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**International
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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

**Lesser Redacted Version of "Request for Extension of Time Limits to File the
Defence List of Evidence and Response to the Document Containing the
Charges," 5 February 2021, ICC-01/09-01/20-96-Conf**

Source: Counsel for Paul Gicheru

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

Ms. Nazhat Shameen Khan

Mr. Anton Steynberg

Counsel for the Defence

Mr. Michael G. Karnavas

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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****Other****REGISTRY**

Registrar

Mr. Peter Lewis

Counsel Support Section**Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations
Section****Other**

Mr. Paul Gicheru, through his Counsel (“the Defence”), pursuant to Rule 121(7) and Regulation 35(2) of the Regulations of the Court (“Regulations”), hereby requests a five-month extension to file its list of evidence for the confirmation of charges and a five-month extension to file its Response to the Prosecutor’s Document Containing the Charges. This Request is made necessary because the 14-day time limit for filing the list of evidence and 30-day time limit for responding to the Document Containing the Charges under the Single Judge’s tentative schedule falls appreciably short of according Mr. Gicheru an effective defence during the confirmation proceedings. Granting this Request will neither prejudice the Prosecutor nor unduly delay the proceedings. This Request and Annexes A, C, and D are filed confidential pursuant to Regulation 23bis(1) of the Regulations of the Court as they contain confidential material.

I. BACKGROUND

1. [REDACTED],¹ the Prosecutor submitted 58 annexes of evidence in support of her application for an arrest warrant against Mr. Gicheru.² After Pre-Trial Chamber II issued the arrest warrant on 10 March 2015,³ the Prosecutor interviewed Mr. Gicheru at least three times [REDACTED]⁴ [REDACTED].⁵ [REDACTED], Mr. Gicheru travelled to the Netherlands at his own expense, voluntarily surrendering to the ICC on 2 November 2020.⁶
2. At the Initial Appearance Hearing on 6 November 2020, the Single Judge set a tentative filing schedule: (a) the Prosecutor’s Document Containing the Charges and list of evidence are due 12 February 2021; (b) the Defence’s list of evidence is due 26 February 2021; (c) the Defence’s response to the Document Containing the Charges is due 15 March 2021; (d) the Prosecutor’s reply to the Defence’s response

¹ [REDACTED].

² *Id.*; *Prosecutor v. Gicheru*, [ICC-01/09-01/20-1-Red](#), Decision on the “Prosecution’s Application under Article 58(1) of the Rome Statute,” 10 March 2015 (“Arrest Warrant Decision”), para. 10.

³ Arrest Warrant Decision.

⁴ [REDACTED].

⁵ [REDACTED].

⁶ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-34](#), Order Setting the Date for the Initial Appearance of Mr Gicheru, 4 November 2020, para. 2.

is due 22 March 2021; and (e) the Defence's sur-reply to the Prosecutor's reply is due 29 March 2021.⁷

3. The same day, the Office of Public Counsel for the Defence ("OPCD") requested leave to be heard on the applicability of Provisional Rule 165.⁸ Submitting its observations on 17 December 2020, it claimed that Pre-Trial Chamber A is not lawfully constituted because Provisional Rule 165 is not in force.⁹ Having heard from the parties,¹⁰ the Single Judge found to the contrary, prompting the OPCD to seek leave to appeal.¹¹ Granted on 23 December 2020,¹² all appeal submissions are before the Appeals Chamber as of 4 January 2021.¹³ A decision is anticipated by 24 May 2021.¹⁴ To avoid uncertainty, the Defence requested that the appeal have suspensive effect.¹⁵

⁷ *Prosecutor v. Gicheru*, ICC-01/09-01/20-T-001-CONF-ENG ET, Transcript, p. 11, l. 1-15.

⁸ The OPCD's initial request was denied *in limine* because it was submitted to the wrong Chamber. *Prosecutor v. Gicheru*, [ICC-01/09-01/20-36](#), OPCD Request for Leave to Appear on the Applicability of Provisional Rule 165, 6 November 2020. *Prosecutor v. Gicheru*, [ICC-01/09-01/20-37](#), Decision Rejecting *in limine* the 'OPCD Request for Leave to Appear on the Applicability of Provisional Rule 165,' 6 November 2020; *Prosecutor v. Gicheru*, [ICC-01/09-01/20-40](#), OPCD Request for Leave to Appear on the Applicability of Provisional Rule 165, 11 November 2020; *Prosecutor v. Gicheru*, [ICC-01/09-01/20-43](#), Decision on the Request to Submit Observations on behalf of the Office of the Public Counsel for the Defence, 12 November 2020.

