

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: **ICC-01/09-01/15**

Date: **11 November 2020**

PRE-TRIAL CHAMBER A

Before: Judge Alapini-Gansou

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR v. PAUL GICHERU AND PHILIP KIPKOECH BETT

Public

OPCD Request for Leave to Appear on the 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. During the initial appearance of Mr. Paul Gicheru on 6 November 2020, Judge Alapini-Gansou invited the parties to submit written observations on the issue of her competence as a single Judge to exercise the powers and functions of Pre-Trial Chamber A in the case of *Prosecutor v. Gicheru and Bett*, as Ordered by the Pre-Trial Division ("PTD") President pursuant to provisionally amended Rule 165 ("Provisional Rule 165").¹ The ICC's Office of Public Counsel for the Defence ("OPCD") seeks standing to make submissions on this question pursuant to Regulation 77(4)(a) and/or (d) of the Regulations of the Court ("RoC"). The OPCD files this request in line with its mandate to represent and protect the rights of Mr Philip Kipkoech Bett, an unrepresented suspect and party in this case, and any potential suspects who are, or would be, subject to charges of Article 70.
2. The OPCD seeks leave to submit that Provisional Rule 165 is not in force, rendering it inapplicable in the present case. If granted standing, the OPCD will demonstrate that: 1) ICC suspects are entitled to have their case heard by a Pre-Trial Chamber established in accordance with the Rome Statute, and this Chamber is competent to adjudicate whether it is validly established; 2) Provisional Rule 165 was amended in urgency by the Plenary of Judges pursuant to Rome Statute Article 51(3) and, by procedure therein, ceased to be applicable law as of 25 November 2016, following the conclusion of the Fifteenth Assembly of States Parties ("ASP") when, at its close, the Assembly did not 'adopt, amend, or reject' the provisionally amended rule; 3) even if it were found that Provisional Rule 165 were somehow still valid, it remains inapplicable in the present case as it was amended only after the issuance of the arrest warrant against Mr Bett and, thus, is barred by the principle of non-retroactivity; and 4) Provisional Rule 165, as amended, is prejudicial in

¹ 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, 2 November 2020, [ICC-01/09-01/15-32](#) ("Decision of 2 November").

that it appears incompatible, inconsistent, and in conflict with the Rome Statute itself.

II. RELEVANT PROCEDURAL HISTORY

3. The arrest warrant against Mr Paul Gicheru and Mr Philip Kipkoech Bett was issued under seal on 10 March 2015 (and unsealed on 10 September 2015) for their alleged responsibility for offences against the administration of justice under Article 70(1)(c) of the Rome Statute.²
4. On 1 March 2016, the Court published the "Report on the Adoption by the Judges of Provisional Amendments to Rule 165 of the Rules of Procedure and Evidence", dated 29 February 2016 (hereinafter, "Report"),³ announcing a set of amendments affecting Article 70 proceedings. Specifically, the Report noted that the Judges of the Court had provisionally amended RPE 165(2) through (4) and (provisionally) adopted RoC 66*bis*. Provisional Rule 165 removed applicability of several articles of the Rome Statute in Article 70 proceedings.⁴ Namely, the number of sitting Judges at each judicial stage of Article 70 proceedings was reduced from three Judges to one Judge at the pre-trial and trial levels and from five Judges to three Judges at the appellate level. It further eliminated any right to seek leave for interlocutory appeal pursuant to Article 82(1)(d) and combined the sentencing phase of Article 76(2) with the Article 74 judgement.

² Decision on the "Prosecution's Application under Article 58(1) of the Rome Statute", 10 March 2015, public redacted version issued 10 September 2015, [ICC-01/09-01/15-1-Red](#).

³ [Report on the Adoption by the Judges of Provisional Amendments to Rule 165 of the Rules of Procedure and Evidence](#), 29 February 2016.

⁴ Specifically Articles 39(2)(b), 57(2), 76(2), and 82(1)(d), and any rules thereunder, in the existing list of provisions not applicable to Article 70 proceedings.

