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**International
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TRIAL CHAMBER III (ARTICLE 70)

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 “Request for Extension of Time to Respond to the OTP’s Applications for the Introduction of Prior Recorded Testimony under Rule 68,” 26 October 2021, ICC-01/09-01/20-201-Conf

Source: Counsel for Paul Gicheru

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

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Mr. Paul Gicheru, through his Counsel (“the Defence”), pursuant to Regulation 35(2) of the Regulations of the Court (“Regulations”), hereby requests Trial Chamber III to extend the deadline for the responses to the Office of the Prosecutor’s (“OTP”) applications for the introduction of prior recorded testimony under Rule 68¹ by one month to 3 December 2021. This Request is made necessary because the 10-day deadline for filing responses to the OTP’s five Rule 68 applications falls appreciably short of according Mr. Gicheru an effective defence, equality of arms, and equal treatment. Granting this Request will neither prejudice the OTP nor unduly delay the proceedings. This Request is filed confidentially pursuant to Regulation 23bis(2) as it relates to submissions classified as confidential.

I. LAW AND ARGUMENT

A. The Defence does not have adequate time and facilities to analyze and respond to the five Rule 68 applications

1. Article 67(1) of the Rome Statute – which incorporates the international standards of justice in Article 14(1) of the International Covenant on Civil and Political Rights² – guarantees Mr. Gicheru the right to an *effective* defence.³ Generally, this means having adequate time and facilities for the preparation of the defence,⁴ having the ability to communicate with Counsel and participate in his own defence,⁵ and having Counsel with the ability to act diligently and zealously in protecting his fair trial rights.⁶ In this instance, it means affording

¹ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-193-Conf](#), Prosecution application for the introduction of prior recorded testimony of Witness P-0397 pursuant to rule 68(2)(c), and alternatively 68(2)(d), 22 October 2021; *Prosecutor v. Gicheru*, [ICC-01/09-01/20-194-Conf](#), Prosecution application under rule 68(3) to introduce the prior recorded testimony of Witness P-073, 22 October 2021; *Prosecutor v. Gicheru*, [ICC-01/09-01/20-196-Conf](#), Prosecution’s request for the introduction of the prior recorded testimony of Witness P-0495 pursuant to rule 68(2)(d), 22 October 2021; *Prosecutor v. Gicheru*, [ICC-01/09-01/20-197-Conf](#), Prosecution application under rule 68(3) to introduce the prior recorded testimony and associated material of Witnesses P-0613, P-0800 and P-0536, 21 October 2021; *Prosecutor v. Gicheru*, [ICC-01/09-01/20-198-Conf](#), Prosecution’s request for introduction of prior recorded testimony of Witnesses P-0731, P-0732, P-0733, P-0734, P-0735, P-0736 and P-0737 pursuant to rule 68(2)(b), 22 October 2021.

² According to Professors William Schabas and Yvonne McDermott, the chapeau provision of Article 67 “is an amalgam of norms” contained in Article 14(1) and (3) of the International Covenant on Civil and Political Rights (“ICCPR”). See William Schabas and Yvonne McDermott, *Article 67*, in Kai Ambos and Otto Triffterer, [The Rome Statute of the International Criminal Court](#), 1653-54 (3rd ed. 2016); ICCPR, [999 UNTS 171](#), 16 December 1966, Art. 14(1).

³ [Rome Statute](#), Art. 67(1)(b), (d). See also *Prosecutor v. Katanga*, [ICC-01/04-01/07-149](#), Decision on the Defence Application for Leave to Appeal the Decision on the Defence Request Concerning Languages, 18 January 2008, p. 5 (holding that the rights under Article 67(1) of the Statute are intended to ensure that the suspect is in a position to effectively participate in mounting a defence).

⁴ [Rome Statute](#), Art. 67(1)(b); [ICCPR](#), Art. 14(1)(b).

⁵ [Rome Statute](#), Art. 67(1)(d); [ICCPR](#), Art. 14(1)(d).

⁶ Defence counsel’s ethical and professional duties of zealousness and diligence are overarching duties central to and connected with other ethical duties of independence, loyalty, confidentiality, lack of conflicts of interest, and communication. The duties of zealousness and diligence require Defence counsel to do anything and everything to ensure that all fair trial rights are fully accorded to the client, including making legal challenges through written and oral submissions, checking the veracity and accuracy of evidence that may be used against the client, objecting to the admissibility of evidence, confronting witnesses, consulting with experts when necessary and relevant, and so on. Although the ICC Code of Professional Conduct for Counsel does not explicitly mention zealousness as

Mr. Gicheru's Defence adequate time and facilities to thoroughly review the OTP's Rule 68 applications, review the annexed materials, consult with and obtain instructions from Mr. Gicheru, and intelligently respond to the OTP's applications.

