



**Original: English**

**No. ICC-01/09-01/20  
Date: 18 January 2021**

**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**

Public Redacted Version of 'Decision on the Registry Request for Guidance regarding Mr Gicheru's Belongings and the Prosecutor's Request for Transmittal of Mr Gicheru's [REDACTED]', 18 December 2020, ICC-01/09-01/20-65-Conf

**Decision 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 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**

**Amicus Curiae**

**REGISTRY**

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**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 Decision on the Registry Request for Guidance regarding Mr Gicheru's Belongings and the Prosecutor's Request for Transmittal of Mr Gicheru's [REDACTED].

## **I. PROCEDURAL HISTORY**

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 'Warrants of Arrest' and the 'Statute' respectively).<sup>1</sup>
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.<sup>2</sup>
4. On 2 November 2020, the President of the Pre-Trial Division constituted the present Chamber pursuant to the aforementioned provisions.<sup>3</sup>
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.
6. On 5 November 2020, the Chamber received the 'Report of the Registry on the Arrest and Surrender of Mr Paul Gicheru and Request for Guidance on Mr Paul Gicheru's belongings' (the 'Registry Report').<sup>4</sup>

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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.

7. On 6 November 2020, in accordance with the Chamber’s order dated 4 November 2020,<sup>5</sup> Mr Gicheru appeared before the Chamber pursuant to article 60(1) of the Statute and rules 121(1) and 163(1) of the Rules.

8. On 12 November 2020, the Chamber received the ‘Prosecution’s Response to the “Report of the Registry on the Arrest and Surrender of Mr Paul Gicheru and Request for Guidance on Mr Paul Gicheru’s belongings”’ (the ‘Prosecutor’s Response’).<sup>6</sup>

9. On 27 November 2020, the Chamber received ‘Paul Gicheru’s Response to the Prosecution’s Response to the “Report on the Registry on the Arrest and Surrender of Mr Paul Gicheru and Request for Guidance on Mr Paul Gicheru’s belongings”’ (the ‘Defence Response’).<sup>7</sup>

10. On 10 December 2020, the Chamber issued the ‘Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence’.<sup>8</sup> 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.<sup>9</sup>

11. On 11 December 2020, the Chamber issued the ‘Decision Severing the Case against Mr Gicheru’.<sup>10</sup>

## II. SUBMISSIONS RECEIVED BY THE CHAMBER

### A. The Registry Report

12. The Registry Report indicates that, following Mr Gicheru’s arrival to the ICC Detention Centre, a Dutch police inspector escorting Mr Gicheru ‘handed over to the

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<sup>4</sup> ICC-01/09-01/20-35-Conf, together with confidential annexes I-VII.

<sup>5</sup> Order Setting the Date for the Initial Appearance of Mr Gicheru, ICC-01/09-01/20-34.

<sup>6</sup> ICC-01/09-01/20-41-Conf.

<sup>7</sup> ICC-01/09-01/20-55-Conf. On 13 November 2020, the Chamber ordered Mr Gicheru to, if he so wishes, respond to the Prosecutor’s Response and address any other matters arising from the Registry Report by no later than 19 November 2020, see Order Setting a Time Limit for Mr Gicheru’s Response, ICC-01/09-01/20-44-Conf. On 20 November 2020, the Chamber *inter alia proprio motu* extended the time limit for the Defence to respond to the Prosecutor’s Response and address any other matters arising from the Registry Report to 27 November 2020 at 16:00 hours, see Decision on Request for Extension of Time and Varying Other Time Limits, ICC-01/09-01/20-51-Conf; a public redacted version was notified on the same day, see ICC-01/09-01/20-51-Red.

<sup>8</sup> ICC-01/09-01/20-61.

<sup>9</sup> ICC-01/09-01/20-61, p. 22.

<sup>10</sup> ICC-01/09-01/20-62.

Registry Officer Mr Gicheru's personal belongings which included [REDACTED] which the Dutch [police inspector] indicated was found on Mr Gicheru during the arrest'.<sup>11</sup> According to the Registry Report, these items 'were then handed over to the ICC Detention Centre for procedures foreseen in regulation 192(1) of the [Regulations of the Registry]'.<sup>12</sup>

13. The Registry Report further points out that the Dutch police inspector also 'handed over to the Registry Officer a transparent plastic bag containing Mr Gicheru's personal belongings [REDACTED]' (the 'Five Items').<sup>13</sup> The Registry Report also mentions that [REDACTED].<sup>14</sup> According to the Registry Report, the Five Items were 'placed in the Registry vault on the same day'.<sup>15</sup> The Registry 'requests the Chamber's guidance on any action in relation to the [Five Items]' (the 'Registry Request').<sup>16</sup>

14. Subsequently, the Registry explained that the Five Items do not fall under regulation 192(1) of the Regulations of the Registry as, in accordance with Dutch legislation, the Five Items were separated from Mr Gicheru's other belongings and transmitted to the requesting entity for determination on the seizure.<sup>17</sup>

