



Original: English

**No. ICC-01/09-01/20
Date: 26 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

**Decision on the postponement of the date of filing of written submissions and
other related deadlines for the confirmation of charges proceedings**

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart

Counsel for the Defence

Mr Michael Karnavas

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
for Participation/Reparations**

**The Office of Public Counsel
for Victims**

**The Office of Public Counsel
for the Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

PRE-TRIAL CHAMBER A (ARTICLE 70) of the International Criminal Court (the ‘Court’) issues the following decision.

I. RELEVANT PROCEDURAL HISTORY

1. On 10 March 2015, Pre-Trial Chamber II, in its then composition, issued warrants of arrest against Paul Gicheru (‘Mr Gicheru’) and Philipp Kipkoech Bett for their alleged responsibility for offences against the administration of justice under article 70(1)(c) of the Rome Statute (the ‘Statute’).¹
2. On 2 November 2020, Mr Gicheru surrendered himself to the authorities of the Kingdom of the Netherlands.
3. On 3 November 2020, following the completion of domestic proceedings in the Netherlands, Mr Gicheru was surrendered to the Court and arrived at the Court’s Detention Centre.
4. On 6 November 2020, Mr Gicheru appeared before the Chamber pursuant to article 60(1) of the Statute and rules 121(1) and 163(1) of the Rules of Procedure and Evidence² (the ‘Rules’ and the ‘First Appearance Hearing’, respectively). During the First Appearance Hearing, the Chamber decided that, in accordance with rule 165(3) of the Rules, no confirmation hearing should be held in the present case, and that parties should instead file written submissions (the ‘Written Submissions’), on 15 March 2021 at the latest.³ The Chamber also ordered, pursuant to rule 121 of the Rules: (1) the Prosecutor to file its Document containing the charges (the ‘DCC’) and the list of evidence on 12 February 2021 at the latest; (2) the Defence, if it wishes so, to disclose pieces of evidence and file a list of evidence on 26 February 2021 at the latest; (3) both parties to file Written Submissions on 15 March 2021 at the latest, as mentioned above;

¹ Decision on the ‘Prosecution’s Application under Article 58(1) of the Rome Statute’, ICC-01/09-01/15-1-Conf-Exp; a public redacted version was notified on the same day, *see* [ICC-01/09-01/15-1-Red](#).

² [Order Setting the Date for the Initial Appearance of Mr Gicheru](#), ICC-01/09-01/15-34.

³ ICC-01/09-01/15-T-001-CONF-ENG, p. 10, line 4 – p. 11, line 12. The Chamber is referring to public portion of the transcripts.

(4) the Prosecutor to file a response on 22 March 2021 at the latest; and (5) the Defence to file a reply on 29 March 2021 at the latest.⁴

5. On 18 November 2020, the Chamber received the ‘Notification of the Appointment of Mr Michael G. Karnavas as Counsel for Mr Paul Gicheru’.⁵

6. On 21 December 2020, the Chamber issued the ‘Decision Setting the Regime for Evidence Disclosure and Other Related Matters’.⁶

7. On 29 January 2021, the Chamber issued the ‘Decision on Mr Gicheru’s Request for Interim Release’.⁷

8. In January 2021, the Chamber received the first four disclosure communications from the Prosecutor.⁸

9. On 20 January 2021, the Chamber received the ‘Prosecution’s Observations on the Provisional Disclosure Schedule in accordance with the Pre-Trial Chamber’s Decision of 21 December 2020’.⁹

10. On 29 January 2021, the Chamber issued the ‘Decision on Mr Gicheru’s Request for Interim Release’ and thereby granted Mr Gicheru’s request for Interim Release.¹⁰

⁴ ICC-01/09-01/15-T-001-CONF-ENG, p.11, lines 1 – 15. The Chamber is referring to public portion of the transcripts.

⁵ [ICC-01/09-01/15-48](#), together with [public annex I](#).

⁶ [ICC-01/09-01/20-67](#), together with public [annex I](#) and public [annex II](#). See also Prosecution, [Prosecution’s written submissions concerning self-representation, severance of the charges, registration and disclosure of evidence, and other procedural matters pertaining to pre-confirmation proceedings](#), 16 November 2020, ICC-01/09-01/20-46; Defence, [Paul Gicheru’s Response to the Prosecution’s written submissions concerning severance of the charges, registration and disclosure of evidence, and other procedural matters pertaining to pre-confirmation proceedings](#), 1 December 2020, ICC-01/09-01/20-56.

