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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

**Prosecution's Response to OPCD's "Request for leave to appeal the Decision on
the Applicability of Provisional Rule 165"**

Source: Office of the Prosecutor

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

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Introduction

1. On 10 December 2020, the Pre-Trial Chamber affirmed that it is validly constituted according to provisional rule 165, which remains in force until such time as it is adopted, amended, or rejected by the Assembly of States Parties (“ASP”).¹ It also held that provisional rule 165 was not applied retroactively in this case,² and that provisional rule 165 is not incompatible with the Statute.³ Both the Parties in this case—the Prosecution and Defence—substantially concur with the reasoning of the Pre-Trial Chamber.⁴

Submissions

2. Only the Office of Public Counsel for Defence (“OPCD”) doubts the continued validity of provisional rule 165.⁵ While it was exceptionally granted leave to address the Pre-Trial Chamber on this matter,⁶ this does not mean that it has standing to seek leave to appeal under article 82(1)(d) of the Statute.⁷ Nor in any event does OPCD show that the intervention of the Appeals Chamber would materially advance the proceedings in this case against Mr Gicheru, as required by article 82(1)(d).⁸ Rather, certification for appeal of the issues proposed by OPCD would impede the prompt resolution of pre-confirmation proceedings in this case, contrary to the apparent wishes of Mr Gicheru, who is represented by professional counsel, and who likewise

¹ [ICC-01/09-01/15-61](#) (“Decision”), paras. 31-35, 39-45.

² [Decision](#), paras. 46-49.

³ [Decision](#), paras. 50-53.

⁴ See [ICC-01/09-01/15-52](#) (“Prosecution Response to OPCD Submissions on Provisional Rule 165”); [ICC-01/09-01/15-53](#) (“Defence Response to OPCD Submissions on Provisional Rule 165”). See also [Decision](#), paras. 18-25.

⁵ See [ICC-01/09-01/15-47](#) (“OPCD Submissions on Provisional Rule 165”); [ICC-01/09-01/20-63](#) (“Request”).

⁶ [ICC-01/09-01/15-43](#) (“Decision Granting OPCD Leave to Appear”); [ICC-01/09-01/15-40](#) (“Request for Leave to Appear”). The President of the Pre-Trial Division had already dismissed in *limine* an earlier petition by OPCD, as it was addressed to the wrong forum: [ICC-01/09-01/15-37](#). See also [Request for Leave to Appear](#), para. 10.

⁷ *Contra* [Request](#), paras. 9-10.

⁸ *Contra* [Request](#), paras. 11, 25-28.

opposes the Request.⁹ For all these reasons, the Request should be promptly dismissed *in limine*.¹⁰

OPCD lacks standing to seek leave to appeal under article 82(1)(d) of the Statute

3. OPCD claims that it has standing to seek leave to appeal because, in its view, Mr Bett “would have the right to seek leave to appeal”—and, in his absence, “it falls on the OPCD to continue the standing it has already been granted to represent and protect Mr Bett’s interests”.¹¹ Yet this not only overlooks the Appeals Chamber’s authoritative guidance, but also that the case against Mr Gicheru has been severed from the case against Mr Bett—who remains a fugitive from the Court.¹² OPCD is not counsel for Mr Bett, nor in any event is Mr Bett entitled to participate in this kind of litigation until he is arrested or he surrenders. Maintaining this orthodoxy affords no prejudice to Mr Bett, who will be fully able to litigate such matters as he wishes when he appears before the Court.

Leave to make submissions on provisional rule 165 did not make OPCD a “party” for the purpose of article 82(1)(d)

4. Article 82(1) grants right of appeal only to those who are a “party” to the impugned decision.¹³

5. Earlier this year, the Appeals Chamber affirmed its prior oral ruling that “‘who qualifies as a ‘party’ in terms of article 82(1) of the Statute must be determined taking into account the type of decision that is the subject of the appeal’ and that ‘the meaning of the term ‘either party’ [in article 82(1) of the Statute] thus depends on the procedural context’.”¹⁴ While it is true that particular types of decisions (such as those under articles 15, 18(4), 19(2), 19(3), and 56(3)) may confer different entities

⁹ See [ICC-01/09-09/20-64](#) (“Defence Response”), para. 1.

¹⁰ *Contra* [Request](#), para. 29.

¹¹ [Request](#), para. 9.

¹² [ICC-01/09-01/15-62](#) (“Severance Decision”), para. 13.

