



UvA-DARE (Digital Academic Repository)

Why the ICC's termination of proceedings against deceased Kenyan defendant Paul Gicheru should not be the end of the matter

Sluiter, G.; Hamilton, T.

Publication date

2022

Document Version

Final published version

[Link to publication](#)

Citation for published version (APA):

Sluiter, G. (Author), & Hamilton, T. (Author). (2022). Why the ICC's termination of proceedings against deceased Kenyan defendant Paul Gicheru should not be the end of the matter. Web publication or website, EJIL: Talk!. <https://www.ejiltalk.org/why-the-iccs-termination-of-proceedings-against-deceased-kenyan-defendant-paul-gicheru-should-not-be-the-end-of-the-matter/>

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

Why the ICC's termination of proceedings against deceased Kenyan defendant Paul Gicheru should not be the end of the matter

 [ejiltalk.org/why-the-iccs-termination-of-proceedings-against-deceased-kenyan-defendant-paul-gicheru-should-not-be-the-end-of-the-matter/](https://www.ejiltalk.org/why-the-iccs-termination-of-proceedings-against-deceased-kenyan-defendant-paul-gicheru-should-not-be-the-end-of-the-matter/)

Göran Sluiter, Tomas Hamilton

October 17, 2022

On 26 September 2022, an ICC defendant, Mr Paul Gicheru, died in Kenya at the age of 52, prompting [the New York Times](#), [Radio France Internationale](#) and [Voice of America](#) to report on the suspicious circumstances surrounding his sudden demise. Mr Gicheru passed away at home after visiting a restaurant, while his son, with him in the restaurant, suffered abdominal pains. Further investigations are needed, but it cannot be excluded that Mr Gicheru was murdered, for example by poisoning. Indeed, Mr Gicheru's lawyer in the ICC proceedings, Michael G Karnavas, [suspects foul play](#), calling on the Kenyan authorities and the ICC to open a full investigation: 'It's somewhat odd that after the election in Kenya, and before the court issues its judgment, there is this incident,' he said, commenting that this 'warrants the ICC stepping up to the plate.'



Mr Gicheru was accused in an ICC trial that would have soon resulted in his conviction or acquittal on charges pursuant to Article 70 of the Rome Statute, concerning the alleged bribery of a number of witnesses in the ICC case against Mr William Ruto – now the President of Kenya. Mr Gicheru was not detained in the Hague pending trial; after initially volunteering to attend proceedings in the Hague, he had returned to Kenya on [interim release with conditions](#) restricting his liberty. The closing statements in the Gicheru case were held on 27 June 2022 and the judgment of Trial Chamber III would likely have been issued within ten months of the parties' final submissions.

Although [Trial Chamber III terminated proceedings](#) against Mr Gicheru on 14 October 2022 (having received from Kenya an authorization of his burial), a number of dilemmas remain. We argue that the ICC needs to consider at least three courses of action: (i) conduct an independent ICC investigation into the cause of death; (ii) in case the evidence points in the direction of foul play, initiate a full and independent ICC investigation under Article 70; (iii) the Prosecutor should issue a broad recusal delegating all strategic decisions, including budgetary decisions, in the Kenya Situation to one or both Deputy Prosecutors.

Independent ICC investigations into the cause of death

Which actor(s) or organ(s) can or should investigate the circumstances surrounding Mr Gicheru's death?

The ICC law allows for the possibility, upon order by the Presidency, of an inquiry into the circumstances of the death of a *detained* person (Regulation 103(7) of the Regulations of the Court). International tribunals have triggered investigations into the death of accused persons, for example when ICTY defendant Mr Slobodan Praljak committed suicide in court by swallowing poison and the ICTY initiated an independent administrative review and requested Dutch authorities to conduct a criminal investigation. The law of the Kosovo Specialist Chambers actually obliges the Registrar to determine the cause of death of someone *in detention*, and in case of suspicious circumstances surrounding the death, the matter must be referred to competent local authorities (Rule 60 of the KSC RPE). In the context of the ECCC, there is a similar duty, mandating the Co-Prosecutors to determine the cause of death of a defendant – also applying when that suspect is outside the ECCC detention facility (Internal Rule 32bis). To discharge the burden to determine the cause of death, the prosecution may order autopsies, toxicology reports and other investigations.

