

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 16 July 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 Annex A**

Public redacted version of "Prosecution's Response to the "Urgent Defence Request for an Extension of Time to File its Written Submissions on the Confirmation of Charges", 22 April 2021, ICC-01/09-01/20-137-Conf

Source: Office of the Prosecutor

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

Court to:

The Office of the Prosecutor

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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REGISTRY

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
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Other

I. INTRODUCTION

1. The Defence for Mr Paul Gicheru¹ requests a one week postponement of the deadline² to file its written submissions on the confirmation of charges due to an alleged breach of the Prosecution's disclosure obligations.³
2. The Prosecution disputes that it is in breach of its disclosure obligations for the purposes of the confirmation proceedings. To the contrary, it has responded diligently, in good faith, and as swiftly as possible to numerous onerous disclosure requests submitted by the Defence between 19 March and 16 April 2021. However, the Prosecution acknowledges that it was only able to provide response to some of these requests in recent days, for reasons discussed further below.
3. In the circumstances, the Prosecution does not oppose a short postponement of the deadline for the filing of the Defence's written submissions on confirmation of up to one week, provided the schedule for the other written submissions ordered by the Chamber are adjusted accordingly.

II. CONFIDENTIALITY

4. Under regulation 23bis (2) of the Regulations of the Court,⁴ this filing is submitted as confidential, since it responds to a filing with similar classification.

III. SUBMISSIONS

5. The Defence's allegations of disclosure breaches by the Prosecution are unfounded. The Prosecution has kept the Chamber and Defence apprised of its progress and intended approach to its disclosure obligation in filings submitted

¹ "Defence".

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

³ "Request", ICC-01/09-01/20-136-Conf +Conf-Anx.

⁴ "Regulations".

on 16⁵ and 18⁶ November 2020, as well as 20 January 2021⁷. No objection was raised by the Defence at the time.

6. Additionally, the Prosecution has repeatedly invited Gicheru and his Defence to provide it with any themes, phrases or keywords that are considered relevant to the defence in order to prioritise the searches, review and disclosure of items in the OTP's possession, and to ensure the disclosure of the most relevant evidence in the most timely manner.⁸ The Defence has to date not availed itself of this offer. The Defence is of course under no obligation to do so, but the inevitable consequence of this, and the late disclosure requests discussed below, is that the Defence will receive the information it considers relevant later than would otherwise have been the case.
7. Over the course of the last month the Defence has submitted a series of disclosure related requests, including no fewer than four submitted last week. Additionally, the Prosecution has already responded to a number of other disclosure requests that the Defence does not mention in the Request or include in its annex. These include requests to provide detailed schedules of witness expenses for a number of Prosecution witnesses and to transfer a number of security related filings from the record of the *Ruto and Sang* case.
8. Each disclosure request requires time and resources to address, including the review and collation of the relevant information; the determination of whether the information is disclosable; the registration thereof, if not already registered; the application of the necessary redactions; the completion of metadata; the creation of disclosure packages; and the documentation of disclosure.
9. Nor does the list of requests detailed in the Defence's most recent email⁹ reflect the true extent of the requests, since in several cases these were in fact multiple

⁵ ICC-01/09-01/20-46.

⁶ ICC-01/09-01/20-49-Conf-Exp.

⁷ ICC-01/09-01/20-81-Conf-Exp.

⁸ See Prosecution's Progress Report on Investigation, Disclosure and Security of Witnesses, ICC-01/09-01/20-49-Conf-Exp, 18 November 2020, para. 26 and fn. 28; email exchange annexed as Annex A.

⁹ Request, -Conf-Anx, pp. 43-44. For ease of reference, the requests are referred to by their numbers on this list.

requests. For instance, the first request¹⁰ (19 March 2021) was to provide lesser redacted versions of a series of security related filings transferred from the record of the *Ruto and Sang* case which were cited – for background purposes – in the Prosecution’s article 58 request¹¹ and in the DCC.¹² This required the Prosecution to re-review the content of and redactions to five filings, 24 annexes comprising 159 documents. The Prosecution observes that the redacted versions of these filings have been available to the Defence for weeks, and several of the documents contained in the annexes have already been disclosed to the Defence, so any prejudice to the Defence occasioned by the delay in making available lesser redacted versions would be limited. As a result of this review, four lesser redacted versions will be filed and an additional twelve items disclosed by 23 April.

