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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 "Request for leave to appeal the Decision on the
Confirmation of Charges against Paul Gicheru"**

Source: Office of the Prosecutor

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Introduction

1. The Defence request is inadmissible, and should be dismissed *in limine*, since article 82(1)(d) of the Statute is inapplicable to proceedings under article 70. Specifically, provisional rule 165 had removed from all parties the right to request leave to appeal an interlocutory decision.¹ In its written submissions on 25 November 2020 and 18 December 2020, the Defence agreed with the Prosecution that provisional rule 165 is effective for the purpose of this case, and causes no unfairness.² Yet surprisingly, in an appeal brought at the instance of the Office of Public Counsel for Defence, the Defence then reversed its former position and claimed that the application of provisional rule 165 was unfair—in part expressly because of the effect on article 82(1)(d).³ This was squarely rejected by the majority of the Appeals Chamber in its judgment,⁴ which is now *res judicata* for the purpose of this case.

2. Notwithstanding this history, the Defence now seeks leave to appeal the confirmation decision recently issued by Pre-Trial Chamber A (Article 70) (“Chamber”) under article 82(1)(d),⁵ based on its view that “it remains unsettled whether [provisional rule 165] disallows the right to interlocutory appeal the Decision on the Confirmation of Charges.”⁶ It suggests that dismissing the Request would mean “[t]urning a blind eye to the errors” in the Confirmation Decision, on the basis of its own view—already rejected by the Pre-Trial Chamber—that the trial will “proceed on flimsy evidence and unfounded charges, only to result in a judgment of acquittal (no case to answer).”⁷

¹ See e.g. [ICC-01/09-01/15-61](#) (“Pre-Trial Chamber Decision on Provisional Rule 165”), para. 28 (quoting provisional rule 165(2): “Article[] [...] 82(1)(d), and any rules thereunder, shall not apply.”).

² See [ICC-01/09-01/20-53](#) (“Defence Response to OPCD”); [ICC-01/09-01/20-64](#) (“Defence Response to OPCD ALA”).

³ See [ICC-01/09-01/20-84-Corr-Red](#) (“Defence Response to OPCD Appeal”), para.

⁴ See [ICC-01/09-01/20-107 OA](#) (“Appeal Judgment”), especially paras. 90-116.

⁵ [ICC-01/09-01/20-156](#) (“Request”), paras. 17-19.

⁶ [Request](#), para. 14.

⁷ [Request](#), para. 15.

Submissions

3. The Chamber should dismiss the Request *in limine*. As the Appeals Chamber has affirmed, article 82 of the Statute exhaustively defines the scope of interlocutory appeal proceedings, and provisional rule 165 serves in this case to exclude article 82(1)(d). As a consequence, the Chamber has no power to certify any issue arising from the Confirmation Decision for appeal, and such matters are reserved for any final appeal under article 81 of the Trial Chamber's judgment on the merits. In any event, the cursory arguments raised in the Request fail even to address the requirements of article 82(1)(d) adequately, and as such again warrant summary dismissal.

4. It also bears recalling that the purpose of provisional rule 165 is to promote the fair and expeditious resolution of article 70 proceedings, in a fashion which is specifically tailored to their more limited scope. As the Defence has itself previously recalled, it had become "evident" to the drafters of provisional rule 165 that, without legislative intervention, "the commitment of judicial resources to [a]rticle 70 proceedings was not commensurate to the gravity and nature of the offences."⁸ Now it has been unequivocally established that provisional rule 165 is indeed applicable to this case—as the Chamber held from the outset⁹—the Chamber should reject the Request summarily in order to give effect to the intended purpose of provisional rule 165: streamlining the judicial process in article 70 proceedings such as the present. Further litigation is fruitless, and a distraction from the parties' preparation for a fair and expeditious trial.

Article 82 exhaustively defines the scope of interlocutory appeal proceedings

5. It is settled law that "[t]he decisions that are subject to appeal are enumerated in articles 81 and 82 of the Statute", and that "[t]here is nothing in Part 8 to suggest that

⁸ [Defence Response to OPCD](#), para. 4. See also [Defence Response to OPCD Appeal](#), para. 7. See further [Pre-Trial Chamber Decision on Provisional Rule 165](#), para. 29.

