

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

*Original: English*

No.: ICC-01/09-01/15  
Date: 2 December 2020

**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 with Confidential Annex A**

**Paul Gicheru's Response to Observations submitted by the Republic of Kenya  
and the Kingdom of the Netherlands pursuant to Pre-Trial Chamber A's Order of  
12 November 2020**

**Source: Counsel for Paul Gicheru**

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

***Court to:***

**The Office of the Prosecutor**

Ms. Fatou Bensouda, Prosecutor

Mr. James Stewart

Mr. Anton Steynberg

**Counsel for the Defence**

Mr. Michael G. Karnavas

**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**

The Competent Authorities of the  
Republic of Kenya

The Competent Authorities of the  
Kingdom of the Netherlands

**Other**

**REGISTRY**

**Registrar**

Mr. Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

Mr. Paul Gicheru, through his Counsel (“the Defence”), hereby responds to the observations submitted by the Republic of Kenya (“Kenya”) and the Kingdom of the Netherlands (“the Netherlands”) pursuant to Pre-Trial Chamber A’s Order of 12 November 2020.<sup>1</sup> Kenya misapprehends the admissibility regime for Article 70 offences and the Netherlands misinterprets the Single Judge’s Order. Accordingly, the Defence requests the Single Judge to clarify the admissibility regime in Article 70 offences and the intended purpose of her Order and invite Kenya and the Netherlands to provide further observations. Annex A to this response is classified as confidential pursuant to Regulation 23bis(1) of the Regulations of the Court as it contains sensitive information personal to Mr. Gicheru.

## **I. BACKGROUND**

1. On 9 November 2020, Mr. Gicheru requested to be provisionally released to Kenya.<sup>2</sup> The Prosecution responded two days later that it did not oppose Mr. Gicheru’s conditional release.<sup>3</sup>
2. The following day, the Single Judge invited Kenya to provide observations as its willingness and ability to enforce possible conditions of provisional release under Rule 119(1) of the Rules of Procedure and Evidence (“Rules”) and facilitate Mr. Gicheru’s travels between Kenya and the Netherlands for the purposes of the Article 70 proceedings.<sup>4</sup> The Single Judge also invited the Netherlands to provide observations as to its willingness and ability to facilitate Mr. Gicheru’s travels “as

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<sup>1</sup> *Prosecutor v. Gicheru and Bett*, [ICC-01/09-01/15-54](#), Transmission of observations submitted by the Republic of Kenya and the Kingdom of the Netherlands pursuant to Pre-Trial Chamber A’s Order ICC-01/09-01/15-42 of 12 November 2020, 27 November 2020, Annexes I and II.

<sup>2</sup> *Prosecutor v. Gicheru and Bett*, ICC-01/09-01/15-38-Conf, The Accused Person’s Request for Interim Release under the Provisions of Article 60(2) of the Rome Statute, 9 November 2020.

<sup>3</sup> *Prosecutor v. Gicheru and Bett*, ICC-01/09-01/15-39-Conf, Prosecution’s response to “The Accused Person’s [Urgent] Request for Interim Release under the Provisions of Article 60(2) of the Rome Statute,” 11 November 2020.

<sup>4</sup> *Prosecutor v. Gicheru and Bett*, [ICC-01/09-01/15-42](#), Order Inviting Observations Pursuant to Rule 119(3) of the Rules of Procedure and Evidence and Regulation 51 of the Regulations of the Court, 12 November 2020, para. 11 (“Order”).

well as the possibility of Mr Gicheru temporarily residing in the Netherlands for the purposes of the proceedings in the present case.”<sup>5</sup>

3. Kenya responded that it could not assist the court in enforcing conditions of provisional release because the High Court of Kenya had quashed Mr. Gicheru’s arrest warrant and directed Kenya not to take any action in furtherance of the request for his surrender.<sup>6</sup>
4. By way of background, the High Court of Kenya found in 2017 that in issuing the arrest warrant and request for cooperation, the ICC Pre-Trial Chamber denied Kenya the opportunity to investigate and prosecute the offences under its International Crimes Act.<sup>7</sup> The High Court considered that it is the primary jurisdiction to try the offences and that the ICC Pre-Trial Chamber should have consulted with Kenya “as required under Rule 162(1)” before making a finding that effective national prosecutions were unlikely to take place.<sup>8</sup>
5. In its observations, however, Kenya noted that although Mr. Gicheru did not comply with Section 41 of the International Crimes Act by notifying the High Court that he formally consents to his surrender, he still has an opportunity to do so – which would allow the High Court to reconsider and provide guidance on Mr. Gicheru’s provisional release.<sup>9</sup>
6. The Netherlands responded that: (i) it would facilitate Mr. Gicheru’s travels for the purposes of the proceedings; (ii) its understanding was that “interim release will ... terminate upon his custody to the Court”; and (iii) it would make arrangements to transport Mr. Gicheru back to the Detention Unit upon his return to the

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<sup>5</sup> [Order](#), para. 12.