⁷ ICC-01/09-01/20-90-Conf; a public redacted version was notified the same day, see [ICC-01/09-01/20-90-Red2](#). See also Registrar, [Transmission of Further Observations Submitted by the Kenyan Authorities pursuant to Pre-Trial Chamber A’s Order ICC-01/09-01/20-76 of 31 December 2020](#), 21 January 2021, ICC-01/09-01/20-82, together with one public [annex](#); Defence, Response to Further Observations Submitted by the Kenyan Authorities pursuant to Pre-Trial Chamber A’s Order ICC-01/09-01/20-76 of 31 December 2020, 21 January 2021, ICC-01/09-01/20-85-Conf, a public redacted version is also available, see [ICC-01/09-01/20-85-Red](#).

⁸ Prosecution’s First Communication of the Disclosure of Evidence, 4 January 2021, [ICC-01/09-01/20-77](#), together with confidential annex A; Prosecution’s Second Communication of the Disclosure of Evidence, 8 January 2021, [ICC-01/09-01/20-78](#), together with confidential annex A; Prosecution’s Third Communication of the Disclosure of Evidence, 13 January 2021, [ICC-01/09-01/20-80](#), together with confidential annex A; and Prosecution’s Fourth Communication of the Disclosure of Evidence, 29 January 2021, [ICC-01/09-01/20-88](#), together with confidential annex A.

⁹ ICC-01/09-01/20-81-Conf-Exp.

¹⁰ ICC-01/09-01/20-90-Conf; a public redacted version was notified the same day, see [ICC-01/09-01/20-90-Red2](#).

11. On 5 February 2021, the Chamber received the Defence’s ‘Request for Extension of Time Limits to File the Defence List of Evidence and Response to the Document Containing the Charges’ (the ‘Defence’s Request’).¹¹

12. On 8 February 2021, the Chamber received the ‘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”’ (the ‘Prosecution’s Response’).¹²

13. On 9 February 2021, the Chamber suspended the deadlines previously set during the First Appearance Hearing.¹³

14. On 15 February 2021, the Chamber received the ‘Prosecution’s Fifth Communication of the Disclosure of Evidence’.¹⁴

II. SUBMISSIONS RECEIVED BY THE CHAMBER

A. The Defence’s Request

15. The Defence requests a five-month extension to file its list of evidence and ‘a five-month extension to file its Response to the Prosecutor’s [DCC]’.¹⁵ The Chamber notes that the Defence mischaracterises the 15 March 2021 deadline.¹⁶ There is no such thing as a response to the DCC, the deadline referenced by the Defence pertains to the Written Submissions pursuant to rule 165(3) of the Rules. The Chamber therefore understands the Defence’s Request to seek a five-month postponement of the deadline to submit Written Submissions (which would be applicable to both the Prosecutor and the Defence).

¹¹ ICC-01/09-01/20-96-Conf, together with confidential annexes A, C and D and public Annex B; a public redacted version was notified on 9 February 2021, *see* [ICC-01/09-01/20-96-Red](#).

¹² ICC-01/09-01/20-97-Conf-Exp; a public redacted version was notified the next day, *see* [ICC-01/09-01/20-97-Red2](#).

¹³ *See* Email sent by the Chamber to the parties, on 9 February 2021 at 17:15.

¹⁴ [ICC-01/09-01/20-99](#), together with Confidential Annex A.

¹⁵ *See* [Defence’s Request](#), p. 3. *See also* para. 6.

¹⁶ [Defence’s Request](#), para. 2.

16. The Defence avers that the Chamber has discretion to grant this request and extend time limits as per rule 121(7) of the Rules and regulation 35(2) of the Regulations of the Court (the ‘Regulations’), if ‘good cause is shown’.¹⁷

17. The Defence argues that the ‘14-day time limit for filing the Defence list of evidence and 30-day time limit for responding to the [DCC] under the Single Judge’s tentative schedule falls appreciably short of according Mr. Gicheru an effective defence’.¹⁸

18. The Defence further submits that the required extensions of time are justified and necessary for the following reasons: (i) the right to an effective defence implies the ability for Counsel to act diligently and zealously;¹⁹ (ii) confirmation proceedings are significant at the ICC;²⁰ (iii) the Defence is at a substantial disadvantage *vis-à-vis* the Prosecutor and requests, in accordance with the principle of equality of arms, to have an equal *opportunity* to prepare its case, in particular in terms of time facilities;²¹ (iv) the disclosure material is voluminous, as the Prosecutor has disclosed a total of 388 documents thus far and will disclose more items;²² and (v) the Defence must meet with Mr Gicheru to review documents and investigate.²³

19. The Defence adds that granting the request would not delay the proceedings to Mr Gicheru’s detriment and that none of the causes for the extension sought are of Mr Gicheru’s doing, namely the volume of the disclosure material, the timing of the disclosure, COVID-19 related restrictions at the Detention Centre that prevented him from reviewing the evidence, and the time the Defence spent responding to the request by the Office of Public Counsel for the Defence regarding Provisional Rule 165 of the Rules.²⁴

¹⁷ [Defence’s Request](#), para. 17.

