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**No. ICC-01/09-01/20**

**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**

Public Redacted Version of 'Decision on Mr Gicheru's Request for Interim Release',  
29 January 2021, ICC-01/09-01/20-90-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 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  
Kingdom of the Netherlands

**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 Decision on Mr Gicheru's Request for Interim Release.

## **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 'Warrant of Arrest' and the 'Statute').<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.

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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](#). This request has been reclassified as public pursuant to the Decision on the Prosecutor's Requests for Reclassification and Redactions and Ordering the Submission of Public Redacted Versions of Certain Documents, 31 December 2020, ICC-01/09-01/20-75-Conf.

<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](#); the Chamber has subsequently 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](#), 10 December 2020, ICC-01/09-01/20-61.

6. On 6 November 2020, in accordance with the Chamber's order dated 4 November 2020,<sup>4</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.

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').<sup>5</sup>

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"' (the 'Prosecutor's Response').<sup>6</sup>

9. On 27 November 2020, in accordance with the Chamber's invitation,<sup>7</sup> 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' ('Kenya' and the 'Observations on behalf of Kenya and the Netherlands').<sup>8</sup>

10. 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' (the 'Defence Response to the Observations on behalf of Kenya and the Netherlands').<sup>9</sup>

11. 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' (the 'Prosecutor's Response to the Observations on behalf of Kenya and the Netherlands').<sup>10</sup>

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<sup>4</sup> [Order Setting the Date for the Initial Appearance of Mr Gicheru](#), ICC-01/09-01/20-34.

<sup>5</sup> ICC-01/09-01/20-38-Conf, together with four confidential annexes; a public redacted version is also available, see [ICC-01/09-01/20-38-Red](#). 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.

<sup>6</sup> ICC-01/09-01/20-39-Conf, together with one confidential annex; a public redacted version is also available, see [ICC-01/09-01/20-39-Red](#).

<sup>7</sup> [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, ICC-01/09-01/20-42.

<sup>8</sup> [ICC-01/09-01/20-54](#), together with public annexes I and II.

<sup>9</sup> [ICC-01/09-01/20-57](#).

<sup>10</sup> [ICC-01/09-01/20-58](#).

12. On 11 December 2020, the Chamber issued the ‘Decision Severing the Case against Mr Gicheru’.<sup>11</sup> The Chamber severed the case against Mr Gicheru from the present case and, in addition, concluded that Pre-Trial Chamber II shall remain seized of the present case in so far as Mr Bett is concerned.<sup>12</sup>

13. On 29 December 2020, the Chamber received ‘Paul Gicheru’s Request for Clarification Concerning the [sic] Pre-Trial Chamber A’s Email of 23 December 2020’ (the ‘Defence Request for Clarification’).<sup>13</sup>

14. On 21 January 2021, in accordance with the Chamber’s invitation,<sup>14</sup> the Chamber received the ‘Transmission of Further Observations Submitted by the Kenyan Authorities pursuant to Pre-Trial Chamber A’s Order ICC-01/09-01/20-76 of 31 December 2020’ (the ‘Further Observations on behalf of Kenya’).<sup>15</sup>

15. On 22 January 2021, the Chamber received the ‘Response to Further Observations Submitted by the Kenyan Authorities pursuant to Pre-Trial Chamber A’s Order ICC-01/09-01/20-76 of 31 December 2020’ on behalf of Mr Gicheru (the ‘Defence Response to the Further Observations on behalf of Kenya’).<sup>16</sup>

## II. SUBMISSIONS RECEIVED BY THE CHAMBER

### A. The Interim Release Request

16. Mr Gicheru has submitted a request for interim release to Kenya.<sup>17</sup> In this regard, he indicates that [REDACTED].<sup>18</sup> Mr Gicheru [REDACTED] and additionally submits that [REDACTED].<sup>19</sup>

17. Moreover, ‘for the purposes of completeness of the record and in the event that the court needs to consider any other factors or grounds’, Mr Gicheru urges the Chamber to consider the following factors as well.<sup>20</sup> First, he avers that he ‘is not a flight risk’ as he ‘voluntarily surrendered to the court at his own cost’ and ‘has

<sup>11</sup> [ICC-01/09-01/20-62](#).

<sup>12</sup> [ICC-01/09-01/20-62](#), paras 13-17.