## **B. The Prosecutor's Response**

15. The Prosecutor requests that the Chamber transmit the [REDACTED] to her 'so that [she] can conduct the necessary examination and analysis of the [REDACTED] for the purposes of [her] investigations into alleged offences under article 70 of the Statute' (the 'Prosecutor's Request').<sup>18</sup>

16. According to the Prosecutor, 'the items listed in the Registry Report, including the [REDACTED], were seized pursuant to an order for search and seizure issued by the previous Single Judge' when issuing the Warrants of Arrest.<sup>19</sup> The Prosecutor avers that 'attempts to interfere with Prosecution witnesses in *The Prosecutor v.*

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<sup>11</sup> ICC-01/09-01/20-35-Conf, para. 10.

<sup>12</sup> ICC-01/09-01/20-35-Conf, para. 10.

<sup>13</sup> ICC-01/09-01/20-35-Conf, para. 11.

<sup>14</sup> ICC-01/09-01/20-35-Conf, para. 12.

<sup>15</sup> ICC-01/09-01/20-35-Conf, para. 13.

<sup>16</sup> ICC-01/09-01/20-35-Conf, para. 16.

<sup>17</sup> Email from the Registry to the Chamber, 13 November 2020, 15:33 hours.

<sup>18</sup> ICC-01/09-01/20-41-Conf, para. 3.

<sup>19</sup> ICC-01/09-01/20-41-Conf, para. 8.

*William Samoei Ruto and Joshua Arap Sang* case took place [REDACTED].<sup>20</sup> For this reason, the Prosecutor [REDACTED].<sup>21</sup> In addition, the Prosecutor [REDACTED].<sup>22</sup> The Prosecutor adds that [REDACTED].

17. She ‘does not object to the return to Gicheru of the remaining items seized from him, subject to any restrictions that may be imposed by the Detention Center’.<sup>23</sup>

### **C. The Defence Response**

18. The Defence submits that, ‘[o]ther than asserting in its *ex parte* and under seal Arrest Warrant Application that attempts to influence OTP witnesses [REDACTED] the OTP offers no compelling facts or evidence warranting an intrusion into the [sic] Mr. Gicheru’s [REDACTED]’.<sup>24</sup> According to the Defence, ‘[s]ince the OTP requests [REDACTED] it should make a request pursuant to Article 56’.<sup>25</sup> The Defence adds that ‘the OTP has not indicated if the OTP (or another entity) will perform [REDACTED]’.<sup>26</sup> The Defence, therefore, requests the Chamber to ‘deny the OTP’s request’.<sup>27</sup>

19. The Defence further avers that, ‘[a]lternatively, should the Single Judge be inclined to entertain the OTP’s Request, given its intrusive nature, the Single Judge should order the OTP to provide further particulars and grant leave, which the Defence seeks, to file a supplemental submission’ (the ‘Defence Request’).<sup>28</sup>

## **III. DETERMINATION BY THE CHAMBER**

### **A. The Registry Request**

20. The Chamber recalls that, when issuing the Warrants of Arrest, then Pre-Trial Chamber II also ordered the Registrar to prepare and transmit a request for cooperation to relevant States ‘to take appropriate measures for: (i) the body/personal search of Paul Gicheru and Philip Kipkoech Bett and any premises where they may be arrested, their residences at the time of their arrests, and any such offices utilised by

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<sup>20</sup> ICC-01/09-01/20-41-Conf, para. 9.

<sup>21</sup> ICC-01/09-01/20-41-Conf, para. 10.

<sup>22</sup> ICC-01/09-01/20-41-Conf, para. 10.

<sup>23</sup> ICC-01/09-01/20-41-Conf, para. 13.

<sup>24</sup> ICC-01/09-01/20-55-Conf, para. 2.

<sup>25</sup> ICC-01/09-01/20-55-Conf, para. 3.

<sup>26</sup> ICC-01/09-01/20-55-Conf, para. 3.

<sup>27</sup> ICC-01/09-01/20-55-Conf, para. 4.

<sup>28</sup> ICC-01/09-01/20-55-Conf, para. 4.

them; (ii) the seizure of any relevant evidence [...] which are, on reasonable grounds, believed to be used in, connected with, or to provide evidence of, the offences for which these warrants of arrest are issued; [...] and (iv) the transmission of any such seized evidence to the Court' (the 'Request for Cooperation').<sup>29</sup>

21. The Chamber further observes that regulation 192 of the Regulations of the Registry defines the procedure to be followed by the Registry in respect of the personal belongings of a person being admitted to the Court's Detention Centre.

22. At the outset, the Chamber notes that the Registry Report did not specify why the Registry is seeking guidance regarding the Five Items while it followed the procedure set out in regulation 192 of the Regulations of the Registry in relation to Mr Gicheru's remaining belongings. However, the Chamber understands, on the basis of the Registry's additional explanation, that the Registry is of the view that this provision is not applicable to the Five Items seeing as, pursuant to Dutch legislation, the Five Items were set aside by the Dutch authorities and separately handed over to the Registry for further seizure by the Court.