¹⁸ [Defence’s Request](#), para. 6.

¹⁹ [Defence’s Request](#), paras 7-8.

²⁰ [Defence’s Request](#), paras 9-10.

²¹ [Defence’s Request](#), paras 11-12.

²² [Defence’s Request](#), paras 13-14.

²³ [Defence’s Request](#), paras 15-16.

²⁴ [Defence’s Request](#), para. 19.

B. The Prosecutor's Response

20. The Prosecutor responds that the Defence has not shown good cause for a five-month postponement of its disclosure deadline.²⁵ The Prosecutor argues that the 'disparity of resources' alluded to by the Defence is 'certainly not greater than in other similar cases before the Court and must have been considered when the time limits in rule 121 were determined'.²⁶ The Prosecutor asserts that the volume of evidence in this case 'is modest compared to most cases before this Court and certainly does not justify a five-month postponement'.²⁷

21. However, the Prosecutor does not oppose a more 'reasonable' postponement of six weeks, provided that the Prosecutor's deadlines are also adjusted accordingly.²⁸ The Prosecutor states that the vast majority of incriminating evidence has already been disclosed, and that the majority of what remains will be disclosed by 12 February 2021, allowing the Defence sufficient time to review it.²⁹

22. The Prosecutor avers that she also needs a four-week postponement of the current deadlines for disclosure and the filing of her DCC, because of difficulties beyond her control, which she details in the confidential version of her filing.³⁰

III. APPLICABLE LAW

23. The Chamber has regard to articles 61 and 67 of the Statute and rule 121 of the Rules.

24. Rule 121 of the Rules, in relevant parts, reads as follows:

1. [...] At this first appearance, the Pre-Trial Chamber shall set the date on which it intends to hold a hearing to confirm the charges. [...]

3. The Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing. [...]

²⁵ [Defence's Request](#), paras 2, 7, 24.

²⁶ [Prosecutor's Response](#), para. 9.

²⁷ [Prosecutor's Response](#), para. 10.

²⁸ [Prosecutor's Response](#), paras 3, 11-12, 24.

²⁹ [Prosecutor's Response](#), para. 14.

³⁰ [Prosecutor's Response](#), paras 5, 15-24.

6. If the person intends to present evidence under article 61, paragraph 6, he or she shall provide a list of that evidence to the Pre-Trial Chamber no later than 15 days before the date of the hearing.

7. The Prosecutor or the person may ask the Pre-Trial Chamber to postpone the date of the confirmation hearing. The Pre-Trial Chamber may also, on its own motion, decide to postpone the hearing.

25. Rule 121(7) of the Rules provides that the Pre-Trial Chamber may decide to postpone the confirmation hearing at the request of the parties or on its own motion. Of note is that the Pre-Trial Chamber, in considering a possible postponement of the confirmation hearing, must ensure that ‘judicial proceedings are conducted in a fair and expeditious manner taking into consideration the competing interests at stake’.³¹ In making its decision, the Pre-Trial Chamber must also take account of the submissions of the parties and the circumstances particular to the case.³²

26. The Chamber considers that for the purposes of ‘written submissions, without a hearing’ pursuant to rule 165(3) of the Rules, rule 121 of the Rules applies *mutatis mutandis* when referencing the hearing to confirm the charges and setting out deadlines in respect thereto. In other words, the ‘written submissions’ pursuant to rule 165(3) of the Rules constitute the ‘hearing’ within the meaning of rule 121 of the Rules.