¹³ [Statute](#), art. 82(1).

¹⁴ [ICC-02/17-137 OA OA2 OA3 OA4](#) (“Afghanistan Standing Decision”), para. 12. *See also* paras. 14, 16.

with the status of “party” for the purpose of appeal,¹⁵ it otherwise remains the case that the term “refers, in the first place, to the prosecution and the defence”.¹⁶ It follows that it is for the entity claiming the status of “party”, for the purpose of article 82(1)(d), to establish that this is consistent with the procedural context. OPCD fails this requirement.

6. In particular, OPCD does not – and cannot – argue that the Decision fell under any of the special procedures which vary the ordinary meaning of the term “party”, for the purpose of article 82(1)(d). Rather, as was made clear, the Decision was taken in the ordinary exercise of the Chamber’s functions in charge of the pre-confirmation and confirmation proceedings in this case.¹⁷ Consequently, the Parties are the Prosecution and the Defence, and they are exclusively vested with standing to seek leave to appeal.

7. Furthermore, while OPCD sought leave to file observations before the Chamber under regulation 77(4)(a) and/or (d),¹⁸ this was not clearly the basis upon which their request was granted. These provisions allow interventions by OPCD in order to “[r]epresent[] and protect[] the rights of the defence” including “the needs of the defence in ongoing proceedings”,¹⁹ or to “[a]dvanc[e] submissions [...] on behalf of the person entitled to legal assistance when defence counsel has not been secured”.²⁰ Neither provision is directly apposite to this case—especially when Mr Gicheru is independently represented by professional counsel. Instead, the Chamber appears to have granted OPCD leave to file observations on a *sui generis* basis,²¹ akin to granting leave to an *amicus curiae* under rule 103.²² It is well accepted that *amici curiae* are not

¹⁵ [Afghanistan Standing Decision](#), paras. 16-18, 21.

¹⁶ [Afghanistan Standing Decision](#), para. 15 (emphasis added).

¹⁷ See e.g. [Decision](#), paras. 32-35.

¹⁸ See [Request for Leave to Appear](#), paras. 12-13.

¹⁹ [Regulations of the Court](#), reg. 77(4)(a).

²⁰ [Regulations of the Court](#), reg. 77(4)(d).

²¹ [Decision Granting OPCD Leave to Appear](#), para. 9.

²² Cf. [ICC-02/17-97](#) (“Afghanistan OPCD Participation Decision”), paras. 46-48 (noting that while the tasks of OPCD set out in regulation 77(4) are “not exhaustive”, they are conditioned on “an identifiable and specific need to represent and protect the rights of the defence, analogous to those explicitly envisaged”; in the absence of such

“parties” to litigation for the purpose of article 82(1), and do not have standing to seek leave to appeal.

8. Whatever the procedural basis for granting the OPCD a limited right of intervention, it did not make them a “party” in the meaning of article 82(1)(d). There was never any suggestion that OPCD was granted an independent role in these proceedings, akin to the Prosecution or the Defence. The Chamber was explicit: OPCD was granted leave *only* “to submit the observations set out in the OPCD Request [for Leave to Appear]”.²³ OPCD has done this, and now its participation in this case is concluded.

9. Nor is there any legitimate forensic interest in finding otherwise. At most, OPCD contends that it was granted leave to make submissions in order to represent Mr Bett and/or other potential article 70 suspects.²⁴ But even this was not clearly accepted by the Chamber when granting OPCD leave to appear; rather, it stressed the consequences for *this* case.²⁵ Having heard the arguments raised by OPCD, and dismissed them, there is no benefit for this case in affording OPCD procedural rights to launch an appeal in the hope – at most – that it might benefit a suspect in *another* case.²⁶ As the following paragraphs explain, this would substantially undermine the framework which serves to promote judicial economy and to protect the rights of each suspect appearing before the Court, through counsel, to challenge the case against them.

a need, it may nonetheless be appropriate in certain circumstances (as in that case) to allow OPCD to participate as an *amicus curiae* under rule 103).

²³ [Decision Granting OPCD Leave to Appear](#), para. 9.

²⁴ [Request](#), para. 9.

²⁵ Compare [Decision Granting OPCD Leave to Appear](#), para.7 (recalling without comment OPCD’s submission concerning the interests that it sought to represent), *with* para. 9 (granting leave to OPCD given “the specific circumstances” and in light of “the importance of the issue under consideration for the conduct of the proceedings in *the present case*”, emphasis added)

²⁶ See also [Defence Response](#), para. 1.