<sup>13</sup> ICC-01/09-01/20-72-Conf, together with confidential Annex A.

<sup>14</sup> [Order Inviting Further Observations from the Republic of Kenya](#), 31 December 2020, ICC-01/09-01/20-76.

<sup>15</sup> [ICC-01/09-01/20-82](#), together with one public annex.

<sup>16</sup> ICC-01/09-01/20-85-Conf (submitted on 21 January 2021, notified on 22 January 2021).

<sup>17</sup> ICC-01/09-01/20-38-Conf, paras 4, 17.

<sup>18</sup> ICC-01/09-01/20-38-Conf, para. 9(a).

<sup>19</sup> ICC-01/09-01/20-38-Conf, paras 9(d), 9(e).

<sup>20</sup> ICC-01/09-01/20-38-Conf, para. 11.

continued cooperating with the court and the office of the prosecutor'.<sup>21</sup> Second, he adds that '[t]here is no evidence or other material which has been placed before the chamber to show that the accused person [sic] has interfered with or may interfere with any witnesses' and that '[t]he charges against the accused person [sic] have not been confirmed and disclosure has not been made'.<sup>22</sup> Third, Mr Gicheru contends that '[t]he Provisions of Articles 21, 66 and 67 of the Rome Statute together with the International Human Rights norms implicate a number of human rights [...] which rights the court should uphold in order to achieve its objective of promoting respect for human rights and the rule of law by granting the accused person [sic] an interim release since the issue of his guilt has not been determined yet'.<sup>23</sup> He further requests the Court to consider that he is [REDACTED] and that, as the alleged offences were committed in Kenya, he 'will be handicapped and [his] right and the ability to prepare for his defence will be adversely affected if [he] remains in detention'.<sup>24</sup> Lastly, Mr Gicheru indicates that [REDACTED].<sup>25</sup> In his view, his [REDACTED].<sup>26</sup>

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

18. The Prosecutor raises two preliminary issues. First, she requests the Chamber to reclassify the [REDACTED] as confidential.<sup>27</sup> Second, she 'seeks the reclassification as "confidential" of [a decision adopted by Pre-Trial Chamber II dated 27 July 2020]'.<sup>28</sup>

19. The Prosecutor 'does not oppose [Mr] Gicheru's request for interim release, subject to the conditions specified [REDACTED], and any other conditions the Chamber may deem fit to impose'.<sup>29</sup> In arriving at this conclusion, the Prosecutor took into account the following factors: 'a. [t]he nature of the charges and potential sentence if convicted; b. [Mr] Gicheru's concrete demonstration of his intention to cooperate with the Court through his voluntary surrender; c. [c]onditions [REDACTED], including the provision of financial security; and d. [t]he previous

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<sup>21</sup> ICC-01/09-01/20-38-Conf, paras 11(a)-11(c).

<sup>22</sup> ICC-01/09-01/20-38-Conf, p. 8.

<sup>23</sup> ICC-01/09-01/20-38-Conf, para. 15.

<sup>24</sup> ICC-01/09-01/20-38-Conf, para. 17.

<sup>25</sup> ICC-01/09-01/20-38-Conf, para. 18.

<sup>26</sup> ICC-01/09-01/20-38-Conf, para. 18.

<sup>27</sup> ICC-01/09-01/20-39-Conf, para. 9.

<sup>28</sup> ICC-01/09-01/20-39-Conf, para. 10.

<sup>29</sup> ICC-01/09-01/20-39-Conf, para. 12.

jurisprudence of the Court on conditional release, including in the *Bemba et al* case'.<sup>30</sup> According to the Prosecutor, '[Mr] Gicheru's voluntary 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'.<sup>31</sup> In addition, [REDACTED] and [REDACTED].<sup>32</sup>

20. Furthermore, '[n]oting that the Chamber has decided that the confirmation proceedings will be in writing',<sup>33</sup> the Prosecutor also requests the Chamber 'to order [Mr] 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'.<sup>34</sup> The Prosecutor contends that '[t]his would ensure the ongoing cooperation of the Suspect and his continued willingness to subject himself to the jurisdiction of the Court'.<sup>35</sup> She adds that [REDACTED].<sup>36</sup> Lastly, in the view of the Prosecutor, 'this is also consistent with the salutary practice in many domestic jurisdictions which require an accused person released on bail or on his/her own recognisance to return to court periodically until the matter is committed for trial'.<sup>37</sup>

