

**Cour
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**International
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Date: 19 November 2020

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 AND PHILIP KIPKOECH BETT***

**Public
With Public Annex A**

**Request for Extension of Time to Respond to “OPCD Submissions on the
Inapplicability of Provisional Rule 165” (ICC-01/09-01/15-47)**

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. Fatou Bensouda, Prosecutor
Mr. James Stewart

Counsel for the Defence

Mr. Michael G. Karnavas

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms. Paolina Massidda

**The Office of Public Counsel for the
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Mr. Xavier-Jean Keïta
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States' Representatives

Other

Pre-Trial Chamber II
Presidency

REGISTRY

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Detention Section

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**Victims Participation and Reparations
Section**

Other

Mr. O-Gon Kwon, ASP President
Mr. Renan Villacis, SASP Director

Mr. Paul Gicheru, through his Counsel (“Defence Counsel”), pursuant to Regulation 35(2) of the Regulations of the Court (“Regulations”), hereby requests a one-week extension to file observations and to respond to the Office of Public Counsel for the Defence (“OPCD”) Submissions on the Inapplicability of Provisional Rule 165.¹ Granting the Request – made due to exceptional circumstances – is in the interests of justice and neither prejudices any Party nor unduly delays the proceedings.

I. BACKGROUND

1. During Mr. Gicheru’s initial appearance on 6 November 2020, where by his own choice, Mr. Gicheru appeared without counsel, Pre-Trial Chamber Judge Alapini-Gansou invited the Prosecutor and Mr. Gicheru to submit written observations on the powers and functions of the Pre-Trial Chamber under Provisional Rule 165 and Regulation 66bis – mainly on whether as a Single Judge, she has the power and functions of Pre-Trial Chamber A, as ordered by the Pre-Trial Division President.²
2. The OPCD sought leave on 11 November 2020 to also make observations on behalf of Mr. Bett, who, unlike Mr. Gicheru who chose to represent himself, had no one to represent his interests.³
3. The following day, the Pre-Trial Chamber granted leave to the OPCD to submit its observations by 17 November 2020 and ordered Mr. Gicheru and the Prosecutor to respond, if they wish, by 20 November 2020.⁴
4. The OPCD filed its Submissions on 17 November 2020, arguing that: 1) this Pre-Trial Chamber has no competence because Provisional Rule 165 is not in force;⁵ 2) even if Provisional Rule 165 is in force, it and corresponding Regulation 66bis

¹ *Prosecutor v. Gicheru and Bett*, ICC-01/09-01/15-47, OPCD Submissions on the Inapplicability of Provisional Rule 165, 17 November 2020 (“OPCD Submissions”).

² *Prosecutor v. Gicheru and Bett*, ICC-01/09-01/15-32, Decision Constituting a Chamber Composed of one Judge from the Pre-Trial Division to Exercise the Powers and Functions of the Pre-Trial Chamber in the Present Case, 2 November 2020.

³ *Prosecutor v. Gicheru and Bett*, ICC-01/09-01/15-40, OPCD Request for Leave to Appear on the Applicability of Provisional Rule 165, 11 November 2020 (“OPCD Request for Leave”), para. 14.

⁴ *Prosecutor v. Gicheru and Bett*, ICC-01/09-01/15, Decision on the Request to Submit Observations on behalf of the Office of the Public Counsel for the Defence, 12 November 2020 (“Decision on OPCD Leave to Submit Observations”), p. 5.

⁵ OPCD Submissions, paras. 13-30.

cannot apply because of the principle of non-retroactivity;⁶ and 3) Provisional Rule 165 and Regulation 66*bis* are incompatible with the Rome Statute.⁷

5. Mr. Gicheru selected Michael G. Karanvas as Defence Counsel, late afternoon, on 18 November 2020, 12 days after Pre-Trial Chamber Judge Alapini-Gansou invited the Parties to make observations.
6. As of the filing of this Request, Defence Counsel has no support staff and, to no small amount of consternation, has labored to acquire the aptitude to access his ICC EPN account and access the case file – difficulties which Defence Counsel expects to resolve with all deliberate speed.

I. LAW AND ARGUMENT

7. Mr. Gicheru is entitled to an *effective* defence.⁸ Generally, this means affording him adequate time and facilities for the preparation of his defence, having the ability to communicate with Defence Counsel and participate in his own defence,⁹ and having Defence Counsel with the capacity to act with all due diligence in protecting his fair trial rights.¹⁰ In this instance, it means affording his Defence Counsel adequate time and facilities to make meaningful observations and file a cogent response to the OPCD's Submissions.

⁶ OPCD Submissions, paras. 31-34.

⁷ OPCD Submissions, paras. 35-49.