2. Under the current 10-day deadline, the Defence must analyze the OTP's five applications and the proposed prior recorded testimony of 13 witnesses to determine whether the criteria under Rule 68(2) and (3) are met. The Defence must also review each document cited in the annexes to the Rule 68 applications and determine whether the associated exhibits: (a) are used by the witnesses and necessary to read and understand their prior recorded testimony;⁷ (b) are relevant and have probative value;⁸ (c) are unduly prejudicial to Mr. Gicheru;⁹ and/or (c) are inadmissible under Article 69(7). This is labor intensive, as a review of the applications shows:
 - a. P-0397: The OTP seeks to introduce under Rule 68(2)(c) and (d) 22 transcripts of interview, their translations, and 15 associated exhibits, including [REDACTED].¹⁰
 - b. P-0730: The OTP seeks to introduce under Rule 68(3) the solemn declaration of P-0730 along with 69 associated exhibits, including [REDACTED].¹¹
 - c. P-0495: The OTP seeks to introduce under Rule 68(2)(d) seven transcripts of interview along with 10 associated exhibits, [REDACTED].¹²
 - d. P-0613: The OTP seeks to introduce under Rule 68(3) 11 witness statements and 36 associated exhibits and lists 41 additional associated exhibits that it intends to introduce during P-0613's testimony, [REDACTED].¹³
 - e. P-0800: The OTP seeks to introduce under Rule 68(3) 46 witness statements and 24 associated exhibits and lists 27 additional associated exhibits that it intends to introduce during P-0800's testimony, [REDACTED].¹⁴

being part of counsel's duties, it is an integral part of their professional responsibilities, generally requiring Counsel to press for every conceivable advantage of a client's case. Doing anything less *could* amount to ineffective legal assistance. ICC Code of Professional Conduct for Counsel, [ICC-ASP/4/Res.1](#), 2 December 2005, Art. 5.

⁷ *Prosecutor v. Ruto and Sang*, [ICC-01/09-01/11-1938-Conf-Corr](#), Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015 ("Ruto and Sang Rule 68 Decision"), para. 33.

⁸ *Prosecutor v. Ntaganda*, [ICC-01/04-02/06-1029](#), Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103, 20 November 2015, para. 15.

⁹ [Ruto and Sang Rule 68 Decision](#), para. 33.

¹⁰ [ICC-01/09-01/20-193-Conf-AnxA](#).

¹¹ [ICC-01/09-01/20-194-Conf-AnxA](#).

¹² [ICC-01/09-01/20-196-Conf-AnxA](#).

¹³ [ICC-01/09-01/20-197-Conf-AnxA](#).

¹⁴ [ICC-01/09-01/20-197-Conf-AnxB](#).

- f. P-0536: The OTP seeks to introduce under Rule 68(3) four witness statements and 28 associated exhibits and lists 48 additional exhibits that it intends to introduce during P-0536's testimony, [REDACTED].¹⁵
 - g. P-0731: The OTP seeks to introduce under Rule 68(2)(b) six solemn declarations and four associated exhibits from the OTP's Senior Investigator and Team Leader in the *Ruto and Sang* case.¹⁶
 - h. P-0732: The OTP seeks to introduce under Rule 68(2)(b) one solemn declaration and one associated exhibit from a former OTP investigator.¹⁷
 - i. P-0733: The OTP seeks to introduce under Rule 68(2)(b) one report concerning the review of forensic extraction [REDACTED] along with one associated exhibit and has listed 32 materials necessary to understand P-0733's prior recorded testimony.¹⁸
 - j. P-0734 and P-0735: The OTP seeks to introduce under Rule 68(2)(b) an expert report on the forensic file extraction along with [REDACTED].¹⁹
 - k. P-0736: The OTP seeks to introduce under Rule 68(2)(b) an expert report on the examination of [REDACTED] with one associated exhibit.²⁰
 - l. P-0737: The OTP seeks to introduce under Rule 68(2)(b) an expert report and four associated exhibits.²¹
3. Some of the Rule 68 applications, most notably those concerning P-0397 and P-0495, go to the acts and conduct of Mr. Gicheru.²² Considering that the Defence will not have an opportunity to cross-examine P-0397 and P-0495 at trial, the Defence must be exceptionally diligent in meticulously reviewing their prior recorded testimony and associated exhibits.²³
 4. Other material requested to be introduced through Rule 68 presents legal issues that must be fully briefed, such as whether any of the audio-recordings of conversations with only

¹⁵ [ICC-01/09-01/20-197-Conf-AnxC](#).

¹⁶ [ICC-01/09-01/20-198-Conf-AnxA](#).

¹⁷ [ICC-01/09-01/20-198-Conf-AnxB](#).

¹⁸ [ICC-01/09-01/20-198-Conf-AnxC](#).

¹⁹ [ICC-01/09-01/20-198-Conf-AnxD](#).

