference to the postponements of confirmation hearings in prior cases cannot in itself justify a five month postponement, since this argument takes no account of the *reasons* for the postponement, nor does it attempt to compare the nature of the cases or the volume of disclosure. The Prosecution notes that, apart from the burden of reviewing the evidence disclosed, the Defence has not explained why it requires more than the 30 day period prescribed in the Rules to review the DCC.

A limited postponement is not opposed

11. However, the Prosecution does not oppose a more limited postponement of the deadlines for Defence disclosure and the schedule for the filing of its written submissions, provided the Prosecution's deadlines are also appropriately adjusted, particularly given the [REDACTED] difficulties being experienced by the Prosecution, as detailed in the next section.
12. The Prosecution acknowledges that the Defence has agreed to conduct an initial [REDACTED] review of a substantial volume of material [REDACTED] which it has undertaken to finalise by 15 February and which may impact upon its review of the evidence disclosed.
13. The Prosecution also appreciates the Defence's need to consult with its client and the logistical issues that may be presented by the fact that he has now been released – albeit at his own request – to Kenya, particularly given the current global pandemic. Indeed, the Prosecution has faced similar logistical challenges. Notwithstanding that consultation may be facilitated by remote video communication, the Prosecution considers that a modest postponement of the

Defence deadlines would be reasonable. The Prosecution submits that a postponement of the Defence's disclosure deadline for **six weeks** would be more than adequate in the circumstances, with written submissions to follow after a further **two weeks**. Since the Chamber has clarified⁸ that the Prosecution's written submissions are intended to provide it with an opportunity to respond to any evidence disclosed by the Defence, the deadline for the Prosecution's submissions should be similarly postponed.

14. The Prosecution has already disclosed, on a rolling basis, the vast majority of its incriminatory evidence and of what remains, the majority will be disclosed by 12 February, notwithstanding any postponement of the disclosure deadline, allowing the Defence sufficient time to review the disclosed evidence⁹ and the DCC.¹⁰
15. However, the Prosecution requests that its own deadlines should also be adjusted so that not only one party would benefit from the postponement. In all the cases mentioned by the Defence in which confirmation hearings were postponed, *both* the Prosecution and Defence deadlines were adjusted, with the DCC and LoE to be filed between 30 and 60 days prior to the commencement of the confirmation proceedings.
16. As foreshadowed in the "Prosecution's Observations on the Provisional Disclosure Schedule [...]",¹¹ on Thursday 4 February 2021 the Prosecution completed [REDACTED] This will require some significant revisions to the Prosecution's draft charging document¹² which would be greatly facilitated by a postponement of the filing deadline.

⁸ Per email received from the Chamber at 16:28 on 01 February 2021.

⁹ Over eight weeks to review the bulk of the evidenced which will have been disclosed by 12 February, and four weeks to review the few remaining items to be disclosed by no later than 12 March.

¹⁰ Four weeks to review the DCC prior to the Defence disclosure deadline and an additional two weeks before filing the Defence's written submissions. This is 50% more than the 30 day period prescribed by Rule 121(3).

¹¹ ICC-01/09-01/20-81-Conf-Exp, -Conf-Red, paras. 14 and 16.

¹² Including [REDACTED], but also the sourcing and hyperlinking [REDACTED] throughout the single charging document, as instructed by the Chamber, *per* email received at 16:28 on 01 February 2021.

[REDACTED]¹³ require a limited postponement of the Prosecution deadlines

17. In its decision setting the schedule for the confirmation proceedings, the Chamber indicated that “[t]he date for the filing of the Document Containing the Charges could be postponed by the Chamber, depending on how the procedure develops”, and that the Chamber would “decide on any request submitted in writing and with justification”. Independently of the Defence postponement request, it has now become apparent that [REDACTED] require delaying the disclosure [REDACTED] and the filing of the DCC [REDACTED].
18. [REDACTED]. [REDACTED]. [REDACTED].
19. [REDACTED],¹⁴ [REDACTED]. [REDACTED].
20. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]¹⁵ [REDACTED].
21. [REDACTED]¹⁶ [REDACTED].
22. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].
23. The Prosecution submits that the need to address these [REDACTED] provides good cause for a limited **four week** postponement of the Prosecutions disclosure and filing deadline for the DCC and LoE. There would be little, if any, prejudice occasioned to the Defence, given Gicheru’s release from custody and the Defence’s own request for postponement.

IV. CONCLUSION

24. The Defence has not shown good cause for the requested five month postponement of its disclosure and filing deadlines for confirmation. However, the Prosecution considers that there is good cause for to a more limited adjustment of the deadlines for both parties as follows:

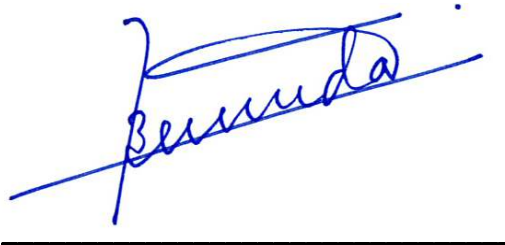
¹³ Previously assigned witness code [REDACTED].

¹⁴ Confidential *Ex Parte* Annex A.

¹⁵ [REDACTED].

¹⁶ A copy of [REDACTED] statement [REDACTED] is attached as Confidential *Ex Parte* Annex B.

- a. The postponement of the deadline to file the DCC and LoE and to disclose any remaining items of evidence by four weeks until 12 March 2021;
- b. The postponement of the Defence's disclosure deadline by six weeks until 09 April 2021;
- c. The postponement of the deadline for the filing of both Parties' written submissions until 23 April 2021; and
- d. The postponement of the deadline for the filing of the Prosecution's response and the Defence's reply until 30 April and 07 May 2021 respectively.



Fatou Bensouda, Prosecutor

Dated this 9th day of February 2021
At The Hague, The Netherlands