⁸ Article 67 of the Rome Statute guarantees that accused are afforded an *effective* defence. See *Case of AO An*, 004/2/07-09-2009-ECCC-OCIJ, Decision on Civil Party Requests for Extension of Time and Page Limits, 27 August 2018, D362/4, para. 10. See also *Prosecutor v. Stanišić & Župljanin*, IT-08-91-A, Decision on Mico Stanišić's and Stojan Župljanin's Motions Seeking Variation of Time and Word Limits to File Appeal Briefs, 4 June 2013, p. 2, 4; *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. The European Court of Human Rights has held that applicants' fair trial rights were violated when circumstances prevented them from being able to effectively exercise their right to appeal. *Marpa Zeeland B.V. & Metal Welding B.V. v. The Netherlands*, ECtHR App. No. 46300/09, 9 November 2004, para. 51.

⁹ See Rome Statute Art. 67(b)(d); International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force on 23 March 1976, 999 U.N.T.S. 171, Art. 14(3) (b), (d).

¹⁰ Due diligence requires Defence Counsel to do anything and everything to ensure that all fair trial rights are fully accorded to their client, including making all necessary legal and factual challenges, checking the veracity and accuracy of evidence gathered by the Prosecutor that is used against the Accused, and so on. ICC Code of Professional Conduct for Counsel, Art. 5; ALASKA RULES OF PROF'L CONDUCT (2017-2018 ed.), Rule 1.3; *Id.*, Comment to Rule 1.3.

8. Defence Counsel was appointed to represent Mr. Gicheru after the commencement of the time limit to respond with only one day to prepare observations and respond to the OPCD's Submissions. The effectively one-day deadline appreciably falls short of meaningfully affording Mr. Gicheru an effective defence.
9. The applicability of Provisional Rule 165 is a novel and complex issue, being raised for the first time in these Article 70 proceedings. As can be gleaned by the OPCD's 14-page and 32-footnote Request for Leave and 22-page and 66-footnote Submissions, the observations requested from the Parties raise complex issues of law, including the drafting history of Provisional Rule 165 and Regulation 66*bis*,¹¹ whether the application of these provisions is barred by the principle of retroactivity,¹² and whether these provisions are in conformity with the Rome Statute.¹³ Any decision on the applicability of Provisional Rule 165 will impact Mr. Gicheru's fair trial rights throughout the remainder of the proceedings.
10. To fulfill his ethical and professional responsibility of due diligence in protecting Mr. Gicheru's fair trial rights and draft meaningful observations and respond to the OPCD's observations, Defence Counsel must thoroughly research and analyze all relevant authority – which includes reviewing and analyzing all authority cited by OPCD in its Submissions and Request for Leave – review other relevant decisions and submissions, discuss the issues with Mr. Gicheru and take instructions from him, and craft cogent submissions. These tasks cannot be done to the highest standard necessary to protect Mr. Gicheru's fair trial rights within the effectively one-day deadline, given the scope, volume, and complexity of the issues raised in the OPCD's Submission, and the fact that Defence Counsel does not yet have support staff.
11. Considering the exceptional circumstances presented in this Request, the Pre-Trial Chamber may extend the time limits for good cause.¹⁴ According to the Appeals

¹¹ OPCD Submissions, paras. 15-24.

¹² OPCD Submissions, paras. 31-34.

¹³ OPCD Submissions, paras. 35-49.

¹⁴ Regulation 35(2).

Chamber, “[a] cause is good, if founded upon reasons associated with a person’s capacity to conform to the applicable procedural rule or regulation or the directions of the Court.”¹⁵ Good cause has been shown, for example, where the legal issues raised were novel and complex and where the Defence was compelled to work simultaneously on two complex filings.¹⁶ The Pre-Trial Chamber may also extend the time limit, even if it has lapsed, if the Party seeking extension demonstrates “that he or she was unable to file the application within the time limit for reasons outside his or her control.”¹⁷

12. The relief sought will not unduly delay the Pre-Trial Chamber’s disposition of the issues raised by seeking observations and granting the OPCD leave to make submissions. Considering in the balance the preliminary stages of the proceedings, the impact the Pre-Trial Chamber’s decision will have on Mr. Gicheru’s fair trial rights throughout the remainder of the Article 70 proceedings against him, and the near imperceptible additional time requested, granting this Request is in the interests of justice and comes at no prejudice to any party.

WHEREFORE, for the above reasons, the Defence respectfully requests a one-week extension to file its observations and respond to the OPCD’s Submissions.

Respectfully submitted, 19 November 2020,

In The Hague, the Netherlands.



Michael G. Karnavas
Counsel for Mr. Paul Gicheru

¹⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06-834, Reasons for the “Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court” of 7 February 2007, 16 February 2007, para. 7.

¹⁶ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1971, Decision on the requests for time and page extension, 18 September 2015, paras. 6-7.

¹⁷ Regulation 35(2).