

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/20
Date: 18 December 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***

Public

**Paul Gicheru's Response to OPCD's Request for Leave to Appeal the Decision on
the Applicability of Provisional Rule 165**

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
Mr. Anton Steynberg

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**

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

Mr. Xavier-Jean Keïta
Ms. Marie O'Leary

States' Representatives

Other

REGISTRY

Registrar

Mr. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

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

Mr. Paul Gicheru, through his Counsel (“the Defence”), hereby responds the Office of Public Counsel for the Defence’s Request for leave to appeal the Decision on the Applicability of Provisional Rule 165 (“OPCD’s Request”).¹ The OPCD lacks standing. Moreover, Article 82(1)(d) of the Rome Statute provides no room for declaratory relief.² Mr. Philip Kipkoech Bett, on whose behalf the OPCD seeks to make submissions, is no longer a Party to the present case.³ Mr. Gicheru, who is represented by Counsel and not by the OPCD, resolutely agrees with the Single Judge that Provisional Rule 165 applies in the Article 70 proceedings against *him*.⁴ No appreciable justice will be suffered by Mr. Bett or others who may be charged with Article 70 offences since the Single Judge’s decision does not preclude further challenges on the applicability of Provisional Rule 165 in future cases.⁵ However meritorious the OPCD’s arguments may appear in favor of granting interlocutory appeal, the present circumstances provide no other option to the Single Judge than to deny the OPCD’s Request for lack of standing.

Respectfully submitted, 18 December 2020,

In The Hague, the Netherlands.



Michael G. Karnavas
Counsel for Mr. Paul Gicheru

¹ *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.

² Rule 82(1)(d) requires that the appellant identify a “decision that involves an issue that would significantly affect the fairness and expeditious conduct of the proceedings or outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution of the Appeals Chamber *may materially advance the proceedings*.” (emphasis added).

³ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-62](#), Decision Severing the Case against Mr Gicheru, 11 December 2020.

⁴ *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.

⁵ *See id.*, para. 43 (noting that it is ultimately the Assembly of States Parties’ responsibility to decide on the application of Provisional Rule 165 by adopting, amending, or rejecting it).