

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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

**Prosecution's Response to the observations submitted by the Republic of Kenya
and the Kingdom of the Netherlands and associated requests**

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The Kingdom of the Netherlands

I. INTRODUCTION

1. The Prosecution submits herewith its response to the observations submitted by the Republic of Kenya ("Kenya")¹ and the Kingdom of the Netherlands ("the Netherlands")² pursuant to Pre-Trial Chamber A's³ Order of 12 November 2020.⁴
2. The Prosecution agrees with the Defence submission⁵ that the decision of the High Court of Kenya,⁶ upon which Kenya relies in its observations, misapprehends the admissibility regime applicable to article 70 offences. Since Gicheru has subsequently travelled to the seat of the Court of his own accord and voluntarily surrendered, the Decision of the High Court is also now moot. The warrant of arrest issued against Gicheru has now been executed and has thus lapsed. In any event, the Prosecution submits that it is clear from the terms of this order that it does not constitute a bar to Kenya's enforcement of any of the conditions of interim release envisaged in rule 119 of the Rules of Procedure and Evidence. Kenya is not required to take any action in furtherance of Gicheru's surrender, which has already occurred.⁷ Finally, 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.
3. However, to the extent that Kenya still regards the High Court Decision as binding notwithstanding Gicheru's waiver – in particular the finding that it, and not the ICC, has primary jurisdiction to try this case⁸ – clarity on the issue of jurisdiction

¹ ICC-01/09-01/15-54-Anx I ("Observations of Kenya").

² ICC-01/09-01/15-54-Anx II ("Observations of the Netherlands").

³ "The Chamber".

⁴ ICC-01/09-01/15-42 ("Chamber's Order").

⁵ ICC-01/09-01/15-57, paras. 8-9.

⁶ Observations of the Netherlands, Annex I ("High Court Decision").

⁷ "Rules".

⁸ High Court Decision, paras. 78(a) and (c).

is desirable to remove any perceived obstacle to Kenya's cooperation, both in regard to the issue at hand, but also going forward. The Prosecution observes that the former Single Judge of PTC II has already ruled on this issue, which ruling stands unless and until varied or set aside. Accordingly, 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.

4. The Prosecution also agrees with the Defence that the Netherlands provided no observations with respect to Gicheru "temporarily residing in the Netherlands, for the purposes of the proceedings in the present case"⁹ and with the relief requested.¹⁰
5. However, the Prosecution notes that Gicheru has been in custody for over a month, notwithstanding the Prosecution's agreement that he may be conditionally released and that the resolution of the abovementioned issues may further delay his release. The Prosecution accordingly considers that any further consultation with the relevant States should be concluded as swiftly as possible.

II. SUBMISSIONS

Response to Kenya's observations

i. Request for reclassification

6. The Prosecution notes that the issue of the misinterpretation by Kenya's High Court of the applicable statutory regime governing article 70 was previously

⁹ Chamber's Order, para. 12.

¹⁰ *Contra* Observations of the Netherlands, fourth paragraph: "[The Ministry of Justice and Security] will also make arrangements for the transport of Mr Gicheru back to the Detention Unit upon his return to the Netherlands".

raised *ex parte* by the Prosecution¹¹ with Pre-Trial Chamber II.¹² This was in response to Registry's filing¹³ of Kenya's communication to the Court of the High Court Decision.¹⁴ In light of Gicheru's subsequent surrender and the fact that Kenya has referred to this decision in its public observations, the basis for the confidential *ex parte* classification no longer exists. The Prosecution accordingly requests that the Registry's Transmission of Communications, the Prosecutions Clarification Request and the determination by PTC II¹⁵ are reclassified as "public". However, for the benefit of the Parties who do not presently have access to the Prosecution's Clarification Request, the salient arguments are rehearsed below.

ii. The High Court Decision is no bar to enforcement of conditions

7. The Prosecution notes that Kenya considers that "by dint of the existing order of the High Court as mentioned hereinabove, Kenya [...] 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". However, nothing in the terms of the relevant order bars such assistance. The relevant portion of the order 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."¹⁶ But given Gicheru's subsequent voluntary surrender, the warrant of arrest issued by the Single Judge which gave rise to the litigation in the Kenyan High Court has now

¹¹ ICC-01/09-01/15-15-Conf-Exp ("Prosecutions Clarification Request").

¹² "PTC II".