OPCD is not counsel for Mr Bett, whose case has now been severed from this case

10. OPCD acknowledges that the case against Mr Bett has been severed from the case against Mr Gicheru.²⁷ Yet in arguing that this chamber retains jurisdiction over any request for leave to appeal the Decision on behalf of Mr Bett,²⁸ OPCD misses the bigger point—which is that, since OPCD is not counsel for Mr Bett and is not instructed by him, Mr Bett cannot be prejudiced by the Chamber’s ruling on provisional rule 165 in this case.

11. OPCD’s position is apparently contradictory, since it seems to concede that the absence of “review by the Appeals Chamber will leave litigation open on these matters”,²⁹ but then asserts that the “the Impugned Decision, itself, has the power to foreclose any interlocutory appeal of any decision under Article 82(1)(d) in this case or any other Article 70 case to come before the Court, ever.”³⁰ This is incorrect, both in overstating the effect of provisional rule 165,³¹ but also to any extent it is intended to suggest that chambers in other cases will be *bound* to follow the Decision.

12. As the Prosecution has previously pointed out, the doctrine of *res judicata* applies only between the parties to the decision in question³²—that is, the Prosecution and Mr Gicheru. The Defence agrees.³³ Consequently, if and when Mr Bett appears before the Court, he will be able to litigate all the matters pertinent to his defence—including, if necessary, the application of provisional rule 165 in the proceedings against him.³⁴ Confirming that OPCD lacks standing to seek leave to appeal on behalf of Mr Bett, because it is not a “party” in the meaning of article 82(1), in fact *promotes* Mr Bett’s rights by ensuring his freedom (in due course) to litigate autonomously. While the Decision may be highly persuasive in any future litigation

²⁷ See [Request](#), para. 10; [Severance Decision](#), paras. 15, 17.

²⁸ [Request](#), para. 10.

²⁹ [Request](#), para. 26.

³⁰ [Request](#), para. 26.

³¹ See [Prosecution Response to OPCD Submissions on Provisional Rule 165](#), para. 29 (bullet 1, noting that some forms of interlocutory appeal remain available under provisional rule 165).

³² [Prosecution Response to OPCD Submissions on Provisional Rule 165](#), para. 6 (especially fn. 10).

³³ [Defence Response](#), para. 1.

³⁴ *Contra* [Request](#), para. 27.

concerning provisional rule 165, it is not binding³⁵ except for the limited purpose of this case.³⁶ It is neither necessary nor appropriate to certify any part of the Decision for appeal on the sole basis that similar issues may arise in other future cases.³⁷

Intervention by the Appeals Chamber will not materially advance the proceedings

13. In any event, the Request also fails on the merits, because it does not satisfy the requirements of article 82(1)(d). In particular – and without prejudice to the Chamber concluding that OPCD has not in fact identified any ‘appealable’ issue genuinely arising from the Decision which would significantly affect the fair and expeditious conduct of these proceedings, or the outcome of the trial³⁸ – the Request does not show that intervention by the Appeals Chamber will materially advance *these* proceedings.³⁹

14. To the contrary, there is every sign that certifying any part of the Decision for appeal will retard the proceedings, to the detriment of Mr Gicheru’s interest in expeditious resolution of his case. “Mr Gicheru, who is represented by Counsel and not by the OPCD resolutely agrees with the Single Judge that Provisional Rule 165 applies” in this case.⁴⁰ In circumstances where both the Prosecution and Defence agree with the correctness of the Decision, there is little forensic interest in pursuing an academic appeal at the instance of a third party. The Parties’ limited resources will be better served by focusing on the issues necessary for expeditious resolution of the pending confirmation proceedings.

³⁵ See [Statute](#), art. 21(2).

³⁶ Cf. [Request](#), para. 11 (“the issue of the applicability of Provisional Rule 165 cannot be considered ‘final’ until it is decided by the Appeals Chamber”).

³⁷ *Contra* [Request](#), paras. 11, 28.


³⁸ Cf. [Request](#), paras. 12-24.

³⁹ *Contra* [Request](#), paras. 25-26.

⁴⁰ [Defence Response](#), para. 1.

Conclusion

15. For all the reasons above, the Request should be dismissed *in limine*.



Fatou Bensouda, Prosecutor

Dated this 21st day of December 2020

At The Hague, The Netherlands