

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

**No. ICC-01/09-01/15
Date: 11 December 2020**

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 AND PHILIP KIPKOECH BETT

Public

Decision Severing the Case against Mr Gicheru

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Counsel for the Defence

Mr Michael Karnavas

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
for Participation/Reparations**

**The Office of Public Counsel
for Victims**

**The Office of Public Counsel
for the Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

PRE-TRIAL CHAMBER A (ARTICLE 70) of the International Criminal Court issues this Decision Severing the Case against Mr Gicheru.

I. PROCEDURAL HISTORY

1. On 10 March 2015, Pre-Trial Chamber II, in its then composition, issued warrants of arrest against Mr Gicheru and Mr Bett for their alleged responsibility for offences against the administration of justice under article 70(1)(c) of the Rome Statute (the ‘Statute’).¹

2. On 2 November 2020, Mr Gicheru surrendered himself to the authorities of the Kingdom of the Netherlands (‘the Netherlands’).

3. On 2 November 2020, Pre-Trial Chamber II requested the President of the Pre-Trial Division to constitute a chamber composed of one judge to exercise the functions and powers of the Pre-Trial Chamber in the present case in accordance with rule 165(2) of the Rules of Procedure and Evidence (the ‘Rules’), as drawn up by the judges of the Court acting under article 51(3) of the Statute on 10 February 2016 (‘Provisional Rule 165’), and regulation 66*bis*(1) of the Regulations of the Court (the ‘Regulations’), which was adopted and entered into force on the same day.²

4. On 2 November 2020, the President of the Pre-Trial Division constituted the present Chamber pursuant to the aforementioned provisions.³

5. On 3 November 2020, following the completion of domestic proceedings in the Netherlands, Mr Gicheru was surrendered to the Court and arrived at the Court’s Detention Centre.

6. On 6 November 2020, in accordance with the Chamber’s order dated 4 November 2020,⁴ Mr Gicheru appeared before the Chamber pursuant to article 60(1) of the Statute and rules 121(1) and 163(1) of the Rules. During the initial appearance, the Chamber *inter alia* also ordered the Prosecutor and Mr Gicheru to submit

¹ Decision on the “Prosecution’s Application under Article 58(1) of the Rome Statute”, ICC-01/09-01/15-1-Conf-Exp; a public redacted version was notified on the same day, *see* [ICC-01/09-01/15-1-Red](#).

² Request to the President of the Pre-Trial Division to constitute a Chamber for the purposes of conducting proceedings under article 70 of the Rome Statute, ICC-01/09-01/15-31-US-Exp.

³ [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](#), ICC-01/09-01/15-32.

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

observations on the possibility of severing the case against Mr Gicheru from the present case by 20 November 2020 and 26 November 2020 respectively.⁵

7. On 16 November 2020, the Chamber received the 'Prosecution's written submissions concerning self-representation, severance of the charges, registration and disclosure of evidence, and other procedural matters pertaining to pre-confirmation proceedings'.⁶ The Prosecutor *inter alia* submits that she 'has no objection to the severance of the charges against Bett'.⁷ According to the Prosecutor, '[Mr] Bett is still at large and his whereabouts are unknown'.⁸ She 'is also unaware of any intention on his part to surrender to the Court'.⁹ The Prosecutor, therefore, submits that 'severing the charges is necessary and advisable, in particular, to safeguard [Mr] Gicheru's right to a fair and expeditious trial'.¹⁰

8. On 20 November 2020, the Chamber issued the 'Decision on Request for Extension of Time and Varying Other Time Limits'.¹¹ The Chamber *proprio motu* extended the time limit for the Defence to respond to the Prosecutor's observations on the possibility of severing the case against Mr Gicheru from the present case to 4 December 2020 at 16:00 hours.¹²

9. On 1 December 2020, the Chamber received 'Paul Gicheru's Response to the Prosecution's written submissions concerning severance of the charges, registration and disclosure of evidence, and other procedural matters pertaining to pre-confirmation proceedings'.¹³ The Defence indicates *inter alia* that it 'does not object to the severance'.¹⁴

10. On 10 December 2020, the Chamber issued the 'Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence'.¹⁵ The Chamber found that Provisional Rule 165 is applicable and that it has been properly constituted as a

⁵ ICC-01/09-01/15-T-001-CONF-ENG, p. 12, lines 5-9.

