

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 5 March 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

**Prosecution's Urgent Request for an Extension of the Page Limit for the filing of
its Document Containing the Charges**

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)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

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REGISTRY

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. Pursuant to regulation 37(2) of the Regulations of the Court¹, the Prosecution requests an extension of the page limit of its Document Containing the Charges (“DCC”) against Mr Paul Gicheru,² as ordered by Pre-Trial Chamber A (Article 70)³ on 6 November 2020.⁴ The Prosecution request permission to file a DCC no longer than 175 pages.
2. The extension is necessary to allow the Prosecution to comply with the Chamber’s order to file a document “‘combin[ing in it] the charges and the narrative and analysis of the facts and evidence into a single document’ including their legal qualification (and the arguments in support of the proposed legal qualification(s))”, with detailed footnotes to the supporting evidence, in order to provide the Defence with “an exhaustive view of the Prosecutor’s case”.⁵
3. In light of the fact that all submissions will be in writing – in lieu of any oral presentation by the parties – permitting the Prosecution sufficient space to comply with the Chamber’s instructions is in the interest of assisting the Chamber and the Defence, since this will permit a comprehensive presentation of the Prosecution’s case.
4. Given the impending filing deadline and in order to give the Chamber sufficient time to decide the issue, the Prosecution requests the Chamber to order the Defence to file its response, if any, by Monday 8 March 2021.

¹ “Regulations”.

² “Gicheru”.

³ “Chamber”.

⁴ ICC-01/09-01/15-T-001-CONF-ENG, p.11, lines 1 – 15; the filing deadline was subsequently extended by the Chamber, ICC-01/09-01/20-103.

⁵ Chamber’s email receive at 16:28 on 1 February 2021.

II. SUBMISSIONS

5. Pursuant to regulation 37(2), the Chamber ‘may, at the request of a participant, extend the page limit in exceptional circumstances’. The current circumstances are exceptional and warrant an extension of the page limit for the following reasons.
6. The Pre-Trial Chamber has ordered the Prosecution to file a document containing the charges,⁶ which is now due on Friday 12 March 2021.⁷ Having sought clarification from the Pre-Trial Chamber as to the format and substance of the DCC, the Prosecutor understands that it is expected to file a document containing an exhaustive view of its case, combining “the charges and the narrative and analysis of the facts and evidence into a single document including their legal qualification (and the arguments in support of the proposed legal qualification(s)).”⁸ The Prosecution is in the final stages of complying with these instructions and is now in a position to give an estimate of the number of pages required to do so.
7. To achieve this, however, more space is required than permitted by the Regulations. Regulation 38 provides, at paragraph 3(g), that the Prosecutor’s document containing a description of the charges filed under rule 121(3) of the Rules of Procedure and Evidence (“Rules”) shall be 30 pages in length. Paragraph 1(a) of the same Regulation provides that pre-trial briefs shall be no longer than 120 pages.
8. Given that the document required by the Chamber will combine what in other cases have been filed separately as a DCC and a Pre-Confirmation Brief, and added to that written submissions on the confirmation of the charges alleged,

⁶ ICC-01/09-01/15-T-001-CONF-ENG, p.11, lines 1 – 15.

⁷ ICC-01/09-01/20-103.

⁸ Email from the Pre-Trial Judge, 1 February 2021 at 16:28.

exceptional circumstance exist to permit the filing of a document exceeding the combined length of the two documents mentioned above.

9. It is in the interests of all parties that the Prosecution be given sufficient space to set out its case in detail: The Chamber will have the advantage of a detailed set of charges supported by comprehensive references to the underlying evidence, which will facilitate its confirmation decision; and the Defence will be given detailed notice of the precise contours of the case that it will be required to meet, should charges be confirmed.

