

**Cour
Pénale
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**International
Criminal
Court**

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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 AND PHILIP
KIPKOECH BETT***

Public

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

Source: Office of the Prosecutor

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Mr Paul Gicheru

I. INTRODUCTION

1. Further to the order of Pre-Trial Chamber A (Article 70)¹ of 6 November 2020, the Prosecution hereby submits its written observations in relation to the following issues: i) Mr Paul Gicheru's² legal representation;³ and ii) the severance of the charges against Mr Phillip Kipkoech BETT.⁴
2. On the first issue, the Prosecution requests that, for the reasons provided below, the Chamber set a deadline by which Gicheru is to appoint defence counsel, should he elect to do so. Alternatively, in the event a defence counsel is not appointed, the Prosecution requests that the Chamber: (a) assign legal assistance to Gicheru pursuant to article 67(1)(d), by instructing Counsel Support Section⁵ to appoint a suitable associate counsel and the necessary support personnel, including a case manager; and (b) direct the Registry to provide Gicheru with the necessary rights and accesses to the Court's relevant IT tools and platforms usually provided to defence teams and with the necessary training on those systems, as soon as possible.
3. On the second issue, the Prosecution has no objection to severance of the charges against Bett pursuant to article 64(4) of the Statute and Rule 136 of the Rules of Procedure and Evidence.⁶
4. In addition, to facilitate the safe and effective registration, handling and disclosure of evidence in this case, the Prosecution requests that three technical protocols reflecting the Court's practice, as detailed below, are formally adopted by the Chamber.
5. Finally, in accordance with the Chambers Practice Manual⁷ and as provided for in the *chapeau* of regulation 34 of the Regulations of the Court,⁸ the

¹ "Chamber".

² "Gicheru".

³ ICC-01/09-01/15-T-001-CONF-ENG ET, p. 17 (lns.15-17).

⁴ "Bett"; ICC-01/09-01/15-T-001-CONF-ENG ET, p. 12 (lns.6-8), and pp. 21-22 (lns.25-1).

⁵ "CSS".

⁶ "Rules".

⁷ Chambers Practice Manual (November 2019), para. 16, p. 5.

⁸ "RoC".

Prosecution suggests that the Chamber set an abbreviated time limit of five days for responses under regulation 24 of the RoC, which is more compatible with the fast pace of pre-trial proceedings.

II. PROCEDURAL HISTORY

6. On 10 March 2015, the former Single Judge for Pre-Trial Chamber II⁹ issued a warrant of arrest for Gicheru, being satisfied that the conditions under article 58(1) of the Statute were fulfilled.¹⁰
7. On 2 November 2020, the President of the Pre-Trial Division constituted the Chamber, composed of Judge Reine Adélaïde Sophie Alapini-Gansou, to exercise the powers and functions of the Pre-Trial Chamber in the case of *The Prosecutor v. Paul Gicheru and Philip Kipkoech Bett*.¹¹
8. On 3 November 2020, Gicheru was surrendered to the Court and on 6 November 2020 he appeared before the Chamber.¹²

III. SUBMISSIONS

A. Legal representation of the Suspect before the ICC

9. The Prosecution notes that Gicheru elected to represent himself at his initial appearance despite the offer of assistance by the CSS and notwithstanding the Prosecution's strong advice to avail himself of such assistance. The Prosecution also notes that he intends to "review [his] position during any subsequent appearances".¹³

⁹ "PTC II".

¹⁰ ICC-01/09-01/15-1-Conf-Exp, "Article 58 Decision".

¹¹ ICC-01/09-01/15-32.

¹² ICC-01/09-01/15-34 and ICC-01/09-01/15-T-001-CONF-ENG ET.

¹³ ICC-01/09-01/15-30-US-Exp 30, para. 13: "[R]egarding the issue of my representation on 2nd November 2020 I intend to appear in person on the first appearance and will thereafter review my position during any subsequent appearances". *See also*, ICC-01/09-01/15-T-001-CONF-ENG ET, p. 3 (ln.9-19) and p. 17 (ln.1-5); ICC-01/09-01/15-45-Conf, para. 5, and ICC-01/09-01/15-45-Conf-AnxII.