⁹ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-47](#), OPCD Submissions on the Inapplicability of Provisional Rule 165, 17 November 2020.

¹⁰ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-53](#), Paul Gicheru's Observations and Response to OPCD Submissions on the Inapplicability of Provisional Rule 165, 25 November 2020; *Prosecutor v. Gicheru*, [ICC-01/09-01/20-52](#), Prosecution's Response to "OPCD's Submissions on the Inapplicability of Provisional Rule 165, 20 November 2020.

¹¹ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-61](#), Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence, 10 December 2020; *Prosecutor v. Gicheru*, [ICC-01/09-01/20-63](#), Request for leave to appeal the Decision on the Applicability of Provisional Rule 165, 16 December 2020, notified on 17 December 2020.

¹² *Prosecutor v. Gicheru*, [ICC-01/09-01/20-68](#), Decision on the 'Request for leave to appeal the Decision on the Applicability of Provisional Rule 165,' 23 December 2020.

¹³ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-79](#), OPCD Appeals against the Decision on Applicability of Provisional Rule 165, 8 January 2021; *Prosecutor v. Gicheru*, [ICC-01/09-01/20-84-Conf-Corr](#), Paul Gicheru's Response to OPCD Appeal against the Decision on Applicability of Provisional Rule 165, 21 January 2021; *Prosecutor v. Gicheru*, [ICC-01/09-01/20-83](#), Prosecution's Response to OPCD's "Appeal[]" against the Decision on Applicability of Provisional Rule 165," 21 January 2021; *Prosecutor v. Gicheru*, [ICC-01/09-01/20-94](#), Reply to the "Prosecution's Response to OPCD's 'Appeal[]' against the Decision on Applicability of Provisional Rule 165," 4 February 2021.

¹⁴ [ICC Chamber's Practice Manual](#), 29 November 2019, para. 92.

¹⁵ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-93-Conf](#), Paul Gicheru's Request for Suspensive Effect Under Article 82(3) of the Rome Statute, 3 February 2021.

4. In the mist of litigating Provisional Rule 165, the Defence received four disclosure packages from the Prosecutor, access to filings and transcripts [REDACTED], and materials seized from Mr. Gicheru's [REDACTED] to screen for privilege:
 - a. **First package:** 148 documents were received on 31 December 2020.¹⁶
 - b. **Second package:** 103 documents were received on 7 January 2021.¹⁷
 - c. **Ruto and Sang filings:** Trial Chamber IV ordered the transfer of five filings from *Ruto and Sang* to Mr. Gicheru's case file on 7 January 2021.¹⁸
 - d. **Third package:** 58 documents were received on 13 January 2021;¹⁹
 - e. **Ruto and Sang transcripts:** Trial Chamber IV ordered the transfer of 37 transcripts from *Ruto and Sang* to Mr. Gicheru's case file on 15 January 2021.²⁰
 - f. **Seized materials:** access was given to [REDACTED] seized from Mr. Gicheru's [REDACTED].²¹
 - g. **Fourth package:** 79 documents were received on 28 January 2021.²²

¹⁶ The Single Judge was informed of this disclosure on 4 January 2021. *Prosecutor v. Gicheru*, [ICC-01/09-01/20-77-Conf-AnxA](#), Annex A to Prosecution's First Communication of the Disclosure of Evidence, 4 January 2021.

¹⁷ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-78-Conf-AnxA](#), Annex A to Prosecution's Second Communication of the Disclosure of Evidence, 7 January 2021, notified on 8 January 2021.

¹⁸ *Prosecutor v. Ruto and Sang*, [ICC-01/09-01/11-2043-Conf-AnxI](#), Annex I to Decision on Prosecution Request for Transfer of Parts of the Record of the Case into Another Case Record, 15 January 2021.

¹⁹ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-80-Conf-AnxA](#), Annex A to Prosecution's Third Communication of the Disclosure of Evidence, 13 January 2021, notified on 14 January 2021.

²⁰ *Prosecutor v. Ruto and Sang*, [ICC-01/09-01/11-2043-Conf](#), Decision on Prosecution Request for Transfer of Parts of the Record of the Case into Another Case Record, 15 January 2021.

²¹ Email from [REDACTED] entitled "[REDACTED]," 25 January 2021 (Annex A); [REDACTED] (Annex B).

