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Date: **29 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 with Public Annex A

Public Redacted Version of "Paul Gicheru's Request for Clarification Concerning the Pre-Trial Chamber A's Email of 23 December 2020", 29 December 2020, ICC-01/09-01/20-72-Conf

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**

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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****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 requests clarification of Pre-Trial Chamber A’s email of 23 December 2020, wherein its Senior Legal Adviser indicated that the Single Judge would not be able to decide on Mr. Gicheru’s provisional release before the beginning of the new year because the High Court of Kenya (“High Court”) has not yet issued a decision reconsidering its 16 November 2017 Judgment.¹ This Request and Annex A are classified as confidential pursuant to Regulation 23bis(1) of the Regulations of the Court as they contain confidential communications.

I. BACKGROUND

1. On 10 March 2015, the Single Judge of Pre-Trial Chamber II ordered the Registrar to transmit a request for the arrest and surrender of Mr. Gicheru to the competent authorities of the Republic of Kenya (“Kenya”).²
2. On 5 May 2020, [REDACTED]³
3. On 21 September 2020, [REDACTED]:
 - a. [REDACTED];
 - b. [REDACTED];
 - c. [REDACTED];
 - d. [REDACTED];
 - e. [REDACTED]; and
 - f. [REDACTED].⁴

¹ Annex A, p. 2.

² *Prosecutor v. Gicheru*, [ICC-01/09-01/20-1-Red](#), Decision on the “Prosecution’s Application under Article 58(1) of the Rome Statute,” 10 March 2015.

³ [REDACTED].

⁴ [REDACTED].

4. On 2 November 2020, Mr. Gicheru travelled to the Netherlands at his own expense to surrender himself to the Dutch authorities [REDACTED].⁵
5. On 3 November 2020, following the completion of domestic proceedings in the Netherlands, Mr. Gicheru was surrendered to the ICC Detention Center.⁶
6. On 9 November 2020, Mr. Gicheru requested to be provisionally released to Kenya.⁷
7. On 11 November 2020, the Prosecution responded that it did not oppose Mr. Gicheru's conditional release considering: (a) the nature of the charges and severity of the sentence; (b) Mr. Gicheru's demonstration of his intent to cooperate with the ICC through his voluntary surrender; (c) [REDACTED]; and (d) the ICC's jurisprudence on conditional release (in particular, *Bemba et al.*, the only previous Article 70 case).⁸
8. On 12 November 2020, the Single Judge invited Kenya to provide observations "as to its willingness and ability to enforce one or more conditions restricting liberty the Chamber could potentially impose ... and ... to facilitate the possibility of Mr Gicheru travelling between Kenya and the Netherlands for the purposes of the proceedings in the present case."⁹
9. On 24 November 2020, Kenya, through its Attorney General, responded that it could not assist in enforcing conditions of provisional release because the High Court quashed Mr. Gicheru's arrest warrant in its 16 November 2017 Judgment and directed Kenya not to take any action in furtherance of the request for his

⁵ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-34](#), Order Setting the Date for the Initial Appearance of Mr Gicheru, 4 November 2020, para. 2.

⁶ *Id.*, para. 3.

⁷ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-38-Conf](#), The Accused Person's Request for Interim Release under the Provisions of Article 60(2) of the Rome Statute, 9 November 2020.

⁸ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-39-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, paras. 12-13.

⁹ *Prosecutor v. Gicheru and Bett*, [ICC-01/09-01/20-42](#), 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.

surrender.¹⁰ The Attorney General noted, however, that Mr. Gicheru still had the opportunity to notify the High Court that he formally consents to his surrender, which would allow the High Court to reconsider its 16 November 2017 Judgment and provide guidance on Mr. Gicheru's provisional release.¹¹