10. The Prosecution acknowledges that Gicheru has the right to conduct his defence in person¹⁴ and is a qualified and experienced lawyer in his domestic jurisdiction. However, Gicheru is not admitted as counsel at the ICC, nor does he have any direct experience regarding ICC litigation.
11. As with any self-represented litigant,¹⁵ there are heightened concerns for the fairness of the proceedings in this case. The Prosecution observes that, even in an article 70 case, the pre-trial proceedings are likely to be procedurally complex, time consuming and logistically challenging, even for a well-resourced defence team. In particular, the review and analysis of pre-trial disclosure is a time and resource-intensive process, requiring an appreciation of the disclosure rules and modalities unique to this Court. In this case, the Prosecution's disclosure will include several hundred pages of documents including transcripts of audio-recorded material, written statements, testimony media articles, photographs and audio/video material.
12. The Prosecution is concerned that unless Gicheru appoints, or is provided with, defence counsel and/or resource personnel, he may be unable to cope with the demands of reviewing disclosure and preparing for the confirmation of charges, including familiarising himself with the IT tools employed by the Court, the Court's procedures and applicable jurisprudence and preparing pre-trial filings to protect his interests. This may also place him at a disadvantage *vis-à-vis* the Prosecution, raising issues regarding the equality of arms.¹⁶

¹⁴ Article 67(1)(d). While article 67 is situated in Part 6 of the Rome Statute concerning *trial* proceedings, the rights set forth in article 67 also apply at the *pre-trial* stage to persons subject to a warrant of arrest who appear before the Court: Rule 121(1) of the Rules of Procedure and Evidence. *See also* ICC-01/04-613 (“[DRC Mudacumura Arrest Warrant Decision](#)”), para. 5; ICC-02/04-01/05-408, paras. 65-66; ICC-01/04-01/06-844, para. 12; ICC-01/04-01/06-834, para. 14.

¹⁵ *Prosecutor v. Krajišnik*, IT-00-39-A, [Decision on Momčilo Krajišnik's Motion for Permission for Nathan Z. Dershowitz to Act as Counsel with Alan M. Dershowitz and for Extension of Time](#), 5 September 2008, para. 8.

¹⁶ *See* ICC-01/05-01/08-55 (“[Bemba Disclosure Decision](#)”), para. 21 (the Pre-Trial Chamber recalled that, in the context of disclosure, the guarantees in article 67—albeit in the context of article 67(1)(a) and (b)—apply at the pre-trial stage to ensure fairness in the disclosure process and respect for equality of arms between the parties).

13. Apart from safeguarding the fairness of the proceedings and ensuring that Gicheru is able to present his defence fully and effectively,¹⁷ the Chamber has an additional interest in protecting the integrity of the proceedings and the truth-seeking function of the trial process before this Court,¹⁸ which might be undermined if Gicheru is not adequately assisted in his defence.
14. Additionally, Gicheru is entitled to be tried without undue delay.¹⁹ In this context, the Prosecution is concerned that if Gicheru does not have the necessary legal and logistical assistance during the pre-trial phase, this may complicate the proceedings and, in particular, impair Gicheru's ability to process the evidence disclosed, which in turn may impact upon the pre-trial schedule set by the Chamber.
15. The concerns regarding adequate representation need to be resolved urgently and cannot wait until the next appearance, since the Prosecution wishes to commence the disclosure process as soon and as efficiently as possible. The Chamber should not permit any delay in the appointment of the necessary legal assistance to derail or delay the expeditious conduct of the pre-trial proceedings.
16. In these circumstances, the Prosecution requests the Chamber to set a deadline for Gicheru to appoint defence counsel, should he elect to do so. Should he choose not to do so, or fail to do so by such deadline, the Prosecution requests the Chamber to: (a) consider assigning legal assistance to Gicheru pursuant to article 67(1)(d),²⁰ by instructing CSS to appoint a suitable associate counsel and

¹⁷ *Prosecutor v. Slobodan Milošević*, IT-02-54-T, [Reasons for Decision on Assignment of Defence Counsel](#), 22 September 2004, para. 32; *Prosecutor v. Slobodan Milošević*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004 ("[Milošević Defence Counsel AD](#)"), para. 12; *Prosecutor v. Šešelj*, IT-03-67-AR73.4, Decision on Appeal against the Trial Chamber's Decision (No. 2) on Assignment of Counsel, 8 December 2006 ("[Šešelj Second Assignment of Counsel AD](#)"), para. 19; *Prosecutor v. Krajišnik*, IT-00-39-A, [Decision on Momčilo Krajišnik's Request to Self-Represent, on Counsel's Motions in Relation to Appointment of Amicus Curiae, and on the Prosecution Motion of 16 February 2007](#), 11 May 2007, para. 13.