²⁰ [ICC-01/09-01/20-198-Conf-AnxE](#).

²¹ [ICC-01/09-01/20-198-Conf-AnxF](#).

²² [ICC-01/09-01/20-193](#), para. 19; [ICC-01/09-01/20-196](#), para. 34; See also [ICC-01/09-01/20-197](#), paras. 20, 34-7, 47.

²³ *Prosecutor v. Katanga*, [ICC-01/04-01/07-2635](#), Decision on the Prosecutor's Bar Table Motions, 17 December 2020, para. 42 (considering that "[t]he right of the accused to examine, or have examined, adverse witnesses is of fundamental importance to the fairness of the proceedings," since "[n]o judgment can be rendered safely if it is based on evidence prepared on behalf of one party which the opponent has not been able to test or verify").

one party's consent are admissible under Article 69(7), an issue Pre-Trial Chamber A has already brought to Trial Chamber III's attention.²⁴

5. Furthermore, considering that the Defence must also continue to review the [REDACTED] documents disclosed by the OTP just before its Rule 68 deadline on 20 and 22 October 2021,²⁵ the current 10-day allotment to respond to the five Rule 68 applications is insufficient. The Defence's proposed deadline of 3 December takes into account that the OTP may submit further Rule 68 applications that it could not complete by the 22 October 2021 deadline "due to ongoing investigations or other exceptional circumstances."²⁶

B. The Defence is in a substantial disadvantage vis-à-vis the OTP

6. The principle of equality of arms "implies the obligation to provide each party with a reasonable opportunity to present his case to the court, including evidence, in circumstances which do not place him at a substantial disadvantage vis-à-vis the opposing party."²⁷ Generally, this means that the Defence should: (a) not be disadvantaged in relation to the OTP considering the principle of basic proportionality; and (b) be permitted to have a fair opportunity to present its case.²⁸ Put differently, the resources afforded to the Defence should not be so disproportionate with those afforded to the OTP as to infringe upon the fundamental rights of the accused to present his or her case, fairly, at each stage of the proceedings.²⁹
7. The Defence does not have all relevant information at its disposal for assessing the Rule 68 applications. Based on a request from the Defence, the OTP submitted recordings associated with P-0397 to the Netherlands Forensic Institute for enhancement since some recordings are only partially translated and/or contain portions that are unintelligible, but does not have the enhanced transcripts and translations ready for disclosure.³⁰ The Defence also lacks access to confidential filings from the *Ruto and Sang* case, which the OTP requested for

²⁴ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-153](#), Decision on the confirmation of charges against Paul Gicheru, 15 July 2021, para. 36.

²⁵ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-192](#), Prosecution's 13th Communication of the Disclosure of Evidence, 21 October 2021; *Prosecutor v. Gicheru*, [ICC-01/09-01/20-195](#), Prosecution's 14th Communication of the Disclosure of Evidence, 22 October 2021.

²⁶ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-185](#), Decision Setting the Commencement Date of the Trial and Related Deadlines, 30 September 2021, para. 20.

²⁷ *Prosecutor v. Lubanga*, [ICC-01/04-01/06-672-tEN](#), Decision on the Defence request for leave to appeal regarding the transmission of applications for victim participation, 6 November 2006, p. 7.

²⁸ *Id.*, See also *Prosecutor v. Stakić*, IT-97-24-A, [Judgement](#), 22 March 2006, para. 149.

²⁹ Article 67(1) of the [Rome Statute](#) provides that fair trial rights apply "in full equality." Article 67(1)(e) expressly incorporates the principle of equality of arms, providing that the accused has the right to "examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her" (emphasis added).

³⁰ [ICC-01/09-01/20-193-Conf-AnxA](#), para. 8.

transfer on 22 October 2021, since they are referenced in the Rule 68 applications and may contain relevant information for the preparation of the defence.³¹

8. On the deadline for its Rule 68 applications, the OTP disclosed [REDACTED] documents for which it seeks admission under Rule 68 or claims are necessary to understand the witnesses' prior recorded testimony.³² Many of these documents have been in the OTP's possession since it began investigating Mr. Gicheru in late 2013.³³ Yet, it calculatedly chose to disclose them now, knowing full well the challenges it would pose to the Defence. To deny the Defence sufficient time to review this material before responding to the Rule 68 applications is to reward the OTP for engaging in tactics not conducive to the fairness of the trial or the OTP's truth seeking function,³⁴ at the expense of Mr. Gicheru's fair trial rights.
9. As noted during the First Status Conference, the OTP also has significant resource advantages over the four-member Defence team, having an armada of lawyers, legal officers, and investigators with institutional knowledge of the ICC, the *Ruto and Sang* case, and several years to prepare its case against Mr. Gicheru.³⁵ Conversely, the Defence with a team – which is limited by the ICC Legal Aid System to a Lead Counsel, one Associate Counsel, one Legal Assistant, and one Case Manager – has had to start from ground zero. Were rigid deadlines to be imposed that assuredly would put the Defence at a distinct disadvantage in meeting its due diligence obligations,³⁶ the disparity in time and resources between the OTP and Defence would risk turning the proceedings into a charade. The Defence is neither suggesting that it have equal financial and human resources, nor that it be afforded the same amount of time it took the OTP to get around to disclosing the material. It is merely requesting – based on the principle of basic proportionality – that it have an equal *opportunity* to prepare Mr. Gicheru's case consistent with the fair trial rights