⁶ [ICC-01/09-01/15-46](#).

⁷ [ICC-01/09-01/15-46](#), para. 18.

⁸ [ICC-01/09-01/15-46](#), para. 18.

⁹ [ICC-01/09-01/15-46](#), para. 18.

¹⁰ [ICC-01/09-01/15-46](#), para. 19.

¹¹ ICC-01/09-01/15-51-Conf; a public redacted version was notified on the same day, see [ICC-01/09-01/15-51-Red](#).

¹² [ICC-01/09-01/15-51-Red](#), para. 20.

¹³ [ICC-01/09-01/15-56](#).

¹⁴ [ICC-01/09-01/15-56](#), para. 1.

¹⁵ ICC-01/09-01/15-61.

chamber composed of one judge to exercise the functions and powers of the Pre-Trial Chamber in the present case.¹⁶

II. DETERMINATION BY THE CHAMBER

11. The Chamber notes article 64(5) of the Statute, which provides that, '[u]pon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused', and rule 136 of the Rules, which stipulates that '[p]ersons accused jointly shall be tried together unless the Trial Chamber, on its own motion or at the request of the Prosecutor or the defence, orders that separate trials are necessary, in order to avoid serious prejudice to the accused [or] to protect the interests of justice [...]'. The Appeals Chamber has previously held that these provisions apply to the pre-trial stage.¹⁷ On the basis of rule 163(1) of the Rules, this holds equally true for pre-trial proceedings regarding offences under article 70 of the Statute.

12. In addition, the Chamber observes that article 61(2)(b) of the Statute reads, in the relevant part, as follows: '[t]he Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has: [...] [f]led or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held'.

13. While Mr Gicheru surrendered himself voluntarily to the Court, Mr Bett remains at large and, at present, it is not known whether there is a realistic possibility of Mr Bett being arrested or surrendering himself voluntarily to the Court in the foreseeable future. In addition, neither the Prosecutor nor the Defence opposes severing the case against Mr Gicheru from the present case.

14. Moreover, the Chamber considers that conducting the confirmation of charges procedure in the absence of Mr Bett is not appropriate in the present circumstances. The Chamber has considered the fact that the counts in the warrants of arrest against Messrs Gicheru and Bett overlap to a significant degree. Even so, and irrespective of

¹⁶ ICC-01/09-01/15-61, p. 22.

¹⁷ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Judgment on the Appeal Against the Decision on Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Chui Cases](#), 9 June 2008, ICC-01/04-01/07-573 (OA 6), paras 7-9.

the question whether the specific conditions of article 61(2)(b) of the Statute and rule 123 of the Rules are fulfilled, the Chamber is of the view that proceeding in the absence of Mr Bett would cause significant prejudice to Mr Gicheru as it would affect his right to be tried without undue delay under article 67(1)(c) of the Statute. In this regard, the Chamber has also taken into account that Mr Gicheru is alleged to be responsible for offences under article 70(1)(c) of the Statute and not for any of the crimes under article 5 of the Statute. Such allegations are, relatively speaking, more confined and, if established, attract lower sanctions pursuant to article 70(3) of the Statute and rule 166 of the Rules.

15. Accordingly, in view of the foregoing, the Chamber decides to sever the case against Mr Gicheru from the present case.

16. Pursuant to regulations 22 and 27(1) of the Regulations of the Registry, the Chamber orders the Registrar to open a new case record entitled *The Prosecutor v. Paul Gicheru*, assign it a new case number and transfer all documents from the present case record to the new case record. The documents in the new case record shall be ordered identically to the order followed in the present case record. The level of classification of the documents to be transferred to the new case record shall also be maintained and, if necessary, will be revised by the Chamber in due course.

17. The Chamber further finds that Pre-Trial Chamber II shall remain seized of the present case in so far as it relates to Mr Bett. While the present Chamber has been constituted for the specific purpose of conducting the initial proceedings before the Court in accordance with article 60 of the Court and the confirmation of charges procedure pursuant to article 61 of the Statute and rule 165 of the Rules following the voluntary surrender of Mr Gicheru, Pre-Trial Chamber II is a permanent Pre-Trial Chamber constituted in accordance with regulation 46 of the Regulations to which *inter alia* the *Situation in the Republic of Kenya* and all cases emanating from that Situation have been assigned. In addition, as mentioned, it is presently not known whether there is a realistic possibility of Mr Bett being arrested or surrendering himself voluntarily to the Court in the foreseeable future.

