



Original: English

**No. ICC-01/09-01/20 OA
Date: 29 January 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 document

**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**

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for the Defence

Mr Michael G. Karnavas

The Office of Public Counsel for the Defence

Mr Xavier-Jean Keïta
Ms Marie O’Leary

REGISTRY

Registrar

Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of the Office of Public Counsel for the Defence against the decision of Pre-Trial Chamber A entitled ‘Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence’ of 10 December 2020 (ICC-01/09-01/20-61),

Having before it the ‘OPCD Request to Dismiss *In Limine* the Prosecution’s Arguments on Standing Or, in the Alternative, Leave to Reply’ of 25 January 2021 (ICC-01/09-01/20-86),

Pursuant to regulations 24(5) and 37(1) of the Regulations of the Court,

Renders the following

DECISION

1. The request to dismiss the Prosecutor’s arguments on standing *in limine* is rejected.
2. The Office of Public Counsel for the Defence may file a reply to the ‘Prosecution’s Response to OPCD’s “Appeal[] against the Decision on Applicability of Provisional Rule 165”’ (ICC-01/09-01/20-83) by 16h00 on Thursday, 4 February 2021. The reply shall not exceed 5 pages and its content shall be limited to arguments on standing.

REASONS

I. PROCEDURAL HISTORY

1. On 10 December 2020, Pre-Trial Chamber A (the ‘Pre-Trial Chamber’) issued the ‘Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence’ (the ‘Impugned Decision’).¹

2. On 11 December 2020, the Pre-Trial Chamber severed the case against Mr Gicheru from the case of *The Prosecutor v. Paul Gicheru and Philip Kipkoech Bett*.²

¹ [ICC-01/09-01/20-61](#).

² [Decision Severing the Case against Mr Gicheru](#), ICC-01/09-01/20-62.

3. On 16 December 2020, the Office of Public Counsel for the Defence (the ‘OPCD’) filed the ‘Request for leave to appeal the Decision on the Applicability of Provisional Rule 165’.³

4. On 18 December 2020, Mr Gicheru filed ‘Paul Gicheru’s Response to OPCD’s Request for Leave to Appeal the Decision on the Applicability of Provisional Rule 165’, objecting to the request on the basis of the OPCD’s lack of standing.⁴

5. On 21 December 2020, the Prosecutor filed the ‘Prosecution’s Response to OPCD’s “Request for leave to appeal the Decision on the Applicability of Provisional Rule 165”’, objecting to the request, *inter alia*, on the basis of the OPCD’s lack of standing.⁵

6. On 23 December 2020, the Pre-Trial Chamber issued the ‘Decision on the “Request for leave to appeal the Decision on the Applicability of Provisional Rule 165”’ (the ‘Decision Granting Leave to Appeal’) granting leave to appeal and determining ‘that the OPCD has standing to seize the Chamber of the OPCD Request by virtue of the 12 November 2020 Decision recognising its mandate to protect the rights of any other potential suspects in these proceedings in so far as the application of Provisional Rule 165 is concerned’.⁶ The Pre-Trial Chamber added:

In any event, [...] ‘[b]y the plain terms of article 82 (1) (d) of the Statute, a Pre-Trial or Trial Chamber may certify [...] a decision on its own accord’. The Chamber considers that the power to *proprio motu* certify a decision under article 82(1)(d) of the Statute necessarily includes the authority to grant leave to appeal a decision on the application of any party or participant notwithstanding the formal standing of that party or participant. Otherwise, the Chamber’s *proprio motu* power could be limited on account of the absence of formal standing of a party or participant in contravention of the plain wording of article 82(1)(d) of the Statute.⁷

7. On 8 January 2021, the OPCD filed the appeal brief.⁸

³ [ICC-01/09-01/20-63](#) (submitted on 16 December 2020, notified on 17 December 2020).

⁴ [ICC-01/09-01/20-64](#), p. 3.

⁵ [ICC-01/09-01/20-66](#), paras 2-12.

⁶ [ICC-01/09-01/20-68](#), para. 28, *referring to* [Decision on the Request to Submit Observations on behalf of the Office of the Public Counsel for the Defence](#), 12 November 2020, ICC-01/09-01/20-43.

⁷ [Decision Granting Leave to Appeal](#), para. 29 (footnote omitted).

⁸ [OPCD Appeals against the Decision on Applicability of Provisional Rule 165](#), ICC-01/09-01/20-79.

8. On 21 January 2021, the Prosecutor filed her response to the appeal brief, in which she challenged the OPCD's standing to appeal the Impugned Decision.⁹

9. On 25 January 2021, the OPCD requested that the Prosecutor's arguments on standing be dismissed *in limine* or, alternatively, that it be granted leave to reply to these arguments.¹⁰

10. On 26 January 2021, the Prosecutor responded to the OPCD request, objecting to both parts of the request, but submitting that a page limit of five pages would be appropriate if leave to reply is granted.¹¹

II. MERITS

A. Request to dismiss the Prosecutor's arguments on standing *in limine*

11. Article 82(1) of the Statute provides that

[e]ither party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

[...]

(d) 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.