21. The Prosecutor also indicates that she 'does not object to [Mr] 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 [his] [REDACTED] [...]'.<sup>38</sup>

22. Lastly, although the Prosecutor 'disagrees with [Mr Gicheru's] submissions on the burden and standard of proof for a request for interim/conditional release, [REDACTED], the [Prosecutor] does not propose to make any further submissions on these issues unless ordered by the Chamber'.<sup>39</sup>

### **C. The Observations on behalf of Kenya and the Netherlands**

23. In its observations dated 24 November 2020, Kenya recalls that, on 16 November 2017, the High Court of Kenya lifted the warrants of arrest against

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<sup>30</sup> ICC-01/09-01/20-39-Conf, para. 13.

<sup>31</sup> ICC-01/09-01/20-39-Conf, para. 17.

<sup>32</sup> ICC-01/09-01/20-39-Conf, para. 18.

<sup>33</sup> ICC-01/09-01/20-39-Conf, para. 20.

<sup>34</sup> ICC-01/09-01/20-39-Conf, para. 21.

<sup>35</sup> ICC-01/09-01/20-39-Conf, para. 21(a).

<sup>36</sup> ICC-01/09-01/20-39-Conf, para. 21(b).

<sup>37</sup> ICC-01/09-01/20-39-Conf, para. 21(c).

<sup>38</sup> ICC-01/09-01/20-39-Conf, para. 23.

<sup>39</sup> ICC-01/09-01/20-39-Conf, para. 26.

Mr Gicheru and Mr Bett *inter alia* on the grounds that ‘[t]he Pre-Trial Chamber of the Court erred in assuming jurisdiction on the basis that an effective national prosecution was unlikely, without consulting Kenya on the matter’ and that ‘[t]he request for the arrest and surrender of Mr. Gicheru and Mr. Bett was not accompanied by the necessary supporting evidence and information’.<sup>40</sup> It adds that the High Court of Kenya ‘directed that Kenya “not take any action in furtherance to the request made for the surrender of the Respondents, unless and until there is compliance with the orders of this court”’.<sup>41</sup>

24. Kenya further submits that, ‘by dint of the existing order of the High Court [of Kenya,] it may not, at this point in time, be able to accord the Court the assistance contemplated in Rule 119(1) of the Court’s Rules of Procedure and Evidence, unless the said order is lifted or otherwise varied’.<sup>42</sup> Kenya further observes that its domestic law ‘provides for surrender [to the Court] by consent’.<sup>43</sup> However, according to Kenya, ‘Mr Gicheru did not comply with this statutory procedure prior to his voluntary surrender to the Court’ which ‘would have provided the High Court [of Kenya] the opportunity to reconsider its judgment of the 16<sup>th</sup> November 2017 and to issue directions on how any action required: [sic] of whatever fashion, in furtherance of the warrant for the arrest and surrender of Mr. Gicheru may, be undertaken’.<sup>44</sup> Kenya adds that ‘the opportunity is still available for Mr. Gicheru to comply with the relevant statutory requirements and provide the High Court [of Kenya] 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’.<sup>45</sup>

25. The Netherlands indicates that, ‘[i]n accordance with article 47 paragraph 1 of the Headquarters Agreement, the host State shall facilitate the transfer of persons granted interim release into a State other than the host State’.<sup>46</sup> Furthermore, according to the Netherlands, ‘[i]n accordance with article 47 paragraph 2 of the Headquarters Agreement, the host State shall facilitate the re-entry into the host State

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<sup>40</sup> [ICC-01/09-01/20-54-AnxI](#), para. 17.

<sup>41</sup> [ICC-01/09-01/20-54-AnxI](#), para. 18 (emphasis in original).

<sup>42</sup> [ICC-01/09-01/20-54-AnxI](#), para. 20.

<sup>43</sup> [ICC-01/09-01/20-54-AnxI](#), para. 21.

<sup>44</sup> [ICC-01/09-01/20-54-AnxI](#), para. 22.

<sup>45</sup> [ICC-01/09-01/20-54-AnxI](#), para. 23.

