

**Cour
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**International
Criminal
Court**

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

Date: **4 February 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

Reply to the “Prosecution’s Response to OPCD’s ‘Appeal[] against the Decision on Applicability of Provisional Rule 165’”

Source: Office of Public Counsel for the Defence

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

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I. INTRODUCTION

1. The Office of Public Counsel for the Defence (“OPCD” or “Office”) files this reply to the Prosecution’s Response,¹ with leave of the Appeals Chamber.² The OPCD has standing to appeal³ because: (1) Pre-Trial Chamber A authorised the OPCD to represent and protect the rights of Mr Philip Kipkoech Bett⁴ and other unrepresented suspects in this case,⁵ in accordance with the Office’s mandate;⁶ (2) the Appeals Chamber has previously recognised the OPCD’s standing to appeal in similar situations; (3) granting the OPCD standing to appeal is consistent with appellate jurisprudence on the definition of “either party” in Article 82(1) of the Statute; (4) the OPCD’s Appeal does not prejudice Mr Bett and other potential suspects, and, in fact, aligns with the interests of Mr Paul Gicheru; and (5) in any event, the Pre-Trial Chamber properly exercised its *proprio motu* power in certifying the issues for appeal. The Appeals Chamber should therefore find the Appeal admissible.

II. ARGUMENTS

2. First, throughout these proceedings and in this appeal, the OPCD acts pursuant to a two-fold mandate to represent and protect the rights of Mr Bett and any other potential suspects⁷ under Regulations 77(4)(a) and (c) of the Regulations of the Court (“RoC”). Pre-Trial Chamber A authorised OPCD to submit observations on the applicability of

¹ [Prosecution’s Response to OPCD’s ‘Appeal\[\] against the Decision on Applicability of Provisional Rule 165’](#), ICC-01/09-01/20-83, 21 January 2021, (“Prosecution Response”).

² [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](#), ICC-01/09-01/20-89, 29 January 2021, para. 18.

³ See [OPCD Appeals against the Decision on Applicability of Provisional Rule 165](#), ICC-01/09-01/20-79, 8 January 2021 (“Appeal” or “OPCD’s Appeal”). The OPCD’s Appeal sought review of Pre-Trial Chamber A’s Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence, ICC-01/09-01/20-61, 10 December 2020 (“Impugned Decision”).

⁴ Mr Bett was a suspect in this case at the time of the Impugned Decision, which was issued before the Severance Decision. See [Decision Severing the Case against Mr Gicheru](#), ICC-01/09-01/20-62, 11 December 2020 (“Severance Decision”).

⁵ See [Decision on the Request to Submit Observations on behalf of the Office of Public Counsel for the Defence](#), ICC-01/09-01/15-43, para. 9 and p. 5; [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 (“Certification Decision”), para. 25.

⁶ Regulations 77(4)(a) and (c) of the Regulations of the Court.

⁷ For the avoidance of doubt, the OPCD is not directly representing Mr Bett and these other potential suspects, rather, it is representing *their interests*. See [OPCD Submissions on the Inapplicability of Provisional Rule 165](#), ICC-01/09-01/20-47, 17 November 2020, para. 13.

Provisional Rule 165 in this case on 12 November 2020,⁸ referencing this RoC 77(4)(a) and (c) mandate.⁹ Mr Bett himself would have standing to appeal.¹⁰

3. Second, in the Certification Decision, Pre-Trial Chamber A highlighted that ICC Chambers have recognised the OPCD's standing to bring appeals when it was exercising similar mandates in the *Darfur* and *DRC* Situations.¹¹ In those instances, the OPCD was invited to submit observations on victims' applications according to its Regulation 77(4) mandate.¹² When the OPCD sought leave to appeal, the Office acknowledged that it is not, in general, a party to the proceedings, however, in specific instances where "it has been expressly tasked to represent the interests of the defence, it can be considered a party to that proceeding".¹³ Those Pre-Trial Chambers granted the Office leave to appeal and the appeals were heard by the Appeals Chamber without any question of the OPCD's standing.¹⁴ In fact, the Prosecution agreed that the OPCD had standing to appeal, given that the Pre-Trial Chamber earlier authorised the Office to submit observations on the issue for which leave to appeal was sought.¹⁵ The OPCD

⁸ [Decision on the Request to Submit Observations on behalf of the Office of the Public Counsel for the Defence](#), ICC-01/09-01/15-43, 12 November 2020.