5. At the Fifteenth ASP General Assembly held from 16-24 November 2016, the Assembly considered Provisional Rule 165, but there was no final view on the matter.⁵
6. On 16 March 2018, the Presidency of the Court recomposed the Chambers and assigned the Situation of the Republic of Kenya and its cases to Pre-Trial Chamber II ("PTC II").⁶ The Judges of the Chamber decided that Judge Antoine Kesia-Mbe Mindua would act as the Presiding Judge of PTC II.⁷
7. On 2 November 2020, the Court announced that Mr. Gicheru had surrendered to the ICC.⁸ Late the same day, the PTD President Judge Tomoko Akane ordered the constitution of the Pre-Trial Chamber A (Article 70), composed of a Single Judge, Judge Reine Adélaïde Sophie Alapini-Gansou, in accordance with Provisional Rule 165(2), to exercise the powers and functions of the Pre-Trial Chamber in the case of *Prosecutor v. Gicheru & Bett*.⁹
8. On 3 November 2020, the Court announced that Mr. Gicheru was in the custody of the ICC.¹⁰
9. On 4 November 2020, the Chamber ordered a hearing for the initial appearance of Mr Gicheru to be convened on Friday, 6 November 2020, at 16h.¹¹

⁵ See [ICC-ASP/15/Res.5](#), para. 125 (as cited in the provisionally amended ICC RPE 165, p. 68, fn.10), "Welcom[ing] the Report of the Working Group on Amendments;" referencing [ICC-ASP/15/24](#), Add.1 and Add.2 which states that "although a large majority of States Parties supported the adoption of the provisional amendments by the Assembly, there was no final view on the matter at that stage. The Working Group was therefore not in a position to make a concrete recommendation to the Assembly at that time. It agreed to reconvene during the fifteenth session of the Assembly to continue the discussion on the provisional amendments" (para. 37) [Emphasis added.].

⁶ Decision assigning judges to divisions and recomposing Chambers, 16 March 2018, [ICC-01/11-59](#).

⁷ Decision on the Election of the Presiding Judge, 22 March 2018, [ICC-01/09-01/15-18](#).

⁸ ICC Press Release, ICC-CPI-20201102-PR1540, [Situation in Kenya: Paul Gicheru surrenders for allegedly corruptly influencing ICC witnesses](#), 2 November 2020.

⁹ Decision of 2 November.

¹⁰ ICC Press Release, ICC-CPI-20201103-PR1543, [Situation in Kenya: Paul Gicheru arrives at ICC Detention Centre](#), 3 November 2020.

¹¹ Order Setting the Date for the Initial Appearance of Mr Gicheru, 4 November 2020, [ICC-01/09-01/15-34](#).

10. On 6 November 2020, the OPCD filed a request for standing before PTD President Judge Akane for the purpose of submitting observations on the applicability of Provisional Rule 165 in the case of *Prosecutor v. Gicheru & Bett*.¹² The application was dismissed the same day, *in limine*, holding “that there are currently no proceedings concerning the case [...] pending before the President of the Pre-Trial Division” and “therefore, that the President of the Pre-Trial Division has no power to rule on the substance of the Request”.¹³
11. At the initial appearance of 6 November, the Prosecution raised the matter of OPCD filing and Judge Alapini-Gansou invited the parties in that case to submit observations “*sur la question de la compétence du Juge de la nomination, enfin du Juge Unique nommé*”.¹⁴

III. OPCD REQUEST FOR STANDING

12. The OPCD requests leave to file submissions pursuant to Regulation 77(4)(a) and/or (d) of the Regulations of the Court to address the question of competence on which Judge Alapini-Gansou invited observations during Mr. Gicheru’s initial appearance. Provision (a) of RoC 77(4) mandates that the OPCD is “entrusted with the power of representing and protecting the rights of the defence during the initial stages of the investigation”; specifically it may “on the instruction or with the leave of the Chamber, make submissions concerning the needs of the defence in ongoing proceedings”.¹⁵

¹² OPCD Request for Leave to Appear on the Applicability of Provisional Rule 165, 6 November 2020, [ICC-01/09-01/15-36](#).

¹³ Decision Rejecting *in limine* the ‘OPCD Request for Leave to Appear on the Applicability of Provisional Rule 165’, 6 November 2020, [ICC-01/09-01/15-37](#) (“PTD President’s Decision”).

¹⁴ [Initial appearance of Paul Gicheru](#), 6 November 2020, 39:40-49:00; 55:12-56:53. Public Transcript not yet available.

¹⁵ Regulation 77(4)(a) of the Regulations of the Court. See e.g. *Situation in Darfur, Sudan*, 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, 23 July 2007, [ICC-02/05-85](#), p. 3.

