

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **25 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

**OPCD Request to Dismiss *In Limine* the Prosecution's Arguments on Standing
Or, in the Alternative, Leave to Reply**

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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Mr. O-Gon Kwon, ASP President

Mr. Renan Villacis, SASP Director

1. The Office of Public Counsel for the Defence (“OPCD” or “Office”) respectfully requests the Appeals Chamber to dismiss *in limine* the Prosecution’s arguments challenging the admissibility of the OPCD’s appeal¹ for purported lack of standing.² The Prosecution fails to provide any legal basis for the proposition that the Pre-Trial Chamber’s determination on the OPCD’s standing, in certifying the appeal pursuant to Article 82(1)(d),³ is reviewable by the Appeals Chamber.⁴ This argument should therefore be dismissed without consideration of its merits. If the Appeals Chamber decides not to dismiss this argument *in limine*, the OPCD respectfully requests leave to file a reply on this discrete issue pursuant to Regulation 24(5) of the Regulations of the Court. The challenge against the admissibility of the appeal was newly raised by the Prosecution in its Response. Further, the issue could not have been reasonably anticipated since the Pre-Trial Chamber conclusively determined that the OPCD has standing in its Certification Decision.⁵

I. The Prosecution’s arguments on the OPCD’s standing should be dismissed *in limine*

2. In its Certification Decision, the Pre-Trial Chamber determined that the OPCD is a party for the purposes of this appeal and, therefore, has standing to bring an appeal under Article 82(1)(d) of the Statute.⁶ In its arguments in Response, the Prosecution is attempting to reopen this issue by submitting that the OPCD is not a party, without providing any authority demonstrating that the

¹ [OPCD Appeals against the Decision on Applicability of Provisional Rule 165](#), ICC-01/09-01/20-79, 8 January 2021 (“Appeal Brief”).

² [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”), paras 4–15.

³ [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. 28.

⁴ See [Prosecution Response](#), para. 5.

⁵ [Certification Decision](#), paras 24–29.

⁶ [Certification Decision](#), paras 24–29.

Appeals Chamber can review the Pre-Trial Chamber's determination when no issue on standing has been certified in an Article 82(1)(d) appeal.⁷

3. Since 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.⁸ The Prosecution has not done so, claiming only that the Appeals Chamber "will always make the final determination as to the admissibility of an appeal" and where "a first-instance chamber misinterpreted or failed to follow clear appellate precedent [...] correction by the Appeals Chamber may be warranted".⁹ It cites no authority or statutory provision for these propositions and, therefore, fails to establish any legal basis for disturbing the Pre-Trial Chamber's determination that the OPCD is a party for the limited purpose of this interlocutory appeal.
4. Under 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.¹⁰ Had the Prosecution considered that the issue of standing was wrongly decided, and that it warranted review by the Appeals Chamber, the proper avenue for seeking such review would have been to request leave to appeal Pre-Trial Chamber A's Certification Decision. If granted, that issue could have been joined to this appeal for proper litigation by all parties. The Prosecution did not do so, and it now challenges that finding for the first time in its response. In making this submission, the

⁷ See [Prosecution Response](#), para. 5.

⁸ See *Prosecutor v Gbagbo & Blé Goudé*, [Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled "Decision giving notice pursuant to Regulation 55\(2\) of the Regulations of the Court"](#), ICC-02/11-01/15-369, 18 December 2015, para. 18 ("The Appeals Chamber concurs with Mr Gbagbo that the Prosecutor has not identified any legal basis for the Appeals Chamber to conduct its own assessment of the criteria of article 82 (1) (d) of the Statute").

⁹ [Prosecution Response](#), para. 5.

¹⁰ Article 82(1)(d) of the Statute: "Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence [...] 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." (emphasis added).

Prosecution appears to be attempting to directly appeal the Certification Decision, which is not permissible under the Statute.¹¹ Therefore, given this unimpugned ruling by the Pre-Trial Chamber, this argument should be dismissed *in limine*.