10. Similarly, in the second request the Defence sought disclosure of “*all* investigation notes taken by the investigators in preparation of or used for drafting investigative reports listed in the enclosed Annex”, which were said to be disclosable as prior statements under rule 76. The annex listed 36¹³ Investigators Reports in respect of which such information was sought. The Prosecution responded immediately clarifying that, in its view, such material did not fall within rule 76 as defined in the consistent jurisprudence of the Court. Nevertheless, the Prosecution undertook to review the underlying sources of information to determine if any were disclosable under rule 77. This has proved to be a lengthy and arduous task. While the Prosecution is still tracing isolated records, the result of the exercise to date has established that the relevant Investigation Reports accurately reflect the Prosecution records and that there is no additional evidence that is assessed to be disclosable under rule 77. The third request (9 April), which deals with a similar issue, is being dealt with together with the second request.

¹⁰ The Prosecution notes that this is not, properly said, a disclosure request.

¹¹ ICC-01/09-144-Conf-Red, para. 3 and fn 5.

¹² [REDACTED].

¹³ Including two duplicates and one incorrect ERN.

11. The information requested in the fifth (13 April), sixth (14 April) and seventh (16 April) requests was all disclosed on 21 April (within four to seven working days). The fifth request involved the review of over 400 items related to [REDACTED] that were prioritised for review and the relevant material was disclosed within a week. The seventh request required the prosecution to review and collate witness expense records for [REDACTED] former witnesses/intermediaries, which was disclosed within four working days.
12. As regards the fourth request (also 13 April), all but six items were disclosed on 21 April, also within seven days. While the Prosecution prioritised the disclosure of these items, since nine items¹⁴ were assessed to contain information disclosable under article 67(2), these required extensive redactions to the identities of numerous protection staff and the application of pseudonyms, in consultation with VWS, which inevitably delayed disclosure. The remaining six items, all rule 77,¹⁵ will be disclosed no later than 23 April.
13. Viewed against the facts set out above, the Prosecution submits that it is not in breach of its disclosure obligations, but to the contrary is properly, diligently and in good faith discharging its disclosure obligations and has been doing its utmost to assess and respond to the Defence requests and disclose any material required as quickly as possible. The Defence's assertion that "[t]his late disclosure, particularly on the eve of a deadline, cannot be viewed as anything other than a tactical move by the Prosecution to frustrate the Defence's ability to diligently represent Mr. Gicheru" is thus unjustified.
14. Notwithstanding this, the Prosecution acknowledges that certain items of evidence have been, and will be, disclosed very shortly before the deadline for written submissions. Accordingly, the Prosecution does not oppose a short postponement of up to one week for the filing of the Defence's written submissions.

¹⁴ Comprising translated transcripts [REDACTED].

¹⁵ Contrary to paragraph 4.a. of the Prosecution's email response of 20 April, the Prosecution in fact managed to include all of the rule 67(2) material in package 3, disclosed on 21 April.

15. Since it was clearly the Chamber's intention that both parties should file their submissions simultaneously, the Prosecution submits that its filing deadline should likewise be postponed by the same period. It also follows that the deadlines for the filing of the Prosecution's response and Defence's reply should also be adjusted accordingly.

IV. CONCLUSION

16. For the reasons set out above, the Prosecution disputes that it is in breach of its disclosure obligations, but does not oppose a short postponement of the deadline for the filing of the Defence's written submissions on confirmation for up to one week, provided the schedule for the other written submissions ordered by the Chamber are adjusted accordingly.



James Stewart, Deputy Prosecutor

Dated this 16th day of July 2021
At The Hague, The Netherlands