Looking again at the ICC law, one interpretation is that Mr Gicheru was at the time of his death not in ICC custody in Scheveningen, and therefore, one could argue, there is no role whatsoever for the ICC to conduct or be involved in any investigation into the cause of death. However, the Court has at least an interest, if not a responsibility, to look into the suspicious circumstances around this Kenyan defendant. An alternative reading of the ICC legal framework, *inter alia* Regulation 103(7), is that Mr Gicheru's detention was suspended, under strict conditions that restricted his liberty, and that this very fact could justify the Court looking into the circumstances of his death, perhaps inspired by the ECCC's legal framework.

An independent and autonomous role for the ICC in investigating Mr Gicheru's death would be welcomed in light of doubts that one may have with respect to the alternative, i.e. fully national, Kenyan, investigations. Kenya has been criticized strongly in the past for failing to effectively investigate the murder of Mr Yebei, an individual connected to ICC's Kenya proceedings (see further below). It would not be unreasonable to be concerned that the Kenyan President, Mr Ruto, may have benefited from the death of Mr Gicheru and may have an interest in any Kenyan investigations being less than thorough and independent.

Can the ICC use Article 70 to investigate allegations of the murder of Mr Gicheru?

In case an autopsy or other facts and circumstances point in the direction of an unnatural cause of death, the question next arises whether the ICC could investigate and prosecute the murder of Mr Gicheru. This will be particularly relevant in case of doubts as to the quality of the Kenyan investigations. The murder of an accused is neither a war crime, crime against humanity, genocide or crime of aggression. Could it be an offence against the administration of justice, as penalized in Article 70?

The enumerated offences in Article 70 do not include 'murder', nor is there any mention of 'defendant'. But the offences of *obstructing the attendance or testimony of a witness* or *retaliating against a witness* pursuant to Article 70(1)(c) could be relevant. This would

depend on who is considered to be a 'witness' within the meaning of this provision.

The Court might read 'witness' broadly to encompass Mr Gicheru if he had already been in cooperation with the OTP with a view to providing evidence or testimony (whether for his own proceedings, or for the case against Mr Ruto).

A broad approach can be drawn from Article 285a of the Dutch Penal Code, which penalizes with up to four years' imprisonment the interference with 'a person's freedom to make a statement before a court', even where the statement is never actually made. According to the commentary on this provision, there need only be:

'a reasonable chance that someone will make a statement. This can already be the case if that person has not (yet) shown the wish to make a statement or has received an invitation, summons or summons to do so.'

Article 285a, which also serves to implement Article 70 of the ICC Statute (see subsection 2) is directed at protecting any person's freedom to make a statement truthfully by criminalising the intention of the perpetrator to interfere with that freedom.

Following such an approach, the question then would be: was there a reasonable chance that Mr Gicheru would make a statement in an ICC case? If so, Article 70 in its current form, with a reasonable interpretation of witness, in light of the object and purpose of Article 70, is applicable. The killing, if proven, would constitute obstructing Mr Gicheru's participation in proceedings as a witness, or retaliating against him for cooperating with the ICC.

Revising 'Article 70' to allow the ICC a more active role

Alternatively, if one were to draft a new Article 70 *bis* – being aware of what happened to witnesses in the previous Kenya case and of what may have happened to Mr Gicheru – it could expand the 'offences against the administration of justice'. Threats, intimidation against -even murder of- an accused could be added, on the grounds that killing an accused at the ICC is not only an offence against the individual's life, but against justice. It prevents justice from being done in the most abrupt and definite way.

It could be argued that 'offence against justice' is not the best label to cover very severe acts against witnesses – or accused persons – the national crimes of murder and causing seriously bodily harm appear more suitable. But prosecuting one does not rule-out prosecuting the other. And these two sets of criminal offences protect very different societal interests (on the one hand, to avoid killings, on the other hand, to uphold the administration of justice).

A significant problem in the context of the ICC is that national investigations -which bear the responsibility for the investigation and prosecution of 'ordinary' crimes- may not always be available or effective to convict the murderer of an ICC defendant or witness. Although in

such a scenario, the ICC would not have (complementary) jurisdiction over the murder, the non-availability of national proceedings would be an additional reason for the ICC to act in cases of serious crimes against its accused and witnesses (and also lawyers and officials).