IV. DETERMINATION BY THE CHAMBER

27. The Chamber notes that both parties agree on the necessity of postponing the date of the filing of the Written Submissions and other related deadlines. However, while the Prosecutor proposes to postpone the filing of the DCC and list of evidence by four

³¹ Pre-Trial Chamber I, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Décision fixant une nouvelle date pour le dépôt du document contenant les charges et pour le début de l’audience de confirmation des charges](#), 18 avril 2019, ICC-01/12-01/18-313 (‘*Ordonnance* of 18 April 2019’), para. 15; [Decision Postponing the Date of the Confirmation hearing](#), 20 July 2018, ICC-01/12-01/18-94-Red-tENG (‘Decision of 20 July 2018’), para. 14; Pre-Trial Chamber II, Case of *The Prosecutor v. Bosco Ntaganda*, [Decision on the ‘Prosecution’s Urgent Request to Postpone the Date of the Confirmation Hearing’ and Setting a New Calendar for the Disclosure of Evidence Between the Parties](#), 17 June 2013, ICC-01/04-02/06-73 (‘Decision of 17 June 2013’), para. 13 and references cited therein; Case of *The Prosecutor v. Dominic Ongwen*, [Decision Postponing the Date of the Confirmation of Charges Hearing](#), 6 March 2015, ICC-02/04-01/15-206 (‘Decision of 6 March 2015’), para. 25. See also Chambers Practice Manual, November 2019, para. 12: ‘Efforts should be made to reduce the average time that passes between the first appearance and the commencement of the confirmation of charges hearing.’

³² [Ordonnance of 18 April 2019](#), para. 15; [Decision of 20 July 2018](#), para. 14; [Decision of 6 March 2015](#), para. 25.

weeks, and the Defence's disclosure deadline by six weeks, the Defence requests five months to terminate its evidence disclosure following the filing of the DCC.

28. For the reasons that follow, the Chamber considers the five-month delay between the filing of the DCC and the disclosure of evidence by the Defence, as requested by the latter, to be unreasonable. This is particularly true in view of the scale of the present case and the volume of the evidence disclosed, compared to other cases.³³ The Chamber finds that the Defence has simply not demonstrated how the particular circumstances of the case would justify a five-month postponement, considering in particular the relatively limited scope of the present case. The Defence cites examples of postponements of confirmation hearings (the great majority of which of five months or less) that were decided in the past by other chambers in other cases, but fails to mention that those cases involved a far more important number of incidents and volume of related evidence than in the present case, as noted by the Prosecutor.³⁴ The Chamber also finds no merit in the Defence's argument that Mr Gicheru's return to Kenya logistically complicates the preparation of the Defence because this is a consequence of Mr Gicheru's own will. In the same way, the Chamber considers that a counsel cannot cite the fact that he or she had to prepare a procedural decision as a reason to justify a postponement request: preparing procedural decisions pertains to the standard duties of the Defence and are not a circumstance specific to the present case.

29. As regards the Defence's argument that granting its request would not delay the proceedings to Mr Gicheru's detriment,³⁵ the Chamber observes that when dealing with a request to postpone confirmation hearings, and in balancing the 'competing interests at stake',³⁶ chambers have indeed consistently referred to the suspect's right to be tried

³³ See e.g. Pre-Trial Chamber II, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaissona*, [Decision on the 'Prosecution's Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines'](#), 15 May 2019, ICC-01/14-01/18-199; *The Prosecutor v. Dominic Ongwen*, [Decision on the confirmation of charges against Dominic Ongwen](#), 23 March 2016, ICC-02/04-01/15-422-Red, pp. 8-9; *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, [Decision pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), 11 November 2014, ICC-01/05-01/13-749, para. 6; *The Prosecutor v. Bosco Ntaganda*, [Decision on the 'Prosecution's Urgent Request to Postpone the Date of the Confirmation Hearing' and Setting a New Calendar for the Disclosure of Evidence Between the Parties](#), 17 June 2013, ICC-01/04-02/06-73, p. 21; *The Prosecutor v. Laurent Gbagbo*, [Decision on the date of the confirmation of charges hearing and proceedings leading thereto](#), 3 June 2013, ICC-02/11-01/11-325, pp. 23-24. See also [Defence's Request](#), para. 18.

³⁴ See [Prosecutor's Response](#), para. 9.

³⁵ [Defence's Request](#), para. 19.

³⁶ See above, para. 25.

without undue delay enshrined in article 67(1)(c) of the Statute, or to the Chamber's responsibility under article 60(4) of the Statute to 'ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor', as reasons for not granting further delays. The Chamber notes that in the present case, the circumstances are different, as the postponement is requested by the Defence, and the suspect has been granted interim release albeit with conditions. However, the Chamber recalls its duty to ensure the expeditiousness of the proceedings, under article 64(2) of the Statute, which does not only comprise the interests of the suspect or the accused, but equally the proper administration of justice as such.

