

**Cour
Pénale
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**International
Criminal
Court**

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

Date: 9 March 2021

THE APPEALS CHAMBER

Before: Judge Howard Morrison, Presiding
Judge Chile Eboe-Osuji
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

Public Redacted Version of “Paul Gicheru’s Request for Suspensive Effect Under Article 82(3) of the Rome Statute,” 3 February 2021, ICC-01/09-01/20-93-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

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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Detention Section

**Victims Participation and Reparations
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Other

Mr. Paul Gicheru, through his Counsel (“the Defence”), hereby submits his Request for Suspensive Effect Under Article 82(3) of the Rome Statute. This Request is made necessary because if the Office of Public Counsel for the Defence’s (“OPCD”) appeal prevails, there would be no legal basis for the Single Judge to rule on the confirmation of charges, which she has indicated will take place on 29 May 2021.¹ Granting this Request will promote legal certainty at no prejudice to the Prosecution since the Appeals Chamber has yet to consider submissions on whether the OPCD’s appeal is admissible and the Prosecution has the opportunity to respond to this Request.² No appreciable delay will result from granting this Request, as the Defence intends to request an extension of the deadlines for submitting its list of evidence and response to the Prosecution’s Document Containing the Charges in light of the volume of disclosure material it must review. This Request and Annex A are filed confidential pursuant to Regulation 23bis(1) of the Regulations of the Court as they contain confidential material.

I. BACKGROUND

1. On 6 November 2020, the Single Judge fixed the date of filing of submissions for the confirmation of proceedings, noting that the deadlines “could be postponed by the Chamber, depending on how the procedure develops”:
 - a. The Prosecution’s Document Containing the Charges and list of evidence it intends to rely on for the confirmation of charges is due 12 February 2021;
 - b. The Defence’s list of evidence it intends to rely on for the confirmation of charges is due 26 February 2021;

¹ See *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, fn. 52: “More specifically, the parties’ written submissions are due on 15 March 2021, the Prosecutor may respond by 22 March 2021 and the Defence may reply by 29 March 2021.... The 60-day deadline for the Chamber to issue its decision will commence to run subsequently.” 60 days from 29 March 2021 is 29 May 2021.

² *Prosecutor v. Gicheru*, [ICC-01/09-01/20-89](#), Decision on the Office of Public Counsel for the Defence’s request for the Prosecutor’s arguments on standing to be dismissed *in limine* and request for leave to reply, 29 January 2021.

- c. The Defence's response to the Prosecution's Document Containing the Charges is due 15 March 2021;
 - d. The Prosecution's reply to the Defence's response is due 22 March 2021; and
 - e. The Defence's sur-reply to the Prosecution's reply is due 29 March 2021.³
2. On 23 December 2020, the Single Judge granted the OPCD leave to appeal her decision on the applicability of Provisional Rule 165, noting that "[t]he schedule for the confirmation of charges procedure, which will be conducted on the basis of written submissions, leaves sufficient time to the Appeals Chamber to issue its judgment."⁴
 3. On 31 December 2020, the Defence received the first disclosure package containing [REDACTED]. The Single Judge was informed of this disclosure on 4 January 2021.⁵
 4. [REDACTED].⁶
 5. On 7 January 2021, the Defence received the second disclosure package containing [REDACTED].⁷
 6. [REDACTED].⁸
 7. On 8 January 2021, the OPCD submitted its appeal against the Decision on Applicability of Provisional Rule 165 claiming that the case must revert to Pre-Trial Chamber II since Provisional Rule 165 is not in force,⁹ without requesting that the appeal have suspensive effect under Article 82(3) of the Statute.

³ *Prosecutor v. Gicheru*, ICC-01/09-01/20-T-001-CONF-ENG ET, Transcript, p. 11, l. 1-15.

⁴ *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, para. 42 (internal citation omitted).

⁵ *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.

⁶ [REDACTED].

⁷ *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.

⁸ [REDACTED].

⁹ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-79](#), OPCD Appeals against the Decision on Applicability of Provisional Rule 165, 8 January 2021, para. 20.

8. On 13 January 2021, the Defence received the third disclosure package containing [REDACTED].¹⁰
9. [REDACTED].¹¹
10. On 21 January 2021, the Defence responded to the OPCD's appeal, arguing that the Appeals Chamber should grant the relief sought and revert the case to Pre-Trial Chamber II,¹² without requesting that the OPCD's appeal have suspensive effect.
11. On 21 January 2021, the Prosecution responded to the OPCD's appeal, claiming that it is inadmissible because the OPCD lacks standing.¹³
12. On 25 January 2021, the OPCD requested the Appeals Chamber to dismiss *in limine* the Prosecution's arguments regarding the admissibility of the OPCD's appeal for lack of standing, or in the alternative, leave to file a reply on this discrete issue.¹⁴
13. [REDACTED].¹⁵
14. On 26 January 2021, the Prosecution responded that there was no basis for leave to reply since the OPCD could have addressed standing in its brief but submitted that a page limit of five pages would be appropriate if leave is granted.¹⁶

¹⁰ *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.

¹¹ [REDACTED].

¹² *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.

¹³ *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.

¹⁴ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-86](#), OPCD Request to Dismiss *In Limine* the Prosecution's Arguments on Standing Or, in the Alternative, Leave to Reply, 25 January 2021.

¹⁵ Email from [REDACTED] entitled "[REDACTED]," 25 January 2021 (Annex A); [REDACTED] (Annex B).

¹⁶ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-87](#), Prosecution's Response to OPCD's "Request to Dismiss *In Limine* the Prosecution's Arguments on Standing or, in the alternative, Leave to Reply," 26 January 2021.