10. On 30 November 2020, the Defence requested the assistance of the External Operations Section to transmit Mr. Gicheru's signed consent and a letter to the Attorney General.¹² In the letter, the Defence requested Attorney General's "good offices to communicate the attached consent to the Cabinet Secretary of Ministry of Interior and Coordination of National Government and the High Court, to request the High Court to reconsider its 16 November 2017 Judgment, and to communicate the Government's reconsidered position to the ICC on whether it is willing and able to enforce conditions of provisional release, if ordered by the Chamber."¹³
11. On 2 December 2020, the Counsel Support Section informed the Defence that the Registry could not be involved in transmitting the documents as it is not a request for cooperation.¹⁴
12. On 2 December 2020, the Defence responded to Kenya's observations, requesting the Single Judge to: (a) clarify the admissibility regime for Article 70 offences in light of Kenya's misapprehension that it has primary jurisdiction and that the ICC

¹⁰ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-54-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"). The High Court found that the Single Judge of Pre-Trial Chamber II, Judge Ekaterina Trendafilova, denied Kenya the opportunity to investigate and prosecute the offences in Kenyan courts under its International Crimes Act. Annex to Response of Kenya, paras. 68-71. The High Court considered that Kenya, not the ICC, has primary jurisdiction to try the offences and that Single Judge Ekaterina Trendafilova should have consulted with Kenya before making a finding that effective national prosecutions were unlikely to take place. *Id.*, para. 78(a). The High Court also found that the Cabinet Secretary, Minister of Interior and Coordination of National Government, the Director of Public Prosecution, and the Attorney General abdicated their responsibility to assert their Constitutional authority on behalf of Kenya as a State Party to the Rome Statute to exercise jurisdiction in the first instance. *Id.*, para. 78(b).

¹¹ [Response of Kenya](#), paras. 21-23.

¹² Annex A, p. 4.

¹³ Annex A, pp. 6-7.

¹⁴ Annex A, p. 8.

failed to consult with it when issuing the arrest warrant; and (b) invite Kenya to provide further observations.¹⁵

13. On 4 December 2020, the Prosecution responded to Kenya's observations, arguing that:

- a. It "agrees with the Defence submission that the decision of the High Court of Kenya ... misapprehends the admissibility regime applicable to article 70 offences," which it had also raised *ex parte* with Pre-Trial Chamber II;¹⁶
- b. The High Court's 16 November 2017 Judgment is moot because Mr. Gicheru had surrendered to the ICC;¹⁷
- c. Kenya conflates the issues of surrender (which had already occurred) and enforcement of provisional release;¹⁸
- d. Kenya misinterprets the jurisdiction and admissibility regime governing Article 70 offences, which, unlike the regime for Article 5 crimes, provides that the ICC has primary jurisdiction over the investigation and prosecution;¹⁹
- e. The Single Judge was not required to consult with Kenyan authorities prior to issuing a decision;²⁰
- f. Since the Single Judge has already ruled on the issue of jurisdiction, Kenya should provide its reasons why the Single Judge's decision should be reconsidered, or confirm that it accepts the ruling as authoritative;²¹ and

¹⁵ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-57](#), 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. 2 December 2020 ("Defence Response to Kenya's Observations").

¹⁶ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-58](#), Prosecution's Response to the observations submitted by the Republic of Kenya and the Kingdom of the Netherlands and associated requests, 4 December 2020 ("Prosecution Response to Kenya's Observations"), paras. 2, 6 (internal citations omitted).

¹⁷ *Id.*, para. 7.

¹⁸ *Id.*, para. 8.

¹⁹ *Id.*, paras. 9-14.

²⁰ *Id.*, para. 15.

²¹ *Id.*, para. 17.