A revised 'Article 70 *bis*' could include an explicit provision for attacks on witnesses and the accused (but also lawyers, officials, staff etc.) connected to the proceedings of the ICC and resulting in serious injury or death(s). The maximum sentence of five years may need to be increased to account for the increased severity of such offences against the administration of justice.

Serious harm to witnesses in the Kenya Situation

If a broader Article 70 had been available from the beginning, the ICC could have responded more robustly to several serious incidents in the Kenya Situation. The fact is that witnesses have not only been bribed and 'corruptly influenced' in the Kenya Situation, but at least one individual, Mr Yebei, connected to ICC proceedings in the Kenya Situation, has been brutally murdered. This is what the former Prosecutor said in early 2015 in a statement related to the death of Mr Yebei (who was not selected as a prosecution witness):

During the course of the Prosecution's investigations, the Office of the Prosecutor contacted numerous individuals in Kenya, including Mr Yebei. However, Mr Yebei was ultimately not included on the Prosecution's list of trial witnesses due to, amongst other reasons, information indicating that Mr Yebei was deeply implicated in the scheme to corrupt Prosecution witnesses in the case against Mr Ruto and Mr Sang.

The former Prosecutor expressed willingness to cooperate in national Kenyan investigations into Mr Yebei's death, which were severely criticized, including by members of Yebei's family. Nobody was ever arrested and tried. Meanwhile, Mr Khan, Ruto's defence counsel at the time, insisted that Yebei was in fact a critical witness for the defence, not the prosecution, while the ICC confirmed that Mr Yebei had been under its protection prior to the killing.

The fate of Mr Yebei, and absence of effective investigations in his case, forebodes ill when it comes to doing justice in respect of the death of Mr Gicheru, as well as other alleged killings of (potential) ICC witnesses reported in Kenyan national press (eg here, here and here).

Legally speaking, with a broader scope of Article 70, the ICC Prosecutor would have been on solid ground to conduct her own investigations into the murder of Mr Yebei. But also on the basis of the current Article 70, interpreting 'witness' in that provision to encompass anyone for whom there is a reasonable chance of providing a witness statement (see above) – the ICC Prosecutor could have conducted investigations. As follows from the OTP press statement of January 2015, Mr Yebei was considered a potential witness at some stage, which should be sufficient to require protection for him – and the Court – from criminal interference.

Some thoughts on next investigative steps in the Kenya Situation

In case the death of Mr Gicheru was indeed the result of a crime, it raises a number of sensitive questions for the ICC's handling of the Kenya Situation.

For context, this is what the former Prosecutor said in the aforementioned statement of January 2015:

Prosecution witnesses in this case have been under siege. The Office of the Prosecutor has identified a network of individuals who have been working together to sabotage the Prosecution's case against Messrs. Ruto and Sang, by using bribes and/or threats to either dissuade witnesses from testifying in this case or influence Prosecution witnesses to recant their testimony.

Later on, this campaign of witness interference sadly proved quite successful, as the case against the last two remaining suspects in the Kenya Situation, Mr Ruto and Mr Sang, collapsed and ended with an acquittal. However, Trial Chamber V(A) was apparently of the view that the accused should not have the full benefit of this campaign of witness interference, issuing an acquittal without prejudice to the Prosecutor's resumption of investigations and prosecutions in the future, in case of new evidence becoming available. This legal move was criticized, but until today the possibility of new trial of current Kenyan President, Mr Ruto, still hangs as a cloud over his head.

At least two scenarios are possible as to how the events in the Gicheru case could trigger proceedings against Ruto in the future (or against the two other suspects in the Kenya Situation against whom arrest warrants have been issued – Mr Barasa and Mr Bett).

First, the trial of Mr Gicheru, and all evidence collected and presented in that trial, could be useful, either directly or as a springboard, for resuming the 'main Kenya case'. It could be that a judgment of conviction would have pointed out that crucial witnesses in the Kenya Situation were bribed or threatened to change their testimony in favour of Mr Ruto. This could present grounds either to take 'fresh' evidence from these same witnesses, or use the initial statements of these witnesses as truthful (which may be possible on the basis of revised Rule 68(2)(b)(d), and assuming a 'new' trial will not raise any issue of retroactive effect of that revised rule) when reopening the case against Mr Ruto.