18. With a view to completing the severance of the case against Mr Gicheru from the present case, the Chamber additionally orders the Registrar to rename the present case record as *The Prosecutor v. Philip Kipkoech Bett*, to retain the present case number,

and to register the following documents (together with any annexes and/or translations)
also in the present case record in the same order and with the same classification:

- i. ICC-01/09-01/15-1-Red; ICC-01/09-01/15-1-Conf-Exp;
- ii. ICC-01/09-01/15-2;
- iii. ICC-01/09-01/15-3;
- iv. ICC-01/09-01/15-4-Conf-Exp;
- v. ICC-01/09-01/15-5-Conf-Exp;
- vi. ICC-01/09-01/15-6;
- vii. ICC-01/09-01/15-7-Conf-Exp;
- viii. ICC-01/09-01/15-8-Conf-Exp;
- ix. ICC-01/09-01/15-9-Conf-Exp-Anx1; ICC-01/09-01/15-9-Conf-Exp-Anx2; ICC-01/09-01/15-9-Conf-Exp-Anx3; ICC-01/09-01/15-9-Conf-Exp-Anx4;
- x. ICC-01/09-01/15-10-Conf-Exp;
- xi. ICC-01/09-01/15-11;
- xii. ICC-01/09-01/15-12-Conf-Exp;
- xiii. ICC-01/09-01/15-13-Conf-Exp;
- xiv. ICC-01/09-01/15-14-Conf-Exp;
- xv. ICC-01/09-01/15-15-Conf-Exp;
- xvi. ICC-01/09-01/15-16-Conf-Exp;
- xvii. ICC-01/09-01/15-17;
- xviii. ICC-01/09-01/15-18;
- xix. ICC-01/09-01/15-31-US-Exp;
- xx. ICC-01/09-01/15-32;
- xxi. ICC-01/09-01/15-36;
- xxii. ICC-01/09-01/15-37;
- xxiii. ICC-01/09-01/15-40;

- xxiv. ICC-01/09-01/15-43;
- xxv. ICC-01/09-01/15-47;
- xxvi. ICC-01/09-01/15-50;
- xxvii. ICC-01/09-01/15-51-Red;
- xxviii. ICC-01/09-01/15-52;
- xxix. ICC-01/09-01/15-53;
- xxx. ICC-01/09-01/15-61.

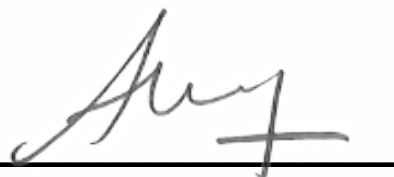
19. Lastly, the Chamber orders the Registrar to register the present decision both in the present case record (which remains assigned to Pre-Trial Chamber II and which is to be renamed as *The Prosecutor v. Philip Kipkoech Bett*) and the new case record to be created in accordance with the present decision (which will be entitled *The Prosecutor v. Paul Gicheru*).

FOR THESE REASONS, THE CHAMBER HEREBY

- a) **DECIDES** to sever the case against Mr Gicheru from the present case;
- b) **ORDERS** the Registrar to open a new case record entitled *The Prosecutor v. Paul Gicheru*, assign it a new case number and transfer all documents from the present case record to the new case record, while maintaining the order of the documents and the documents' level of confidentiality from the present case record;
- c) **DECIDES** that Pre-Trial Chamber II shall remain seized of the present case in so far as it relates to Mr Bett;
- d) **ORDERS** the Registrar to rename the present case record as *The Prosecutor v. Philip Kipkoech Bett*, to retain the present case number, and to register the documents (together with any annexes and/or translations) enumerated in paragraph 18 of the present decision also in the present case record in the same order and with the same classification; and
- e) **ORDERS** the Registrar to register the present decision both in the present case record (which remains assigned to Pre-Trial Chamber II and which is to be renamed as *The Prosecutor v. Philip Kipkoech Bett*) and the new case record to

be created in accordance with the present decision (which will be entitled *The Prosecutor v. Paul Gicheru*).

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



Judge Reine Adélaïde Sophie Alapini-Gansou

Dated this Friday, 11 December 2020

At The Hague, The Netherlands