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**International
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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 PHILIPP
KIPKOECH BETT***

Public

Public Lesser Redacted Version of “Prosecution’s additional submissions in compliance with order ICC-01/09-01/15-23-US-Exp’, ICC-01/09-01/15-24-US-Exp, 17 July 2020”, 30 March 2021

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Other

Introduction

1. As ordered¹ by Pre-Trial Chamber II,² the Prosecution files its additional submissions on the conditions underlying the warrant of arrest³ for Mr Gicheru.⁴
2. There remain reasonable grounds to believe that Gicheru has committed crimes within the jurisdiction of the Court. While certain factors underpinning the necessity for arrest have changed, there remain sufficient grounds to maintain the warrant of arrest against Gicheru. In the Prosecution's view, maintaining the warrant of arrest also represents the best option to secure Gicheru's appearance before the Court.

Classification

3. 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 an order of a similar classification.

Submissions

4. At the outset, the Prosecution wishes to stress the seriousness of attempts to thwart the proper administration of justice such as those addressed in this case. Every case that has come to trial before the Court to date has been affected, to a greater or lesser extent, by attempts to interfere with Prosecution witnesses. In the *Ruto and Sang* case, such interference was one of the main reasons for the collapse of the Prosecution case. Indeed, it is no exaggeration to state that the core mission of the Court – to end impunity for the most serious crimes of concern to the international community – depends on the extent to which it can successfully repress and punish attempts to derail its truth seeking function and fulfil its obligations under article 68(1) to protect its witnesses. Thus, the Prosecution would strenuously oppose any suggestion that someone suspected on reasonable grounds of serious offences

¹ ICC-01/09-01/15-23-US-Exp.

² "The Chamber".

³ "Warrant".

⁴ "Gicheru" or "the Suspect".

against the administration of justice could escape justice simply due to the fact that they are able to avoid the execution of their arrest warrants for a protracted period. This would seriously degrade the deterrent effect of potential prosecutions under article 70.

5. Although rule 163(2) provides for a period of prescription of five years for article 70 offences, it specifically provides that this shall be interrupted by the initiation of an investigation or prosecution. In the instant case, both an investigation and prosecution have been initiated, the latter formalised through the issuing of the Warrant.⁵ Thus, the clear intention of the drafters was that the mere non-execution of a warrant of arrest should not terminate proceedings.

Grounds relied on in the Prosecution's article 58(1) application

6. The Single Judge found that the evidence presented by Prosecution in its article 58(1) application⁶ established reasonable grounds to believe that Gicheru had committed crimes within the jurisdiction of the Court,⁷ namely corruptly influencing no fewer than six Prosecution witnesses.⁸ The Single Judge described the campaign to corrupt prosecution witnesses as “comprehensive and systematic”.⁹ The Single Judge also considered that there were “reasons overwhelmingly militating in favour of the exercise of the jurisdiction of the Court”.¹⁰ These reasons underpinning all these findings still hold true today.
7. If anything, the evidence against Gicheru of the commission of these crimes has strengthened since then. The Prosecution witnesses¹¹ and the corroborating evidence described in the Application are still available. Significantly, in 2018,

⁵ The legal texts do not specify when precisely a prosecution commences. It seems this would in fact be upon filing of an article 58(1) or (4) request by the Prosecutor, at which time the Registrar will open a case record, subject to an order of the Chamber seized with the matter (regulation 20(2), Regulations of the Registry). However, at the latest, the prosecution is commenced once the Chamber grants judicial approval by issuing a warrant of arrest or summons.

⁶ ICC-01/09-144-US-Exp (“Application”).

⁷ Article 58(1)(a).

⁸ ICC-01/09-01/15-1-Conf-Exp, para. 22 (“Article 58(1) Decision”).

⁹ *Id.*, para. 28.

¹⁰ Article 58(1) Decision, para. 6.

¹¹ With the exception of P-0397, who had already gone missing under suspicious circumstances prior to the Application; *See* Application para. 46.

Gicheru agreed to be interviewed by the OTP in order to present his side. This interview took place on 20 September 2018 and was conducted in accordance with article 55(2).¹² While he denied the charges and professed not to have had any dealings with the six witnesses named in the Application,¹³ he did confirm various phone numbers alleged to have been used in the Scheme, including his office landline. He was unable to explain the two recorded conversations between himself and P-0397, who he claimed not to know, including one using the said office landline.¹⁴ He also confirmed the authenticity of a business card provided to the Prosecution by P-0397, which the latter alleges Gicheru gave to him during the course of their corrupt dealings.

8. Regarding the necessity for arrest,¹⁵ the Prosecution relied in its Application on all three of the non-cumulative grounds listed in article 58(1)(b).¹⁶ The Single Judge found that all three grounds had been established.¹⁷ The Prosecution considers that, while certain circumstances have changed or evolved since the issuing of the warrant of arrest in 2015, the arrest of Gicheru remains necessary for at least two of the three non-cumulative reasons listed in article 58(b),¹⁸ namely: (i) to ensure his appearance at trial; and (ii) to ensure that he does not obstruct or endanger the investigation and/or subsequent court proceedings.
9. As regards the necessity of arrest to secure appearance before the Court,¹⁹ the Prosecution notes that the charges may now be regarded in an even more serious light, given that the *Ruto and Sang* trial has since been terminated largely due to the very witness bribery and recantation scheme²⁰ for which Gicheru now stands accused, thus increasing the incentive to evade justice. Although Gicheru has at

¹² The Prosecution does not consider it necessary to annex the lengthy transcripts of this interview for the purposes of these submissions, but will gladly provide these to the Chamber if requested.

¹³ Application.

