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PRE-TRIAL DIVISION

Before: Judge Tomoko Akane, President of the Pre-Trial Division

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. The ICC's Office of Public Counsel for the Defence ("OPCD") seeks standing to make submissions to the Pre-Trial Division ("PTD") President in the present case 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 in this case, and any potential suspects who are, or would be, subject to charges of Article 70.
2. On Monday evening, the PTD President issued a decision in which she applied provisionally amended Rule 165 ("Provisional Rule 165") to constitute a Pre-Trial Chamber composed of one Judge in *The Prosecutor v. Gicheru & Bett*.¹ The OPCD seeks leave to submit that Provisional Rule 165 is not in force, rendering it inapplicable in the present case. If granted leave, OPCD will demonstrate that: 1) 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; and 2) 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.

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").

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 66bis. Provisional Rule 165 removed applicability of several articles of the Rome Statue 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.
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

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 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

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

III. OPCD REQUEST FOR STANDING

10. The OPCD requests leave to file submissions pursuant to Regulation 77(4)(a) and/or (d) of the Regulations of the Court. Provision (a) mandates that the OPCD is “entrusted with the power of representing

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](#).

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”.¹² 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.

11. 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 Duty Counsel identified, and therefore has someone to represent his interests, Mr. Bett does not. As an unrepresented co-suspect in the case, Mr. Bett is subject to the decision to utilise Provisional Rule 165, which the OPCD will argue is not an applicable rule. He has no appointed Counsel to litigate this issue on his behalf and it is therefore necessary for OPCD to fulfil this role.
12. It is important for his interests to be represented because the use of Provisional Rule 165 is potentially prejudicial to Mr. Bett, as it means proceeding on the basis of a rule which, as the OPCD will argue, is not in force. Moreover, the purported use of this provision means 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

¹² 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.

Article 82(1)(d), and his trial and sentencing proceedings would occur in the same phase.¹³

13. 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 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.
14. 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. Principal Counsel of the Office is “entrusted with the power of representing and protecting the rights of the defence during the initial stages of the investigation”.¹⁴ 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.¹⁵ In the *Afghanistan Situation*, the Appeals Chamber considered that there may be circumstances that engage the mandate of OPCD at even earlier stages

¹³ Provisional Rule 165(2) (“Articles 39(2)(b) [...] 76(2) and 82(1)(d), and any rules thereunder, shall not apply”).

¹⁴ See e.g. Pre-Trial Chamber I, 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. See also Regulation 77(4)(a) of the Regulations of the Court.

¹⁵ *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.

when “premised on an identifiable and specific need to represent and protect the rights of the defence”.¹⁶

15. 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.

IV. PRELIMINARY ISSUE: the President of the Pre-Trial Division is the appropriate judicial authority to hear the matter

16. The OPCD files this Request before the PTD President because she is the judicial authority who issued the decision applying Provisional Rule 165. Having issued that decision, the PTD President has the power to grant any anticipated remedy that may be necessary to reverse its effect.¹⁷ Indeed, under provisional Regulation 66bis(1), the PTD President is the only judicial authority envisaged to exercise the power purportedly conferred by Provisional Rule 165(2) to constitute the one-Judge Chamber for Article 70 proceedings. While the OPCD will argue that this provision is not in force, and therefore did not give her the power to issue the Decision of 2 November, the PTD President is still best placed to hear the arguments because the legal texts do not envisage any other first-instance judicial authority who could order the

¹⁶ *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.

¹⁷ For instance, in England and Wales, rule 3.5(5) of the [Criminal Procedure Rules and Practice Directions 2020](#) provides that, for magistrates’ courts and Crown Courts, “[a]ny power to give a direction under this Part includes a power to vary or revoke that direction”. There is a similar rule for civil courts in rule 3.1(7) of the [Civil Procedure Rules 1998](#), which provides that “[a] power of the court under these Rules to make an order includes a power to vary or revoke the order”, exercisable in relation to an order that the court has previously made. See [Lahey v Pirelli Tyres Ltd](#) [2007] EWCA Civ 91, para. 19.

remedies in respect of that Decision. The choice of filing before the PTD President should not, however, be understood as tacit acknowledgement of the applicability of Provisional Rule 165(2) or the powers this provision purports to give her.

V. NATURE OF ANTICIPATED SUBMISSIONS

- A. *Provisional Rule 165 was valid only for the period of Plenary amendment through its expiry at the subsequent ASP*
- 17. 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 amendment 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.
- 18. 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.] 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.¹⁸
- 19. Similarly, the OPCD will also submit that RoC 66bis can not be considered valid at this time. While amendments of the RoC are within

¹⁸ See e.g. Triffterer and Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Beck 2016), pp. 1342-43, §§29-30.

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.

- 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*
- 20. 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.
- 21. 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”¹⁹ with ‘detriment’ meaning that “the overall position of the accused in the proceedings be negatively affected by the disadvantage”²⁰. 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.

¹⁹ *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.

²⁰ *Ibid.*, para. 78.

C. Incompatibility of the provisional amendments with the Rome Statute

22. 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. 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.
23. 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”²¹ 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.
24. 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

²¹ [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.

[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".²²

25. 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 merging of trial and sentencing proceedings at the *ad hoc* tribunals as "a mistake".²³

VI. RELIEF REQUESTED

26. For the reasons above, the OPCD respectfully requests that the PTD President recognise OPCD's mandate, as conferred in RoC 77(4), and grant leave to the OPCD to make submissions on the inapplicability of Provisional Rule 165(2) – and related RoC 66bis – in the present case seeking appropriate relief.



Xavier-Jean Keïta
Principal Counsel of the OPCD

Dated this, 6th Day of November 2020
At The Hague, The Netherlands

²² *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.

²³ 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.