

Annex II

Confidential EX PARTE only available to the Prosecution and the Registry

**Transmission of Communications with the Kenyan Authorities regarding Updates
on the Status of the Procedure before the High Court of Kenya**

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When replying please quote:

Note No. 63/2017

The Embassy of the Republic of Kenya to the Kingdom of the Netherlands presents its compliments to the Registry of the International Criminal Court (ICC) and has the honor to refer to the latter's Note Verbale: NV/2017/EOSS/56/JCA/ab requesting for an update on judicial developments in Kenya regarding the ICC request for the arrest and surrender of Mr. Paul Gicheru and Mr Philip Kipkoech Bett.

The Embassy has the honor to convey to the Registry the information pertaining to the above mentioned case as submitted by the Office of the Attorney General in Kenya.

The Embassy of the Republic of Kenya to the Kingdom of the Netherlands avails itself this opportunity to renew to the Registry of the International Criminal Court (ICC) the assurances of its highest consideration.

The Hague, 23rd November, 2017

The International Criminal Court (ICC)

The Hague





REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY-GENERAL
&
DEPARTMENT OF JUSTICE

AG/SEC/14/209/5 VOL. I

17 October 2017

The Registry

International Criminal Court (ICC)

P.O. Box 19519

2500 CM, The Hague

THE NETHERLANDS

RE: INVITATION FOR AN UPDATE ON JUDICIAL DEVELOPMENTS IN KENYA REGARDING THE ICC REQUEST FOR ARREST AND SURRENDER OF MR. PAUL GICHERU AND MR. PHILIP KIPKOECH BETT

I acknowledge receipt of a note verbale from your office dated 27 February 2017 and referenced **NV/2017/EOSS/56/JCA/ab**, regarding the above-referenced matter. The long delay in responding to your note is sincerely regretted; and I appreciate your patience in this regard.

The matter of the arrest and surrender of Mr. Gicheru and Mr. Bett (hereinafter jointly referred to as 'the accused persons') is pending before the High Court of Kenya ('the Court'), awaiting a ruling of the court. For your information, a chronological summary of facts and events regarding the litigation of this matter is provided here below:

- i. The Director of Public Prosecutions (DPP) filed an Originating Notice of Motion application dated 28 May, 2015, seeking the following orders:
 - a. That by reason of the nature and urgency of the matter, the application be heard *ex parte*, in chambers; and under seal in the first instance;
 - b. That the Court issues warrants of arrest against the accused persons, pending determination of their eligibility for surrender to the International Criminal Court (ICC), to face charges under Article 70 of the Rome Statute for offences against the administration of justice;

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- c. That the Court issues orders for search of the accused persons' premises, where they were arrested or resided at the time of arrest; and any such offices utilized by them;
- d. That the Court orders the seizure of any relevant evidence, such as cell phones, computers or PDA's, diaries, address books, notes or records of meetings or conversations, financial or banking records and/or cash;
- e. That the Court grants permission for an investigator from the Office of the Prosecutor of the ICC, to be present during the execution of any search and seizure;
- f. That any evidence seized subsequent to the search, be transmitted to the ICC;
- g. That upon arrest, the accused persons be brought before the Court as soon as possible, for the Court to determine the issue of remand and bail in accordance to **Section 35(4)** of Kenya's International Crimes Act;
- h. That upon arrest, the accused persons be brought before the Court as soon as possible; and the Court to make a determination on the eligibility for the stated persons' surrender from Kenya to the ICC, to face charges for offences against the administration of justice as set out in the warrants of arrest submitted by the ICC;
- i. That pending hearing for eligibility for surrender of the accused persons, the Court be pleased to make such orders on the remand of the accused persons as may be expedient;
- j. That the Court issues such other orders and directions as are expedient in the interest of justice.

The application of the DPP ('the application'), was supported by an affidavit sworn by the late **Hon. Maj. Gen. (rtd) Joseph Nkaisserry**, then Cabinet Secretary, Ministry of Interior and Co-ordination of National Government, on the grounds that:

- a. A request had been made by the ICC under **Article 89(1)** of the Rome Statute for the arrest and surrender from Kenya of the accused persons, against whom the Pre-Trial Chamber had issued a warrant of arrest under **Article 58** of the Rome Statute;

- b. The request for arrest and surrender of the accused persons had been made by the ICC to Kenya and received, through the authorized channels, by the Minister responsible for Internal Security of the Republic of Kenya;
 - c. The request was supported by the information and documents required by **Article 91** of the Rome Statute and Kenya's International Crimes Act, 2008;
 - d. The request satisfied all the requirements of the Law in Kenya and the Rome Statute;
 - e. On the basis of the information presented, the accused persons named in the arrest warrants were suspected of being in Kenya;
 - f. There were reasonable grounds to believe that the respondents stated in the application were the persons to whom the joint request for arrest and surrender from the ICC relates;
 - g. The stated respondents are eligible for surrender in relation to crimes against the administration of justice, for which they have been indicted by the ICC;
 - h. The Court has the requisite jurisdiction to grant the orders sought in the application.
 - ii. On the same day of 28 May 2015, the Court, after hearing the DPP's application *ex-parte*; and by reason of the nature and urgency of the matter, ordered the issuance of warrants for the arrest of the accused persons.
 - iii. Subsequently, the respondents in the DPP's application, namely, Mr. Gicheru and Mr. Bett, applied to the Court, seeking orders which included:
 - a. That the Court quashes the warrants of arrest issued against them on 28 May 2015;
 - b. That the Court quashes the decision of the Cabinet Secretary for the Ministry of Interior and Co-ordination of National Government to execute the ICC request for arrest and surrender of the applicant; contained in the Cabinet Secretary's letter dated 14 May 2015, addressed to the DPP.
 - iv. The Court ordered the applicants, namely, Mr. Gicheru and Mr. Bett, to serve their applications upon the Attorney General; and directed that the matter be mentioned on 10th November, 2015, for further directions.
 - v. On 21 April 2016 the Attorney General applied to the Court to be enjoined as *amicus curiae* in the matter.
 - vi. The Court directed the Attorney General to file and serve his *amicus curiae* brief within 30 days; and required the other parties to file and serve their respective responses within 21 days of service.

- vii. Thereafter, the matter was listed for mention on 12 July 2017, to confirm whether all parties had filed their written submissions.
- viii. Afterwards, both applications, that is, of the applicants and the Attorney General, respectively; were heard together.
- ix. The matter was listed for highlighting of submissions on 18 July 2017. Highlighting of submissions by all parties was done from 18 to 20 July 2017.
- x. Then the Court scheduled the matter for ruling on 20 September 2017. However, the Court did not sit on the scheduled day. Parties were informed by the Court registry that the awaited ruling would be delivered on notice.

My office will communicate to you the outcome of the ruling once it is issued.



GITHU MUIGAI, EGH, SC
ATTORNEY-GENERAL