

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **24 December 2020**

THE APPEALS CHAMBER

Before: Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. PAUL GICHERU***

Public
URGENT

OPCD Request for an Extension of Time

Source: Office of Public Counsel for the Defence

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 Mr Gicheru

Mr. Michael 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 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 Center

**Victims Participation and
Reparations Section**

Other

Mr. O-Gon Kwon, ASP President

Mr. Renan Villacis, SASP Director

1. The OPCD seeks an urgent 4-day extension of time, until 8 January 2021, to file its brief on the three interlocutory issues granted yesterday in the *Decision on the 'Request for leave to appeal the Decision on the Applicability of Provisional Rule 165'*.¹ There is 'good cause' for this extension because of: 1) the unusually limited number of working days due to three official holidays during the deadline period; 2) the lack of staffing resources in the recess period; and 3) the complexity and novelty of the three issues and need for proper pleading before the Appeals Chamber.
2. On 23 December, at 15h54, Pre-Trial Chamber A granted the Office of Public Counsel for the Defence ("OPCD") leave to make interlocutory appeal on three issues:
 - a) *Whether the Chamber erred in finding that Provisional Rule 165 continues to be applicable considering that the Assembly of States Parties has not adopted a specific decision adopting, amending or rejecting Provisional Rule 165 in accordance with the terms of article 51(3) of the Statute;*
 - b) *Whether the Chamber erred in law in finding that a new procedural regime commences at the Initial Appearance Hearing and that the Provisional Rule only came into effect at that time; and*
 - c) *Whether the Chamber erred in finding that Provisional Rule 165 is not incompatible with the Statute on the grounds that article 70(2) of the Statute stipulates that "[t]he principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence" and, in addition, that Provisional Rule 165 does not restrict any of the fundamental rights enshrined in article 67 of the Statute.*²
3. The Decision was filed in the recess period and on the cusp of ICC closure for two holiday days, with a third occurring within that same 10-day deadline

¹ *Decision on the 'Request for leave to appeal the Decision on the Applicability of Provisional Rule 165'*, ICC-01/09-01/20-68, 23 December 2020.

² Issues 1 and 3 have been re-formulated by Pre-Trial Chamber A. *See ibid.*, para. 38.

period. While swift Decision of Pre-Trial Chamber A was expected, the exact timing of the notification leads to an unusually limited number of working days available to draft an appeal brief on these complex and novel issues. A ten-day deadline under Regulation of the Court (“RoC”) 65(4) would, under normal circumstances, provide between six and eight full working days in which to prepare an appeal brief. Because of the three ICC official holiday days³ in the current 10-day deadline period, this is reduced to only four full working days.⁴

4. This is compounded by the Office’s reduced staffing during recess. Between the dates 24 December 2020 to 4 January 2021, the Office is expected to be staffed with 2 persons (33% of the total staff and 0% of interns⁵/visiting professionals) owing to the reasonable expectation that some staff take leave days during the recess periods. Given the unique function of the Office in supporting Defence, it is without recourse to reassign other Court personnel to ‘fill-in’ during this time. Furthermore, those remaining are expected to simultaneously continue the ongoing work to ensure all outstanding 2020 obligations are completed and preparations for 2021 are made.
5. The 4-day extension sought is exactly what the deadline would be if the Decision had been filed just six minutes later (as then being ‘noticed’ on 24 December and, under RoC 33(1)(c), the deadline would begin tolling from 29 December). This would allow for the much-needed additional staff, some of whom are scheduled to return between 4 and 8 January, to assist.
6. Third, the three grounds, including two that have been reformulated, are substantial and novel matters concerning the interpretation of Article 51(3) of the Statute and the potential retroactive application of provisional rules. That requires not only careful thought and additional research to present, but also proper time to edit the document to ensure that all three substantive grounds

³ 25 December 2020, 28 December 2020, 1 January 2021.

⁴ The full working days available under the current deadline are 24, 29, 30, and 31 December 2020.

⁵ Otherwise known as “OPCD Juniors”.

can be contained in the 20-page limit. As noted by Pre-Trial Chamber A in certification pursuant to Article 82(1)(d), “the Provisional Rule 165 Decision constitutes a significant precedent for any future proceedings to be conducted on this basis”.⁶

7. It is acknowledged that RoC 19*bis* does not suspend the deadlines during recess periods *pro forma*; however, it does grant the Chambers the power to suspend deadlines within that provision as well as more generally pursuant to RoC 35(2) if good cause is shown. Certain Chambers have afforded a small extension of time in exactly these circumstances finding such ‘good cause’ of the recess period.⁷
8. Here, the recess runs through 11 January 2021, so the filing would be made still before the normal activity resumes again. Further, a matter of four days should not create great delay in the proceedings, especially considering the timetable set forth by Pre-Trial Chamber A for the Confirmation of Charges briefing.⁸

⁶ *Decision on the ‘Request for leave to appeal the Decision on the Applicability of Provisional Rule 165*, ICC-01/09-01/20-68, 23 December 2020, para. 26.

⁷ *See, e.g. Prosecutor v. Lubanga*, Decision on the Application of the Office of Public Counsel for Victims for an extension of the time limit set by the Order of 13 July 2017, [ICC-01/04-01/06-3345-tENG](#), 21 July 2017, para. 8 (“The Chamber also takes account of the fact that, during the recess, the resources available to the parties in terms of time and staff are more limited.”). *See also Prosecutor v. Gbagbo & Blé Goudé*, Decision on the Prosecutor’s request for time extension for the notice of appeal and the appeal brief, [ICC-02/11-01/15-1268](#) (deadline extended for notice of appeal as falling during recess period).

⁸ *See Decision on the ‘Request for leave to appeal the Decision on the Applicability of Provisional Rule 165*, ICC-01/09-01/20-68, 23 December 2020, fn. 52.

RELIEF REQUESTED

9. The OPCD respectfully requests that the Appeals Chamber find good cause in the specific circumstances and grant an extension of time, until 8 January 2021, to file the interlocutory appeal brief on these three issues.



Xavier-Jean Keïta
Principal Counsel of the OPCD

Dated this 24th Day of December 2020
at Dakar, Senegal