<sup>6</sup> *Prosecutor v. Gicheru and Bett*, [ICC-01/09-01/15-54-AnxI](#), Transmission of observations submitted by the Republic of Kenya and the Kingdom of the Netherlands pursuant to Pre-Trial Chamber A’s Order ICC-01/09-01/15-42 of 12 November 2020, 27 November 2020, Annex I, Response of the Attorney General of Kenya dated 24 November 2020, paras. 19-20 (“Response of Kenya”).

<sup>7</sup> [Annex to Response of Kenya](#), paras. 68-71.

<sup>8</sup> [Annex to Response of Kenya](#), para. 78(a).

<sup>9</sup> [Response of Kenya](#), paras. 21-23.

Netherlands.<sup>10</sup> The Netherlands provided no observations on the possibility of Mr. Gicheru temporarily residing in the Netherlands for the purposes of the Article 70 proceedings.

7. On 30 November 2020, the Defence requested the Division of External Operations to submit Mr. Gicheru's signed consent and a letter requesting Kenya's reconsideration to the Attorney General of Kenya.<sup>11</sup>

## II. ARGUMENT

### *Kenya Misapprehends the Admissibility Regime for Article 70 Offences*

8. Kenya's observations, noting that its High Court considered that Kenya has primary jurisdiction over the offences and the ICC Pre-Trial Chamber failed was required to consult with it under Rule 162(1),<sup>12</sup> misapprehends the admissibility regime for Article 70 cases.
9. Rule 162, which governs the Court's jurisdiction over Article 70 offences, operates with a presumption that the ICC will have jurisdiction since these offences concern the ICC's administration of justice. Rule 162(1) gives the Court *discretion* to consult with States Parties before deciding to exercise jurisdiction but does not require consultation as a precondition to admissibility.<sup>13</sup> Rule 162(2) enumerates factors the Court *may* consider in determining whether to exercise jurisdiction over Article 70 offences, including "the availability and effectiveness of prosecution in a State Party," but does not require the Court to engage Article 17 analysis of a States Party's willingness and ability to prosecute in domestic courts.<sup>14</sup>

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<sup>10</sup> *Prosecutor v. Gicheru and Bett*, [ICC-01/09-01/15-54-AnxII](#), Transmission of observations submitted by the Republic of Kenya and the Kingdom of the Netherlands pursuant to Pre-Trial Chamber A's Order ICC-01/09-01/15-42 of 12 November 2020, 27 November 2020, Annex II ("Response of the Netherlands").

<sup>11</sup> Confidential Annex A.

<sup>12</sup> [Annex to Response of Kenya](#), para. 78(a).

<sup>13</sup> See *Prosecutor v. Bemba et al.*, [ICC-01/05-01/13-1-tENG](#), Warrant of Arrest for Jean Pierre BEMBA GOMBO, Aimé KILOLO MUSAMBA, Jean-Jacques MANGENDA KABONGO, Fidèle BABALA WANDU and Narcisse ARIDO, 20 November 2013, para. 7.

<sup>14</sup> Rule 162(3) provides that Part 2 of the Statute (including Article 17's admissibility regime for Article 5 core crimes) does not apply.

*The Netherlands misinterprets the Single Judge's Order*

10. The Netherlands provided no observations on whether Mr. Gicheru could temporarily reside in the Netherlands for the purposes of the Article 70 proceedings.

11. The Netherlands misinterprets the Single Judge's Order, which specifically requested observations on "the possibility of Mr Gicheru temporarily residing in the Netherlands, for the purposes of the proceedings in the present case."<sup>15</sup> The Single Judge did not only ask the Netherlands whether it would facilitate Mr. Gicheru's travel between Kenya and the Netherlands, but also whether he could temporarily reside in the Netherlands for the purposes of the proceedings – just as the accused in *Bemba et al.* were permitted to do while their trial was ongoing.<sup>16</sup>

**WHEREFORE**, for the above reasons, the Defence respectfully requests the Single Judge to:

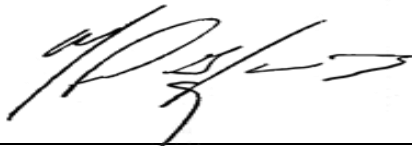
- A. CLARIFY** the admissibility regime applicable to Article 70 cases and the intended purpose of her Order of 12 November 2020;
- B. INVITE** Kenya to provide further observations in light of the admissibility regime applicable to Article 70 cases;
- C. INVITE** the Netherlands to provide further observations on the possibility of Mr. Gicheru to temporarily residing in the Netherlands for the purposes of the Article 70 proceedings; and
- D. ORDER** the Registrar to transmit the present response to the competent authorities of Kenya and the Netherlands.

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<sup>15</sup> [Response of the Netherlands](#).

<sup>16</sup> *Prosecutor v. Bemba et al.*, [ICC-01/05-01/13-1151](#), Decision Regarding Interim Release, 17 August 2015, para. 28, p. 15. The Trial Chamber permitted the Accused in *Bemba et al.* to be provisionally released and required their attendance in The Hague at trial, without requiring their detention.

Respectfully submitted, 2 December 2020,  
In The Hague, the Netherlands.



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**Michael G. Karnavas**  
**Counsel for Mr. Paul Gicheru**