¹⁸ *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Appointment of Counsel and Order on Further Trial Proceedings, 5 November 2009 ("[Karadžić Defence Counsel Decision](#)"), para. 20.

¹⁹ Article 67(1)(c).

²⁰ The suspect's rights—and, as a corollary, the Court's powers—under article 67, also apply at the pre-trial stage: *see above*, fn. 15. Chambers of the Court have previously ordered remedies to ensure that the suspect's

the necessary support personnel, which would include—at minimum—a case manager; and (b) direct the Registry to provide Gicheru with the necessary rights and accesses to the Court's relevant IT tools and platforms usually provided to defence teams,²¹ and to provide Gicheru with the necessary training on those systems, as soon as possible.

17. The appointment of legal and logistical support staff to assist Gicheru would allow Gicheru to receive advice and assistance without usurping his right to conduct his defence as he sees fit, while ensuring expeditious proceedings, and would therefore be in the interests of justice.²² Moreover, such an arrangement in this case would not contravene his statutory right to conduct his defence in person. As established in the jurisprudence of the *ad hoc* tribunals, the right to conduct one's own defence is not absolute, and may be curtailed, *inter alia*, when this would obstruct the expeditious conduct of proceedings,²³ even if this is not intentional.²⁴ This is consistent with the international human rights jurisprudence on the right of self-representation.²⁵ Finally, the proposed appointment of legal and logistical staff would be a proportionate measure that is limited to the extent necessary to protect the Chamber's interest in assuring reasonably expeditious proceedings.²⁶

rights under article 67 have been respected at the pre-trial stage: *see e.g.* [DRC Mudacumura Arrest Warrant Decision](#), para. 5; ICC-02/11-01/11-572 ("[Gbagbo Confirmation Adjournment AD](#)"), para. 36; ICC-01/05-01/08-55 ("[Bemba Disclosure Decision](#)"), para. 21.

²¹ Such as a secure ICC email account, e-Court, HPE Records Manager, Citrix, Webex, etc.

²² Similar arrangements of legal assistance through assistant counsel, rather than counsel, have been approved in other cases before the ICTY. *See e.g.* *Prosecutor v. Slobodan Milošević*, IT-02-54-T, [Reasons for Decision on Assignment of Defence Counsel](#), 22 September 2004, paras. 35-36; *Prosecutor v. Krajišnik*, IT-00-39-A, [Decision on Momčilo Krajišnik's Motion to Reschedule Status Conference and Permit Alan Dershowitz to Appear](#), 28 February 2008, para. 8.

²³ [Milošević Defence Counsel AD](#), paras. 12, 13; [Šešelj Second Assignment of Counsel AD](#), para. 19; *Prosecutor v. Krajišnik*, IT-00-39-A, [Decision on Momčilo Krajišnik's Request to Self-Represent, on Counsel's Motions in Relation to Appointment of Amicus Curiae, and on the Prosecution Motion of 16 February 2007](#), 11 May 2007, para. 13; [Karadžić Defence Counsel Decision](#), para. 15; *Prosecutor v. Norman et al.*, SCSL-04-14-T, [Decision on the Application of Sam Hinga Norman for Self-Representation under Article 17\(4\)\(d\) of the Statute of the Special Court](#), 8 June 2004, para. 8.

²⁴ [Milošević Defence Counsel AD](#), para. 14; [Šešelj Second Assignment of Counsel AD](#), para. 19.

²⁵ HRC, *Carlos Correia de Matos v. Portugal*, Communication No. 1123/2002, [Views](#), 28 March 2006, para. 7.4; ECtHR, *Galstyan v. Armenia*, Application No. 26986/03, [Judgment](#), 15 November 2007, para. 91.

²⁶ [Karadžić Defence Counsel Decision](#), para. 16; [Milošević Defence Counsel AD](#), para. 18.