¹³ ICC-01/09-01/15-14-Conf-Exp ("Registry's Transmission of Communications").

¹⁴ ICC-01/09-01/15-14-Conf-Exp-AnxIII.

¹⁵ ICC-01/09-01/15-16-Conf-Exp.

¹⁶ Observations of Kenya, para. 18 (emphasis added).

been executed and has therefore lapsed. It would thus appear that this order, as regards Gicheru, is now moot.

8. Kenya's response also conflates the issues of surrender and enforcement of conditions of interim release. Kenya is not requested to take any action in furtherance of surrender, which has already occurred. The issue on which Kenya's observations were sought was the enforcement of conditions of interim release, as set out in the Chamber's Order and in rule 119. It is possible that, in the event that Gicheru were to breach the conditions of his release, the Chamber may decide to issue a warrant for his arrest under rule 119(4). However, that would be a fresh warrant, issued subsequent to Gicheru's voluntary surrender to the jurisdiction of the Court and the submission of his consent to surrender and any subsequent request for surrender would need to be considered afresh in that context.

iii. The High Court Decision is based on a misinterpretation of the jurisdiction regime for article 70 offences

9. While Kenya does not explicitly challenge the jurisdiction of the Court to prosecute Gicheru for alleged offences under article 70, its observations appear to demonstrate that it considers the findings of the Kenyan High Court to be authoritative, including the finding that "[t]he High Court has primary jurisdiction to try the subject offences".¹⁷ In these circumstances, the Prosecution considers it necessary to resolve this issue of jurisdiction to ensure that it presents no further obstacles to cooperation going forward.
10. In rejecting the application for the surrender of Gicheru and Bett and lifting the warrants against them, the High Court Decision identifies what it considers as two fatal errors in the procedure before this Court in the issuance of the request for

¹⁷ Observations of Kenya, para. 17.

arrest and surrender: (i) that the Single Judge, in her decision on the Prosecutor's application for a warrant of arrest,¹⁸ did not respect the principle of complementarity; and (ii) that before issuing her decision, the Single Judge failed to seek the views of the Kenyan authorities.¹⁹

11. The errors identified in the High Court Decision, however, arise from a fundamental misinterpretation of the jurisdiction and admissibility regime governing article 70 offences. Although the High Court recounts the provisions of the Statute that it considered applicable to the principle of complementarity – in particular article 17, article 1 and the preamble – it overlooked the fact that article 70 offences are excluded from the normal regime applicable to article 5 crimes. In particular, as rule 163(2) of the Rules makes clear, “[t]he provisions of Part 2, and any rules thereunder, shall not apply, with the exception of article 21”.²⁰ The rule thereby gives effect to article 70(4)(b), which provides that it is for the Court to determine whether a case should be submitted for domestic prosecution. As the provision clearly states, “[u]pon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution...” (emphasis added). This is also why rule 162(1) of the Rules makes it discretionary whether the Court consults with States Parties that may have jurisdiction over the offence, stating “the Court may consult with” such States.
12. Article 17, located in Part 2, thus finds no application to offences against the administration of justice. Similarly, the reliance on references to the Court's complementary jurisdiction in article 1 and the preamble is inapposite since, read

¹⁸ ICC-01/09-01/15-1-Red.

¹⁹ High Court Decision, paras. 66-72, 78(a) and 78(c).

²⁰ It appears from the High Court Decision that the High Court did not make any reference to this vital provision, despite the fact that it is referred to in the decision of the Single Judge; ICC-01/09-01/15-1-Conf-Exp, para. 4.

in context, these both refer to prosecutions for the most serious crimes of international concern—that is article 5 crimes.

13. The effect of these provisions is that, unlike article 5 crimes, it is *the Court* which enjoys primary jurisdiction over the investigation and prosecution of article 70 offences, unless and until the Court²¹ exercises its discretion to refer the matter to a State Party for prosecution. This interpretation is also supported by the drafting history of rule 162.²²
14. If the plain language of the provisions is not clear enough, a purposive interpretation also supports this conclusion. Once a case is properly before the Court,²³ it is the responsibility of the Chamber tasked with the duty to ensure the fairness and expeditiousness of the trial²⁴ and maintain order over the proceedings.²⁵ The offences against the administration of justice contained in article 70 concern offences committed against the administration of justice at this Court, not that of the State Party. In the instant matter, the conduct that is the focus of the warrants against the suspects is alleged to have had a direct and serious impact upon the *Ruto and Sang* case—a case that the Appeals Chamber confirmed was admissible before the Court.²⁶ Thus it is both logical and appropriate that the Court should have jurisdiction to prosecute Gicheru and Bett for offences under article 70, unless it decides otherwise.
15. Nor was the Single Judge – or the Prosecutor – required to consult with the Kenyan authorities prior to issuing her decision, this also being a discretionary assessment

²¹ As defined in article 34.

