

**Cour
Pénale
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**International
Criminal
Court**

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Date: 21 July 2021

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

**Request for Leave to Appeal the Decision on the Confirmation of Charges against
Paul Gicheru**

Source: Counsel for Paul Gicheru

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

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Other

Mr. Paul Gicheru, through his Counsel (“the Defence”), hereby requests leave to appeal Pre-Trial Chamber A’s “Decision on the Confirmation of Charges against Paul Gicheru” pursuant to Article 82(1)(d) of the Rome Statute.¹

I. BACKGROUND

1. As soon as Mr. Gicheru arrived in the Netherlands to surrender to the ICC on 2 November 2020,² Pre-Trial Chamber II requested the President of the Pre-Trial Division to constitute Pre-Trial Chamber A on the basis of Provisional Rule 165,³ which was provisionally adopted by the Judges on 10 February 2016 for urgent application but not expressly adopted or rejected by the Assembly of States Parties (“ASP”) as required under Article 51(3) of the Rome Statute at its 15th, 16th, 17th, 18th, or 19th sessions.
2. Before Mr. Gicheru appeared at his Initial Appearance Hearing on 6 November 2020, the Office of the Public Counsel for the Defence (“OPCD”) filed a request to appear before the President of the Pre-Trial Division on the applicability of Provisional Rule 165.⁴ The OPCD’s request was denied *in limine* since no case was pending before the Pre-Trial Division.⁵
3. At Mr. Gicheru’s Initial Appearance Hearing, the Prosecutor raised the *in limine* denial of the OPCD’s request,⁶ inviting Mr. Gicheru’s submissions on whether “he is happy for this matter to be convened before this Chamber, rather than to have the matter postponed until the Chamber can be reconstituted.”⁷ Mr. Gicheru agreed

¹ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-153](#), Decision on the confirmation of charges against Paul Gicheru, 14 July 2021 (“Decision on the Confirmation of Charges”).

² *Prosecutor v. Gicheru*, [ICC-01/09-01/20-34](#), Order Setting the Date for the Initial Appearance of Mr Gicheru, 4 November 2020, para. 2.

³ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-31](#), Request to the President of Pre-Trial Chamber Division to constitute a Chamber for the purposes of conducting the proceedings under article 70 of the Statute, 2 November 2020.

⁴ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-36](#), OPCD Request for Leave to Appear on the Applicability of Provisional Rule 165, 6 November 2020.

⁵ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-37](#), Decision Rejecting *in limine* the ‘OPCD Request for Leave to Appear on the Applicability of Provisional Rule 165,’ 6 November 2020.

⁶ *Prosecutor v. Gicheru*, ICC-01/09-01/20-T-001-CONF-ENG ET, Transcript, p. 13, lines 3-6.

⁷ *Prosecutor v. Gicheru*, ICC-01/09-01/20-T-001-CONF-ENG ET, Transcript, p. 13, lines 7-11.

that the “Pre-Trial Chamber should continue handling the matter in spite of the objection.”⁸

4. The OPCD resubmitted its request for leave to appear on the applicability of Provisional Rule 165 on 11 November 2020, which Pre-Trial Chamber A granted the following day.⁹ In its brief of 17 November 2020, the OPCD argued that: (a) Pre-Trial Chamber A is not lawfully constituted because Provisional Rule 165 is not in force; (b) Provisional Rule 165 is barred by the principle of non-retroactivity; and (c) Provisional Rule 165 is inconsistent with the Statute.¹⁰
5. Responding on 20 November 2020, the Prosecutor argued that: (a) Provisional Rule 165 is in force since the ASP has not yet decided to adopt, amend, or reject it; (b) Provisional Rule 165 is not being applied retroactively to the detriment of Mr. Gicheru; and (c) Provisional Rule 165 is compatible with the Statute.¹¹
6. Responding to OPCD’s submissions on 25 November 2020, the Defence argued that: (a) Pre-Trial Chamber A is lawfully established because Provisional Rule 165 is in force and applicable; (b) Provisional Rule 165 is not being applied to retroactively to the detriment of Mr. Gicheru; and (c) Provisional Rule 165 is consistent with the Statute.¹²
7. On 10 December 2020, Pre-Trial Chamber A held that Provision Rule 165 applies in the present proceedings.¹³ Reasoning that the text of Article 51(3) shows that positive action by the ASP is required – to adopt, amend, or reject the provisional

⁸ *Prosecutor v. Gicheru*, ICC-01/09-01/20-T-001-CONF-ENG ET, Transcript, p. 15, lines 10-11.

⁹ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-40](#), OPCD Request for Leave to Appear on the Applicability of Provisional Rule 165, 11 November 2020; *Prosecutor v. Gicheru*, [ICC-01/09-01/20-43](#), Decision on the Request to Submit Observations on behalf of the Office of the Public Counsel for the Defence, 12 November 2020.

¹⁰ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-47](#), OPCD Submissions on the Inapplicability of Provisional Rule 165, 17 November 2020.

¹¹ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-52](#), Prosecution’s Response to “OPCD’s Submissions on the Inapplicability of Provisional Rule 165, 20 November 2020.