⁹ [Pre-Trial Chamber Decision on Provisional Rule 165](#), paras. 45, 49, 53. See also [Appeal Judgment](#), paras. 76, 89, 116.

a right to appeal arises except as provided thereunder.”¹⁰ As such, “the inexorable inference is that the Statute defines exhaustively the right to appeal”, with no “gap” or “lacuna” in the “sense of an objective not being given effect to by its provisions.”¹¹

6. The Defence has previously acknowledged that “[e]liminating the right to interlocutory appeal [under article 82(1)(d)] also eliminates the *Chamber’s discretion* to certify issues for appeal that would, in their opinion, materially advance the proceedings.”¹² This is consistent with the plain wording of article 82, which otherwise only permits an interlocutory appeal—again, as the Defence itself accepts—against “decisions on jurisdiction and admissibility, provisional release, and decisions of the Pre-Trial Chamber to act on its own initiative in relation to unique investigative opportunities under [a]rticle 56.”¹³ The Defence has not sought to avail itself of article 82(1)(a) to (c), nor indeed would such a claim lie before this Chamber.

7. Accordingly, the Request must be dismissed *in limine* if the Chamber is satisfied that provisional rule 165 does indeed exclude article 82(1)(d) in its entirety for the purpose of this case, including with regard to the Confirmation Decision.

The Appeals Chamber confirmed that provisional rule 165 is effective for the purpose of this case, and that article 82(1)(d) is therefore excluded

8. “[A]rticle 82(1)(d) of the Statute may not be used to re-litigate issues that have already been decided by the Appeals Chamber.”¹⁴ This follows from the principle of *res judicata*, which promotes procedural fairness and judicial economy by requiring that a final judgment on the merits is conclusive between the parties to those proceedings on all matters contained within it. A judgment of the Appeals Chamber in an interlocutory appeal is a final judgment in this sense. If it were not so, this

¹⁰ [ICC-01/04-168 OA3](#) (“DRC Extraordinary Review Appeal Judgment”), para. 35.

¹¹ [DRC Extraordinary Review Appeal Judgment](#), para. 39.

¹² [Defence Response to OPCD Appeal](#), para. 48 (emphasis supplied).

¹³ [Defence Response to OPCD](#), para. 40. See further [Statute](#), art. 82(1)(a)-(c).

¹⁴ [ICC-01/13-115](#) (“*Comoros Leave to Appeal Decision*”), para. 12. Judge Alapini-Gansou, dissenting, did not necessarily disagree with this principle, but rather with the scope of the issue that had been decided by the Appeals Chamber: see [ICC-01/13-115-Anx](#) (“*Comoros Dissenting Opinion*”), para. 12.

would defeat the object of interlocutory appeals, which exist to ensure that ongoing proceedings follow a course approved in advance by the Appeals Chamber. While the Appeals Chamber may on occasion depart from its prior reasoning, it will be wholly exceptional for this to occur in proceedings between the same parties in materially similar circumstances.

9. Consequently, the Request must be considered in light of the Appeals Chamber's previous judgment in this case on the validity of provisional rule 165. The Request cannot be a vehicle by which the Defence seeks to re-litigate the validity of provisional rule 165.

10. Like the Chamber, the majority of the Appeals Chamber not only ruled that provisional rule 165 continued to be in force, according to article 51(3) of the Statute,¹⁵ but also that it is compatible with all the provisions of the Statute, including the rights of the accused.¹⁶ Integral to this reasoning was the question—raised both by the appellant (the Office of Public Counsel for the Defence) and the Defence (on behalf of Mr Gicheru)—whether it was permissible to exclude “the procedural possibility of interlocutory appeals under article 82(1)(d) of the Statute”.¹⁷ None of the parties to the appeal, nor the Appeals Chamber itself, ever contemplated any qualification to the exclusion of article 82(1)(d) from article 70 proceedings—to the contrary, it was universally understood and assumed that provisional rule 165 bars reliance on article 82(1)(d) for *any* kind of decision. It was in this context that the Appeals Chamber, by majority, held unequivocally that:

[T]he Appeals Chamber underlines that the Pre-Trial and Trial Chambers are required to ensure that the rights of the suspect or accused person are respected. Any concern that they may have failed in this duty may be raised before the Appeals Chamber in a final appeal and any necessary remedy may

¹⁵ [Appeal Judgment](#), para. 76.

