

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: ICC-01/09-01/15
Date: 1 February 2018

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Chang-ho Chung

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF THE PROSECUTOR V. PAUL GICHERU AND PHILIP
KIPKOECH BETT**

Confidential, *EX PARTE*, only available to the Prosecution and the Registry

**Prosecution request for an urgent order clarifying the Court's competence in respect
of article 70 offences**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

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Other

I. Introduction

1. Pursuant to article 64(6)(7) of the Rome Statute ("Statute") and regulation 29 of the Regulations of the Court ("Regulations"), the Office of the Prosecutor ("Prosecution") requests the Pre-Trial Chamber II ("Chamber") to urgently issue an order clarifying that the Republic of Kenya remains under the obligation to execute the request for the arrest and surrender of Paul Gicheru ("Gicheru") and Philip Kipkoech Bett ("Bett"),¹ issued pursuant to the decision of the Single Judge of Pre-Trial Chamber II ("PTC").²

2. Such an order is necessary in light of the recent ruling by the High Court in Nairobi which rejected the Government of Kenya's application for the surrender of Gicheru and Bett, and lifted the domestic warrant of arrest issued against them pursuant to the Single Judge's Decision.³ In particular, the High Court's decision ("Decision") was vitiated by an erroneous interpretation of the provisions of the Statute and the Rules of Procedure and Evidence ("Rules") governing offences against the administration of justice before this Court as well as the attendant duties of States Parties to give effect to those provisions under their domestic laws.

3. The Office of the Director of Public Prosecutions ("DPP") has filed a notice of appeal against the Decision.⁴ Nonetheless, there is the danger that, unless remedied through a clarification by this Court, the appeal may be adversely affected by the High Court's erroneous appreciation of the applicable statutory regime. Since the Court's interests in the matter are being represented domestically by the DPP, the Prosecution anticipates that any clarification by this Chamber could be placed before the Court of

¹ ICC-01/09-01/15-4-Conf-Exp.

² ICC-01/09-01/15-1-Conf-Exp, para. 31 (a) and (b).

³ ICC-01/09-01/15-14-Conf-Exp-AnxIII, p. 37, para. 84. *See also* sections 29-30 of the 2008 International Crimes Act [Kenya].

⁴ ICC-01/09-01/15-14-Conf-Exp-AnxIII, p. 38.

Appeal in Kenya by either the DPP or another party to the proceedings.⁵ The Prosecution understands the deadline for the parties to file their respective appeals briefs is fast-approaching. For this reason, the Prosecution requests an urgent decision on this application.

II. Procedural history

4. On 10 March 2015, the Single Judge issued an Arrest Warrant for Gicheru and Bett, on charges of interfering with ICC witnesses contrary to article 70(1)(c) of the Statute.⁶

5. On 1 April 2015, the Registry of the International Criminal Court ("Registry") notified the Kenyan authorities of the Court's requests for the arrest and surrender of Gicheru and Bett to the ICC, as well as the search and seizure of their persons, residences and offices at the time of their arrest.⁷

6. On 19 October 2015, 26 January 2016 and 15 January 2018 respectively, the Registry transmitted to the PTC the replies of the Kenyan authorities to the Registry's various requests for clarification on the arrest of Gicheru and Bett and the procedure followed before the High Court of Kenya.⁸

7. In the reply transmitted by the Registry on 15 January 2018, the Kenyan authorities informed the PTC that on 16 November 2017, the High Court of Kenya had issued a ruling in which, *inter alia*, it dismissed the application of the Government of Kenya for the surrender of Gicheru and Bett, and lifted the domestic warrants of arrest

⁵ Rule 87(1)(k) of the Court of Appeal Rules of the Republic of Kenya.

⁶ ICC-01/09-01/15-1-Conf-Exp.

⁷ ICC-01/09-01/15-7-Conf-Exp, paras. 2 and 3.

⁸ ICC-01/09-01/15-12-Conf-Exp and ICC-01/09-01/15-12-Conf-Exp-Anx1; ICC-01/09-01/15-13-Conf-Exp and ICC-01/09-01/15-13-Conf-Exp-Anx1; and ICC-01/09-01/15-14-Conf-Exp and ICC-01/09-01/15-14-Conf-Exp-Anx1-3.

issued against them.⁹ The High Court further determined the execution of the Court's request for search and seizure invalid and unlawful.¹⁰

III. Confidentiality

8. Pursuant to regulation 23(2)*bis* of the Regulations, the Prosecution requests that this document be received as "Confidential, *EX PARTE*, only available to the Prosecution and the Registry", as it relates to the Registry's 15 January 2018 Transmission which bears the same classification. However, should the Chamber deem it appropriate in the circumstances, the Prosecution will file a public redacted version of this application.

IV. Submissions

9. In rejecting the application for the surrender of Gicheru and Bett and lifting the warrants against them, the Decision identifies what it considers as two fatal errors in the procedure before this Court in the issuance of the request for arrest and surrender: (i) that the Single Judge, in her decision on the Prosecutor's application for a warrant of arrest,¹¹ did not respect the principle of complementarity; and (ii) that before issuing her decision, the Single Judge failed to seek the views of the Kenyan authorities.¹²

⁹ ICC-01/09-01/15-14-Conf-Exp-AnxIII, pp. 32 and 37, at para. 78(a) and 84.

¹⁰ See ICC-01/09-01/15-14-Conf-Exp-AnxIII, pp. 33-37, at paras. 78(d), 81-83, relying on untested allegations by the Respondents in the domestic proceedings that they were subjected to pressure, attempts at coercion and intimidation by members of the Office of the Prosecutor, and disputing the presence and role of a Prosecution representative in the requests' execution, contrary to ICC-01/09-01/15-1- Conf-Exp, p. 19 and article 99(1).

