

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/09-01/20**
Date: **29 October 2021**

TRIAL CHAMBER III

Before: Judge Miatta Maria Samba

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. PAUL GICHERU

Public

**Decision on the Defence Request for Extension of Time to Respond to the
Prosecution's Five Rule 68 Requests**

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

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**Unrepresented Applicants
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TRIAL CHAMBER III of the International Criminal Court, in the case of *The Prosecutor v. Paul Gicheru*, having regard to Articles 64(2) & 67(1)(b) of the Statute and Regulation 35 of the Regulations of the Court, issues this ‘Decision on the Defence Request for Extension of Time to Respond to the Prosecution’s Five Rule 68 Requests’.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 22 October 2021, pursuant to the Chamber’s direction,¹ the Office of the Prosecutor (the ‘Prosecution’) filed five requests for the admission of prior recorded testimony pursuant to Rule 68 of the Rules of Procedure and Evidence (the ‘Rules’). Specifically, the Prosecution requested the admission of the prior recorded testimony of seven witnesses pursuant to Rule 68(2)(b) of the Rules,² one witness pursuant to Rule 68(2)(c) of the Rules,³ one witness pursuant to Rule 68(2)(d) of the Rules,⁴ and four witnesses pursuant to Rule 68(3) of the Rules (together, the ‘Prosecution’s Rule 68 Requests’).⁵ At present, the Defence’s responses to the Prosecution’s Rule 68 Requests are due by Thursday, 4 November 2021.⁶

2. On 26 October 2021, the Defence filed a request for the extension of time to respond to the Prosecution’s Rule 68 Requests (the ‘Request’), seeking to extend the time limit for all responses by one month, to Friday 3 December 2021.⁷

¹ Decision Setting the Commencement Date of the Trial and Related Deadlines, 30 September 2021, [ICC-01/09-01/20-185](#), Section H.

² Prosecution’s request for introduction of prior recorded testimony of Witnesses P-731, P-732, P-0733 P-0734, P-0735, P-0736 and P-0737 pursuant to rule 68(2)(b), 22 October 2021, ICC-01/09-01/20-198-Conf and related Annexes. A public redacted version was notified on 27 October 2021 ([ICC-01/09-01/20-198-Red](#)).

³ Prosecution application for the introduction of prior recorded testimony of Witness P-0397 pursuant to rule 68(2)(c), and alternative 68(2)(d), 22 October 2021, ICC-01/09-01/20-193-Conf and related Annexes. A public redacted version was notified on 27 October 2021 ([ICC-01/09-01/20-193-Red](#)).

⁴ Prosecution’s request for the introduction of the prior recorded testimony of Witness P-0495 pursuant to rule 68(2)(d), 22 October 2021, ICC-01/09-01/20-196-Conf and related Annexes. A public redacted version was notified on 27 October 2021 ([ICC-01/09-01/20-196-Red](#)).

⁵ Prosecution application under rule 68(3) to introduce the prior recorded testimony and associated material of Witnesses P-0613, P-0800 and P-0536, 22 October 2021, ICC-01/09-01/20-197-Conf and related Annexes. A public redacted version was notified on 27 October 2021 ([ICC-01/09-01/20-197-Red](#)); Prosecution application under rule 68(3) to introduce the prior recorded testimony of Witness P-0730, 22 October 2021, ICC-01/09-01/20-194-Conf and related Annexes. A public redacted version was notified on 27 October 2021 ([ICC-01/09-01/20-194-Red](#)).

⁶ See Regulations 33 and 34(b) of the Regulations of the Court.

⁷ 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. A public redacted version was notified on 28 October 2021 (ICC-01/09-01/20-201-Red).

3. In support of the Request, the Defence submits that it does not have adequate time and facilities to analyse and respond to the Prosecution's Rule 68 Requests within the current deadline. In this regard, the Defence makes reference to the number of witnesses and the volume of associated material in respect of each witness that it must review,⁸ noting that some of the Prosecution's Rule 68 Requests contains material that goes to the acts and conduct of the accused.⁹

4. The Defence further submits that it is at a 'substantial disadvantage' vis-à-vis the Prosecution,¹⁰ arguing, *inter alia*, that the Prosecution has 'significant resource advantages'¹¹ over the Defence, and that it should 'not be disadvantaged in relation to the [Prosecution] considering the principle of basic proportionality' and it should 'be permitted to have a fair opportunity to present its case'.¹² Last, the Defence submits that the Chamber has the discretion to extend the deadline for responses,¹³ noting that 'a reasonable and necessary extension will not delay the proceedings'.¹⁴

5. On 27 October 2021, the Prosecution informed the Chamber via email that it does not oppose a 'reasonable extension' of the response deadline 'given the number of filings and the volume of material concerned'.¹⁵ As regards to the duration of any extension, the Prosecution indicates that it defers to the Chamber's discretion.¹⁶

II. ANALYSIS

6. The Chamber notes that, pursuant to Regulation 35(2) of the Regulations of the Court, that a chamber may extend a time limit where 'good cause is shown'. In this regard, the Chamber recalls that, in the past, other chambers have held that 'good cause' is satisfied if, *inter alia*, delay is caused by a heavy workload requiring simultaneous preparation of complex filings or where there are significant issues of law and fact.¹⁷

⁸ Request, para. 2.

⁹ Request, para. 3.