B. Severance of the charges

18. As expressed in the initial appearance hearing,²⁷ the Prosecution has no objection to the severance of the charges against Bett pursuant to article 64(4) of the Statute and Rule 136 of the Rules.²⁸ While Gicheru has voluntarily surrendered to the Court, Bett is still at large and his whereabouts are unknown to the Prosecution. The Prosecution is also unaware of any intention on his part to surrender to the Court. As far as the Prosecution is aware, the issue of Bett's surrender is still pending appeal in the Kenyan courts and there is no indication of any imminent disposal of the case.

19. The Prosecution notes that, on the contrary, Gicheru is committed to a confirmation proceedings within the timetable ordered by the Chamber in his initial appearance hearing and has expressed his agreement to the severance of his case.²⁹ In these circumstances, the Prosecution submits that severing the charges is necessary and advisable, in particular, to safeguard Gicheru's right to a fair and expeditious trial. If circumstances change, namely that Bett would be surrendered to the Court, the Chamber could then consider joining the charges while giving due regard to the rights of the accused individuals.

C. Registration and disclosure of evidence

20. The Prosecution requests that the Chamber adopt the most recent version of the Unified Technical Protocol for the provision of evidence, witness and victims information in electronic form ("E-court Protocol")³⁰ and direct the parties to fully comply with it.

²⁷ ICC-01/09-01/15-T-001-CONF-ENG ET, p. 21 (lns.17-21).

²⁸ With regard to the Pre-Trial Chamber's power to join or sever charges under article 64(5) of the Statute and Rule 136 of the Rules, see ICC-01/14-01/18-87, paras. 9-10. *See also*, ICC-02/05-01/07-87.

²⁹ ICC-01/09-01/15-T-001-CONF-ENG ET, p. 22 (lns.10-14).

³⁰ As adopted most recently by the Pre-Trial Chamber in the *Ali Kushayb* case, ICC-02/05-01/20-116-Anx1.

D. Exceptions to disclosure (redactions)

21. Consistent with the practice of other pre-trial chambers, the Prosecution requests the Chamber to adopt the procedure for exceptions to disclosure in the form of redaction of information under rules 81(2) and (4) of the Rules as contained in paragraphs 99 to 101 of the latest version of the Chambers Practice Manual.³¹ The Chamber is requested to specify that, as clarified by the Single Judge in the *Ali Kushayb* case, the procedure set out therein applies to both the Prosecutor and the Defence.³²
22. With regard to any other redactions that do not fall under the standard categories listed in the Chambers Practice Manual, the Prosecution submits that, in line with the practice adopted in other cases,³³ these should be subject to discrete applications for the Chamber's authorization, redacted versions of which shall also be provided to the receiving party. To prevent that adjudication of such requests prolonging the disclosure process, the Prosecution suggests that the parties be allowed to simultaneously proceed to disclosure with redactions, as proposed. The Chamber would then either authorize the proposed redactions or order their lifting.

E. Protocol on the handling of confidential information during investigations and contact between a party and witnesses of the opposing party

23. Protocols on witness contacts and confidential information during investigations are now standard practice at the Court, as they have been

³¹ Chambers Practice Manual (November 2019), paras. 99-101, pp. 31-34.

³² ICC-02/05-01/20-116, para. 12(i).

³³ As adopted most recently by the Pre-Trial Chamber in the *Ali Kushayb* case, ICC-02/05-01/20-116, para. 13.

adopted in the majority of cases, both at the pre-trial³⁴ and trial stage of the proceedings.³⁵

24. In line with this practice, the Prosecution hereby proposes that the Chamber adopt the Protocol on the handling of confidential information during investigations and contacts between a party and witnesses of other parties ("Proposed Protocol").³⁶ This Proposed Protocol was adopted by Trial Chamber VII in the *Bemba et al.* case³⁷ which, like the present one, concerned offences against the administration of justice only and thus is more suitable to address the specific circumstances of these proceedings.

25. The Proposed Protocol modifies only slightly the protocols adopted in other cases in that: (a) it omits all references to the rights of participating victims given that there are none in the present case; (b) it regulates in detail the modalities of the conduct of interviews of witnesses with the other party; and (c) it extends its applicability to the intermediaries the parties may use during their respective investigations.