¹⁴ As described in the Application, paras. 43-44.

¹⁵ Article 58(1)(b).

¹⁶ Application, paras. 120-124.

¹⁷ Article 58(1) Decision, paras. 26-27.

¹⁸ Application, paras. 120-123.

¹⁹ Article 58(1)(b)(i).

²⁰ "Scheme"; See Application, paras. 16-18.

times indicated his willingness to cooperate with the Court, including in his latest letter,²¹ the Prosecution is of the view that his mere say-so is insufficient guarantee of cooperation, as explained more fully in paragraphs 16-17 below, and that maintaining the warrant of arrest provides the best prospect of securing his attendance at trial.

10. As regards the necessity to prevent the obstruction of the investigation and/or subsequent court proceedings,²² the Prosecution notes that the influence of the members of the Scheme remains significant, particularly – though not exclusively – in the Rift Valley. The ultimate beneficiary of the Scheme, William Samoei Ruto, is still the Deputy President of Kenya. Additionally, since the Warrant was issued, Gicheru has been appointed to a senior position in a Kenyan State Corporation,²³ providing reasonable grounds to believe that his ability to obstruct the Prosecution’s investigations and any subsequent proceedings may in fact have increased.
11. As the *Ruto and Sang* trial has since been terminated, the final ground relied upon in the Application²⁴ has lost much – but not all – of its force. The Prosecution notes that the trial was terminated without prejudice. Should further evidence implicating Ruto and Sang come to light, it is possible that charges could be reinstated, in which case the need to prevent Gicheru from committing further crimes against the administration of justice may once again come to the fore. However, the Prosecution acknowledges that, as matters stand, this remains a speculative possibility, and thus does not rely on this ground for the purposes of these submissions.

Issues raised in Gicheru’s letter

²¹ ICC-01/09-01/15-21-US-Exp-Anx.

²² Article 58(1)(b)(ii).

²³ Board Chairman of the Export Processing Zones Authority (EPZA), <https://epzakenya.com/about-us/leadership/>. Gicheru also confirmed this in his article 55(2) interview.

²⁴ Application, para. 124.

12. As already foreshadowed in the Prosecution's Response to "Transmission of a letter received from Mr Paul Gicheru and observations of the Registry on such a letter",²⁵ the Prosecution does not consider the issues raised in Gicheru's letter affect the grounds for arrest under article 58(1)(b)(i) and (ii), described above.
13. The Prosecution observes that Gicheru has not provided the additional information requested by the Prosecution in relation to his health condition and responsibilities to his children,²⁶ allegedly due to the COVID-19 related restrictions still prevailing in Kenya, but will assume *arguendo* that they are true.
14. As regards Gicheru's alleged health conditions, on the face of it none of these conditions – individually or cumulatively – would prevent the execution of the warrant of arrest or the subsequent trial of the Suspect. Further, whether Gicheru appeared before the Court by virtue of an arrest warrant or pursuant to a summons would appear to make little difference to these conditions.
15. As regards his need to travel [REDACTED], this does not provide any justification for withdrawing the warrant of arrest against him. Many suspects in criminal matters have [REDACTED] commitments, but these cannot take precedence over the proper administration of justice.
16. Finally, as to Gicheru's undertaking "to co-operate and to voluntarily appear before the court at any time if required to do so", the Prosecution observes that little, if any, weight can be placed on the personal undertaking of a person accused of serious crimes against the administration of justice. The evidence placed before the Single Judge has established reasonable grounds to believe that he was prepared to bribe Prosecution witnesses in an attempt to thwart the trial of others. Logic dictates that it would be naive to expect him to honour any undertakings in relation to his own prosecution, absent adequate guarantees that he will do so. In this regard, the Prosecution notes that for several years Gicheru has been engaging in litigation in

²⁵ ICC-01/09-01/15-22-US-Exp, para. 8 ("Response").

²⁶ Response, paras. 6-7.

the Kenyan courts to block his arrest and surrender to the Court, which appears to be at odds with his more recent offer of cooperation.

17. In the Prosecution's view, only a genuine, substantial and unequivocal act of cooperation with the Court, though either his surrender²⁷ or voluntary appearance at the seat of the Court, would suffice to mitigate the article 58(1) risks described above. As foreshadowed in the Response,²⁸ in these circumstances, the Prosecution considers that it may be possible to agree on conditions²⁹ that would sufficiently mitigate the remaining article 58(1) risks that would permit interim release, subject to the determination of the Chamber.

Additional factors in favour of arrest

18. The Prosecution considers that maintaining the warrant of arrest represents the best opportunity of securing Gicheru's appearance before the Court. [REDACTED] Put simply, the Warrant is [REDACTED]. Since there appears to be little prospect [REDACTED], the best prospect of executing the Warrant will be to [REDACTED].

19. [REDACTED]

20. In the interim, the Prosecution will continue to engage with Gicheru with a view to securing his voluntary surrender/appearance. The Prosecution is engaging with the Registry to devise an operational plan to facilitate such a voluntary surrender/appearance notwithstanding the operational constraints linked to the COVID-19 global pandemic.

Conclusion

21. For the reasons described above, the Prosecution considers that the conditions underlying the warrant of arrest for Mr Gicheru have not changed significantly

²⁷ Thus facilitating the execution of the warrant of arrest by the Registry.

²⁸ Response, para. 9.

²⁹ Including, at least, a substantial bond, security or surety under rule 119(1)(g).

since the time of its issuance. Accordingly, there are no grounds to set aside the warrant of arrest issued by the Single Judge on 10 March 2015.



Ms Nazhat Shameen Khan, Deputy Prosecutor

Dated this 29th day of May 2023

At The Hague, The Netherlands