¹¹ ICC-01/09-01/15-1-Conf-Exp.

¹² ICC-01/09-01/15-14-Conf-Exp-AnxIII, pp. 27-32, at paras. 66-72 and 78(a).

10. The errors identified in the Decision, however, arise from a fundamental misunderstanding of the statutory regime governing article 70. Although the High Court devotes much space to recounting the applicable statutory regime governing the principle of complementarity, it overlooked the fact that article 70 offences are excluded from this regime. In particular, as rule 163(2) of the Rules makes clear, “[t]he provisions of Part 2, and any rules thereunder, shall not apply, with the exception of article 21”.¹³ Article 17, located in Part 2, thus finds no application to offences against the administration of justice. The rule thereby gives effect to article 70(4)(b), which provides that it is for the Court to determine whether a case should be submitted for domestic prosecution. As the provision clearly states, “[u]pon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution...” (emphasis added). This is also why rule 162(1) of the Rules makes it discretionary whether the Court consults with States Parties that may have jurisdiction over the offence, stating “the Court *may* consult with” such States.

11. The effect of these provisions is that, unlike article 5 crimes, it is *the ICC* which enjoys primary jurisdiction over the investigation and prosecution of article 70 offences, unless and until the Court exercises its discretion to refer the matter to a State Party for prosecution. If the plain language of the provisions is not clear enough, a purposive interpretation supports this conclusion. Once a case is properly before the ICC, it is the responsibility of the Chamber tasked with the duty to ensure the fairness and expeditiousness of the trial¹⁴ and maintain order over the proceedings.¹⁵ The offences against the administration of justice contained in article 70 concern offences committed against the administration of justice *at this Court*, not that of the State Party. In the

¹³ It appears from ICC-01/09-01/15-14-Conf-Exp-AnxIII that the High Court did not make any reference to this vital provision, despite the fact that it is referred to in the decision of the Single Judge; ICC-01/09-01/15-1-Conf-Exp, para. 4.

¹⁴ Article 64(2).

¹⁵ Article 64(9)(b).

instant matter, the conduct that is the focus of the warrants against the suspects is alleged to have had a direct and serious impact upon the prosecution of Messrs Ruto and Sang. Thus it is both logical and appropriate that the Court should have jurisdiction to prosecute Gicheru and Bett for offences under article 70, unless it decides otherwise.

12. Accordingly, there was no legal basis to consider the factors set out in article 17 since that provision is inapplicable to the present proceedings. Nor was the Single Judge required to consult with the Kenyan authorities prior to issuing her decision, this also being a discretionary assessment for this Court.¹⁶ The Single Judge properly considered the factors set out in rule 162(2) of the Rules, which are themselves discretionary, and determined that the Court should continue to exercise jurisdiction over the case.

13. The Decision also relies on section 18 of Kenya's International Crimes Act. It is of course the prerogative of Kenyan courts to interpret their own laws. Nonetheless, insofar as the law in question seeks to give effect of the domestic implementation of ICC Statute, the PTC is entitled to consider the effects of that law, if any, on Kenya's statutory duty to cooperate. As a preliminary observation, it is not apparent how recourse to section 18 of the Act assists. That section merely provides that a person who falls within the scope of its sub-articles "*may be* tried and punished in Kenya for that offence" (emphasis added), as opposed to *shall be* so punished. Thus, the clear wording of this section merely provides for the *possibility* of persons being tried in Kenya for article 70-related offences: it does not, expressly or impliedly, purport to confer primary jurisdiction on the Kenyan courts over such offences. As described above, this is consistent with the provisions of the Statute and Rules which permit but do not require the Court to refer article 70 cases to a State Party for prosecution. In any event, the

¹⁶ The Prosecution notes, additionally, that upon issuance of the warrants, the request for arrest and surrender requested the Republic of Kenya "if appropriate and in accordance with article 97 of the Statute to consult the Court without delay in the event it identifies problems which may impede or prevent the execution of the present request"; ICC-01/09-01/15-4-Conf-Exp, p. 5.

purpose of such implementing legislation is to give domestic effect to the treaty obligations of the Republic of Kenya to cooperate fully with the Court pursuant to articles 86 and 88 of the Statute. Were a conflict to exist, this would not relieve a State of its duty to give effect to its treaty obligations.¹⁷

V. Relief Sought

14. In light of the above, the Prosecution requests the Chamber for an order clarifying that:

- (i) the complementarity regime under article 17 of the Statute has no application in the investigation and prosecution of offences under article 70, and thus the Court, not the State Party concerned, has primary jurisdiction over such offences;
- (ii) the Single Judge had discretion to decide whether or not the Court should exercise its jurisdiction over these offences or alternatively to refer the matter to the Kenyan Authorities for prosecution;
- (iii) in exercising such discretion, the Single Judge was permitted but not obliged to consult with the Kenyan authorities; and therefore
- (iv) the Republic of Kenya remains under the obligation to execute the request for arrest and surrender of Paul Gicheru and Philip Kipkoech Bett.

¹⁷ Article 27, Vienna Convention on the Law of Treaties. The Prosecution also recalls the general rule in article 59(4) that “[i]t shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b)”. While it is clear that the procedures under article 59 do not apply to article 70 offences, given the simplified scheme created by rule 165(2), it would be illogical for the Court to enjoy primacy over article 70 offences while permitting the competent authorities of the custodial State to challenge whether the Court’s warrants were properly issued.

15. The Prosecution further requests that such a decision be urgently notified to the Kenyan authorities in advance of the pending appeal against the decision of the High Court.



Fatou Bensouda, Prosecutor

Dated this 1st day of February 2018

At The Hague, The Netherlands