<sup>46</sup> [ICC-01/09-01/20-54-AnxII](#), p. 2.



of persons granted interim release and their short-term stay in the host State for any purpose related to proceedings before the Court'.<sup>47</sup> In this regard, the Netherlands understands that 'the interim release will not commence until Mr Gicheru has been transferred to into [sic] the custody of the authorities of the Republic of Kenya and it will terminate upon his return to the custody of the Court'.<sup>48</sup>

26. In addition, '[i]n accordance with article 47 paragraph 3 of the Headquarters Agreement, [the Netherlands] would like to request that the Court informs the Surveillance and Protection Programme of the National Coordinator for Security and Counterterrorism's Surveillance [...] and the Custodial Institutions Agency's Transport and Support Service [...] of the specific travel arrangements, namely date of departure, date of return and, if appropriate, full flight details, the medical condition and possible safety risks involved'.<sup>49</sup>

#### **D. The Defence Response to the Observations on behalf of Kenya and the Netherlands**

27. According to the Defence, it requested 'the Division of External Operations [of the Registry of the Court] 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'.<sup>50</sup>

28. The Defence submits that Kenya 'misapprehends the admissibility regime for Article 70 cases'.<sup>51</sup> 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'.<sup>52</sup>

29. The Defence further avers that '[t]he Netherlands provided no observations on whether Mr. Gicheru could temporarily reside in the Netherlands for the purposes of the Article 70 proceedings'.<sup>53</sup>

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<sup>47</sup> [ICC-01/09-01/20-54-AnxII](#), p. 2.

<sup>48</sup> [ICC-01/09-01/20-54-AnxII](#), p. 2.

<sup>49</sup> [ICC-01/09-01/20-54-AnxII](#), p. 2.

<sup>50</sup> [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.

<sup>51</sup> [ICC-01/09-01/20-57](#), para. 8.

<sup>52</sup> [ICC-01/09-01/20-57](#), para. 9.

<sup>53</sup> [ICC-01/09-01/20-57](#), para. 10.

30. The Defence accordingly requests 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 and the Netherlands.<sup>54</sup>

### **E. The Prosecutor's Response to the Observations on behalf of Kenya and the Netherlands**

31. As a preliminary issue, the Prosecutor requests the Chamber to reclassify the following documents as public: ICC-01/09-01/20-14-Conf-Exp, ICC-01/09-01/20-15-Conf-Exp and ICC-01/09-01/20-16-Conf-Exp.<sup>55</sup>

32. The Prosecutor submits that, 'given [Mr] Gicheru's [...] voluntary surrender, the warrant of arrest issued by the Single Judge which gave rise to the litigation in the Kenyan High Court has now been executed and has therefore lapsed' and '[i]t would thus appear that [the order of the High Court of Kenya], as regards [Mr] Gicheru, is now moot'.<sup>56</sup> Furthermore, according to the Prosecutor, 'Kenya is not requested to take any action in furtherance of surrender' and '[t]he issue on which Kenya's observations were sought was the enforcement of conditions of interim release'.<sup>57</sup> The Prosecutor is also of the view 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'.<sup>58</sup>

33. The Prosecutor further avers that '[t]he errors identified in the High Court [of Kenya] Decision [...] arise from a fundamental misinterpretation of the jurisdiction and admissibility regime governing article 70 offences' as it 'overlooked the fact that article 70 offences are excluded from the normal regime applicable to article 5 crimes'.<sup>59</sup> Thus, '[t]o the extent that Kenya still regards the High Court Decision as binding notwithstanding [Mr] Gicheru's waiver – in particular the finding that it, and not the ICC, has primary jurisdiction to try this case – the Prosecution agrees with the Defence that clarity on the issue of jurisdiction is desirable to remove any perceived

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<sup>54</sup> [ICC-01/09-01/20-57](#), p. 6.

<sup>55</sup> [ICC-01/09-01/20-58](#), para. 6.

<sup>56</sup> [ICC-01/09-01/20-58](#), para. 7.

<sup>57</sup> [ICC-01/09-01/20-58](#), para. 8.

<sup>58</sup> [ICC-01/09-01/20-58](#), para. 2.