¹⁶ [Appeal Judgment](#), para. 116.

¹⁷ [Appeal Judgment](#), para. 112.

be applied at that stage. Therefore, the Appeals Chamber concludes that *the elimination of the procedural possibility of interlocutory appeals under article 82(1)(d) of the Statute* does not vitiate any right vested in the parties generally or in the accused in particular.¹⁸

11. The Defence simply ignores the procedural history, and the plain implication of the Appeals Chamber’s reasoning, when it asserts that “it remains unsettled whether [the application of provisional rule 165] disallows the right to interlocutory appeal [of] the Decision on the Confirmation of Charges.”¹⁹ Both provisional rule 165 itself, and the Appeal Judgment, are clear in excluding any reliance upon article 82(1)(d). Necessarily, this would apply no less to decisions confirming the charges against an accused person, and committing them to trial.

12. Additional Defence arguments to overcome the ordinary meaning of the plain terms of provisional rule 165 are tenuous and unconvincing.

- First, the reference by the Defence to the views of a small number of States Parties concerning an *alternative* amendment to rule 165—which has not been adopted²⁰—is immaterial to the correct interpretation of the rule which is actually in force for the purpose of this case.²¹ For as long as provisional rule 165 has not been rejected or amended by the Assembly of States Parties (“ASP”), it is entirely irrelevant whether some States Parties may once have suggested that a narrower rule might be formulated. The very fact that provisional rule 165 was *not* amended by the ASP as suggested by those States demonstrates that there was no consensus in support of that viewpoint.

¹⁸ [Appeal Judgment](#), para. 112 (emphasis added).

¹⁹ [Request](#), para. 14.

²⁰ See e.g. [Appeal Judgment](#), para. 72 (considering that “[t]he Assembly of States [...] appears not to have treated the provisional rule as having been implicitly rejected when it was *not adopted, rejected or amended* at the next session that followed its adoption by the judges” or considered “during at least the next two ordinary sessions”, emphasis added).

²¹ Cf. [Request](#), para. 14 (referring to views presented at the 15th ASP Session).

- Second, while the Defence may consider that a narrower reading of provisional rule 165 might still serve its object and purpose,²² this cannot be reconciled with the plain terms of provisional rule 165, in their ordinary meaning. As well established, article 31 of the Vienna Convention on the Law of Treaties requires an interpretation which can reconcile the plain terms, the context, and the object and purpose. In this case, the unqualified exclusion of article 82(1)(d) from article 70 proceedings is not only consistent with the plain terms and context, but also with the object and purpose—since eliminating the possibility of appealing a decision confirming the charges necessarily will serve the interests of provisional rule 165 by ensuring that well-founded cases progress expeditiously to trial. The Defence shows no good reason to adopt a contrary approach.

13. For these reasons, the Request must be considered to be barred by provisional rule 165, and therefore should be dismissed *in limine*.

The Request fails to address the requirements of article 82(1)(d) adequately

14. In any event, the Request also fails on the merits, because it does not satisfy the requirements of article 82(1)(d). Not only is the essence of the Defence argument a mere disagreement with the reasoning in the Confirmation Decision,²³ which is impermissible, but its assertion that the proposed issues would significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial, is wholly undeveloped.²⁴ It is far from axiomatic that leave to appeal a decision confirming the charges will be granted, especially since many of the Defence concerns (concerning the assessment of evidence and the credibility of witnesses) will necessarily be considered at trial. In these circumstances, the Defence fails to establish that the intervention of the Appeals Chamber will materially advance the proceedings.

²² [Request](#), para. 15.

²³ See [Request](#), paras. 15-17.

²⁴ [Request](#), para. 18.

Conclusion

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



James Stewart, Deputy Prosecutor

Dated this 22nd day of July 2021

At The Hague, The Netherlands