A. The DCC will combine charges, a narrative and legal analysis of the evidence

10. The document that the Prosecution will file by 12 March 2021 consists of a combination of a DCC and a pre-trial brief, in that it will contain both the charges and a detailed narrative and explanation of the evidence, including detailed footnotes referencing the supporting evidence. Regulation 38(3)(g) applies to documents that only provide a “description of the charges.”
11. The charges and narrative relate to eight separate incidents, each concerning a witness who was corruptly influenced corrupted or interfered by Gicheru and/or his associates. The narrative relating to each of these witnesses is complex: the corrupt influencing of the respective witnesses did not occur in a single incident, but rather over the course of several interactions, sometimes spanning weeks or even months. The charges and the narrative will also describe the involvement of a variety of actors in Gicheru’s network. Given Gicheru’s close personal involvement in these activities, it is also necessary to describe them in sufficient detail.
12. Furthermore, to fully capture Gicheru’s individual criminal responsibility, the DCC will describe the various and relevant modes of liability as applied to the facts relevant to each of the eight witnesses. Some of the modes of liability require

more explanation, in particular in the context of concerted actions by a variety of actors within the framework of a common plan or common purpose.

13. The degree of specificity demanded and the requirement to include in the footnotes of the DCC the evidence in support of the charges were found to be reasonable justifications by the Pre-Trial Chamber in the *Al Hassan* case to warrant an extension of the page limit and allow a 500-page DCC. The nature of the present case does not require a similar volume and the Prosecution assesses that 175 pages will be sufficient to present the Chamber and the Defence with a detailed view of the case.⁹

B. No oral hearings will take place

14. During the initial appearance of 6 November 2020, the Chamber, highlighted the fact that Rule 165(3) provides that for the confirmation process of cases relating to article 70, the Pre-Trial Chamber may make any of the determinations on the basis of written submissions without a hearing, unless the interest of justice otherwise require.¹⁰ The Chamber decided that oral hearings for the purposes of article 61 were unnecessary in the current case.¹¹
15. The Prosecution understands that the filing of the DCC on 12 March will be its only opportunity to present its case during this stage of the proceedings, since the purpose of these subsequent submissions “is mainly to afford the Prosecutor an opportunity to make observations on the evidence the defence may present.”¹²
16. This constitutes an additional reason to provide the Prosecution the space necessary to present its case for the purposes of the confirmation stage.

⁹ While numbers are not the only factor in the appreciation of such requests, the Prosecution notes that the only previous article 70 prosecution, the *Bemba et al.* case, featured a DCC of 78 pages. However, this included only facts and charges, but no narrative of the evidence) and a Pre-Trial Brief of 117 pages, *see* respectively ICC-01/05-01/13-526-AnxB1-Red2 and ICC-01/05-01/13-1110-Red. Similar to the present case, written submissions were received *in lieu* of oral hearings.

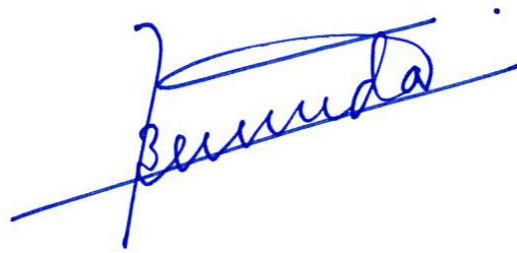
¹⁰ ICC-01/09-01/15-T-001-CONF-ENG, p.10.

¹¹ ICC-01/09-01/15-T-001-CONF-ENG, p.10, lns. 18-19.

¹² Email from the Pre-Trial Judge, 1 February 2021 at 16:28.

III. RELIEF SOUGHT

17. For the foregoing reasons, the Prosecutions submits that the required content and detail of the DCC and the absence of a confirmation hearing justify an increase of the page limit prescribed by regulation 38, and respectfully requests permission to file a DCC of a maximum of 175 pages.
18. Additionally, the Prosecution requests the Chamber to order the Defence to file its response, if any, by 8 March 2021.



Fatou Bensouda, Prosecutor

Dated this 5th day of March 2021

At The Hague, The Netherlands