²² See for instance Lee (ed) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, pp. 610-612.

²³ Which presupposes that the requisite admissibility and jurisdiction requirements are met.

²⁴ Article 64(2).

²⁵ Article 64(9)(b).

²⁶ ICC-01/09-01/11-307.

for this Court.²⁷ The Single Judge properly considered the factors set out in rule 162(2) of the Rules, which are themselves discretionary, and determined that the Court should continue to exercise jurisdiction over the case.

iv. The Defence request for clarification of the admissibility regime

16. To the extent that Kenya still regards the High Court Decision as binding notwithstanding Gicheru's waiver – in particular the finding that it, and not the ICC, has primary jurisdiction to try this case²⁸ – the Prosecution agrees with the Defence that clarity on the issue of jurisdiction is desirable to remove any perceived obstacle to Kenya's cooperation, both in regard to the issue at hand, but also going forward. However, the Prosecution observes that its previous request for clarification was rejected by PTC II on the basis that it considered that there was no statutory basis upon which it could provide such a clarification. Additionally, as already noted, Part 2 does not apply to the present case, it is not open for the Prosecution to request a ruling on jurisdiction or admissibility under article 19(3), nor for Kenya to challenge under articles 19(2)(b) or 19(4).
17. As regards the Defence's request to "invite Kenya to provide further observations in light of the admissibility regime applicable to Article 70 cases", the Prosecution observes that the Single Judge has already ruled on the issue of jurisdiction, which ruling stands. Accordingly, 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.

²⁷ The Prosecution also notes that the request for arrest and surrender requested the Republic of Kenya "if appropriate and in accordance with article 97 of the Statute to consult the Court without delay in the event it identifies problems which may impede or prevent the execution of the present request"; ICC-01/09-01/15-4-Conf-Exp, p. 5.

²⁸ High Court Decision, paras. 78(a) and (c).

18. Given that the issue at hand is pressing, as it concerns the liberty of the Suspect, the Prosecution requests that the pending request for interim relief should not be delayed pending the outcome of any requests that Kenya may choose to file in this regard.

Response to the Netherlands' observations

19. The Prosecution agrees with the Defence that the Netherlands has not provided observations in relation to Gicheru "temporarily residing in the Netherlands, for the purposes of the proceedings in the present case",²⁹ rather than being detained in the ICC Detention Centre during his presence in the Netherlands.³⁰

20. The Prosecution agrees that the Netherlands should be requested to provide further observations on the possibility of Gicheru temporarily residing in the Netherlands for the purposes of the article 70 proceedings.

21. However, the Prosecution observes that this will only become an issue in concrete terms when Gicheru is next required to attend the proceedings in person at the seat of the Court, which may be several months hence. Thus, the Prosecution considers that the pending decision on the request for interim release need not necessarily be delayed until receipt of such further observations.

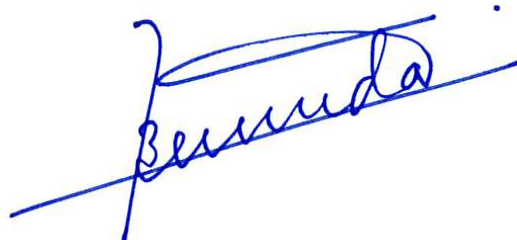
III. CONCLUSION AND RELIEF SOUGHT

22. The Prosecution agrees with the Defence's submissions relating to the observations of Kenya and the Netherlands and sets out above its proposed way forward.

²⁹ Chamber's Order para. 12.

³⁰ *Contra* Observations of the Netherlands, fourth paragraph: "[The Ministry of Justice and Security] will also make arrangements for the transport of Mr Gicheru back to the Detention Unit upon his return to the Netherlands".

23. The Prosecution requests the reclassification as “public” of the Registry’s Transmission of Communications, the Prosecutions Clarification Request and the determination by PTC II.



Fatou Bensouda, Prosecutor

Dated this 4th day of December 2020
At The Hague, The Netherlands