

Public Redacted Version of Annex A

From: [REDACTED]
Sent: 23 December 2020 15:10
To: Mascetti, Daria; Alapini-Gansou, Reine
Cc: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
Subject: RE: Message to the Honorable Single Judge of Pre-Trial Chamber A from Counsel representing Mr. Gicheru

Dear Counsel,

The Pre-Trial Chamber will not be in a position to take a decision on this matter before the beginning of next year, taking into consideration that the High Court of Kenya has not yet issued its decision after being requested to reconsider its 16 November 2017 Judgment.

With kind regards,

[REDACTED]
Senior Legal Adviser of the Pre-Trial Division

(On behalf of Pre-Trial Chamber A)

From: Mascetti, Daria <dmascetti@iccepn.org>
Sent: mercredi 23 décembre 2020 10:35
To: Alapini-Gansou, Reine [REDACTED]
Cc: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Subject: Message to the Honorable Single Judge of Pre-Trial Chamber A from Counsel representing Mr. Gicheru

Please find below an email to the Honorable Single Judge of Pre-Trial Chamber A from Counsel representing Mr. Gicheru:

To the Honorable Single Judge of Pre-Trial Chamber A,

I write to you concerning Mr. Gicheru's request for provisional release.

Considering the forthcoming winter holiday season that is upon us, I am respectfully inquiring whether a decision will be taken prior to the beginning of the new year. Obviously, if possible, Mr. Gicheru would appreciate spending Christmas with his family.

With the Prosecution not opposing Mr. Gicheru's request, with Mr. Gicheru having traveled to the Netherlands for the expressed reason of surrendering himself to the ICC in light of his arrest warrant, with Mr. Gicheru's submission of a signed consent to the Attorney General of Kenya as suggested, and with the High Court of Kenya being requested to reconsider its 16 November 2017

Judgment – even though the issue of whether ICC has jurisdiction over the alleged article 70 offences is moot – there should be no obstacles preventing Kenya’s cooperation in this matter.

Recognizing the complexities involved issuing decisions concerning provisional release, it is with the greatest respect that I make this inquiry. To the extent Her Honor can provide any guidance, it is most appreciated.

Sincerely yours,

Michael G. Karnavas
Counsel for Mr. Paul Gicheru

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From: Mascetti, Daria
Sent: 30 November 2020 15:55
To: [REDACTED]
Cc: [REDACTED] Karnavas, Michael
Subject: RE: Request for CSS Assistance - Defence Team of Mr Paul Gicheru
Attachments: 201130 - Mr Paul Gicheru's Consent to surrender.pdf; 201130 - Signed consent.pdf; 48 - Anx1.PDF; 48 - Notification of appointment.PDF

Dear Mr [REDACTED],

Further to my email of this morning, please find attached all the documents that must be forwarded to the External Operations Section for transmission to The Republic of Kenya.

I would appreciate if you could: (i) acknowledge receipt of this email as well as of the attachments; and (ii) inform us of any follow-up you may have on this matter.

Should you require any additional information, please do not hesitate to contact me.

Kind regards,
Daria

From: [REDACTED]
Sent: 30 November 2020 13:16
To: Mascetti, Daria <dmascetti@iccepn.org>
Cc: [REDACTED]; Karnavas, Michael
[REDACTED]
Subject: RE: Request for CSS Assistance - Defence Team of Mr Paul Gicheru

Dear Ms Mascetti,

Thank you for your email.

As soon as we receive the final (and signed) request for cooperation from the Defence team for Mr Gicheru we will forward it to the relevant Registry colleagues for onward transmission to the external entity as per the CSS' standard practice.

For your reference, I attach the following guiding document as you may find it useful.

Kind regards,
[REDACTED]

From: Mascetti, Daria <dmascetti@iccepn.org>
Sent: 30 November 2020 12:49
To: [REDACTED]
Cc: [REDACTED]
[REDACTED] Karnavas, Michael [REDACTED]
Subject: Request for CSS Assistance - Defence Team of Mr Paul Gicheru

Dear Mr [REDACTED],

I hope this email finds you well.