13. Provision (d) allows for the Office to “[a]dvanc[e] submissions, on the instruction or with leave of the Chamber, on behalf of the person entitled to legal assistance when defence counsel has not been secured”. It is noted that Provision (f) further instructs the Office to assist in instances of Article 70.
14. Granting the OPCD standing is necessary to allow the Office to fulfil its mandate to represent the interests of the Defence in this case. While it is understood that Mr. Gicheru has now chosen to represent himself, and can therefore submit written observations as invited, Mr. Bett has no one to represent his interests even though he would be bound by any decision on this issue. It would be in the interests of fairness to ensure that views on his behalf, as well as those of Mr. Gicheru and the Prosecution, are heard. The OPCD is mandated to provide these views in such a situation until such time as Mr. Bett may have the ability to put forward a position himself.
15. It is particularly important for Mr. Bett’s interests to be represented because, in addition to determining the issue of the competence of this Chamber, the OPCD will submit that use of Provisional Rule 165 is to his detriment. In addition to the obvious prejudice of proceeding on the basis of a rule which, as the OPCD will argue, is not in force, the use of this provisional rule would mean that he would have circumscribed procedural rights compared with a defendant in Article 5 proceedings. Among other things, his case would be heard by a Chamber composed of only one Judge instead of three, he would be denied the opportunity to file interlocutory appeals under Article 82(1)(d), and his trial and sentencing proceedings would occur in the same phase.¹⁶
16. Furthermore, the general applicability of Provisional Rule 165 beyond November 2016, and until a decision is made by the States, remains one that is in the interest of all other defendants who will face Article 70 proceedings. Future suspects who may eventually be party to proceedings will unlikely be

¹⁶ Provisional Rule 165(2) (“Articles 39(2)(b) [...] 76(2) and 82(1)(d), and any rules thereunder, shall not apply”).

able to be heard on the issue of applicability of Provisional Rule 165 if it is determined now, despite their rights being affected in making such a decision. This would amount to a denial of the right to be heard and intensifies the need to resolve such application at this time. It is therefore vital that the arguments representing their interests are presented in the context of the applicability in this case.

17. Under Regulation 77(4) of the Regulations of the Court, the OPCD has the duty to protect the rights of the Defence, which it is fulfilling by raising these issues and requesting to be heard. Pre-Trial Chamber I has previously authorised the OPCD to present observations on the interests of the Defence for an unrepresented suspect in the *Gaddafi and Al-Senussi* proceedings.¹⁷ In the *Afghanistan Situation*, the Appeals Chamber considered that there may be circumstances that engage the mandate of OPCD at even earlier stages when “premised on an identifiable and specific need to represent and protect the rights of the defence”.¹⁸
18. There is clearly an identifiable and specific need to engage OPCD’s mandate in this instance to address the question of whether Provisional Rule 165 applies on behalf of suspects who otherwise cannot litigate this issue. To find otherwise would nullify the rights Mr. Bett and other potential suspects may have to challenge this issue at this early stage when any prejudice could still be reversed.

¹⁷ *Prosecutor v Gaddafi and Al-Senussi*, Public Redacted Version of Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi, 6 December 2011, [ICC-01/11-01/11-39-Red](#), para. 10.

¹⁸ *Situation in Afghanistan*, Decision on the participation of *amici curiae*, the Office of Public Counsel for the Defence and the cross-border victims, 24 October 2019, [ICC-02/17-97](#), para. 47.

IV. PRELIMINARY MATTER: PRE-TRIAL CHAMBER A CAN EXAMINE THE VALIDITY OF ITS OWN ESTABLISHMENT

19. If granted leave, the OPCD's anticipated submissions presuppose that this Pre-Trial Chamber has the power to assess the validity of its own establishment. The OPCD argues that the Chamber has the power to adjudicate on this issue as necessary to properly address the question of competence, on which Judge Alapini-Gansou has invited written submissions of the parties.
20. The OPCD submits that each defendant is granted international human rights, which includes being tried at a tribunal established by law.¹⁹ The phrase "established by law" covers not only the legal basis for the very existence of a tribunal, such as has been litigated before other international criminal tribunals,²⁰ but also the compliance by the tribunal with its own laws and the composition of the bench in each case in accordance with those laws.²¹ To be established by law, a bench composing a Pre-Trial Chamber at the ICC must therefore be constituted in accordance with the laws in force according to the Rome Statute.
21. Notwithstanding that OPCD seeks to argue that it is invalidly constituted, Pre-Trial Chamber A is competent to examine the issue of whether it was validly established by law. This power is derived from the principle of "*la*

¹⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Art. 14(1); European Convention on Human Rights, Art. 6(1); American Convention on Human Rights, Art. 8(1).