<sup>59</sup> [ICC-01/09-01/20-58](#), para. 11.

obstacle to Kenya's cooperation, both in regard to the issue at hand, but also going forward'.<sup>60</sup> In this regard, the Prosecutor 'observes that the Single Judge has already ruled on the issue of jurisdiction' and, 'should Kenya question or dispute the Court's jurisdiction in respect of this case, it should provide reasons why the *ex parte* decision should be reconsidered, or confirm that it accepts the ruling as authoritative'.<sup>61</sup>

34. Lastly, the Prosecutor 'agrees with the Defence that the Netherlands has not provided observations in relation to [Mr] Gicheru "temporarily residing in the Netherlands, for the purposes of the proceedings in the present case"' and that 'the Netherlands should be requested to provide further observations'.<sup>62</sup>

#### **F. The Defence Request for Clarification**

35. Following an enquiry by the Defence, the Chamber informed the Defence [REDACTED].<sup>63</sup> The Defence requests clarification [REDACTED].<sup>64</sup>

#### **G. The Further Observations on behalf of Kenya**

36. Pursuant to the Chamber's invitation,<sup>65</sup> Kenya indicates, in its observations dated 18 January 2021, that '[t]he Office of the Attorney General of Kenya confirms receipt of [Mr Gicheru's signed consent [to be surrendered to the Court] and a letter requesting Kenya's reconsideration]' and it 'takes note of the observations made by the Prosecution to the effect, *inter alia*, 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*".<sup>66</sup>

37. Kenya further observes 'that while it is, in principle, willing to cooperate with the Court with regard to this matter, Kenya's ability to enforce any specific conditions that the Chamber imposes would be determined only after Kenya has notice of those specific conditions with sufficient clarify, detail and scope'.<sup>67</sup>

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<sup>60</sup> [ICC-01/09-01/20-58](#), para. 16.

<sup>61</sup> [ICC-01/09-01/20-58](#), para. 17.

<sup>62</sup> [ICC-01/09-01/20-58](#), paras 19-20.

<sup>63</sup> ICC-01/09-01/20-72-Conf, para. 16.

<sup>64</sup> ICC-01/09-01/20-72-Conf, para. 18.

<sup>65</sup> [Order Inviting Further Observations from the Republic of Kenya](#), 31 December 2020, ICC-01/09-01/20-76, para. 16.

<sup>66</sup> [ICC-01/09-01/20-82-Anx](#), para. 4 (emphasis in original).

<sup>67</sup> [ICC-01/09-01/20-82-Anx](#), para. 9 (emphasis in original).

38. Furthermore, according to Kenya, ‘[i]n the event that Kenya subsequently confirms to the Court, upon the Court’s imposition of any specific and clear conditions for Mr. Gicheru’s release, that it is able to enforce the conditions, Kenya observes that it shall do so only when Mr. Gicheru is placed in its custody, within Kenya, immediately upon his release by the Court’.<sup>68</sup>

#### **H. The Defence Response to the Further Observations on behalf of Kenya**

39. The Defence asserts that [REDACTED].<sup>69</sup> In the view of the Defence, [REDACTED].<sup>70</sup>

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

#### **A. The Interim Release Request**

40. The Chamber is seized of a request for interim release pursuant to article 60(2) of the Statute. This provision stipulates that ‘[a] person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions’. Article 58(1) of the Statute provides that the Pre-Trial Chamber shall issue a warrant of arrest or a summons to appear if it is satisfied that: ‘(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and (b) The arrest of the person appears necessary: (i) To ensure the person’s appearance at trial; (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances’.

41. The Chamber also recalls that the Appeals Chamber has previously found ‘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

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<sup>68</sup> [ICC-01/09-01/20-82-Anx](#), para. 10.

<sup>69</sup> ICC-01/09-01/20-85-Conf, p. 3.

<sup>70</sup> ICC-01/09-01/20-85-Conf, p. 3.

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'.<sup>71</sup>

42. When issuing the Warrant of Arrest, Pre-Trial Chamber II considered that the arrest of Mr Gicheru appeared necessary on the basis of all three reasons set forth in article 58(1)(b) of the Statute. More specifically, Pre-Trial Chamber invoked the following factors in support of its conclusion: (i) the improbability that 'the persons concerned will respect the authority of the Court by promptly submitting themselves to its jurisdiction voluntarily';<sup>72</sup> (ii) 'the network of connections [the persons concerned] dispose of and their access to financial resources, in particular through Paul Gicheru, which they could use to evade justice';<sup>73</sup> (iii) the potential term of imprisonment for the offences for which the proceedings are being brought by the Prosecutor;<sup>74</sup> (iv) 'the evidence that [the persons concerned] have allegedly engaged in efforts to corrupt witnesses of the Court';<sup>75</sup> and (v) the evidence demonstrating the comprehensive and systematic nature of the campaign to corrupt witnesses<sup>76</sup>.