12. The OPCD argues that '[u]nder Article 82(1)(d) of the Statute, it is the Pre-Trial or Trial Chamber that determines whether the requirements are met for a participant to bring an appeal to the Appeals Chamber'.¹² It contends that '[s]ince it is effectively requesting to overturn the Pre-Trial Chamber's determination, it is for the Prosecution to establish that this finding is reviewable and that the Appeals Chamber has the power to overturn it'.¹³ The OPCD submits that the proper avenue for the Prosecutor to seek

⁹ [Prosecution's Response to OPCD's 'Appeal\[\] against the Decision on Applicability of Provisional Rule 165'](#), ICC-01/09-01/20-83.

¹⁰ [OPCD Request to Dismiss *In Limine* the Prosecution's Arguments on Standing Or, in the Alternative, Leave to Reply](#), ICC-01/09-01/20-86 (the 'Request'), para. 9.

¹¹ [Prosecution's Response to OPCD's 'Request to Dismiss *In Limine* the Prosecution's Arguments on Standing or, in the alternative, Leave to Reply'](#), ICC-01/09-01/20-87 (the 'Response').

¹² [Request](#), para. 4.

¹³ [Request](#), para. 4, referring to *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled "Decision giving notice](#)

review of the Decision Granting Leave to Appeal would have been to request leave to appeal that decision.¹⁴

13. The Prosecutor submits that there is no basis to dismiss her objection to the OPCD's standing to appeal, arguing that, '[i]t is settled law that the Appeals Chamber—and not the Pre-Trial Chamber—determines the admissibility of its own proceedings, including on matters arising from a Pre-Trial Chamber's certification under article 82(1)(d)'.¹⁵

14. The Appeals Chamber recalls that 'article 82 (1) (d) of the Statute clearly vests power solely in the Pre-Trial and Trial Chambers to certify appealable issues and to determine whether appellate resolution will materially advance the proceedings'.¹⁶ However, this power is circumscribed by the terms of article 82(1)(d) of the Statute. While the right to appeal under article 82(1)(d) of the Statute arises only if the Pre-Trial or Trial Chamber is of the opinion that any such decision must receive the immediate attention of the Appeals Chamber,¹⁷ the *chapeau* of article 82(1) of the Statute provides that only a 'party' may bring such an appeal forward to the Appeals Chamber. The Appeals Chamber considers that the power of the Pre-Trial or Trial Chamber 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. While it was appropriate for the Pre-Trial Chamber to consider the issue of standing in the Decision Granting Leave to Appeal, the Appeals Chamber considers that it is not bound by the Pre-Trial Chamber's determination in this respect and may re-assess this question independently.

[pursuant to Regulation 55\(2\) of the Regulations of the Court](#)", 18 December 2015, ICC-02/11-01/15-369 (the '*Gbagbo* OA7 Judgment'), para. 18.

¹⁴ [Request](#), para. 4.

¹⁵ [Response](#), para. 1, referring to *Prosecutor v. Thomas Lubanga Dyilo*, [Decision on the 'Urgent Request for Directions' of the Kingdom of the Netherlands of 17 August 2011](#), 26 August 2011, ICC-01/04-01/06-2799, para. 8; [Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings](#), 14 December 2012, ICC-01/04-01/06-2953, paras 10, 64; *Prosecutor v. Germain Katanga*, [Decision on the admissibility of the appeal against the 'Decision on the application for the interim release of detained Witnesses DRC-D02-P0236, DRCD02-P0228 and DRC-D02-P0350'](#), 20 January 2014, ICC-01/04-01/07-3424, para. 29; *Situation in the Democratic Republic of the Congo*, [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, ICC-01/04-168 (the '*Lubanga* OA3 Judgment'), paras 35, 38-39.

¹⁶ [Gbagbo OA7 Judgment](#), para. 18.

¹⁷ [Lubanga OA3 Judgment](#), para. 20.

15. Therefore, the request to dismiss the Prosecutor's arguments on standing *in limine* is rejected.

B. Request for leave to reply

16. Regulation 24(5) of the Regulations of the Court provides:

Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations. Unless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated.

17. The Appeals Chamber may grant a request for leave to reply if the above-mentioned conditions are met, or if it considers that a reply would otherwise be necessary for the adjudication of the appeal.¹⁸

18. Given that the issue of the OPCD's standing is a new issue raised in the Response, and in view of the lack of clarity regarding whether this could be raised again on appeal, the Appeals Chamber considers it appropriate to grant the OPCD leave to file a reply to this part of the Response. The reply shall be filed by 16h00 on Thursday, 4 February 2021 and shall not exceed 5 pages.

Done in both English and French, the English version being authoritative.



Judge Howard Morrison

Presiding

Dated this 29th day of January 2021

At The Hague, The Netherlands

¹⁸ *Prosecutor v. Bosco Ntaganda*, [Decision on Mr Ntaganda's request for leave to reply](#), 3 March 2017, ICC-01/04-02/06-1813, para. 8; *see also Prosecutor v. Bosco Ntaganda*, [Decision on Mr Ntaganda's request for leave to reply](#), 17 July 2017, ICC-01/04-02/06-1994, para. 14.