⁹ [Certification Decision](#), paras 25, 28.

¹⁰ See [Prosecution Response](#), para. 13. The case law of the Court indicates that suspects have *locus standi* to participate in proceedings after the Article 58 decision against them has been issued. See *Situation in Kenya, Decision on a Request for Leave to Appeal*, ICC-01/09-43, 11 February 2011, para. 9 ("The Chamber, therefore, does not consider a person, against whom a summons to appear has been requested, as having *locus standi*, nor does it recognize him as a 'party' to the proceedings, within the meaning of article 82(1)(d) of the Statute, until it has taken a decision on the Prosecutor's [Article 58] applications" [Emphasis Added.]).

¹¹ See [Certification Decision](#), para. 26.

¹² See *Situation in Darfur, Decision authorising the filing of observations on applications a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 for participation in the proceedings*, ICC-02/05-85, 23 July 2007, p. 3.

¹³ *Situation in Darfur, Request for leave to appeal the "Decision on the request of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor"*, ICC-02/05-112, 10 December 2007, para. 16.

¹⁴ See *Situation in Darfur, Decision on Request for leave to appeal the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court on the Disclosure of Exculpatory Materials by the Prosecutor"*, ICC-02/05-118, 25 January 2008 and *Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007*, ICC-02/05-177, 2 February 2009; *Situation in the DRC, Decision on Request for leave to appeal the "Decision on the Requests of the OPCD on the Production of Relevant Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court on the Disclosure of Exculpatory Materials by the Prosecutor"*, ICC-01/04-438, 23 January 2008 and *Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007*, ICC-01/04-556, 19 December 2008.

¹⁵ *Situation in Darfur, Prosecution's Response to OPCD's Request for leave to appeal the "Decision on the request of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor"*, ICC-02/05-115, 13 December 2007 ("Prosecution's Response to OPCD's request for leave to appeal in *Darfur*"), para. 6 ("The Prosecution does not deny that, in this instance, the OPCD has standing to file the Application. The Single Judge authorised the OPCD to submit observations on a number of victims' applications pursuant to Rule 89(1),

submits that the issue of its standing to appeal should not be treated any differently in this case. Once the OPCD has been granted leave to represent the interests of a suspect or suspects on a particular issue, it would undermine the Office’s mandate to protect the rights of the Defence if it could not have standing to appeal when the requirements of Article 82(1)(d) are otherwise met.

4. The Prosecution’s attempts to distinguish the *DRC* and *Darfur* precedents, and to justify departing from its stance on the OPCD’s standing in those situations, are not persuasive.¹⁶ Critically, the OPCD had standing to seek leave to appeal in the absence of any suspect or accused in those Situations; here, where there is a named and unrepresented defendant – Mr Bett – the potential prejudice is even more tangible and concrete. Additionally, the Prosecution’s non-objection to the OPCD’s standing in the *DRC* and *Darfur* precedents is irrelevant. The Pre-Trial Chambers and Appeals Chamber implicitly decided that OPCD was a party for the purposes of appeal in those Situations, which is what made those appeals admissible. They did not become admissible because the Prosecution did not oppose them.

5. Third, the OPCD’s standing in this appeal is consistent with the Appeals Chamber’s definition of “party” in the *Afghanistan* Standing Decision.¹⁷ The Pre-Trial Chamber did not “substitut[e] its own test” on the meaning of the term “party”.¹⁸ Rather, it acknowledged that the *Afghanistan* Standing Decision required it to take into account the “type of decision” subject to appeal, and it concluded that a decision that Provisional Rule 165 is applicable sets a precedent for other potential defendants in Article 70 proceedings.¹⁹ In this “procedural context”, RoC 77(4) gives the OPCD a

and did not question the standing of OPCD to file the requests which were the basis of the Decision.”). *See also Situation in DRC*, [Prosecution’s Response to OPCD’s Request for leave to appeal the “Decision on the request of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86\(2\)\(e\) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor”](#), ICC-01/04-421, 17 December 2007 (“Prosecution’s Response to OPCD’s request for leave to appeal in *DRC*”), para. 6.

¹⁶ [Prosecution Response](#), fn. 15, stating that these precedents were in an “unusual context [...] in the absence of any accused or Defence counsel” and that it had “not opposed OPCD’s standing to seek leave to appeal” in those instances. *Cf.* [Prosecution’s Response to OPCD’s request for leave to appeal in *Darfur*](#), para. 6; [Prosecution’s Response to OPCD’s request for leave to appeal in *DRC*](#), para. 6.