¹² *Prosecutor v. Gicheru*, [ICC-01/09-01/20-53](#), Paul Gicheru’s Observations and Response to OPCD Submissions on the Inapplicability of Provisional Rule 165, 25 November 2020.

¹³ *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, p. 22.

rule – Pre-Trial Chamber A considered that if the Rule lapses at the “next session,” this “would make recourse to article 51(3) of the Statute very problematic and its application almost impossible, because of the basic functioning of the ASP itself.”¹⁴ Pre-Trial Chamber A further found that Provisional Rule 165 was not being applied retroactively and that it is compatible with the Statute and does not restrict any Article 67 fair trial rights.¹⁵

8. In the midst of the ASP’s 19th session, the OPCD on 16 December 2020 sought leave to appeal Pre-Trial Chamber A’s decision, arguing that she had discretion to grant leave to appeal even though her decision “that Provisional Rule 165 ostensibly applies ... foregoes any ability to make request[s] for interlocutory appeal pursuant to Article 82(1)(d).”¹⁶
9. On the last day of the ASP’s 19th session, 23 December 2020, Pre-Trial Chamber A granted the OPCD’s leave to appeal the Impugned Decision.¹⁷ Since Provisional Rule 165 was being invoked for the first time and its decision “constitutes a significant precedent for any future proceedings to be conducted on this basis,”¹⁸ Pre-Trial Chamber A considered its decision reviewable since the very basis for the proceedings would likely undergo appellate scrutiny *only* after a trial judgment is rendered.¹⁹ Three issues were certified for appeal.²⁰
10. The ASP concluded its 19th session on 23 December 2020 without discussing, considering, or proposing any adjustments to Provisional Rule 165, and without

¹⁴ *Id.*, paras. 41-2.

¹⁵ *Id.*, paras. 47-52.

¹⁶ *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, notified on 17 December 2020, para. 11.

¹⁷ *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.

¹⁸ *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, para. 26.

¹⁹ *Id.*, para. 32.

²⁰ *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, paras. 18, 38.

having to consider any requests to augment the budget to deal with Article 70 cases.

11. On 8 March 2021, the Appeals Chamber held that Provisional Rule 165 applies, since the reference to “the next ordinary session” in Article 51(3) of the Statute must be interpreted as the next session at which the provisional rule is adopted, amended, or rejected, rather than the next session following the adoption of the provisional rule.”²¹ The Appeals Chamber did not specifically hold that Provisional Rule 165 eliminates the right to appeal the *confirmation decision*, but held that:

The Pre-Trial and Trial Chambers are required to ensure that the rights of the suspect or accused person are respected. Any concern that they may have failed in this duty may be raised before the Appeals Chamber in a final appeal and any necessary remedy may be applied at that stage.²²

12. On 15 July 2021, Pre-Trial Chamber A confirmed the charges against Mr. Gicheru.²³

II. REQUEST FOR LEAVE TO APPEAL

13. Article 82(1)(d) of the Rome Statute provides that either party may appeal “[a] decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.” According to the Appeals Chamber, “[p]ut in a nutshell, the object of paragraph (d) of article 82(1) of the Statute is to pre-empt the repercussions of erroneous decisions on the

²¹ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-107](#), Judgment on the appeal of the Office of Public Counsel for the Defence against the decision of Pre-Trial Chamber A of 10 December 2020 entitled ‘Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence’, 8 March 2021, para. 1.

²² *Id.*, para. 112.

²³ [Decision on the Confirmation of Charges](#).

fairness of the proceedings or the outcome of the trial.”²⁴ The Pre-Trial Chamber is vested with discretion to certify issues for appeal.²⁵

14. While the Appeals Chamber’s judgment confirmed that Provisional Rule 165 applies, in this instance, it remains unsettled whether its application disallows the right to interlocutory appeal the Decision on the Confirmation of Charges. The Appeals Chamber did not address submissions by States Parties, most notably, France and Germany, who at the 15th ASP Session, proposed that Provisional Rule 165 be modified to keep the number of sitting Judges in the Chambers except the Pre-Trial Chamber, which would have a Single Judge *for decisions other than on the confirmation of charges* and to retain the right to interlocutory appeal:

Articles ~~39(2)(b)~~, 53, ~~57(2)~~, **and 59**, ~~76(2) and 82(1)(d)~~, and any rules thereunder, shall not apply.

A chamber composed of **at least** one judge from the Pre-Trial Division shall exercise the functions and powers of the Pre-Trial Chamber from the moment of receipt of an application under Article 58. When the Pre-Trial Chamber is seized of offences against the administration of justice under article 70, orders or rulings issued under article 61 paragraph 7 must be concurred by a majority of judges. ~~A Chamber composed of one judge shall exercise the functions and powers of the Trial Chamber, and a panel of three judges shall decide appeals. The procedures for constitution of Chambers and the panel of three judges shall be established in the regulations.~~²⁶

15. Disallowing interlocutory appeals of the confirmation decision does not Judges’ stated purpose in adopting the provisional amendments to Rule 165 – to save the ICC resources in adjudicating Article 70 cases²⁷ – nor the purpose of Article 61(7) in filtering out only those cases for which the Prosecutor has presented “sufficiently

²⁴ *Prosecutor v. Lubanga*, [ICC-01/04-168](#), Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006 (“*Lubanga Decision*”), para. 19.

