

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

**No. ICC-01/09-01/15
Date: 12 November 2020**

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

**Urgent
Public**

Order Inviting Observations Pursuant to Rule 119(3) of the Rules of Procedure and Evidence and Regulation 51 of the Regulations of the Court

Order 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

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
Republic of Kenya

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 Order Inviting Observations Pursuant to Rule 119(3) of the Rules of Procedure and Evidence (the ‘Rules’) and Regulation 51 of the Regulations of the Court (the ‘Regulations’).

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 ‘Statute’).¹
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, as drawn up by the judges of the Court acting under article 51(3) of the Statute on 10 February 2016, and regulation 66*bis*(1) of the Regulations, which was adopted and entered into force on the same day.²
4. On 2 November 2020, the President of the Pre-Trial Division constituted the present Chamber pursuant to the aforementioned provisions.³
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 6 November 2020, in accordance with the Chamber’s order dated 4 November 2020,⁴ Mr Gicheru appeared before the Chamber pursuant to article 60(1) of the Statute and rules 121(1) and 163(1) of the Rules.

¹ Decision on the “Prosecution’s Application under Article 58(1) of the Rome Statute”, ICC-01/09-01/15-1-Conf-Exp; a public redacted version was notified on the same day, *see* [ICC-01/09-01/15-1-Red](#).

² 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-01/09-01/15-31-US-Exp.

³ 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-01/09-01/15-32.

⁴ Order Setting the Date for the Initial Appearance of Mr Gicheru, ICC-01/09-01/15-34.

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’).⁵ Mr Gicheru requests conditional release to the Republic of Kenya (‘Kenya’).⁶

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’).⁷ The Prosecutor does not oppose the Interim Release Request.⁸

9. The Chamber notes articles 58(1) and 60(2) of the Statute, rules 118 and 119 of the Rules, and regulation 51 of the Regulations. In particular, rule 119(3) provides that, ‘[b]efore imposing or amending any conditions restricting liberty, the Pre-Trial Chamber shall seek the views of the Prosecutor, the person concerned, any relevant State and victims that have communicated with the Court in that case and whom the Chamber considers could be at risk as a result of a release or conditions imposed’, while regulation 51 of the Regulations stipulates that, ‘[f]or the purposes of a decision on interim release, the Pre-Trial Chamber shall seek observations from the host State and from the State to which the person seeks to be released’.

10. It is also recalled that the Appeals Chamber has previously held that ‘in order to grant conditional release the identification of a State willing to accept the person concerned as well as enforce related conditions is necessary’.⁹

11. Given that Mr Gicheru seeks conditional release to Kenya and the Prosecutor is not opposed to this request,¹⁰ the Chamber invites Kenya to submit any observations that it considers relevant to the Chamber’s impending decision on the Interim Release Request and, in particular, as to its willingness and ability to enforce one or more

⁵ ICC-01/09-01/15-38-Conf, together with four confidential annexes. 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.

⁶ ICC-01/09-01/15-38-Conf, paras 4, 9, p. 12.

⁷ ICC-01/09-01/15-39-Conf, with confidential annex.

⁸ ICC-01/09-01/15-39-Conf, para. 1.

⁹ Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa”, 2 December 2009, [ICC-01/05-01/08-631-Red](#) (OA2), para. 106.

¹⁰ ICC-01/09-01/15-38-Conf, p. 12; ICC-01/09-01/15-39-Conf, para. 1.

conditions restricting liberty the Chamber could potentially impose, including those set out in rule 119(1) of the Rules with a specific emphasis on the following conditions arising from that provision: '(a) The person must not travel beyond territorial limits set by the Pre-Trial Chamber without the explicit agreement of the Chamber; (b) The person must not go to certain places or associate with certain persons as specified by the Pre-Trial Chamber; (c) The person must not contact directly or indirectly victims or witnesses; (d) The person must not engage in certain professional activities; (e) The person must reside at a particular address as specified by the Pre-Trial Chamber; (f) The person must respond when summoned by an authority or qualified person designated by the Pre-Trial Chamber [...]'. In this regard, the Chamber specifically requests Kenya to provide observations as to its willingness and ability to facilitate the possibility of Mr Gicheru travelling between Kenya and the Netherlands for the purposes of the proceedings in the present case.

12. Furthermore, the Chamber invites the Netherlands to submit any observations that it, as the host State, considers relevant to the Chamber's impending decision on the Interim Release Request, including, in particular, as to its willingness and ability to facilitate the possibility of Mr Gicheru travelling between Kenya and the Netherlands, as well as the possibility of Mr Gicheru temporarily residing in the Netherlands, for the purposes of the proceedings in the present case.

13. Having received the Interim Release Request and the Prosecutor's Response, and noting that the Chamber is not aware of victims having communicated with the Court in relation to the present case, the Chamber considers that it is not necessary to request any further observations pursuant to rule 119(3) of the Rules.

14. Lastly, the Chamber specifies that the present order is issued for the purposes of adopting a decision on the Interim Release Request and, as a consequence, neither this order nor any observations received shall be construed as prejudging any matter to be determined in the context of that decision.

FOR THESE REASONS, THE CHAMBER HEREBY

- a) **INVITES** the Republic of Kenya to provide the observations specified in paragraph 11 of the present order by no later than 26 November 2020;
- b) **INVITES** the Kingdom of the Netherlands to provide the observations specified in paragraph 12 of the present order by no later than 26 November 2020; and
- c) **ORDERS** the Registrar to forthwith transmit the present order to the competent authorities of the Republic of Kenya and the Kingdom of the Netherlands.

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



Judge Reine Adélaïde Sophie Alapini-Gansou

Dated this Thursday, 12 November 2020

At The Hague, The Netherlands