¹⁷ *See Situation in Afghanistan*, [Reasons for the Appeals Chamber’s oral decision dismissing as inadmissible the victims’ appeals against the decision rejecting the authorisation of an investigation into the situation in Afghanistan](#), ICC-02/17-137, 4 March 2020 (“*Afghanistan* Standing Decision”).

¹⁸ *See Prosecution Response*, para. 7.

¹⁹ *See Certification Decision*, para. 24.

mandate to protect the interests of those unrepresented defendants, and the Pre-Trial Chamber therefore interpreted the term “party” broadly in this case.²⁰

6. Fourth, as the OPCD is acting to represent *the interests* of Mr Bett and other potential suspects, rather than acting as counsel for them directly, any arguments the Office makes cannot be attributed to them and “should not prejudice the arguments which the defence may put forward at a later stage”.²¹ The Prosecution’s submission that the OPCD’s standing risks limiting Mr Bett’s freedom to challenge Provisional Rule 165²² is therefore incorrect. Furthermore, granting OPCD standing to appeal aligns with the interests of Mr Gicheru, who now supports two of the three grounds of the OPCD’s Appeal.²³ The ICTY Appeals Chamber has deemed the alignment of such interests to be a factor in favour of granting prospective appellants standing to appeal, even if they were not a party in those particular cases.²⁴
7. Fifth, and in the alternative, Pre-Trial Chamber A certified the issues for appeal using its *proprio motu* power under Article 82(1)(d).²⁵ It must be able to utilise this power, irrespective of the OPCD’s standing, to give effect to the Appeals Chamber’s finding that Pre-Trial Chambers may “certify the existence of an appealable issue [...] on its own accord”.²⁶ Far from promoting judicial economy, the Prosecution’s restrictive interpretation of this power²⁷ would deny appellate review in circumstances where resolution of the issues by the Appeals Chamber would materially advance the proceedings.
8. Finally, the Severence Decision does not render the OPCD’s Appeal moot, nor does it extinguish the OPCD’s standing. Quite the opposite, the transfer of Mr Bett’s case to

²⁰ See [Certification Decision](#), paras 27–28.

²¹ See *Prosecutor v Kony et al*, [Judgment on the appeal of the Defence against the “Decision on the admissibility of the case under article 19 \(1\) of the Statute” of 10 March 2009](#), ICC-02/04-01/05-408, 16 September 2009, para. 61.

²² See [Prosecution Response](#), para. 14.

²³ See [Public Redacted Version of “Corrected Version of “Paul Gicheru’s Response to OPCD Appeal against the Decision on Applicability of Provisional Rule 165”, 21 January 2021, ICC-01/09-01/20-84-Conf”, 1 February 2021, ICC-01/09-01/20-84-Conf-Corr](#), ICC-01/09-01/20-84-Corr-Red, 2 February 2021.

²⁴ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.6, [Decision on the Interlocutory Appeal by the Amici Curiae Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case](#), 20 January 2004, para. 5. See also *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.11, [Decision on Appeal Against the Decision on the Accused’s Motion to Subpoena Zdravko Tolimir](#), 13 November 2013, paras 9–12.

²⁵ See [Certification Decision](#), para. 29.

²⁶ *Situation in DRC*, [Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal](#), ICC-01/04-168, 13 July 2006, para. 20.

²⁷ See [Prosecution Response](#), para. 9.

Pre-Trial Chamber A and back to Pre-Trial Chamber II highlights the necessity to determine the correct procedural framework that governs the proceedings against him. The OPCD must, by implication, have standing to appeal to protect Mr Bett's interests in legal certainty,²⁸ as well as those of other potential suspects.

III. CONCLUSION

9. For the reasons above, the OPCD respectfully requests that the Appeals Chamber find that the Appeal is admissible.



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Dated this 4th Day of February 2021
at Dakar, Senegal

²⁸ The Severance Decision declared that “Pre-Trial Chamber II shall *remain* seized of the present case in so far as it relates to Mr Bett”, implying that his case never left that Chamber, even though the Pre-Trial Division President had transferred it to Pre-Trial Chamber A. Compare [Severance Decision](#), p. 8 with [Decision Constituting a Chamber Composed of one Judge from the Pre-Trial Division to Exercise the Powers and Functions of the Pre-Trial Chamber in the Present Case](#), ICC-01/09-01/15-32, 2 November 2020, p. 4.