As a second scenario, a judgment of conviction might have contained incriminating findings of Mr Ruto's involvement in a scheme of interference with witnesses to the advantage of his case. In such a scenario, Mr Ruto would risk becoming considered a co-perpetrator and fresh proceedings for offences against the administration of justice could be initiated against him. His position as sitting Kenyan President would not endow him with immunities in light of the language in Article 27(2) (ruling out any immunity based on official capacity and thereby not distinguishing between core crimes and offences against the administration of justice).

The fact that Mr Gicheru is dead, and therefore a judgment can no longer be delivered in his case, would not necessarily 'save' Mr Ruto from possible future proceedings at the ICC. The evidence of the Gicheru case is already in the hands of the Prosecutor and can be used for future investigations, with or without a judgment of conviction. But a strong judgment of conviction would certainly have given a considerable boost to possible future investigations.

This leads to the question whether the OTP is in fact able and prepared to take the necessary steps to deliver justice in the Kenya Situation, and -in the event the evidence points in that direction- to open or re-open proceedings against Kenyan President Ruto.

The objective risk of ICC prosecutorial bias in the Kenya Situation

It is widely known that the current Prosecutor, Mr Karim Khan KC, acted as defence counsel for Mr Ruto for many years. While in principle, the Code of Conduct of the Bar Council of England and Wales does not prohibit former defence counsel from being employed by prosecuting authorities that are dealing with related matters, the ICC must be wary of the objective risk of bias in the Kenya Situation.

Correctly, Mr Khan recused himself on 29 June 2021 from participating in the Gicheru case pursuant to Article 42(7) of the ICC Statute. The Prosecutor's recusal applies, however, only to proceedings in that 'case', leaving it uncertain how it affects his potential role in the re-evaluation of the Ruto proceedings (or potential proceedings in Barasa or Bett, should custody over either suspect be obtained). The consequence of the Prosecutor's recusal was specified as follows:

the Prosecutor will (i) not have access to any non-public filings in the record of the case; (ii) not have access to any non-public evidence submitted in the record of the case; and (iii) not be involved in any discussion or decision on a substantial or administrative level related to the case. Further, the Chamber considers that the Deputy Prosecutor will replace the Prosecutor and perform any of his functions for the purposes of this case.

The Prosecutor's self-recusal under Article 42 does not resolve all the issues. Article 42(2) of the Statute makes clear that the Prosecutor has full authority over management and resources within his office. It is difficult to imagine how someone other than Mr Khan could, for example, decide on allocating more resources to the Kenya Situation or, if the evidence makes that possible, re-opening the proceedings against his former client, Mr Ruto. It is equally difficult to imagine how someone other than Mr Khan could issue a robust statement in reaction to the death of Mr Gicheru.

If the Prosecutor's office does not provide a robust response to the death of Mr Gicheru, and there are no further investigative steps against Mr Ruto, a fair-minded observer may perceive bias in the ICC's treatment of the Kenya Situation. While it may not reach the level of a conflict of interest under Section 9 of the Code of Conduct for the Office of the Prosecutor,

paragraph 23(d) of that code refers to ‘full independence’ in terms of perceptions – the Prosecutor must ‘refrain from any activity which may lead to *any reasonable inference* that their independence has been compromised’, and paragraph 31 prohibits participation in ‘any matter in which their impartiality *might reasonably be doubted* on any ground’.

Fueled by the incident of Mr Gicheru’s death, an objective observer could have justifiable concerns of an appearance of bias, i.e. that the Prosecutor does not wish to go after his former client. We suggest this would be an opportune moment for the Prosecutor to issue a broad recusal delegating all strategic decisions in the Kenya Situation, including budgetary decisions, to one or both of the Deputy Prosecutor (Mr Mame Mandiaye Niang (Senegal) and Ms Nazhat Shameem Khan (Fiji)).

Conclusion

Based on our analysis, we offer three practical recommendations for the Court to consider.

Following Trial Chamber III’s termination of proceedings against Mr Gicheru on 14 October 2022, the Chamber or the Presidency should order an independent ICC investigation into the cause of his death. In the event this points in the direction of foul play, the Deputy Prosecutor(s) should initiate a full and independent ICC investigation into the alleged murder of Mr Gicheru as a potential offence against the administration of justice pursuant to Article 70. The ICC Prosecutor should recuse himself from the Kenya Situation in a very broad manner, to permit the Deputy Prosecutor(s) to finally seek to deliver justice.

Note: one of the authors, Göran Sluiter, has represented witnesses in the *Ruto* case at the ICC.