30. In this regard, the Chamber considers the Prosecutor's proposed new schedule to be more reasonable, and notes in particular the difficulties encountered in the course of her investigation,³⁷ the fact that pieces of evidence have been disclosed only recently,³⁸ and that new evidence is still being identified by the Prosecutor, which will subsequently have to be disclosed to the Defence.³⁹

31. The Chamber also notes that in the present case, the Prosecutor proposes to file her DCC and terminate the disclosure of evidence one month before the Defence's disclosure of evidence, which would provide the Defence with 15 additional days in addition to the 15 days already foreseen by rule 121(3) and (6) of the Rules. The Chamber recalls in this context the reasoning of Pre-Trial I in the *Al Hassan* case, according to which: 'rule 121(3) of the Rules imposes on the Prosecutor a minimum notice period beyond which the suspect's right "[t]o have adequate time and facilities for the preparation of the defence" under article 67(1)(b) of the Statute would necessarily be compromised'⁴⁰ and that:

³⁷ See [Prosecutor's Response](#), paras 16-22.

³⁸ See [Defence's Request](#), para. 4.

³⁹ See [Defence's Request](#), para. 13.

⁴⁰ [Decision on the Defence Request concerning the Time Limit for the Prosecutor to File the Document Containing a Detailed Description of the Charges](#), 5 October 2018, ICC-01/12-01/18-143-tENG, para. 23 referring to [Ordonnance of 18 April 2019](#), para. 20 and *The Prosecutor v. Bosco Ntaganda*, [Decision Setting the Regime for Evidence Disclosure and Other Related Matters](#), 12 April 2013, ICC-01/04-02/06-47, para. 16 ('it should be noted that the intervals referred to in rule 121 of the Rules are only indicative of the minimum notice periods a party may avail itself of to comply with its disclosure obligations. This interpretation finds support in the express wording "no later than" found in rule 121(3-6) and (9) of the Rules. The Single Judge wishes to underline that the Rules serve the application of the Statute and, accordingly, are subordinate to the Statute in all cases, the hierarchy between the two texts being clearly established in article 51(5) of the Statute. The minimum notice periods established in rule 121 of the Rules, especially the notice period set in rule 121(3) regarding disclosure by the Prosecution, must

having regard to the hierarchy of norms which operates between article 67(1)(b) of the Statute and rule 121(3) of the Rules, the Chamber is of the opinion that the bench may, pursuant to article 61(3) of the Statute, require more notice than the 30-day minimum under rule 121(3) of the Rules where they find that the specific circumstances of the case so warrant, in particular to give effect to the suspect's right '[t]o have adequate time and facilities for the preparation of the defence'.

32. Finally, the Chamber stresses that a postponement does not only benefit the Prosecutor but is equally responsive to the submissions of the Defence that it needs more time to analyse the already-disclosed material and the defence counsels' need to meet with its client to review the documents. Indeed, the postponement of the date for the Written Submissions for almost six weeks constitutes a partial grant of the Defence's Request.

33. For the foregoing reasons, the Chamber rejects the Defence's request for a five-month postponement and grants the Prosecutor's proposed new schedule,⁴¹ which will be set out in the disposition part of the present decision.

therefore be taken in conjunction with and subject to article 67(1)(b) of the Statute, which provides that the 'accused' must have adequate time for the preparation of his or her defence.') [internal footnotes omitted].

⁴¹ See [Prosecutor's Response](#), para. 24. The Chamber notes that it sets the date of the filing of the list of evidence by the Defence on 8 April 2020 in order to comply with the 15 days deadline of rule 121(6) of the Rules.

FOR THESE REASONS, THE CHAMBER HEREBY

- a) **GRANTS in part** the Defence's Request to the extent that it requests a postponement of the current deadlines of the confirmation proceedings;
- b) **DISMISSES in part** the Defence's Request to the extent that it requests a five-month postponement;
- c) **GRANTS** the Prosecutor's request to postpone the current deadlines of the confirmation proceedings; and
- d) **ORDERS:**
 - 1. The Prosecutor to file her DCC and list of evidence on 12 March 2021 at the latest;
 - 2. The Defence to file its list of evidence on 8 April 2021 at the latest;
 - 3. The Prosecutor and the Defence to file their Written Submissions, replacing the confirmation hearing in the present case, on 23 April 2021 at the latest;
 - 4. The Prosecutor to file her response to the Defence's Written Submissions on 30 April 2021 at the latest;
 - 5. The Defence to file its response to the Prosecutor's Written Submissions and its reply to the Prosecutor's Response to the Defence's Written Submissions on 7 May 2021.

Done in both English and French, the English version being authoritative.



Judge Reine Adélaïde Sophie Alapini-Gansou

Dated this Friday, 26 February 2021

At The Hague, The Netherlands