²² The Single Judge was informed of this disclosure on 29 January 2021. *Prosecutor v. Gicheru*, [ICC-01/09-01/20-88-Conf-AnxA](#), Annex A to Prosecution's Fourth Communication of the Disclosure of Evidence, 28 January 2021.

5. The Defence has been informed that a fifth disclosure package is forthcoming.²³ Mr. Gicheru was provisionally released to Kenya on 29 January 2021.²⁴ [REDACTED] Mr. Gicheru – who, at the outset of selecting Lead Counsel, has expressed his intent to be involved in the preparation and presentation of his defence, as he is entitled.

II. LAW AND ARGUMENT

6. The 14-day time limit for filing the Defence list of evidence and 30-day time limit for responding to the Document Containing the Charges under the Single Judge’s tentative schedule²⁵ falls appreciably short of according Mr. Gicheru an effective defence during the confirmation proceedings because:
- a. the right to an *effective* defence includes Counsel having the ability to act diligently and zealously;
 - b. the confirmation proceedings are significant;
 - c. the Defence is in a substantial disadvantage vis-à-vis the Prosecutor;
 - d. the disclosure material is voluminous; and
 - e. the Defence must meet with Mr. Gicheru to review documents and investigate prior to producing its list of evidence and responding to the Document Containing the Charges.

The Single Judge, having the discretion to extend the time limits, should, in the interest of justice, do so.

A. The current time limits fall short of according Mr. Gicheru an effective defence

²³ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-81-Conf-Red](#), Confidential Redacted Version of “Prosecution’s Observations on the Provisional Disclosure Schedule in accordance with the Pre-Trial Chamber’s Decision of 21 December 2020”, dated 20 January 2020, 20 January 2021, para. 9.

²⁴ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-90](#), Decision on Mr Gicheru’s Request for Interim Release, 29 January 2021.

²⁵ *Prosecutor v. Gicheru*, ICC-01/09-01/20-T-001-CONF-ENG ET, Transcript, p. 11, l. 1-15.

An effective defence includes having Counsel who can act diligently and zealously

7. Article 67(1) of the Rome Statute – which incorporates the international standards of justice in Article 14(1) the International Covenant on Civil and Political Rights²⁶ – guarantees Mr. Gicheru the right to an *effective* defence.²⁷ Generally, this means having adequate time and facilities for the preparation of the defence,²⁸ having the ability to communicate with Counsel and participate in his own defence,²⁹ and having Counsel with the ability to act diligently and zealously in protecting his fair trial rights.³⁰ In this instance, it means affording Mr. Gicheru’s Defence adequate time and facilities to thoroughly review the disclosure material, consult with and obtain instructions from Mr. Gicheru, and intelligently produce its list of evidence and respond to the Document Containing the Charges.
8. To fulfill its ethical and professional duties of diligence and zealously in protecting Mr. Gicheru’s fair trial rights and provide him a robust and *effective* defence at the confirmation proceedings, the Defence must review and analyze all material disclosed by the Prosecutor, meet with Mr. Gicheru to discuss the

²⁶ 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).

²⁷ [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).

²⁸ [Rome Statute](#), Art. 67(1)(b); [ICCPR](#), Art. 14(1)(b).

²⁹ [Rome Statute](#), Art. 67(1)(d); [ICCPR](#), Art. 14(1)(d).

³⁰ Defence counsel’s ethical and professional duties of zealously 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 zealously 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 zealously as 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. See also [ALASKA RULES OF PROF’L CONDUCT](#) (2017-2018 ed.), Rule 1.3; *Id.*, Comment to Rule 1.3.

documents with him and take his instruction, investigate, review the law, make necessary objections, and craft *meaningful* submissions.³¹ These tasks cannot be done to the highest standard necessary to protect Mr. Gicheru's fair trial rights within the time constraints of the Single Judge's tentative schedule – fitting as it may have been when issued.

