



Original: English

**No. ICC-01/09-01/20
Date: 31 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

Public

Order Inviting Further Observations from the Republic of Kenya

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart

Counsel for the Defence

Mr Michael G. Karnavas

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
for Participation/Reparations**

**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

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

PRE-TRIAL CHAMBER A (ARTICLE 70) of the International Criminal Court issues this Order Inviting Further Observations from the Republic of Kenya.

1. On 10 March 2015, Pre-Trial Chamber II, in its then composition, issued warrants of arrest against Mr Gicheru and Mr Bett for their alleged responsibility for offences against the administration of justice under article 70(1)(c) of the Rome Statute (the ‘Statute’).¹
2. On 2 November 2020, Mr Gicheru surrendered himself to the authorities of the Kingdom of the Netherlands (‘the Netherlands’).
3. On 2 November 2020, Pre-Trial Chamber II requested the President of the Pre-Trial Division to constitute a chamber composed of one judge to exercise the functions and powers of the Pre-Trial Chamber in the present case in accordance with rule 165(2) of the Rules of Procedure and Evidence (the ‘Rules’), as drawn up by the judges of the Court acting under article 51(3) of the Statute on 10 February 2016 (‘Provisional Rule 165’), and regulation 66*bis*(1) of the Regulations of the Court, which was adopted and entered into force on the same day.²
4. On 2 November 2020, the President of the Pre-Trial Division constituted the present Chamber pursuant to the aforementioned provisions.³
5. On 3 November 2020, following the completion of domestic proceedings in the Netherlands, Mr Gicheru was surrendered to the Court and arrived at the Court’s Detention Centre.

¹ Decision on the “Prosecution’s Application under Article 58(1) of the Rome Statute”, ICC-01/09-01/20-1-Conf-Exp; a public redacted version was notified on the same day, *see* ICC-01/09-01/20-1-Red.

² Request to the President of the Pre-Trial Division to constitute a Chamber for the purposes of conducting proceedings under article 70 of the Rome Statute, ICC-01/09-01/20-31-US-Exp.

³ Decision Constituting a Chamber Composed of one Judge from the Pre-Trial Division to Exercise the Powers and Functions of the Pre-Trial Chamber in the Present Case, ICC-01/09-01/20-32. On 10 December 2020, the Chamber found that Provisional Rule 165 is applicable and that it has been properly constituted as a chamber composed of one judge to exercise the functions and powers of the Pre-Trial Chamber in the present case: *see* Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence, ICC-01/09-01/20-61. On 23 December 2020, the Chamber granted leave to the Office of the Public Counsel for the Defence to appeal this decision: *see* Decision on the ‘Request for leave to appeal the Decision on the Applicability of Provisional Rule 165’, ICC-01/09-01/20-68.

6. On 6 November 2020, in accordance with the Chamber's order dated 4 November 2020,⁴ Mr Gicheru appeared before the Chamber pursuant to article 60(1) of the Statute and rules 121(1) and 163(1) of the Rules.

7. On 9 November 2020, the Chamber received 'The Accused Person's [sic] Request for Interim Release under the Provisions of Article 60(2) of the Rome Statute' on behalf of Mr Gicheru (the 'Interim Release Request').⁵ Mr Gicheru requests conditional release to the Republic of Kenya ('Kenya').⁶

8. On 11 November 2020, the Chamber received the 'Prosecution's response to "The Accused Person's [Urgent] Request for Interim Release under the Provisions of Article 60(2) of the Rome Statute"'.⁷ The Prosecutor does not oppose the Interim Release Request.⁸

9. On 12 November 2020, the Chamber issued the 'Order Inviting Observations Pursuant to Rule 119(3) of the Rules of Procedure and Evidence and Regulation 51 of the Regulations of the Court' (the '12 November 2020 Order').⁹ The Chamber invited Kenya and the Netherlands to submit any observations that they consider to be relevant to the Chamber's impending decision on the Interim Release Request.¹⁰

10. On 27 November 2020, the Chamber received the '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'.¹¹ Kenya provided its observations pursuant to the 12 November 2020 Order on 24 November 2020 (the 'Observations by Kenya').¹² Kenya *inter alia* submits that 'there is a binding decision by the High Court lifting the said warrants for the arrest and surrender of Mr Gicheru and Mr. Bett and directing Kenya not to take any action in furtherance of the request for the surrender of the two individuals'.¹³ Kenya adds that 'Mr. Gicheru

⁴ Order Setting the Date for the Initial Appearance of Mr Gicheru, ICC-01/09-01/20-34.

⁵ ICC-01/09-01/20-38-Conf, together with four confidential annexes. The Chamber clarifies that Mr Gicheru is a person subject to a warrant of arrest at the current stage of the proceedings and he is therefore not an accused.

⁶ ICC-01/09-01/20-38-Conf, paras 4, 9, p. 12.

⁷ ICC-01/09-01/20-39-Conf, together with one confidential annex.

⁸ ICC-01/09-01/20-39-Conf, para. 1.

⁹ ICC-01/09-01/20-42.

¹⁰ ICC-01/09-01/20-42, para 11-12.

¹¹ ICC-01/09-01/20-54, together with public annexes I and II.

¹² ICC-01/09-01/20-54-AnxI.

