

**Cour
Pénale
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**International
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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

Lesser redacted version of 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’, dated 11 November 2020, ICC-01/09-01/20-39-Conf”, 15 January 2021, ICC-01/09-01/20-39-Red

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

The Office of the Prosecutor

Ms Nazhat Shameen Khan

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

Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Mr Paul Gicheru

I. INTRODUCTION

1. The Prosecution does not oppose “The Accused Person’s Request for Interim Release under the Provisions of Article 60(2) of the Rome Statute”.¹ While the risks under article 58(1)(b)(i) and (ii) continue to exist, these have been reduced by Mr Paul Gicheru’s² voluntary surrender to the Court and may now be sufficiently mitigated through the imposition of suitable conditions of release under rule 119 of the Rules of Procedure and Evidence,³ specifically those conditions agreed upon between Gicheru and the Prosecutor.⁴
2. However, the Prosecution requests Pre-Trial Chamber A⁵ to order Gicheru to appear in person before it at the seat of the Court on a specific date, and then from time to time, to ensure his continued cooperation with the Court and to provide the Pre-Trial Chamber with the opportunity to enforce the conditions of his release, if required.
3. The Prosecution does not oppose the return of the personal items seized from Gicheru upon his arrest, except for his mobile phone, which the Prosecution requests be retained by the Registry pending further submissions by the Parties and a determination by the Chamber.

II. CONFIDENTIALITY

4. Under regulation 23*bis* (2) of the Regulations of the Court (“Regulations”), this response is filed as “confidential”, since it responds to a filing of the same classification.

¹ ICC-01/09-01/15-38-Conf, “Request”.

² “Gicheru” or “the Suspect”.

³ “Rules”.

⁴ ICC-01/09-01/15-28-US-Exp-Anx1.

⁵ “Chamber”.

PROCEDURAL HISTORY

5. On 10 March 2015, the former Single Judge for Pre-Trial Chamber II⁶ issued a warrant of arrest for Mr Paul Gicheru, being satisfied that the conditions under article 58(1) of the Statute were fulfilled.⁷
6. On 27 July 2020, PTC II found that the requirements of article 58(1)(b)(i) and (ii) of the Statute continued to be met and determined that the warrant of arrest against Gicheru would remain in effect.⁸
7. On 6 August 2020, the Prosecution requested,⁹ and PTC II granted,¹⁰ urgent permission to disclose to Gicheru the PTC's determination that "the warrant of arrest against Mr Paul Gicheru shall remain in effect".
8. On 2 November 2020, the President of the Pre-Trial Division constituted Pre-Trial Chamber A (Article 70), composed of Judge Reine Adélaïde Sophie Alapini-Gansou, to exercise the powers and functions of the Pre-Trial Chamber in the case of *The Prosecutor v. Paul Gicheru and Philip Kipkoech Bett*.¹¹

III. SUBMISSIONS

Preliminary issue - reclassification

9. In the Request, Gicheru relies upon an agreement entered into with the Prosecutor, which is presently filed on the record as "Under Seal, Ex Parte, only available to the Office of the Prosecutor" ("Agreement").¹² Since the reason for this classification has now fallen away given Gicheru's surrender to the Court, and since the contents of the Agreement are already known to Gicheru, the

⁶ "PTC II".

⁷ ICC-01/09-01/15-1-Conf-Exp, "Article 58 Decision".

⁸ ICC-01/09-01/15-25-US-Exp, paras. 17, 19 and disposition, "Second Article 58 Decision".

⁹ ICC-01/09-01/15-27-US-Exp.

¹⁰ See Confidential Annex.

¹¹ ICC-01/09-01/15-32.

¹² ICC-01/09-01/15-28-US-Exp-Anx1.

Prosecution request that both the Agreement and its cover filing¹³ are reclassified as “confidential”.

10. Additionally, the Prosecution seeks the reclassification as “confidential” of the Second Article 58 Decision, considering that:

- a. the determination of PTC II to maintain the warrant of arrest has already been communicated to Gicheru, with permission of that Chamber;
- b. the reasons for the current classification no longer apply given his voluntary surrender to the Court; and
- c. the reasons for that decision are also relevant to the Request.

11. Although the current classifications of the abovementioned filings were imposed by a differently constituted Chamber, Pre-Trial Chamber A has the authority to order reclassification, since it has been seized with the case by the President of the Pre-Trial Division under provisional rule 163(3) to “exercise the powers and functions of the Pre-Trial Chamber in the case of *The Prosecutor v. Paul Gicheru and Philip Kipkoech Bett*”.¹⁴ Pre-Trial Chamber A is thus henceforth responsible for the record of the case, including the determination of the classification of filings.¹⁵

Conditional release

12. The Prosecution does not oppose Gicheru’s request for interim release, subject to the conditions specified in the Agreement, and any other conditions the Chamber may deem fit to impose.¹⁶

13. In arriving at this conclusion, the Prosecution took into account a number of factors, including:

- a. The nature of the charges and potential sentence if convicted;

¹³ ICC-01/09-01/15-28-US-Exp.

¹⁴ ICC-01/09-01/15-32, p. 4.

¹⁵ The Prosecution will, in due course, file further request for reclassification of pre-arrest filings and decisions, with redactions as necessary.

¹⁶ Henceforth “conditional release”.