The confirmation proceedings are significant

9. In deviating from the scanty confirmation procedures of the *ad hoc* tribunals,³² which, by any standard, afforded no participatory rights to Suspects at that stage of the proceedings, the ICC adopted confirmation procedures “to protect the rights of the Defence against wrongful and wholly unfounded charges,” and to ensure that “only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion” are committed to trial.³³
10. Significant strategic decisions are made at the confirmation of charges phase based on the Defence's theory of the case, which, ordinarily, will be appreciated and developed once the Defence has an opportunity to dissect the Prosecution's evidence, analyze the disclosure material, meet with the client, and conduct its own investigation. Absent full appreciation of the disclosure material, absent

³¹ See also *Prosecutor v. Stanišić & Župljanin*, IT-08-91-A, [Decision on Mićo Stanišić's and Stojan Župljanin's Motions Seeking Variation of Time and Word Limits to File Appeal Briefs](#), 4 June 2013, p. 2; *Prosecutor v. Sainović et al.*, IT-05-87-A, [Decision on Joint Request for Extension of Time to File Respondent's Brief](#), 27 July 2009, p. 4; *Marpa Zeeland B.V. & Metal Welding B.V. v. The Netherlands*, [ECtHR App. No. 46300/99](#), 9 November 2004, para. 51.

³² At the ICTY and ICTR, indictment confirmation proceedings are conducted *ex parte* and the Defence may only challenge the indictment once it has been confirmed by a Reviewing Judge. Consequently, the standard of proof to confirm the indictment was low; the Reviewing Judges of the ICTY and ICTR only had to be “satisfied that a *prima facie* case ha[d] been established by the Prosecutor.” In determining whether the Prosecutor had established a *prima facie* case, the Reviewing Judge was not concerned with the sufficiency of the Prosecutor's evidence, but whether the facts as pleaded by the Prosecutor in the indictment formed a credible case against the Accused. See [ICTY Statute](#), Art. 19; [ICTR Statute](#), Art. 18; [ICTY Rules of Procedure and Evidence](#), [IT/32/Rev.50](#), 8 July 2015, Rule 72(A)(ii); *Prosecutor v. Milošević*, IT-02-54, [Decision on Review of Indictment](#), 22 November 2001, paras. 2, 14; *Prosecutor v. Krnojelac*, IT-97-25, [Decision on the Defence Preliminary Motion on the Form of the Indictment](#), 24 February 1999, para. 7; *Prosecutor v. Serushago*, ICTR-98-39-1, [Decision on Review of the Indictment](#), 29 September 1998, p. 2.

³³ *Prosecutor v. Lubanga*, [ICC-01/04-01/06-803-tEN](#), Decision on the Confirmation of Charges, 29 January 2007, para. 37.

conducting any requisite investigation, and absent meaningful consultation with the client, the Defence's ability to make sound strategic decisions would be circumscribed and the confirmation proceedings would be rendered meaningless.

The Defence is in a substantial disadvantage vis-à-vis the Prosecutor

11. 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."³⁴ Generally, this means that the Defence should: (a) not be disadvantaged in relation to the Prosecutor considering the principle of basic proportionality; and (b) be permitted to have a fair opportunity to present its case,³⁵ including at the confirmation proceedings. Put differently, the resources afforded to the Defence should not be so disproportionate with those afforded to the Prosecutor as to infringe upon the fundamental rights of the Accused to present his or her case, fairly, at each stage of the proceedings.³⁶

12. Much of the evidence pertaining to this case has been in the Prosecutor's possession since she began investigating Mr. Gicheru in late 2013.³⁷ In addition to her 19-month investigation, the Prosecutor interviewed Mr. Gicheru four times [REDACTED], and will have had 14 weeks since Mr. Gicheru surrendered to the ICC to conduct additional investigations and further analyze the evidence. The Prosecutor also has significant resource advantages over the three-member Defence team, having an armada of lawyers, legal officers, investigators with institutional knowledge of the ICC, the *Ruto and Sang* case, and the case against Mr. Gicheru. Conversely, the Defence has had to start from zero, with a team limited to a Lead Counsel, one

³⁴ *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.

³⁵ *Id.* See also *Prosecutor v. Stakić*, IT-97-24-A, [Judgement](#), 22 March 2006, para. 149.

³⁶ 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).

³⁷ [REDACTED].

Legal Consultant and one Case Manager. The Defence is not suggesting that it have equal financial and human resources. It is requesting – based on the principle of basic proportionality – that it have an equal *opportunity* to prepare case at all stages of the proceedings.³⁸

The disclosure material is voluminous

13. Thus far, the Prosecutor has disclosed four out of five batches of evidence for a total of 388 documents, including witness statements, affidavits, transcripts of interviews, transcripts of audio/visual material, transcripts of recorded telephone and skype conversations, investigator’s reports, reports on the analysis of mobile phones and SIM cards, media reports, and forensic images of files extracted from mobile phones.³⁹ Also, it has extracted [REDACTED] from Mr. Gicheru’s [REDACTED], from which it will disclose non-privileged items [REDACTED].⁴⁰ [REDACTED].⁴¹ Finally, yet to be disclosed is a fifth package of materials from an additional witness, background reports, recently collected evidence, and possibly additional materials.⁴² The volume and significance of the undisclosed material is unknown, though, beyond cavil, will require close scrutiny and further consumption of time and resources.

