

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/09-01/20**  
Date: **5 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***

**Confidential**

**Prosecution's Response to "Paul Gicheru's Request for Suspensive Effect under  
Article 82(3) of the Rome Statute"**

**Source:** Office of the Prosecutor

**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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Mr Michael Karnavas

**Legal Representatives of the Victims**

**Legal Representatives of the  
Applicants**

**Unrepresented Victims**

**Unrepresented Applicants**

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**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Other**

**Section**

1. Having reversed its position before the Pre-Trial Chamber,<sup>1</sup> and after the interim release of Mr Gicheru,<sup>2</sup> the Defence now requests suspensive effect of the appeal filed by the Office of Public Counsel for the Defence (“OPCD”).<sup>3</sup> It argues that, “[w]ere 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”.<sup>4</sup> Yet, in the circumstances of this case, grant of suspensive effect by the Appeals Chamber—which is a discretionary measure<sup>5</sup>—is not required.<sup>6</sup> A mere claim of urgency is not sufficient justification.<sup>7</sup>

2. In particular, the implementation of the Decision would not “create an irreversible situation that could not be corrected”, would not “lead to consequences that would be very difficult to correct”, and would not “potentially defeat the purpose of the appeal”.<sup>8</sup> The issue of the confirmation decision is not imminent at this time and, even in the Defence’s view, the Pre-Trial Chamber is already “aware that the consequence [of the appeal] is that [it] may have to wait for an Appeals Chamber decision before ruling on the confirmation of charges.”<sup>9</sup> Nor is the Defence currently scheduled to file its response to the Document Containing the Charges (“DCC”) for another six weeks, on 15 March 2021<sup>10</sup>—and, in any event, the Defence acknowledges that it intends to request from the Pre-Trial Chamber a *further* extension of the schedule pertaining to the confirmation proceedings.<sup>11</sup> Even if this were denied, as the Pre-Trial Chamber itself expressly recalled, there is no basis to apprehend that the confirmation decision will be issued prior to the resolution of the appeal proceedings.<sup>12</sup>

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<sup>1</sup> See [ICC-01/09-01/20-84-Corr-Red](#) (“Defence Response to OPCD Appeal”), para. 2.

<sup>2</sup> See [ICC-01/09-01/20-90-Red2](#) (“Interim Release Decision”).

<sup>3</sup> See [ICC-01/09-01/20-93-Conf](#) (“Request”). At such time as the Defence files a public redacted version of the Request, this response may be re-classified as public.

<sup>4</sup> [Request](#), para. 19.

<sup>5</sup> See e.g. [ICC-02/05-01/20-134 OA](#) (“*Abd-Al-Rahman* Suspensive Effect Decision”), para. 6.

<sup>6</sup> [Request](#), para. 18.

<sup>7</sup> [Abd-Al-Rahman Suspensive Effect Decision](#), para. 10 (rejecting a request for suspensive effect, while recognising the urgency of the situation).

<sup>8</sup> See [Abd-Al-Rahman Suspensive Effect Decision](#), para. 9.

<sup>9</sup> [Request](#), para. 20.

<sup>10</sup> [Request](#), para. 1(c).

<sup>11</sup> [Request](#), para. 22. While the Defence raises this to reassure the Appeals Chamber that suspending the effect of the Decision “will not appreciably delay the proceedings”, it is also relevant to the necessity of the relief sought.

<sup>12</sup> [ICC-01/09-01/20-68](#) (“Certification Decision”), para. 42 (“The schedule for the confirmation of charges procedure [...] leaves sufficient time to the Appeals Chamber to issue its judgment”, citing [Regulations of the Court](#), regulation 53 (60-day time limit for confirmation decisions); ICC, [Chambers Practice Manual](#), 4<sup>th</sup> Ed., 29 November 2019, para. 92 (timetable for interlocutory appeal judgments).

3. It also seems to be accepted between the Parties that no prejudice can ensue from the mere continuation of the proceedings in preparation for the confirmation decision,<sup>13</sup> since they are likely to occur entirely in writing,<sup>14</sup> and—if made necessary by any appeal judgment concluding that provisional rule 165 is invalid in these proceedings—a newly constituted Pre-Trial Chamber would be just as well placed to review the written record as the Pre-Trial Chamber in its present composition.

4. Finally, the Prosecution notes that the Decision did not positively order the continuation of the proceedings, but instead simply dismissed the correctness of the concerns raised by OPCD.<sup>15</sup> As such, the relief now sought by the Defence (which would seem, effectively, to be a stay of the proceedings before the Pre-Trial Chamber) cannot be obtained by the “non-enforcement” of the Decision<sup>16</sup>—which was more akin to a procedural decision than a direction for the Parties to act or refrain from acting in a certain way.<sup>17</sup>

5. In these circumstances, the Defence may if necessary avail itself of the Pre-Trial Chamber, which “has the power to adapt the proceedings before it in such a way as to address any concern [...] resulting from the appeal”.<sup>18</sup> Intervention on this issue by the Appeals Chamber is neither justified nor necessary.



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**Fatou Bensouda, Prosecutor**

Dated this 5<sup>th</sup> day of February 2021

At The Hague, The Netherlands

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<sup>13</sup> See [Request](#), paras. 18-19 (expressing concern about the Pre-Trial Chamber “precipitously mov[ing] ahead”, but only claiming prejudice arising from the confirmation decision).

<sup>14</sup> See [Rules of Procedure and Evidence](#), rule 165(3) (in its original form). See also [Certification](#) Decision, para. 42.

<sup>15</sup> See [ICC-01/09-01/15-61](#) (“Decision”), Disposition (dismissing the OPCD’s submission, and finding that provisional rule 165 is applicable to the proceedings).

<sup>16</sup> See [ICC-01/04-02/06-1968 OA6](#) (“*Ntaganda* Suspensive Effect Decision”), para. 9; [ICC-02/04-01/05-92 OA](#) (“*Kony* Suspensive Effect Decision”), para. 3.

<sup>17</sup> See [Ntaganda Suspensive Effect Decision](#), para. 9 (noting that “the relief sought [...] cannot be attained through a suspension of the Impugned Decision”, and observing that it would be “difficult to discern any effect that suspending a decision that merely rejects a procedural motion would have”).

<sup>18</sup> [Ntaganda Suspensive Effect Decision](#), para. 10.