15. On 28 January 2021, the Defence received the fourth disclosure package containing [REDACTED]. The Single Judge was informed of this disclosure on 29 January 2021.¹⁷

16. On 29 January 2021, the Appeals Chamber granted the OPCD's request to file a reply on the issue of standing, reasoning that the Appeals Chamber considers that the Pre-Trial Chamber's power to certify issues for appeal under Article 82(1)(d) of the Statute does not extend to granting leave to appeal to persons or entities that are not parties within the meaning of that provision, and that it is not bound by the Pre-Trial Chamber's determination and may re-assess the question independently.¹⁸

II. LAW AND ARGUMENT

17. While the Defence understands that it should have requested that the OPCD's appeal have suspensive effect in its Response brief,¹⁹ it is still within the Appeals Chamber's discretion to grant this Request considering the "specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under the circumstances."²⁰

18. The specific circumstances of this case warrant granting this Request. The implementation of the Single Judge's decision "would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were

¹⁷ *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.

¹⁸ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-89](#), Decision on the Office of Public Counsel for the Defence's request for the Prosecutor's arguments on standing to be dismissed *in limine* and request for leave to reply, 29 January 2021, para. 14.

¹⁹ Article 82(3) of the Rome Statute provides that an appeal does not have suspensive effect "unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence." Rule 156(5) provides that the appellant may request that the appeal have suspensive effect.

²⁰ *Prosecutor v. Bemba*, [ICC-01/05-01/08-499](#), Decision on the Request of the Prosecutor for Suspensive Effect, 3 September 2009, para. 11.

to find in favour of the appellant” and “would lead to consequences that ‘would be very difficult to correct and may be irreversible.’”²¹

19. Were the Single Judge to precipitously move ahead with the confirmation of charges proceedings before an Appeals Chamber decision, and were the Appeals Chamber to reverse the Impugned Decision, the Single Judge’s decision on the confirmation of charges would be made without legal authority. The basis of the trial proceedings would become null and void,²² causing further delays and complications, all of which can be avoided by granting this Request.
20. In granting leave, the Single Judge considered that it was necessary to “determine whether the basis for the current proceedings as well as any future proceedings based on article 70 of the Statute and Provisional Rule 165, is legally sound.”²³ The Single Judge was aware that the consequence of certifying the issues for appeal is that she may have to wait for an Appeals Chamber decision before ruling on the confirmation of charges.²⁴
21. Granting this Request would provide legal certainty for the confirmation of charges proceedings at no prejudice to the Prosecutor since the Appeals Chamber has yet to consider submissions on whether the OPCD’s appeal is admissible and the Prosecution has the opportunity to respond to this Request.

²¹ See *Prosecutor v. Bemba*, [ICC-01/05-01/18-817](#), Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the “Decision on the Admissibility and Abuse of Process Challenges,” 9 July 2010, para. 11.

²² It is trite law that a decision rendered without legal authority is null and void. See e.g. *Prosecutor v. Kupreškić et al.*, IT-95-16, [Decision on Appeal by Dragan Papic against Ruling to Proceed by Deposition](#), 15 July 1999, para. 14 (the ICTY Appeals Chamber held the Trial Chamber’s ruling to take depositions from Defence witnesses “null and void” because the Trial Chamber was not composed of three judges when it made the order as required by Rule 71 and Article 12 of the ICTY Statute); *Prosecutor v. Ntuyahaga*, ICTR-98-40-T, [Declaration on a Point of Law](#), 22 April 1999, para. 17 (the ICTR Trial Chamber held that the Registrar’s “Safe Conduct” document which he delivered to Mr. Bernard Ntuyahaga upon his release was “null and void” because “neither the provisions of Security Council resolutions, nor those of the Statute, nor those of the Rules of Procedure and Evidence, nor any instructions rendered by the Trial Chamber, empower the Registrar to issue the document entitled ‘Safe Conduct’”).

²³ See *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, para. 42.

²⁴ *Id.*

22. Granting this Request will not appreciably delay the proceedings. The Defence has been provided with four out of five disclosure packages from the Prosecutor ([REDACTED]);²⁵ material [REDACTED];²⁶ and [REDACTED] ([REDACTED]).²⁷ Considering that the Defence has yet to go over the disclosure material with Mr. Gicheru because of his detention,²⁸ and that the Defence must fully appreciate all of this material before receiving the Document Containing the Charges, it is effectively impossible to carry out the Defence's duties in a diligent²⁹ and responsible manner under the current schedule. The Defence accordingly intends to request the Single Judge to extend the deadlines for the Defence's list of evidence and response to the Prosecution's Document Containing the Charges.

WHEREFORE, for the above reasons, the Appeals Chamber should grant this Request for suspensive effect under Article 82(3) of the Statute.

Respectfully submitted, 9 March 2021,

In The Hague, the Netherlands.



Michael G. Karnavas
Counsel for Mr. Paul Gicheru

²⁵ See *supra* Background, paras. 4-5, 8, 15.

²⁶ See *supra* Background, para. 13.

²⁷ See *supra* Background, paras. 6, 9.

²⁸ See *Prosecutor v. Gicheru*, [ICC-01/09-01/20-90-Conf](#), Decision on Mr. Gicheru's Request for Interim Release, 29 January 2021.

²⁹ Due diligence requires Counsel to do anything and everything to ensure that all fair trial rights are accorded to their client, including checking the veracity of all evidence used by the Prosecutor against the client, making all necessary legal and factual challenges, and so on. [ALASKA RULES OF PROF'L CONDUCT](#) (2017-2018 ed.), Rule 1.3; *Id.*, Comment to Rule 1.3.