³⁸ 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.

³⁹ *Prosecutor v. Gicheru, ICC-01/09-01/20-77-Conf-AnxA*, Annex A to Prosecution’s First Communication of the Disclosure of Evidence, 4 January 2021; *Prosecutor v. Gicheru, ICC-01/09-01/20-78-Conf-AnxA*, Annex A to Prosecution’s Second Communication of the Disclosure of Evidence, 7 January 2021, notified on 8 January 2021; *Prosecutor v. Gicheru, ICC-01/09-01/20-80-Conf-AnxA*, Annex A to Prosecution’s Third Communication of the Disclosure of Evidence, 13 January 2021, notified on 14 January 2021; *Prosecutor v. Gicheru, ICC-01/09-01/20-88-Conf-AnxA*, Annex A to Prosecution’s Fourth Communication of the Disclosure of Evidence, 28 January 2021.

⁴⁰ Email from Anton Steynberg entitled “Urgent: Proposed analysis of [REDACTED],” 20 January 2021 (Annex C); Email from [REDACTED] entitled “[REDACTED],” 25 January 2021 (Annex A); [REDACTED] (Annex B).

⁴¹ [REDACTED].

⁴² [REDACTED]; Email from Anton Steynberg entitled “RE: PEXO and Rule 77 review,” 27 January 2021 (Annex D).

14. The Defence requires, at a minimum, five months to review and digest this material prior to meeting and discussing the case with Mr. Gicheru. Much, if not all of this material, must also be reviewed independently by Mr. Gicheru in order to prepare to meet with his Defence team. The current 14-day allotment for the list of evidence and 30-day allotment for the response to the Document Containing the Charges are insufficient, as would an extension of a few more weeks when considering the tasks required of the Defence to be diligent and for Mr. Gicheru to fully enjoy his right to assist in his own defence.

The Defence must meet with Mr. Gicheru to review documents and investigate

15. Considering the disparity in institutional knowledge of the case between the Prosecutor and the Defence, Mr. Gicheru's involvement is critical. Only once the Defence meets with Mr. Gicheru and reviews the disclosure material with him, can it have a full appreciation of the case to determine the significance of the documents, what other documents may be available, which documents should be included on the Defence list of evidence, and what sort of tactical decisions may be necessary when it comes to the investigation. The Defence cannot have targeted, well-managed meetings with Mr. Gicheru – as required by the time and resource constraints – if Mr. Gicheru does not have sufficient time to review and analyze most of the [REDACTED] documents, [REDACTED] files, and [REDACTED] prior to meeting with the Defence.

16. Due to Mr. Gicheru's detention from 2 November 2020 to 31 January 2021,⁴³ the COVID-19 restrictions at the Detention Center, and technical difficulties using the document support software, the Defence has been unable to effectively meet and review documents with Mr. Gicheru. The Defence has also had to spend significant time and resources litigating the applicability of Provisional Rule 165, raised by the OPCD. As meritorious as the issues are, the time spent litigating this matter should

⁴³ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-90](#), Decision on Mr Gicheru's Request for Interim Release, 29 January 2021.

be factored into the equation in considering the time requested for extending the time limits related to the confirmation proceedings.

B. The Single Judge has discretion to extend the time limits

17. The Single Judge is “responsible for the fair conduct of the proceedings regarding Mr Gicheru” and has authority under Rule 121(1) to set the scheduling for the confirmation of the proceedings. The purpose of Rule 121 is “to allow the person and the Defence sufficient time in advance of the confirmation hearing in which to acquaint themselves with the charges and prepare” for the written confirmation submissions.⁴⁴ To give effect to this purpose, the Single Judge has discretion under Rule 121(7) and Regulation 35(2) to extend the time limits for the Defence list of evidence and response to the Document Containing the Charges if “good cause is shown.”