- b. Gicheru's concrete demonstration of his intention to cooperate with the Court through his voluntary surrender;
 - c. Conditions agreed to by the Suspect, including the provision of financial security; and
 - d. The previous jurisprudence of the Court on conditional release, including in the *Bemba et al* case,¹⁷ which is the only previous case before the Court relating to article 70 charges.
14. The Prosecution considers that, by voluntarily surrendering within the timeframe agreed, Gicheru has fully performed his undertakings to date and hence that the Prosecution is bound to honour the Agreement.
15. While the Prosecution acknowledges, and the Agreement specifically recognises, that the Chamber is not bound by the Agreement, the Prosecution considers that the conditional release of the Suspect is justified in the circumstances.
16. The Appeals Chamber has previously described the circumstances in which conditional release may be appropriate:
- "In relation to conditional release, the Appeals Chamber recalls that the examination of conditions of release is discretionary and that conditional release is possible in two situations: (1) where a Chamber, although satisfied that the conditions under article 58 (1) (b) are not met, nevertheless considers it appropriate to release the person subject to conditions; and (2) where risks enumerated in article 58 (1) (b) exist, but the Chamber considers that these can be mitigated by the imposition of certain conditions of release."¹⁸
17. The second of these scenarios applies to the present case. As foreshadowed in its submissions to PTC II,¹⁹ the Prosecution considers that Gicheru's voluntary

¹⁷ ICC-01/05-01/13- 969 OA 5, OA 6, OA 7, OA 8, OA 9; ICC-01/05-01/13-1151.

¹⁸ *Prosecutor v. Bemba*, ICC-01/05-01/08-1626-Red OA7, para. 55; See also *Prosecutor v. Gbagbo*, ICC-02/11-01/11-278-Red OA, para. 77.

¹⁹ Second Article 58 Decision, para. 11.

surrender, while not entirely removing the risks under article 58(1)(b), has sufficiently reduced those risks that they may now be adequately mitigated through the imposition of suitable conditions of release.

18. [REDACTED] For these reasons, the Prosecution considers that financial guarantees, coupled with the additional conditions set out in the Agreement, provide the best option to mitigate the risks under article 58(1)(b).
19. [REDACTED]²⁰ [REDACTED].²¹

Order to appear in person from time to time

20. Noting that the Chamber has decided that the confirmation proceedings will be in writing,²² the Prosecution observes that if the charges are confirmed, the next time Gicheru may appear in person before the Chamber could be at the opening statements of his trial, several months from now.
21. In these circumstances, it would be prudent to order Gicheru to appear in person before the Chamber at the seat of the Court on a specified date, and thereafter from time to time or at important moments of the case, for instance, when the confirmation decision under article 61(7) is issued.
- a. This would ensure the ongoing cooperation of the Suspect and his continued willingness to subject himself to the jurisdiction of the Court.
 - b. [REDACTED] this would enable the Chamber to enforce the conditions of release, if necessary, by facilitating the execution of any warrant of arrest issued under rule 119(4) should Gicheru breach any of the conditions of release.
 - c. Finally, this is also consistent with the salutary practice in many domestic jurisdictions which require an accused person released on bail

²⁰ Rule 119(3).

²¹ Regulation 51.

²² ICC-01/09-01/15-T-001-CONF-FRA ET, p.10, ln. 13-21.

or on his/her own recognisance to return to court periodically until the matter is committed for trial.

22. The Prosecution accordingly requests that, if and when the Chamber grants the conditional release of the Suspect, it orders him to appear again in person before the Chamber at the seat of the Court on a fixed date, and then from time to time as it considers appropriate.

Additional matters

23. The Prosecution does not object to Gicheru's request to return the items seized from him upon his arrest by the Dutch authorities and transmitted to the Registry, with the exception of the mobile phone listed in paragraph 11 (iv) of the "Report of the Registry on the Arrest and Surrender of Mr Paul Gicheru and Request for Guidance on Mr Paul Gicheru's belongings".²³

24. The Prosecution observes that these items were seized pursuant to an order for search and seizure issued by the previous single judge upon request of the Prosecution.²⁴ The Prosecution considers that the mobile phone may contain information pertinent to its investigation and will accordingly request the Chamber to order the Registry to transmit this item to the Prosecution for further examination and analysis.

25. However, given the urgency of the current Request and the possibility that Gicheru may also wish to respond to such an application, the Prosecution considers it preferable to set out its full arguments in relation to this request in a separate filing to which Gicheru can respond. In the meantime, the Prosecution requests that this item is not yet returned to Gicheru but rather retained by the Registry pending the resolution of the issue.

²³ ICC-01/09-01/15-35-Conf.

²⁴ ICC-01/09-01/15-1-Red, paras. 30-31.

26. Finally, the Prosecution notes Gicheru's submissions regarding the burden of proof²⁵ and his medical condition.²⁶ Although the Prosecution disagrees with his submissions on the burden and standard of proof for a request for interim/conditional release, and with his submission that his health condition would justify his release given its view on the Request, the Prosecution does not propose to make any further submissions on these issues unless ordered by the Chamber.

IV. CONCLUSION AND RELIEF SOUGHT

27. The Prosecution does not oppose the conditional release of the Suspect, subject to the conditions set out in the Agreement between Gicheru and the Prosecutor,²⁷ and any other conditions the Chamber deems fit to impose.

28. The Prosecution requests the Chamber to order that Gicheru appear in person before it at the seat of the Court on a specific date, and then from time to time, to ensure his continued cooperation and to provide the opportunity to enforce the conditions of his release, if required.

29. The Prosecution requests that the mobile phone seized from Gicheru upon his arrest be retained by the Registry pending further submissions by the Parties and a determination by the Chamber.



Ms Nazhat Shameen Khan, Deputy Prosecutor

Dated this 7th day of June 2023
At The Hague, The Netherlands

²⁵ Request, paras. 16-17.

²⁶ Request, para. 18.

²⁷ ICC-01/09-01/15-28-US-Exp-Anx1.