¹³ ICC-01/09-01/20-54-AnxI, para. 19.

did not comply with [the] statutory procedure prior to his voluntary surrender to the Court’ but that ‘the opportunity is still available for Mr. Gicheru to comply with the relevant statutory requirements and provide the High Court with the opportunity to provide guidance insofar as the question of furthering the case against Mr. Gicheru and the possible role of the Government of Kenya is concerned’.¹⁴

11. On 2 December 2020, the Chamber received ‘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’.¹⁵ The Defence *inter alia* submits that, on 30 November 2020, it requested ‘the Division of External Operations to submit Mr. Gicheru’s signed consent [to be surrendered to the Court] and a letter requesting Kenya’s reconsideration to the Attorney General of Kenya’.¹⁶ The Defence adds that Kenya ‘misapprehends the admissibility regime for Article 70 cases’.¹⁷ According to the Defence, ‘[r]ule 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’.¹⁸ The Defence requested the Chamber to ‘[clarify] the admissibility regime applicable to Article 70 cases and the intended purpose of [its] Order of 12 November 2020’ and invite further observations from Kenya.¹⁹

12. On 4 December 2020, the Chamber received the ‘Prosecution’s Response to the observations submitted by the Republic of Kenya and the Kingdom of the Netherlands and associated requests’.²⁰ The Prosecutor *inter alia* submits that it agrees ‘that the decision of the High Court of Kenya, upon which Kenya relies in its observations, misapprehends the admissibility regime applicable to article 70 offences’.²¹ In addition, according to the Prosecutor, ‘[s]ince [Mr] Gicheru has subsequently travelled to the seat of the Court of his own accord and voluntarily surrendered, the Decision of the High

¹⁴ ICC-01/09-01/20-54-AnxI, paras 22-23.

¹⁵ ICC-01/09-01/20-57.

¹⁶ ICC-01/09-01/20-57 para. 7. Subsequently, the Registry informed the Chamber that counsel for Mr Gicheru submitted the documents to the High Court of Kenya through the Kenyan Embassy in the Netherlands: *see* email from the Registry to the Chamber, dated 8 December 2020, 17:44 hours.

¹⁷ ICC-01/09-01/20-57, para. 8.

¹⁸ ICC-01/09-01/20-57, para. 9.

¹⁹ ICC-01/09-01/20-57, p. 6.

²⁰ ICC-01/09-01/20-58.

²¹ ICC-01/09-01/20-58, para. 2.

Court is also now moot'.²² The Prosecutor adds that, '[i]n any event, [...] it is clear from the terms of this order that it does not constitute a bar to Kenya's enforcement of any of the conditions of interim release envisaged in rule 119 of the Rules of Procedure and Evidence'.²³ The Prosecutor also avers that [Mr] Gicheru has now communicated his consent to surrender in compliance with Section 41 of Kenya's International Crimes Act, which should lead to the removal of any perceived impediment to the enforcement of the conditions of his interim release'.²⁴ However, in the view of the Prosecutor, 'to the extent that Kenya still regards the High Court Decision as binding notwithstanding [Mr] Gicheru's waiver', Kenya 'should provide reasons why the *ex parte* decision should be reconsidered, or confirm that it accepts the ruling as authoritative'.²⁵

13. On 11 December 2020, the Chamber issued the 'Decision Severing the Case against Mr Gicheru'.²⁶

14. The Chamber agrees with the Prosecutor that issues pertaining to the enforcement of conditions in relation to interim release are distinct from issues related to surrender under domestic law.

15. Moreover, the Chamber notes that, following Mr Gicheru's voluntary surrender to the Court, he, in addition, communicated to the High Court of Kenya that he consents to be surrendered to the Court in accordance with the domestic legislation of Kenya. In view of these developments, the Observations by Kenya dated 24 November 2020 no longer reflect the current state of affairs in relation to the Interim Release Request.

16. Accordingly, taking into account these considerations, the Chamber renews its invitation to Kenya to submit any observations that it considers relevant to the Chamber's impending decision on the Interim Release Request and, in particular, as to its willingness and ability to enforce one or more conditions restricting liberty the Chamber could potentially impose, including those set out in rule 119(1) of the Rules with a specific emphasis on the following conditions arising from that provision: '(a) The person must not travel beyond territorial limits set by the Pre-Trial Chamber without the explicit agreement of the Chamber; (b) The person must not go to certain

²² ICC-01/09-01/20-58, para. 2.

²³ ICC-01/09-01/20-58, para. 2.

²⁴ ICC-01/09-01/20-58, para. 2.

²⁵ ICC-01/09-01/20-58, para. 3.

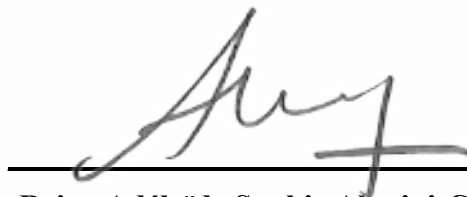
²⁶ ICC-01/09-01/20-62.

places or associate with certain persons as specified by the Pre-Trial Chamber; (c) The person must not contact directly or indirectly victims or witnesses; (d) The person must not engage in certain professional activities; (e) The person must reside at a particular address as specified by the Pre-Trial Chamber; (f) The person must respond when summoned by an authority or qualified person designated by the Pre-Trial Chamber'. In this regard, the Chamber specifically requests Kenya to provide observations as to its willingness and ability to facilitate Mr Gicheru travelling between Kenya and the Netherlands for the purposes of the proceedings in the present case taking into consideration its obligation, as a State Party to the Statute, to cooperate fully with the Court in accordance with article 86 of the Statute.

FOR THESE REASONS, THE CHAMBER HEREBY

- a) **INVITES** the Republic of Kenya to provide the observations specified in paragraph 16 of the present order by no later than 20 January 2021; and
- b) **ORDERS** the Registrar to forthwith transmit the present order to the competent authorities of the Republic of Kenya.

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



Judge Reine Adélaïde Sophie Alapini-Gansou

Dated this Thursday, 31 December 2020

At The Hague, The Netherlands