23. In the view of the Chamber, neither the Request for Cooperation nor regulation 192 of the Regulations of the Registry distinguishes between the procedure to be followed by the Registry in relation to the personal belongings of a person being admitted to the Court's Detention Centre on the basis of the domestic legislative framework of the authorities executing the Request for Cooperation. Rather, upon admission of a person to the Court's Detention Centre, the applicable framework is defined by the legal texts of the Court, including the Regulations of the Registry, and any relevant decisions issued by a Chamber.

24. Therefore, the Chamber decides that the Registry shall follow the procedure set out in regulation 192 of the Regulations of the Registry in relation to the Five Items.

### **B. The Prosecutor's Request**

25. The Chamber recalls that, on the basis of the evidence cited in the 'Prosecution's Application under Article 58(1) of the Rome Statute',<sup>30</sup> the Warrants

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<sup>29</sup> ICC-01/09-01/20-1-Red, paras 30-31.

<sup>30</sup> ICC-01/09-144-US-Exp, together with annexes A-C, under seal *ex parte*, only available to the Prosecutor and the Registry, and annexes 1.1-11.2, under seal *ex parte*, only available to the Prosecutor and the Registry.

of Arrest *inter alia* establish that there are reasonable grounds to believe ‘that there has existed, from at least April 2013, a criminal scheme designed to systematically approach and corruptly influence witnesses of the Prosecutor through bribery and other methods of inducements in exchange for their withdrawal as prosecution witnesses and/or recantation of their prior statements to the Prosecutor’ involving Mr Gicheru, Mr Bett and Mr Barasa’.<sup>31</sup> In addition, the Request for Cooperation extends *inter alia* to the seizure of ‘[REDACTED] [...] which are, on reasonable grounds, believed to be used in, connected with, or to provide evidence of, the offences for which these warrants of arrest are issued’.<sup>32</sup>

26. In the view of the Chamber, the reference to the ‘criminal scheme designed to systematically approach and corruptly influence witnesses’ encompasses [REDACTED]. Therefore, when considered against the threshold of ‘reasonable grounds’ arising from the Request for Cooperation, the [REDACTED] may be considered to have been used in, connected with, or to provide evidence of the offences for which the Warrants of Arrest have been issued. The Defence argument that the Prosecutor must establish ‘compelling facts or evidence warranting an intrusion into the [sic] Mr. Gicheru’s [REDACTED]’<sup>33</sup> misstates the applicable threshold for the seizure of evidence and is, accordingly, dismissed.

27. Furthermore, the Chamber considers that it is not necessary for the Prosecutor to, as argued by the Defence, ‘make a request pursuant to Article 56’ in order to [REDACTED].<sup>34</sup> The Request for Cooperation, which is the legal basis for the Prosecutor’s Request, was issued pursuant to articles 54(1)(a) and 57(3)(a) of the Statute.<sup>35</sup> Therefore, it would be superfluous to require an additional legal basis for the Prosecutor’s analysis of the [REDACTED]. It remains the Prosecutor’s responsibility to conduct this analysis in accordance with the requirements arising from the Court’s legal texts and, if necessary, the Defence may raise any issue in connection with this matter in the subsequent stages of the proceedings.

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<sup>31</sup> ICC-01/09-01/20-1-Red, para. 11.

<sup>32</sup> ICC-01/09-01/20-1-Red, p. 19.

<sup>33</sup> ICC-01/09-01/20-55-Conf, para. 2.

<sup>34</sup> ICC-01/09-01/20-55-Conf, para. 3.

<sup>35</sup> ICC-01/09-01/20-1-Red, para. 31.



28. Having found that the Prosecutor's Request is sufficiently substantiated and that the Request for Cooperation constitutes the legal basis for the Prosecutor's Request, the Chamber considers that it is not necessary to, as requested by the Defence, order the Prosecutor 'to provide further particulars and grant leave [to the Defence] to file a supplemental submission'.<sup>36</sup>

**FOR THESE REASONS, THE CHAMBER HEREBY**

- a) **DECIDES** that the Registry shall follow the procedure set out in regulation 192 of the Regulations of the Registry in relation to the Five Items with the exception of the [REDACTED];
- b) **GRANTS** the Prosecutor's Request;
- c) **ORDERS** the Registry to transmit the [REDACTED] to the Prosecutor;
- d) **REJECTS** the Defence Request; and
- e) **ORDERS** the Registry, the Prosecutor and the Defence to file public redacted versions of the Registry Report, the Prosecutor's Response, and the Defence Response, respectively, as soon as possible.

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



**Judge Reine Adélaïde Sophie Alapini-Gansou**

Dated this Monday, 18 January 2021

At The Hague, The Netherlands

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<sup>36</sup> ICC-01/09-01/20-55-Conf, para. 4.