43. Following the issuance of the Warrant of Arrest, Mr Gicheru remained at large until he voluntarily surrendered himself. [REDACTED].<sup>77</sup> [REDACTED].<sup>78</sup> In the view of the Chamber, Mr Gicheru's voluntary surrender demonstrates his concrete willingness to subject himself to the jurisdiction of the Court in relation to the allegations against him. The Chamber additionally notes that the Prosecutor does not oppose Mr Gicheru's request for interim release together with conditions restricting liberty.

44. The Chamber further observes that Mr Gicheru allegedly bears responsibility for offences under article 70(1)(c) of the Statute and not for any of the crimes under

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<sup>71</sup> Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled "Decision on Applications for Provisional Release"](#), 19 August 2011, ICC-01/05-01/08-1626-Red, para. 55.

<sup>72</sup> [ICC-01/09-01/20-1-Red](#), para. 26.

<sup>73</sup> [ICC-01/09-01/20-1-Red](#), para. 26.

<sup>74</sup> [ICC-01/09-01/20-1-Red](#), para. 26.

<sup>75</sup> [ICC-01/09-01/20-1-Red](#), para. 27.

<sup>76</sup> [ICC-01/09-01/20-1-Red](#), para. 28.

<sup>77</sup> [REDACTED].

<sup>78</sup> [REDACTED].

article 5 of the Statute. Such allegations, if established, attract lower sanctions pursuant to article 70(3) of the Statute and rule 166 of the Rules. This factor additionally militates in favour of Mr Gicheru's request for interim release in the specific circumstances of this case, namely a person having voluntarily surrendered himself and the Prosecutor not opposing his request for interim release.

45. Moreover, while there is no information before the Chamber establishing that the aforementioned risks under article 58(1)(b) of the Statute no longer exist, the Chamber is of the view that these risks may be adequately mitigated by imposing conditions restricting liberty on the basis of rule 119 of the Rules.

46. In this regard, the Chamber notes that [REDACTED].<sup>79</sup> [REDACTED]. [REDACTED].<sup>80</sup> [REDACTED].<sup>81</sup> [REDACTED].<sup>82</sup> [REDACTED].

47. Accordingly, in view of the foregoing, the Chamber grants Mr Gicheru's request for interim release and imposes the following conditions restricting liberty on the basis of rule 119 of the Rules. Mr Gicheru:

- shall provide financial security to the Registrar in the form of cash or bank order to the value of KSH 1,000,000 (one million Kenyan shillings);
- shall comply fully with all orders issued in this case and surrender himself immediately to the relevant authorities if required by the Chamber;
- shall appear before the Chamber at the date, time, place, and in the manner ordered by the Chamber and shall remain in attendance until excused;
- shall not obstruct or endanger the investigation or the court proceedings and shall not engage in any activities, directly or indirectly, that are prohibited under article 70 of the Statute;
- shall not contact, directly or indirectly, any of the Prosecutor's witnesses or victims in this case, except through counsel authorised to represent him before this Court and in accordance with the applicable protocols;

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<sup>79</sup> [REDACTED].

<sup>80</sup> [REDACTED].

<sup>81</sup> [REDACTED].

<sup>82</sup> [REDACTED].

- shall not, directly or through any other person, make any public statements, social media post, or communicate with the media about the merits of the case;
- shall reside in Kenya at the following address for the duration of the proceedings when not present in the Netherlands for the purposes of court proceedings and subject to the following condition, unless otherwise authorised in advance by the Chamber: [REDACTED];
- shall provide the Registrar with copies of all passports, visas, identity documents, and any other travel documents issued to him; shall not travel internationally except to [REDACTED] and the Netherlands (the 'List'); shall inform the Registrar or his delegate, no later than seven (7) days prior to any international travel to a country on the List, of the purpose of the trip, the dates of travel, itinerary, the address(es) where he will reside during the trip and the means by which he may be contacted (except when travelling to the seat of the Court at its request); and may, upon good cause shown, request the Chamber not later than fourteen (14) days prior to the intended travel to add a further country or countries to the List;
- shall report once a week to the Registrar, his delegate, or other person(s) on the date and time and in the manner to be determined by the Registrar, which may include the use of video conferencing technology; and
- shall provide the Registrar with all mobile and other telephone numbers and shall ensure that at least one of his mobile telephone numbers remains active and with sufficient credit to be reachable at any time.

