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

Date: 30 March 2021

Date of submission: 03 May 2023

**PRE-TRIAL CHAMBER II**

**Before:** Judge Antoine Kesia-Mbe Mindua, Presiding Judge  
Judge Tomoko Akane  
Judge Rosario Salvatore Aitala

**SITUATION IN THE REPUBLIC OF KENYA**

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

**Public**

Lesser Public Redacted Version of "Prosecution's Response to 'Transmission of a letter received from Mr Paul Gicheru and observations of the Registry on such a letter' (ICC-01/09-01/15-21-US-Exp)", 5 May 2020, ICC-01/09-01/15-22-US-Exp, 30 March 2021, ICC-01/09-01/15-22-Red

**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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**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

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

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Osvaldo Zavala Giler

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## INTRODUCTION

1. In light of the Registry's filing of its "Transmission of a letter received from Mr Paul Gicheru and observations of the Registry on such a letter",<sup>1</sup> the Office of the Prosecutor<sup>2</sup> hereby confirms its receipt of this letter and updates Pre-Trial Chamber II ("the Chamber") on the steps taken to date in response.

## CLASSIFICATION

2. Pursuant to regulation 23bis(2) of the Regulations of the Court ("RoC"), this response is filed as under seal, *ex parte*, only available to the Office of the Prosecutor, as it responds to a filing of a similar classification.

## SUBMISSIONS

3. The Prosecution confirms that it is in receipt of the above-mentioned letter and is actively pursuing steps to secure the voluntary surrender of Mr Paul Gicheru.<sup>3</sup>
4. Since receipt of the letter, the Prosecution has been in contact with Gicheru, both telephonically and by email, for the following purposes:
  - (i) To obtain further information regarding the alleged "compassionate health and family reasons" for which he seeks to have the warrant of arrest withdrawn in order to establish whether such request is well founded;
  - (ii) To explore any conditions and modalities for his offer to "co-operate and to voluntarily appear before the court"; and
  - (iii) [REDACTED]
  - (iv) [REDACTED]

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<sup>1</sup> ICC-01/09-01/15-21-US-Exp ("Registry's Observations").

<sup>2</sup> "Prosecution" or "OTP".

<sup>3</sup> "Gicheru" or "the Suspect".

5. To date, the Prosecution has established from Gicheru<sup>4</sup> that:
  - (i) [REDACTED].<sup>5</sup>
  - (ii) [REDACTED]
  - (iii) Due to the above, he seeks withdrawal of the warrant of arrest so that he may travel internationally, [REDACTED] to receive medical treatment, without risk of arrest.
6. The Prosecution has not yet independently verified the information provided by the Suspect. The information is also lacking in some important details and the Prosecution has therefore requested Gicheru to supply:
  - (i) Further medical documents outlining his treatment/prognosis and why he requires to be treated abroad; and
  - (ii) Additional information regarding the support/responsibilities he has [REDACTED].
7. Gicheru has agreed to supply this information, but advises that it might take some time due to COVID-19 related restrictions in Nairobi.
8. But even assuming the information provided to date to be correct, the OTP does not consider this sufficient reason to withdraw the warrant of arrest. The Suspect is by no means unique in having health concerns and family commitments and these should not be a bar to the execution of the warrant of arrest so that he may at last face justice for crimes that touch the core of this Court's ability to fulfil its mandate. Furthermore, there is no guarantee that Gicheru would indeed "co-operate and [...] voluntarily appear before the court" once the warrant was withdrawn, and no way of enforcing cooperation in such event.

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<sup>4</sup> See Annex 1.

<sup>5</sup> [REDACTED].

9. However, the Prosecution does consider that there may be scope for a compromise solution. For instance, the Prosecution considers that it may be possible to reach an agreement with the Suspect that, if he were to voluntarily surrender himself to the Court, the Prosecution would not oppose his interim release<sup>6</sup> on terms that would permit him to travel internationally for the above mentioned purposes, subject to suitable conditions that would adequately ensure that the provisions of article 58(1)(b) are observed. Any such agreement would, of course, be subject to the ultimate decision of the Chamber.
10. However, any discussion of such a proposal with the Suspect will be a delicate one, involving [REDACTED] and carefully considered timing. In this regard, before the Prosecution were to broach this subject with the Suspect, it would be important to know if and when the Registry would be in a position to facilitate his transfer to The Hague should he surrender to the Court, and his possible return to Kenya should he be released under conditions that would permit this.<sup>7</sup>
11. To this end, the Prosecution will request the Registry to provide it with details on the outcome of the assessment that it is conducting “to assess whether and how it can overcome the new operational constraints linked to the COVID-19 global pandemic”.<sup>8</sup>
12. The Prosecution will inform the Chamber of any significant developments.



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**Ms Nazhat Shameen Khan, Deputy Prosecutor**

Dated this 3rd day of May 2023

At The Hague, The Netherlands

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<sup>6</sup> In light of his voluntary cooperation, should this materialise, [REDACTED].

<sup>7</sup> Taking into account the medical conditions that he reportedly suffers.