26. The Prosecution requests that the following discrete amendments to the Proposed Protocol as adopted by Trial Chamber VII be implemented in the present case:

- a. Paragraphs 3 should reflect that the Proposed Protocol is applicable to the present proceedings, identified with the record number ICC-01/09-01/15 instead of ICC-01/05-01/13.³⁸ Additionally, the second sentence in the same paragraph, which currently reads "[i]t does not create any new obligations or modify existing obligations or rights in case ICC-

³⁴ *Gbagbo*, ICC-02/11-01/11-49 and *Lubanga*, ICC-01/04-02/06-185.

³⁵ *Ntaganda*, ICC-01/04-02/06-412; *Katanga* ICC-01/04-01/07-1134, ICC-01/04-01/07-2007-Anx1 and ICC-01/04-01/07-2047; *Bemba* ICC-01/05-01/08-813-Red; *Banda and Jerbo* ICC-02/05-03/09-451-Anx; *Lubanga* ICC-01/04-01/06-1372; *Kenyatta*, ICC-01/09-02/11-469-Anx; *Ruto and Sang*, ICC-01/09-01/11-458-AnxA-Corr; *Bemba et al.* ICC-01/05-01/13-1093; and *Ali Kushayb*, ICC-02/05-01/20-116 and ICC-02/05-01/20-116-Anx2.

³⁶ ICC-01/05-01/13-1093-Anx.

³⁷ ICC-01/05-01/13-1093.

³⁸ ICC-01/05-01/13-1093-Anx, p. 1.

01/05-01/08", is irrelevant to the present case and should be removed entirely;

- b. Paragraph 4(a) should define the "party" to the present proceedings as "the Prosecution or Mr Paul Gicheru and their respective teams, including counsel, resource persons, and investigators" instead of "the Prosecutor or Jean-Pierre Bemba, Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, or Narcisse Arido".³⁹

F. Time limit for responses

27. In accordance with the Chambers Practice Manual⁴⁰ and as provided for in the *chapeau* of regulation 34 of the Regulations of the Court,⁴¹ the Prosecution suggests that, the Chamber set an abbreviated time limit of five days for responses under regulation 24 of the RoC, that is more compatible with the fast pace of pre-trial proceedings.

IV. CONCLUSION AND RELIEF SOUGHT

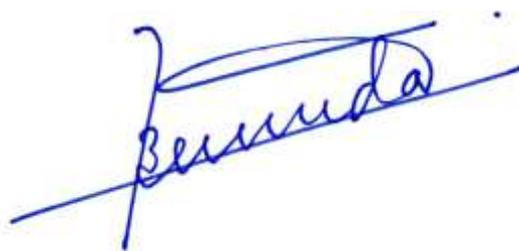
28. In light of the foregoing, the Prosecution respectfully requests the Chamber to:
- a. set a deadline by which Gicheru is to appoint defence counsel, should he elect to do so;
 - b. in the event he does not elect to appoint defence counsel: (i) consider instructing CSS to appoint a suitable associate counsel and the necessary support personnel to assist Gicheru in his defence; and (ii) direct the Registry to provide Gicheru with the necessary rights and accesses to the Court's relevant IT tools and platforms usually provided to defence teams, and to provide Gicheru with the necessary training on the use of those systems as soon as possible;

³⁹ ICC-01/05-01/13-1093-Anx, p. 1.

⁴⁰ Chambers Practice Manual (November 2019), para. 16, p. 5.

⁴¹ "RoC".

- c. sever the case against Bett;
- d. formally adopt and place on the record of the case the following three protocols:
 - i. the most recent version of the Unified Technical Protocol for the provision of evidence, witness and victims information in electronic form ("E-court Protocol");
 - ii. the procedure for exceptions to disclosure in the form of redaction of information under rules 81(2) and (4) of the Rules, in accordance with paragraphs 99 to 101 of the latest version of the Chambers Practice Manual;
 - iii. the Protocol on the handling of confidential information during investigations and contacts between a party and witnesses of other parties, with amendments as proposed in paragraph 26 of this filing; and
- e. consider setting an abbreviated time limit of five days for responses under regulation 24 of the RoC, in line with the Chambers Practice Manual.



Fatou Bensouda, Prosecutor

Dated this 16th day of November 2020
At The Hague, The Netherlands