18. In exercising her discretion, the Single Judge must consider all relevant factors, such as Mr. Gicheru’s right to an effective defence, the significance of the confirmation proceedings, the disadvantage the Defence has vis-à-vis the Prosecutor, the volume of the disclosure material, and the need to meet with Mr. Gicheru to review documents and investigate, all which militate in favor of granting a reasonable extension of five months. Granting a five-month extension is also consistent with the principle of equal treatment, given that the Pre-Trial Chambers have routinely postponed the confirmation hearings or written submissions by an average of five to six months:

- a. *Al Hassan*: The Pre-Trial Chamber initially postponed the confirmation hearing by eight months (from 24 September 2018 to 6 May 2019),⁴⁵ before again

⁴⁴ *Prosecutor v. Al Hassan*, [ICC-01/12-01/18-94-Red-tENG](#), Decision Postponing the Date of the Confirmation Hearing, 18 October 2018, para. 26.

⁴⁵ *Prosecutor v. Al Hassan*, [ICC-01/12-01/18-94-Red-tENG](#), Decision Postponing the Date of the Confirmation Hearing, 20 July 2018.

postponing the hearing for another two months (from 6 May 2019 to 8 July 2019).⁴⁶

- b. *Yekatom and Ngaïssona*: The Pre-Trial Chamber postponed the confirmation of charges hearing by three months (from 18 June 2019 to 19 September 2019).⁴⁷
- c. *Al Rahman*: The Pre-Trial Chamber postponed the confirmation of charges hearing by two months (from 7 December 2020 to 22 February 2021),⁴⁸ before again postponing the hearing for another three months (from 22 February 2021 to 24 May 2021).⁴⁹
- d. *Ntanganda*: The Pre-Trial Chamber postponed the confirmation of charges hearing by five months (from 23 September 2013 to 10 February 2014).⁵⁰
- e. *Ongwen*: The Pre-Trial Chamber postponed the confirmation of charges hearing by five months (from 24 August 2015 to 21 January 2016).⁵¹
- f. *Bemba et al.*: The Pre-Trial Chamber postponed the confirmation proceedings three times, postponing it on one occasion by four months.⁵²

III. CONCLUSION AND RELIEF SOUGHT

19. Granting this Request for a reasonable and necessary extension will not delay the proceedings to Mr. Gicheru's detriment. None of the causes for the extension

⁴⁶ *Prosecutor v. Al Hassan*, [ICC-01/12-01/18-313-tENG](#), Decision Rescheduling the Date of Filing of the Document Containing the Charges and the Commencement of the Confirmation Hearing, 18 April 2019.

⁴⁷ *Prosecutor v. Yekatom and Ngaïssona*, [ICC-01/14-01/18-403-Red-Corr](#), Corrected version of 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona,' 14 May 2020.

⁴⁸ *Prosecutor v. Al Rahman*, [ICC-02/05-01/20-196](#), Decision on the Prosecutor's Request for Postponement of the Confirmation Hearing and related deadlines, 2 November 2020.

⁴⁹ *Prosecutor v. Al Rahman*, [ICC-02/05-01/20-238](#), Decision on the Prosecutor's Second Request to Postpone the Confirmation Hearing and Requests for Variation of Disclosure Related Time Limits, 18 December 2020.

⁵⁰ *Prosecutor v. Ntanganda*, [ICC-01/04-02/06-73](#), 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.

⁵¹ *Prosecutor v. Ongwen*, [ICC-02/04-01/15-206](#), Decision Postponing the Date of the Confirmation of Charges Hearing, 6 March 2015.

⁵² *Prosecutor v. Bemba et al.*, [ICC-01/05-01/13-749](#), Decision pursuant to Article 61(3)(a) and (b) of the Rome Statute, para. 5.

sought are of Mr. Gicheru's doing: the volume of disclosure material, the timing of the disclosure (which began seven weeks after Mr. Gicheru's initial appearance), the time spent by the Defence in litigating the applicability of Provisional Rule 165 due to the OPCD's submissions, the COVID-19 restrictions on the ICC Detention Center, and Kenya's non-responses to the Single Judge concerning his Provisional Release – all of which, when considered, militate in favor of granting the relief sought.

WHEREFORE, for the above reasons, the Single Judge should:

- A. Grant this Request;
- B. Extend the time limit to file the Defence list of evidence by five months; and
- C. Extend the time limit to file the Defence response to the Document Containing the Charges by five months.

Respectfully submitted, 29 November 2022,

In The Hague, the Netherlands.



Michael G. Karnavas
Counsel for Mr. Paul Gicheru