²⁵ *Id.*, para. 20.

²⁶ Report of the Working Group on Amendments, Annex V, Non-Paper submitted by France and Germany: Proposed amendments to provisional rule 165 of the Rules of Procedure and Evidence, 15 November 2017, [ICC-ASP/16/22](#).

²⁷ Report of the Study Group on Governance Cluster I in relation to the provisional amendments to rule 165 of the Rules of Procedure and Evidence, 21 September 2016, [ICC-ASP/15/7](#), para. 10.

compelling charges going beyond mere theory or suspicion.”²⁸ Turning a blind eye to the errors committed by Pre-Trial Chamber A means allowing a trial to proceed on flimsy evidence and unfounded charges, only to result in a judgment of acquittal (*no case to answer*). In other words, a trial would take place even though at the “filtering” phase, the evidence taken as a whole is so unsatisfactory and so unreliable that a reasonable Trial Chamber would *not* convict based on that evidence.²⁹

16. The Pre-Trial Chamber A must “ponder the possible implications of a given issue being wrongly decided on the outcome of the case.”³⁰ As argued by the Defence in its Written Submissions, the Trial Chamber will inquire at the close of the Prosecution’s case: “*did the case for the prosecution remain as strong as the Pre-Trial Chamber had found it to be when the charges were confirmed?*”³¹ If *prima facie* the evidence seems insufficient to meet the No Case to Answer standard, it axiomatically is insufficient for confirmation and insufficient to proceed to trial. Sending a case to trial when it should not have been confirmed is neither prudent nor serves the interests of judicial economy. Hence why leave to appeal is sought.

17. Accordingly, the Defence requests leave to appeal on the following issues whether Pre-Trial Chamber A erred in law and fact in:

- a. Failing to apply the correct standard of proof for a decision on the confirmation of charges under Article 61(7) of the Rome Statute;³²

²⁸ *Prosecutor v. Lubanga*, [ICC-01/04-01/06-803-tEN](#), Decision on the confirmation of charges, 29 January 2007, para. 37-9.

²⁹ *Id.*

³⁰ *Lubanga Decision*, para. 13.

³¹ *Prosecutor v. Ruto*, [ICC-01/09-01/11-2027-Red-Corr](#), Public redacted version of Decision on Defence Applications for Judgments of Acquittal, 5 April 2016 (Reasons of Judge Eboe-Osuji), paras. 121-2 (emphasis added).

³² [Decision on the Confirmation of Charges](#), paras. 22-6, 30-4.

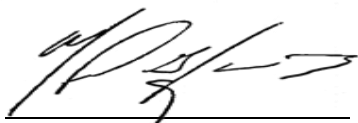
- b. Failing to provide a reasoned opinion by not considering the Defence's arguments and challenges to the evidence concerning any of the Prosecution witnesses;³³
- c. Failing to properly assess the credibility of the Prosecution witnesses in light of adverse credibility findings made by the *Ruto and Sang* Trial Chamber;³⁴
- d. Relying on the unreliable and uncorroborated hearsay statements of Prosecution witnesses;³⁵ and
- e. Concluding that there is sufficient evidence against Mr. Gicheru under Article 61(7) of the Rome Statute to commit him to trial.³⁶

18. An immediate resolution of these issues by the Appeals Chamber is necessary for the fair and expeditious conduct of the proceedings and its outcome, since an appeal would demonstrate that the charges against Mr. Gicheru should not be confirmed.

19. Granting leave to appeal materially advances the proceedings in Mr. Gicheru's case, "move[s] forward" the proceedings, and "remove[s] doubts on the correctness of the decision or map of course of action along the right lines."³⁷

Respectfully submitted, 21 July 2021,

In The Hague, the Netherlands.



Michael G. Karnavas
Counsel for Mr. Paul Gicheru

³³ [Decision on the Confirmation of Charges](#), paras. 34, 56-70 (regarding P-397); 71-87 (regarding P-516); 88-112 (regarding P-613); 113-20 (regarding P-800); 121-5 (regarding P-495); 126-30 (regarding P-536); 131-54 (regarding P-341); 155-65 (regarding P-274).

³⁴ [Decision on the Confirmation of Charges](#), paras. 29, 40-2.

³⁵ [Decision on the Confirmation of Charges](#), paras. 32-33, 56-70 (regarding P-397); 71-87 (regarding P-516); 88-112 (regarding P-613); 113-20 (regarding P-800); 121-5 (regarding P-495); 126-30 (regarding P-536); 131-54 (regarding P-341); 155-65 (regarding P-274).

³⁶ [Decision on the Confirmation of Charges](#), Disposition.

³⁷ [Lubanga Decision](#), paras. 14-5.