

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 1 March 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*, Prosecutor only**

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

To be notified, in accordance with regulation 31 of the Regulations of the Court, to:

**The Office of the Prosecutor**

Fatou Bensouda

James Stewart

**Counsel for the Defence**

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
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**

Herman von Hebel

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**Pre-Trial Chamber II** issues the following decision on the “Prosecution request for an urgent order clarifying the Court’s competence in respect of article 70 offences”, filed on 1 February 2018 (“Request”).<sup>1</sup>

1. On 10 March 2015, the Single Judge of Pre-Trial Chamber II issued, under seal, warrants of arrest for Paul Gicheru and Philip Kipkoech Bett for offences against the administration of justice under article 70(1)(c) of the Statute.<sup>2</sup> In the same decision, the Single Judge also ordered the Registrar to prepare and transmit to Kenya: (i) a request for the arrest and surrender of the suspects; and (ii) a request for search of the suspects’ persons and their premises, and for the seizure and transmission to the Court of any relevant evidence.<sup>3</sup> These requests were notified to Kenya on 1 April 2015.<sup>4</sup>
2. On 10 September 2015, this Chamber unsealed and made public the existence of the warrants of arrest.<sup>5</sup>
3. From a report of the Kenyan Director of Criminal Investigations dated 13 November 2015, transmitted to the Chamber on 27 January 2016,<sup>6</sup> it transpires that the suspects had been arrested, released on bail by the High Court of Kenya, sometime on or before 30 July 2015, and that there had been no search and seizure in light of the “urgency in arresting the suspects after they were located within Nairobi and to comply with the Constitution of Kenya provision of presenting arrested suspects before a court of law within 24 hours”.<sup>7</sup> According to the same report, the matter remained pending before the High Court of Kenya.<sup>8</sup>

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<sup>1</sup> ICC-01/09-01/15-15-Conf-Exp.

<sup>2</sup> “Decision on the ‘Prosecution’s Application under Article 58(1) of the Rome Statute’”, ICC-01/09-01/15-1-Conf-Exp.

<sup>3</sup> *Ibid.*, pp. 18-19.

<sup>4</sup> ICC-01/09-01/15-7-Conf-Exp, with confidential *ex parte* annexes.

<sup>5</sup> “Order unsealing the warrant of arrest and other documents”, ICC-01/09-01/15-11.

<sup>6</sup> ICC-01/09-01/15-13-Conf-Exp-Anx1.

<sup>7</sup> *Ibid.*, p. 3.

<sup>8</sup> *Id.*

4. On 15 January 2018, the Chamber received from the Registry, *inter alia*, a letter by the Embassy of Kenya in the Netherlands, dated 5 January 2018,<sup>9</sup> conveying a report by the Attorney General, dated 30 November 2017. The report states that on 16 November 2017 the High Court of Kenya rendered a ruling in which it “dismissed the application for [the suspects’] surrender to the ICC” (“High Court Ruling”), and that “[t]he Office of the Director of Public Prosecutions has applied for the certified proceedings and had filed a notice of Appeal against the decision of the High court”.<sup>10</sup> Copies of the High Court Ruling<sup>11</sup> and of the notice of appeal were enclosed with the Attorney General’s report.<sup>12</sup>
5. On 1 February 2018, the Prosecutor filed the Request in which she submits that the errors identified by the High Court of Kenya in the procedure before the Court leading to the issuance of the warrants of arrest “arise from a fundamental misunderstanding of the statutory regime governing article 70”.<sup>13</sup> According to the Prosecutor, article 70 offences are excluded from the statutory regime governing the principle of complementarity,<sup>14</sup> and the Court enjoys primary jurisdiction over the investigation and prosecution of article 70 offences, unless and until it exercises its discretion to refer the matter to a State Party.<sup>15</sup>
6. The Prosecutor 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;

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<sup>9</sup> ICC-01/09-01/15-14-Conf-Exp-AnxIII, p. 2.

<sup>10</sup> *Ibid.*, p. 3.

<sup>11</sup> *Ibid.*, pp. 4-37.

<sup>12</sup> *Ibid.*, pp. 38-40.

<sup>13</sup> Request, para. 10.

<sup>14</sup> *Id.*

<sup>15</sup> *Ibid.*, para. 11.

(ii) the Single Judge had discretion to decide whether or not the Court should exercise its jurisdiction over these offences or alternatively 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.”<sup>16</sup>

7. It is clear from this that the Prosecutor requests that the Chamber issue an order clarifying certain questions of law purportedly wrongly decided in the High Court Ruling, with the overt purpose of influencing further domestic proceedings in Kenya.
8. The Prosecutor files this Request pursuant to article 64(6), (7) of the Statute and regulation 29 of the Regulations of the Court. In the view of the Chamber, none of these provisions provides a legal basis for the issuance of an order as requested by the Prosecutor. Article 64(6) of the Statute deals with the powers of a Trial Chamber prior to or during a trial – such as for example requiring the attendance and testimony of witnesses and production of evidence, providing for protection of confidential information, or providing for the protection of accused, witnesses and victims, while article 64(7) of the Statute concerns the publicity of trial proceedings and possible restrictions thereof. Regulation 29 of the Regulations of the Court provides that in case of non-compliance by participants with the regulations or an order of a Chamber made thereunder, the Chamber may issue any order deemed necessary in the interests of justice. As is obvious from a plain reading of these provisions, none of them confers upon the Pre-Trial Chamber the power to issue orders providing clarification in the context of national proceedings conducted in relation to requests for arrest and surrender by the Court in

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<sup>16</sup> *Ibid.*, para. 14.


circumstances such as the present. The Prosecutor also does not further elaborate on how in her view these provisions would justify the issuance of such an order by the Chamber.

9. In a similar vein, and more generally, the Chamber considers that there is no other legal basis for the issuance of such an order in the Statute, in particular not in article 57(3) of the Statute, which is the leading provision as concerns the judicial competence of the Pre-Trial Chamber, and does not contain in any of its sub-provisions references that could be interpreted as giving the Chamber the power to provide clarification in the context of national proceedings related to requests for arrest and surrender by the Court.
10. As is apparent from the information available to the Chamber, following notification of the Court's request for arrest and surrender, Kenya is currently undertaking domestic proceedings in execution of said request. These proceedings underlie the domestic law of Kenya, and, as outlined above, there is no provision in the Court's legal framework providing the power to issue orders providing clarification in this context.

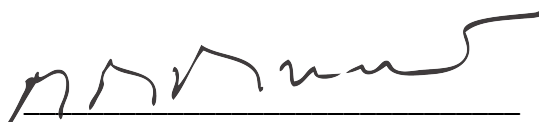
**FOR THESE REASONS, THE CHAMBER**

**REJECTS** the Request.

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



**Judge Cuno Tarfusser**  
**Presiding Judge**



**Judge Marc Perrin de Brichambaut**



**Judge Chang-ho Chung**

Dated this 1 March 2018

At The Hague, The Netherlands