Further to the submission on 27 November 2020 of the Observations of the Republic of Kenya on the request for provisional release of Mr Gicheru ("27 November 2020 Kenya Observations"), the Defence team of Mr Gicheru wishes to request the assistance of CSS in forwarding a response to the 27 November 2020 Kenya Observations to the External Operations Division.

The Attorney General of the Republic of Kenya in the 27 November 2020 Observations of the Republic of Kenya requires, in order to comply with the statutory requirements of the International Crimes Act of Kenya, Mr Gicheru to communicate his consent to his surrender to the ICC to the High Court of Kenya. Accordingly, the Defence team, after having prepared the consent, has contacted the ICC Detention Centre in order to request their assistance to get Mr Gicheru signature on the consent that will be attached to the official letter. As soon as a scanned copy of this document is received, it will be forwarded to you.

As per past practice, the Defence would like to request CSS assistance in forwarding the documentation to the External Operations Division as soon as the signed consent is received.

Should you require any additional information, please do not hesitate to contact me.

Kind regards,
Daria

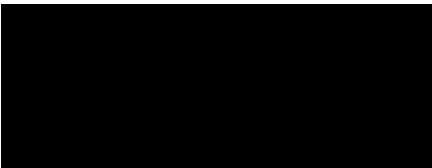
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MICHAEL G. KARNAVAS
Attorney at law



30 November 2020



To: **Mr. Paul Kihara Kariuki**
Attorney General of the Republic of Kenya

Re: Mr. Paul Gicheru's consent to surrender to the ICC relevant to the Republic of Kenya's observations to ICC Pre-Trial Chamber A [AG/SEC/14/209/6 VOL 1(53)]

Dear Mr. Attorney General,

As Mr. Paul Gicheru's appointed Counsel in the Article 70 proceedings against him at the International Criminal Court ("ICC"), I write regarding the Republic of Kenya's observations regarding its willingness and ability to enforce conditions of provisional release and facilitate Mr. Gicheru's travel between Kenya and the Netherlands for the proceedings.

In your observations you note that the High Court of Kenya lifted Mr. Gicheru's arrest warrant and directed Kenya not to act in furtherance of the request for his surrender. You also note that although Mr. Gicheru did not comply with the statutory procedure in Section 41 of the International Crimes Act by notifying the High Court that he consents to surrender, he still has an opportunity to do so.

Obviously, by traveling on his own volition to the Netherlands to surrender to the ICC, Mr. Gicheru has consented to the ICC's jurisdiction. However, noting the need for Mr. Gicheru to formally comply with Section 41 of the International Crimes Act, through this letter and the attached consent, hereby informs the High Court of Kenya that he knowingly, intelligently, freely, and unequivocally consents to being surrendered to the ICC for the Article 70 proceedings initiated against him by the ICC Office of the Prosecutor ("OTP").

The OTP does not object to Mr. Gicheru's provisional release and it is virtually certain that Pre-Trial Chamber A will decide favorably for Mr. Gicheru. Accordingly, I respectfully and urgently request your good offices to communicate the attached consent to the Cabinet Secretary of Ministry of Interior and Coordination of National Government and the High Court of Kenya, to request the High Court to reconsider its 16 November 2017 Judgment, and to communicate the Government's reconsidered position to the ICC on whether it is willing and able to enforce conditions of provisional release, if ordered by the Chamber.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'M. Karnavas', with a stylized flourish at the end.

Michael G. Karnavas
Counsel for Mr. Paul Gicheru

From: [REDACTED]
Sent: 02 December 2020 13:36
To: Mascetti, Daria
Cc: [REDACTED]; Karnavas, Michael
Subject: RE: Request for CSS Assistance - Defence Team of Mr Paul Gicheru

Dear Ms Mascetti,

Further to your request for transmission (by the Registry) of certain documents signed by Mr Gicheru, I was informed by the relevant Registry colleagues that the transmission you request does not fall within the Registry's mandate as it is not a request for cooperation as such but rather relates to the transmission of documents (i.e. notification to the High Court) which Mr Gicheru has to provide – as a Kenyan citizen - to his government in relation to his surrender to the Court, according to our understanding.

The Registry is not to be involved in this and, consequently, cannot honour your request for transmission.

In light of the above, I invite you to look into other modalities of sending the document to the Kenyan authorities.

Please do not hesitate me should you require further or additional information.