³¹ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-200](#), Fourth Request for the urgent transfer of part of the record of the case into another case record, 25 October 2021.

³² See *Prosecutor v. Gicheru*, [ICC-01/09-01/20-192](#), Prosecution's 13th Communication of the Disclosure of Evidence, 21 October 2021; *Prosecutor v. Gicheru*, [ICC-01/09-01/20-195](#), Prosecution's 14th Communication of the Disclosure of Evidence, 22 October 2021.

³³ *Situation in the Republic of Kenya*, [ICC-01/09-144-Conf-Red](#), Confidential redacted version of Prosecution's Application under Article 58(1) of the Rome Statute, 9 February 2015, ICC-01/09-144-US-Exp, 23 December 2020, para. 8.

³⁴ [Rome Statute](#), Art. 54.

³⁵ [ICC-01/09-01/20-T-048-CONF-ENG](#), p. 9.

³⁶ See *supra* fn. 6; ICC Code of Professional Conduct for Counsel, [ICC-ASP/4/Res.1](#), 2 December 2005, Art. 5.

guaranteed to him by the Rome Statute³⁷ and the due diligence owed to him by his assigned counsel.³⁸

C. Trial Chamber III has discretion to extend the deadline

10. Trial Chamber III is responsible for ensuring that the trial is conducted with full respect for the rights of Mr. Gicheru³⁹ and has discretion under Regulation 35(2) of the Regulations to extend the deadline “if good cause is shown.”
11. In exercising its discretion, Trial Chamber III must consider all relevant factors, such as Mr. Gicheru’s right to an effective defence, the significance of the Rule 68 applications, the volume of the annexed material, and the disadvantage the Defence has *vis-à-vis* the OTP, all which militates in favor of granting a reasonable extension of one month. Granting a one-month extension is also consistent with the principle of equal treatment,⁴⁰ given that the Defence teams for Ruto and Sang had six weeks to respond to the OTP’s Rule 68 applications in the *Ruto and Sang* case.⁴¹

II. CONCLUSION AND RELIEF SOUGHT

12. Granting this Request for a reasonable and necessary extension will not delay the proceedings. None of the causes for the extension sought are of Mr. Gicheru’s doing: the volume of the material sought for admission under Rule 68, the timing of the OTP’s disclosure (which occurred *on* its deadline), and lack of all materials necessary to fully respond to the Rule 68 applications – all of which, when considered, militates in favor of granting the relief sought.

WHEREFORE, the Defence requests Trial Chamber III to **GRANT** this Request and **EXTEND** the deadline to file responses to the OTP’s Rule 68 applications by one month to 3 December 2021.

³⁷ The principle of equality of arms does not require that parties have equal financial or human resources, but that they have an equal opportunity to prepare their case, including having adequate time and facilities, equal access to evidence, and equal access to be heard. See *Prosecutor v. Nahimana*, [ICTR-99-52-A](#), Judgement, 28 November 2007, para. 220; *Prosecutor v. Kordić & Čerkez*, [IT-95-14/2-A](#), Judgement, 17 December 2004, paras. 175-76.

³⁸ See *supra* fn. 6; ICC Code of Professional Conduct for Counsel, [ICC-ASP/4/Res.1](#), 2 December 2005, Art. 5.

³⁹ [Rome Statute](#), Art. 64(2).

⁴⁰ The principle of equal protection “requires that similar cases are dealt with in similar proceedings.” See Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, [CCPR/C/GC/32](#), 23 August 2007, para. 14. See also *Prosecutor v. Bemba et al.*, [ICC-01/05-01/13-955](#), Decision on the Defence applications for judicial review of the decision of the Registrar on the allocation of resources during the trial phase, 21 May 2015, paras. 35-6; *Prosecutor v. Bemba et al.*, [ICC-01/05-01/13-2276-Red](#), Judgment on the appeals of the Prosecutor, Mr Jean- Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VIII entitled “Decision on Sentence pursuant to Article 76 of the Statute,” 8 March 2018, para. 245.

⁴¹ [Ruto and Sang Rule 68 Decision](#), paras. 1-7.

Respectfully submitted, 28 October 2021,
In The Hague, the Netherlands.



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