48. In the event that Mr Gicheru would fail to comply with any of the aforementioned conditions restricting liberty, the Chamber may declare the financial security provided by Mr Gicheru forfeit to the Court, issue a warrant of arrest in respect of Mr Gicheru at the request of the Prosecutor or on its own initiative pursuant to rule 119(4) of the Rules, and/or issue any other order it deems relevant in response to a failure to comply with these conditions.

49. As to the Prosecutor's request to order Mr 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',<sup>83</sup> the Chamber is not persuaded that such an order is required for the purposes of the present decision. The Chamber has determined that, as part of the conditions restricting liberty under rule 119 of the Rules, Mr Gicheru 'shall appear before the Chamber at the date, time, place, and in the manner ordered by the Chamber and shall remain in attendance until excused'. Should the Chamber determine that there is a particular reason necessitating Mr Gicheru to appear before it, an order to this effect will be issued and Mr Gicheru and Kenya are bound to abide by such an order. Therefore, the Chamber rejects the Prosecutor's request without prejudice to any further determination on this matter.

50. The Chamber further observes that Kenya submits that, '[i]n the event that Kenya subsequently confirms to the Court, upon the Court's imposition of any specific and clear conditions for Mr. Gicheru's release, that it is able to enforce the conditions, Kenya [...] shall do so only when Mr. Gicheru is placed in its custody, within Kenya, immediately upon his release by the Court'.<sup>84</sup> However, following the removal of any impediments to Kenya's cooperation under its domestic law in view of the communication of Mr Gicheru's signed consent to be surrendered to the Court and a letter requesting Kenya's reconsideration, Kenya need not agree to the specific conditions restricting liberty. This is because the conditions that Kenya may have to enforce do not exceed those set forth in rule 119 of the Rules, Kenya has indicated that 'it is, in principle, willing to cooperate with the Court with regard to this matter',<sup>85</sup> and, as a State Party, it has a duty to cooperate with the Court under article 86 of the Statute. Should Kenya consider that it is prevented from enforcing a specific condition restricting liberty, it may consult with the Court pursuant to article 97 of the Statute. In addition, regarding Kenya's assertion that it shall only enforce conditions restricting liberty 'when Mr. Gicheru is placed in its custody, within Kenya, immediately upon his release by the Court', the Chamber wishes to clarify that, by means of the present decision, Mr Gicheru shall be released to the territory of Kenya and that it, therefore, understands the reference to placing Mr Gicheru in Kenya's

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<sup>83</sup> ICC-01/09-01/20-39-Conf, para. 21.

<sup>84</sup> [ICC-01/09-01/20-82-Anx](#), para. 10.

<sup>85</sup> [ICC-01/09-01/20-82-Anx](#), para. 9 (emphasis in original).



custody as relating exclusively to Kenya's ability to enforce the relevant conditions restricting liberty as established by this Chamber once Mr Gicheru arrives to Kenya and while residing at the address mentioned in the present decision.

51. Furthermore, as requested by Mr Gicheru,<sup>86</sup> the Chamber orders the Registrar to [REDACTED].<sup>87</sup> In this regard, the Chamber further orders the Prosecutor to indicate as soon as possible [REDACTED].<sup>88</sup>

52. Lastly, having found that the foregoing considerations constitute an adequate basis for granting Mr Gicheru's request for interim release with the aforementioned conditions restricting liberty, the Chamber need not address Mr Gicheru's additional arguments in support of his Interim Release Request.<sup>89</sup>

### **B. The Related Requests**

53. As submitted by the Defence and the Prosecutor,<sup>90</sup> the Chamber notes that the Netherlands has not provided observations as to 'the possibility of Mr Gicheru temporarily residing in the Netherlands [...] for the purposes of the proceedings in the present case' in accordance with the Chamber's invitation dated 12 November 2020.<sup>91</sup> Accordingly, the Chamber renews its invitation to the Netherlands to provide observations as to this issue by no later than 26 February 2021, taking further into consideration that Mr Gicheru's request for interim release to Kenya has been granted and he, therefore, may have to travel to the seat of the Court for the purposes of the present proceedings and reside temporarily on the territory of the Netherlands without being detained, in accordance with article 47 of the 'Headquarters Agreement between the International Criminal Court and the Host State'.