¹⁰ Request, Section B.

¹¹ Request, para. 9.

¹² Request, para. 6.

¹³ Request, para. 11.

¹⁴ Request, para. 12.

¹⁵ Email from the Prosecution to the Chamber, 27 October 2021, at 12:38.

¹⁶ Email from the Prosecution to the Chamber, 27 October 2021, at 12:38.

¹⁷ See Appeals Chamber, *The Prosecutor v. Dominic Ongwen*, Decision on the Defence request for extension of time limit for the filing of the notice of appeal and appeal brief, 2 June 2021, [ICC-02/04-](#)

7. The Chamber notes that the main argument of the Defence is the fact that there are multiple filings it has to respond to at the same time and that it lacks the resources to do so. However, the Chamber is of the view that this does not automatically mean that the response deadline for all five requests need to be extended in order to provide the Defence with adequate time to respond. Rather, the Chamber will look at the specific requests to assess whether an extension should be given.

8. Taking this approach, the Chamber recognises, with respect to the prior recorded testimony sought to be admitted pursuant to Rules 68(2)(b), 68(2)(c) and 68(2)(d) of the Rules, that, if granted, the Defence will not have an opportunity to cross-examine those witnesses. Similarly, the Chamber notes that some of the Rule 68(2) applications contain material that goes to the acts and conduct of the accused. The Chamber therefore considers it pertinent, in the interests of fairness, that the Defence has adequate time to properly analyse and respond to the requests pursuant to Rule 68(2) of the Rules.

9. Accordingly, based on the foregoing, the Chamber is persuaded to grant a reasonable extension of time for the responses to the three Prosecution requests currently sought to be admitted pursuant to Rule 68(2) of the Rules.¹⁸

10. As to the length of such an extension, the Chamber finds that the Defence's request for a one month extension is excessive. First, the Defence has been familiar with the material covered by the requests under Rule 68(2)(c)¹⁹ and (d)²⁰ of the Rules since the Pre-Trial stage. Similarly, the Prosecution previously announced that it would make these requests,²¹ and thus the Chamber notes that the Defence was able to anticipate these specific motions. Further, the Chamber recalls that pursuant to Article 64(2) of the Statute the Chamber must ensure that the proceedings are conducted fairly

[01/15-1837](#), A2; Appeals Chamber, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the requests for time and page extension, 18 September 2015, [ICC-01/09-01/11-1971](#), OA10; Appeals Chamber, *The Prosecutor v. Laurent Koudou Gbagbo*, Decision on the "Requête aux fins de suspension des délais prévus par la Règle 154(1) du Règlement de procédure et de preuve et par la Norme 64(5) du Règlement de la Cour jusqu'à la fin des vacances judiciaires, fixée au lundi 6 août 2012", 19 July 2012, [ICC-02/11-01/11-189](#), OA.

¹⁸ Namely, [ICC-01/09-01/20-193-Red](#), [ICC-01/09-01/20-196-Red](#), [ICC-01/09-01/20-198-Red](#).

¹⁹ [ICC-01/09-01/20-193-Red](#).

²⁰ [ICC-01/09-01/20-196-Red](#).

²¹ Prosecution's submissions on issues for the First Status Conference, 10 September 2021, ICC-01/09-01/20-171-Conf, paras 17 and 18. A public redacted version was notified on 14 September 2021 ([ICC-01/09-01/20-171-Red](#)).

and expeditiously. As a result, the Chamber is of the view that an extension of two weeks for the Defence's responses to the Prosecution's Rule 68(2) requests is reasonable in the present circumstances.

11. With respect to the responses to the Prosecution's requests pursuant to Rule 68(3) of the Rules, the Chamber finds that good cause has not been shown that would warrant an extension of the time limit for responding to these requests. The Chamber recalls that the Defence has been on notice for some time that the Prosecution would be seeking admission of the prior recorded testimony of several witnesses pursuant to Rule 68(3) in the present case.²² Similarly, the Chamber further notes that the Defence has had access to a vast amount of the material sought to be admitted by the Prosecution in respect of the majority of these witnesses for some time. Last, the extension of time concerning the three requests pursuant to Rule 68(2) of the Rules allows the Defence sufficient time to respond to the Rule 68(3) requests. The Chamber will therefore not extend the deadline for the Defence's responses to the two Prosecution requests pursuant to Rule 68(3) of the Rules.²³

²² Indeed the Defence has been on notice that the Prosecution would seek to admit the prior recorded testimony of P-0800, P-0613 and P-0536 - *See* Prosecution's submissions on issues for the First Status Conference, 10 September 2021, ICC-01/09-01/20-171-Conf, para. 14. A public redacted version was notified on 14 September 2021 ([ICC-01/09-01/20-171-Red](#)).

²³ Namely, [ICC-01/09-01/20-197-Red](#); [ICC-01/09-01/20-194-Red](#).

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the Request in part;

EXTENDS the time limit for the Defence to respond to ICC-01/09-01/20-193-Red, ICC-01/09-01/20-196-Red, ICC-01/09-01/20-198-Red to Monday, 22 November 2021;
and

REJECTS the remainder of the Request.

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

A handwritten signature in blue ink, appearing to read 'Miatta', is positioned above a horizontal line.

Judge Miatta Maria Samba

Dated 29 October 2021

At The Hague, The Netherlands