II. In the alternative, the OPCD requests leave to reply on the discrete issue of standing

5. If the Appeals Chamber decides not to grant the request to dismiss the Prosecution's argument *in limine*, the OPCD respectfully requests leave to reply to the discrete issue of standing under Regulation 24(5) of the Regulations of the Court. This argument is a new issue raised by the Prosecution in response, and the OPCD could not have reasonably anticipated it.
6. Even though the Prosecution has already attempted to challenge the OPCD's standing in its arguments before the Pre-Trial Chamber,¹² that issue was concluded in the Certification Decision.¹³ In these appeal proceedings, the first time the OPCD's standing has been challenged is in the Prosecution's Response,¹⁴ thereby constituting a 'new' issue.
7. The OPCD could not have reasonably anticipated that the Prosecution would challenge the OPCD's standing again before the Appeals Chamber in this way. By contrast, it was foreseeable that the standing issue would be raised before the Pre-Trial Chamber because Article 82(1)(d) gives the first-instance Chamber the power to determine whether the requirements for leave to

¹¹ See *Prosecutor v Gbagbo & Blé Goudé*, [Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled "Decision giving notice pursuant to Regulation 55\(2\) of the Regulations of the Court"](#), ICC-02/11-01/15-369, 18 December 2015, para. 18 ("The Appeals Chamber also considers that, in making this submission, the Prosecutor appears to be attempting to directly appeal the Decision Granting Leave to Appeal, which is not permissible under the Statute").

¹² [Prosecution's Response to OPCD's "Request for leave to appeal the Decision on the Applicability of Provisional Rule 165"](#), ICC-01/09-01/20-66, 21 December 2020, para. 8.

¹³ [Certification Decision](#), paras 24–29.

¹⁴ [Prosecution Response](#), para 4–15.

appeal are met. The OPCD accordingly addressed this issue pre-emptively before that Chamber.¹⁵ But it was not foreseeable that the issue of standing would be raised again in these appeal proceedings. The OPCD considered that the Pre-Trial Chamber's dismissal of the Prosecution's challenge against the OPCD's standing was conclusively settled,¹⁶ and, therefore, went on to develop only the three certified issues in its Appeal Brief. The Prosecution fails to cite any precedent where, once a first-instance Chamber has determined that a participant has standing to bring an appeal under Article 82(1)(d), this has subsequently been relitigated – let alone overruled – by the Appeals Chamber.¹⁷ This exemplifies how the issue could not have been reasonably anticipated.

8. The Prosecution relies on an appellate decision in the *Afghanistan* situation on the meaning of a “party”,¹⁸ but the OPCD could not foresee that this case law would be used to support their attempt to reopen the issue of standing when it has already been determined by the Pre-Trial Chamber. The Appeals Chamber in *Afghanistan* entertained the issue of standing because it clearly falls on the Appeals Chamber to make that determination when appeals exist as of right, such as in an appeal under Article 82(1)(a) of the Statute. But the same cannot be said for appeals under Article 82(1)(d), which, as discussed, gives that responsibility to the Pre-Trial or Trial Chamber.¹⁹ If leave to reply is

¹⁵ [Request for leave to appeal the Decision on the Applicability of Provisional Rule 165](#), ICC-01/09-01/20-63, 17 December 2020, paras 8–9.

¹⁶ [Certification Decision](#), paras 24–29.

¹⁷ See [Prosecution Response](#), para. 5.

¹⁸ [Prosecution Response](#), paras 6–8 citing *Situation in the Islamic Republic of 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.

¹⁹ *Prosecutor v Gbagbo & Blé Goudé*, [Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled “Decision giving notice pursuant to Regulation 55\(2\) of the Regulations of the Court”](#), ICC-02/11-01/15-369, 18 December 2015, para. 18 (“The Appeals Chamber observes 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.”)

granted, the OPCD will argue that the Pre-Trial Chamber was correct in determining that the Office is a party, and has standing, for the purposes of this appeal.²⁰

RELIEF REQUESTED

9. Therefore, the OPCD respectfully requests:
- a. that the Appeals Chamber dismiss the Prosecution's arguments on the standing of the OPCD in this appeal²¹ *in limine*; OR,
 - b. in the alternative, grant the OPCD leave to reply to the discrete issue of standing under Regulation 24(5) of the Regulations of the Court.



Xavier-Jean Keïta
Principal Counsel of the OPCD

Dated this 25th Day of January 2021
at Dakar, Senegal

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

²¹ [Prosecution Response](#), paras 4–15.