54. Furthermore, the Chamber recalls that it has already ruled on the Prosecutor's requests for reclassification set forth in the Prosecutor's Response and the

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<sup>86</sup> ICC-01/09-01/20-38-Conf, para. 9(e).

<sup>87</sup> [REDACTED], ICC-01/09-01/20-65-Conf; a public redacted version is also available, see [ICC-01/09-01/20-65-Red](#).

<sup>88</sup> Office of the Prosecutor, 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", 12 November 2020, ICC-01/09-01/20-41-Conf, para. 11; a public redacted version is also available, see [ICC-01/09-01/20-41-Red](#).

<sup>89</sup> ICC-01/09-01/20-38-Conf, paras 11-18.

<sup>90</sup> [ICC-01/09-01/20-57](#), para. 10; [ICC-01/09-01/20-58](#), para. 19.

<sup>91</sup> [ICC-01/09-01/20-42](#), para. 12.

Prosecutor's Response to the Observations on behalf of Kenya and the Netherlands.<sup>92</sup> In addition, given that the Chamber has granted Mr Gicheru's request for interim release with the aforementioned conditions restricting liberty, it need not address either the Defence request that the Chamber '[clarify] the admissibility regime applicable to Article 70 cases' contained in the Defence Response to the Observations on behalf of Kenya and the Netherlands<sup>93</sup> or the Defence Request for Clarification<sup>94</sup>.

#### **FOR THESE REASONS, THE CHAMBER HEREBY**

- a) **GRANTS** Mr Gicheru's request for interim release with the conditions restricting liberty specified in the present decision;
- b) **FINDS** that, in the event that Mr Gicheru would fail to comply with any of the conditions restricting liberty specified in the present decision, the Chamber may declare the financial security provided by Mr Gicheru forfeit to the Court, issue a warrant of arrest in respect of Mr Gicheru at the request of the Prosecutor or on its own initiative pursuant to rule 119(4) of the Rules, and/or issue any other order it deems relevant in relation to a failure to comply with these conditions;
- c) **REJECTS** the Prosecutor's request to order Mr 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 without prejudice to any further determination on this matter;
- d) **ORDERS** the Registrar to forthwith make all necessary arrangements to implement the present decision, including by: liaising with the competent authorities of Kenya and the Netherlands (including those indicated in ICC-01/09-01/20-54-AnxII); ensuring that Mr Gicheru provides financial security to the Registrar in the form of cash or bank order to the value of KSH 1,000,000 (one million Kenyan shillings); ensuring that Mr Gicheru provides the Registrar with copies of all passports, visas, identity documents and any other travel

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<sup>92</sup> Decision on the Prosecutor's Requests for Reclassification and Redactions and Ordering the Submission of Public Redacted Versions of Certain Documents, 31 December 2020, ICC-01/09-01/20-75-Conf, paras 28-29, 31-32.

<sup>93</sup> [ICC-01/09-01/20-57](#), p. 6.

<sup>94</sup> ICC-01/09-01/20-72-Conf.

documents issued to him; putting in place the modalities for Mr Gicheru to travel internationally in so far as permitted pursuant to the present decision and to report to the Registry once a week; ensuring that Mr Gicheru provides all mobile and other telephone numbers; [REDACTED]; and making any other arrangements as required;

e) **ORDERS** the Registrar to submit a report on the implementation of the present decision as soon as possible after the interim release of Mr Gicheru and to submit an updated report if there are any new developments regarding the present decision;

f) **ORDERS** the Prosecutor to indicate as soon as possible [REDACTED];

g) **INVITES** the Netherlands to provide observations as to the possibility of Mr Gicheru temporarily residing in the Netherlands for the purposes of the proceedings in the present case as specified in the present decision by no later than 26 February 2021; and

h) **FINDS** that it need not address the Prosecutor's requests for reclassification set forth in the Prosecutor's Response and the Prosecutor's Response to the Observations on behalf of Kenya and the Netherlands, the Defence request that the Chamber '[clarify] the admissibility regime applicable to Article 70 cases' contained in the Defence Response to the Observations on behalf of Kenya and the Netherlands, and the Defence Request for Clarification.

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



**Judge Reine Adélaïde Sophie Alapini-Gansou**

Dated this Friday, 29 January 2021

At The Hague, The Netherlands