²⁰ See, e.g., ICTY, *Prosecutor v. Dusho Tadić*, Case No. IT-94-1, [Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction](#), 2 October 1995; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR90.1, [Decision on the Defence Appeals Against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal"](#), 24 October 2012; SCSL, *Prosecutor v. Kallon et al.*, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-14-AR72(E), SCSL-2004-16-AR72(E), [Decision on Constitutionality and Lack of Jurisdiction](#), 13 March 2004.

²¹ ECtHR, *Posokhov v. Russia*, [Application no. 63486/00](#), 4 March 2003, para. 39 ("the phrase 'established by law' covers not only the legal basis for the very existence of a 'tribunal' but also the composition of the bench in each case"); ECtHR, *Fatullayev v. Azerbaijan*, [Application no. 40984/07](#), 22 April 2010, para. 144.

compétence de la compétence”,²² which gives each court “incidental” jurisdiction to determine its own jurisdiction,²³ and includes the power for a judicial body to examine whether its “creator” established it according to law.²⁴ Both Pre-Trial Chamber I and Pre-Trial Chamber II have recognised that *la compétence de la compétence* is a fundamental principle of international law and that any judicial body has the power and duty to determine the boundaries of its own jurisdiction and competence;²⁵ this power lies “exclusively with the relevant Chamber itself”.²⁶ Pre-Trial Chamber A therefore has the power to examine whether it was constituted, in the PTD President’s Decision of 2 November, in accordance with the applicable law. If granted leave to appear, the OPCD would elaborate that Provisional Rule 165 is not the applicable law, and that the constitution of Pre-Trial Chamber A was therefore invalid.

²² ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, [Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction](#), 2 October 1995, paras 17–18, referring to the Statute of the United Nations Administrative Tribunal, Art. 2, para. 3, and the Statute of the International Court of Justice, Art.36, para. 6.

²³ ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, [Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction](#), 2 October 1995, para. 18.

²⁴ See ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, [Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction](#), 2 October 1995, para. 22 (“...the Appeals Chamber finds that the International Tribunal has jurisdiction to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council”). See also SCSL, *Prosecutor v. Kallon et al.*, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-14-AR72(E), SCSL-2004-16-AR72(E), [Decision on Constitutionality and Lack of Jurisdiction](#), 13 March 2004, para. 34 (“It is beyond argument, therefore, that the Appeals Chamber of the Special Court has the competence to determine whether or not the Special Court has jurisdiction to decide on the lawfulness and validity of its creation”); ICJ, [Effect of Awards of Compensation Made by the United Nations Administrative Tribunal](#), 1954 ICJ Reports 47, at 56 (Advisory Opinion of 13 July 1954) (“[t]he legal power of the General Assembly to establish a tribunal competent to render judgements binding on the United Nations has been challenged. Accordingly, it is necessary to consider whether the General Assembly has been given this power by the Charter [of the United Nations]”).

²⁵ Pre-Trial Chamber I, *Request under Regulation 46(3) of the Regulations of the Court*, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, [ICC-RoC46\(3\)-01/18-37](#), 6 September 2018, paras 30–33; Pre-Trial Chamber II, *Situation in Uganda*, Decision on the Prosecutor’s Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission Filed by the Registry on 5 December 2005, [ICC-02/04-01/05-147](#), 9 March 2006, paras 22–23.

²⁶ Pre-Trial Chamber II, *Situation in Uganda*, Decision on the Prosecutor’s Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission Filed by the Registry on 5 December 2005, [ICC-02/04-01/05-147](#), 9 March 2006, para. 23.

V. NATURE OF ANTICIPATED SUBMISSIONS

A. Provisional Rule 165 is not in force because it was valid only for the period of Plenary amendment through its expiry at the subsequent ASP

22. The OPCD seeks leave to make submissions to demonstrate that Provisional Rule 165, in particular 165(2), is not applicable given its expiry at the Fifteenth ASP. While the Plenary of Judges was well within its Article 51(3) powers to create provisional amendments to Rule 165 at that time, in urgency, the lack of any concrete decision by the ASP has caused the provisional amendments to expire in November 2016, leaving the original Rule 165 as applicable thereafter.
23. The OPCD wishes to make observations on the textual interpretation of Article 51(3) which requires that a provisional rule as drawn up by the Plenary may only be applied “until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties”. [Emphasis added.] A plain reading of this Rome Statute provision, alone, indicates that Provisional Rule 165 ceased to be in force at the closing of the Fifteenth Assembly, following the ASP not taking any of the three actions listed in the latter part of Article 51(3) and failure of the Plenary or ASP to enact such legislation anew. Such interpretation is further supported by Rome Statute commentary.²⁷
24. Similarly, the OPCD will also submit that RoC 66bis can not be considered valid at this time. While amendments of the RoC are within the purview of the Plenary of Judges, such provision must remain consistent with the Rome Statute and, upon invalidity of Provisional Rule 165, RoC 66bis no longer conformed to the guarantees of the Rome Statute itself. In short, when Provisional Rule 165 expired, the validity of RoC 66bis ceased as well.