- g. Given that the request for provisional release concerns Mr. Gicheru's liberty, it "should not be delayed pending the outcome of any requests that Kenya may choose to file in this regard."²²
14. On 3 December 2020, the Defence contacted the Kenyan Embassy in The Hague to explain its response to Kenya's observations and to seek its good offices to transmit Mr. Gicheru's consent and letter requesting the Attorney General to request the High Court to reconsider its 16 November 2017 Judgment.²³ During a meeting on that same date, [REDACTED], [REDACTED], assured the Defence that she would see to it that the documents presented to her would be forwarded to the Attorney General.²⁴
15. On 23 December 2020, the Defence wrote to the Single Judge inquiring as to whether she would decide on Mr. Gicheru's provisional release prior to the beginning of the new year and updating her as to the Defence's efforts to have the High Court reconsider its 16 November 2017 Judgment.²⁵
16. On 23 December 2020, the Senior Legal Adviser of Pre-Trial Chamber A responded that the Single Judge "will not be in a position to take a decision on this matter before the beginning of next year, taking into consideration that the High Court of Kenya has not yet issued its decision after being requested to reconsider its 16 November 2017 Judgment."²⁶
17. As of the date of this filing, the Defence has not received any confirmation that the Attorney General has transmitted Mr. Gicheru's signed consent to the High Court or requested it to reconsider its 16 November 2017 Judgment.

²² *Id.*, para. 18.

²³ Annex A, pp. 11-13.

²⁴ Annex A, pp. 11-13.

²⁵ Annex A, p. 14.

²⁶ Annex A, p. 2.

II. REQUEST FOR CLARIFICATION

18. The Defence respectfully requests clarification of Pre-Trial Chamber A's email of 23 December 2020 given the lack of further observations by Kenya as to whether any matter is pending before the High Court:

- a. *Whether the Single Judge has communicated with Kenyan authorities (including its Attorney General and High Court) after the Defence and Prosecution responses to Kenya's observations, and if not, whether she intends to do so;*
- b. *Whether the Single Judge considers that the Defence must formally apply to the High Court to request reconsideration of its 16 November 2017 Judgment and litigate the matter under Kenyan procedure when it will certainly take weeks, if not months, and possibly even years for the High Court to decide on the matter;²⁷*
- c. *Whether it is the Single Judge's intention to refrain from issuing a decision on provisional release until and unless the High Court reconsiders its 16 November 2017 Judgment, even though: (a) the Judgment does not preclude Mr. Gicheru from voluntarily surrendering to the ICC;²⁸ (b) the issue of his surrender is moot;²⁹ and (c) the ICC has primary jurisdiction over Article 70 offences;³⁰*
- d. *Whether refraining from issuing a decision on provisional release unless the High Court reconsiders its 16 November 2017 Judgment would effectively subordinate the Single Judge and the ICC to Kenyan courts; and*
- e. *Whether, in the event the 16 November 2017 Judgement is not reconsidered, the Single Judge will follow the ICC's jurisprudence on provisional release in Bemba et al.³¹ – the*

²⁷ Given that it took two years to litigate applications to quash the arrest warrant, it is not unreasonable to expect that the pace of litigation would be any less time consuming in deciding whether to reconsider its 16 November 2017 Judgment. See [Annex to Response of Kenya](#). Even when the High Court eventually hears the application, reconsideration is no guarantee.

²⁸ See *supra* fn. 10. See also [Annex to Response of Kenya](#).

²⁹ [Prosecution Response to Kenya's Observations](#), paras. 2, 7.

³⁰ [Defence Response to Kenya's Observations](#), paras. 8-9; [Prosecution Response to Kenya's Observations](#), paras. 9-15.

³¹ In *Bemba et al.*, the Single Judge of Pre-Trial Chamber II granted provisional release even though the Democratic Republic of Congo stated twice that it was not in a position to enforce conditions of

only other previous Article 70 case – and grant provisional release upon Mr. Gicheru’s personal commitment to appear before the ICC whenever summoned.

WHEREFORE, for the above reasons, the Defence respectfully requests the Single Judge to clarify Pre-Trial Chamber A’s email of 23 December 2020.

Respectfully submitted, 29 January 2021,
In The Hague, the Netherlands.



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provisional release and saw no need to consult with further with any State Party. *Prosecutor v. Bemba et al.*, [ICC-01/05-01/13-683](#), Decision requesting observations from States Parties for the purposes of the review of the detention of the suspects pursuant to Regulation 51 of the Regulations of the Court, 26 September 2014, p. 4; *Prosecutor v. Bemba et al.*, [ICC-01/05-01/13-703](#), Decision ordering the release of release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, 21 October 2014, pp. 5-6.