²⁷ See e.g. Triffterer and Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Beck 2016), pp. 1342-43, §§29-30.

B. Alternatively, the arrest warrant against Mr. Bett was issued prior to amendment of Provisional Rule 165 and its effect is barred by the principle of non-retroactivity

25. Additionally, OPCD seeks to make alternate submissions on the non-applicability of Provisional Rule 165 in this case by virtue of the retroactive nature of the amended text.
26. Even if Provisional Rule 165 were properly in place beyond December 2016, the principle of non-retroactivity of new legislation is a cornerstone of litigation before the ICC. As held by the Appeals Chamber in *Ruto & Sang*, “amendments to the Rules shall enter into force upon adoption; however, they shall not be applied retroactively to the detriment of the person that is being investigated or prosecuted”²⁸ with ‘detriment’ meaning that “the overall position of the accused in the proceedings be negatively affected by the disadvantage”²⁹. As the application of this rule negatively affects the position of the defendants in this case by denying certain provisions of the Rome Statute afforded to other defendants before the Court, the OPCD will argue that its retroactive applicability should be barred.

C. Incompatibility of the provisional amendments with the Rome Statute

27. If granted leave, the OPCD can highlight how certain restrictions of Provisional Rule 165 are incompatible with Article 51(4) in that “[t]he Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute”. Specifically, the concerns of reduced rights for Article 70 defendants caused by 1) reduced Judges on a panel; 2) lack of interlocutory appeal; and 3) non-bifurcated sentencing proceedings.

²⁸ *Prosecutor v. Ruto & Sang*, Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled “Decision on Prosecution Request for Admission of Prior Recorded Testimony”, 12 February 2016, [ICC-01/09-01/11-2024](#), para. 74.

²⁹ *Ibid.*, para. 78.

While the provisional amendments were made in 2016, this is the first case to see application of them through the assignment of a Single Judge to hear the entirety of the pre-trial proceedings. However, at the same time, the sole Article 70 case tried to date, *Prosecutor v. Bemba et al.*, has been an example of the novelty and complexity brought by such charges that warrant the full panoply of procedural rights guaranteed by the Rome Statute.

28. For example, OPCD submissions can demonstrate how the choice to reduce the number of sitting judges at each level of the proceedings would appear contrary to the Rome Statute. The Report states that while “[R]ule 165 ensures that the rights of accused persons (...) are safeguarded”³⁰ there is apparently no explanation substantiating such statement vis-à-vis bench reductions and, indeed, contravenes the past and recent drafting history of the RPE and commentary on ‘high international standards’ set for judicial decision-making.
29. Further, the OPCD would expound on the importance of a ‘safety valve’ in the manner of the ability to request interlocutory appeal during the course of a case – any case of any size – to ensure a defendant’s right to a fair trial. This will be done with particular attention to the ICC Appeals Chamber’s recognition that, “the object of [Article 82(1)(d)] is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”.³¹
30. Finally, the OPCD will elaborate on how dispensing with sentencing proceedings as a separate procedure can have a detrimental effect on fair trial rights, such as the right to remain silent, pursuant to Article 67(1)(g) of the Rome Statute, noting that even the late Judge Cassese referred to the

³⁰ [Report on the Adoption by the Judges of Provisional Amendments to Rule 165 of the Rules of Procedure and Evidence](#), 29 February 2016, para. 22.

³¹ *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](#), para. 19.

merging of trial and sentencing proceedings at the *ad hoc* tribunals as “a mistake”.³²

VI. RELIEF REQUESTED

31. For the reasons above, the OPCD respectfully requests that Pre-Trial Chamber A recognise the OPCD’s mandate, as conferred in RoC 77(4), and grant it leave to make submissions on the question of competence of Pre-Trial Chamber A and the applicability of Provisional Rule 165(2) – and related RoC 66*bis* –in the present case.



Xavier-Jean Keïta
Principal Counsel of the OPCD

Dated this, 11th Day of November 2020
At The Hague, The Netherlands

³² Special Tribunal for Lebanon, Rules of Procedure and Evidence, Rev.1 (as of 10 June 2009), [Explanatory Memorandum by the Tribunal’s President](#), para. 41.