Kind regards,

[REDACTED]

From: Mascetti, Daria <dmascetti@iccepn.org>
Sent: 30 November 2020 15:55
To: [REDACTED]
Cc: [REDACTED]; Karnavas, Michael
 <MKarnavas@iccepn.org>
Subject: RE: Request for CSS Assistance - Defence Team of Mr Paul Gicheru

Dear Mr [REDACTED],

Further to my email of this morning, please find attached all the documents that must be forwarded to the External Operations Section for transmission to The Republic of Kenya.

I would appreciate if you could: (i) acknowledge receipt of this email as well as of the attachments; and (ii) inform us of any follow-up you may have on this matter.

Should you require any additional information, please do not hesitate to contact me.

Kind regards,

Daria

From: [REDACTED] >
Sent: 30 November 2020 13:16
To: Mascetti, Daria <dmascetti@iccepn.org>
Cc: [REDACTED]; Karnavas, Michael
 <MKarnavas@iccepn.org>
Subject: RE: Request for CSS Assistance - Defence Team of Mr Paul Gicheru

Dear Ms Mascetti,

Thank you for your email.

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For your reference, I attach the following guiding document as you may find it useful.

Kind regards,

From: Mascetti, Daria <dmascetti@iccepn.org>

Sent: 30 November 2020 12:49

To: [REDACTED]

Cc: [REDACTED]; Karnavas, Michael <MKarnavas@iccepn.org>

Subject: Request for CSS Assistance - Defence Team of Mr Paul Gicheru

Dear Mr [REDACTED],

I hope this email finds you well.

Further to the submission on 27 November 2020 of the Observations of the Republic of Kenya on the request for provisional release of Mr Gicheru ("27 November 2020 Kenya Observations"), the Defence team of Mr Gicheru wishes to request the assistance of CSS in forwarding a response to the 27 November 2020 Kenya Observations to the External Operations Division.

The Attorney General of the Republic of Kenya in the 27 November 2020 Observations of the Republic of Kenya requires, in order to comply with the statutory requirements of the International Crimes Act of Kenya, Mr Gicheru to communicate his consent to his surrender to the ICC to the High Court of Kenya. Accordingly, the Defence team, after having prepared the consent, has contacted the ICC Detention Centre in order to request their assistance to get Mr Gicheru signature on the consent that will be attached to the official letter. As soon as a scanned copy of this document is received, it will be forwarded to you.

As per past practice, the Defence would like to request CSS assistance in forwarding the documentation to the External Operations Division as soon as the signed consent is received.

Should you require any additional information, please do not hesitate to contact me.

Kind regards,
Daria

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MICHAEL G. KARNAVAS
Attorney at law

[REDACTED] 4 December 2020 [REDACTED]

To: [REDACTED]

Re: Meeting concerning Mr. Paul Gicheru and request for assistance

Dear [REDACTED],

Please allow me to again express my sincerest gratitude to you and your colleagues for taking the time on very short notice to meet with me and my assistant, Daria Mascetti, concerning my client, Mr. Paul Gicheru.

The purpose of the meeting was to seek the good offices of the Embassy of the Republic of Kenya to transmit certain documents to the Attorney General, Mr. Paul Kihara Kariuki, concerning Mr. Gicheru's ongoing efforts to obtain provisional release and return to Kenya during the pre-trial phase of his Article 70 case before the International Criminal Court ("ICC"). What I failed to note was that earlier in the week, on 30 November 2020, we had sought the assistance of the Counsel Support Section ("CSS") to transmit Mr. Gicheru's consent and other related documents to Mr. Kariuki. The CSS informed us the following day in the afternoon that the request was beyond their remit; hence our reaching out to you.

As I noted, Mr. Gicheru has requested to be provisionally released to return to Kenya during the pre-trial phase and to freely reside in the Netherlands outside the ICC Detention Center during his trial. The Single Judge appointed to this case, Judge Reine Adélaïde Sophie Alapini-Gansou, requested observations from the Republic of Kenya and the Kingdom of the Netherlands. The Republic of Kenya, through the Attorney General, misapprehended the Statute and Rules by failing to appreciate the distinction between Article 5 crimes and Article 70 offenses, while the Kingdom of the Netherlands misunderstood the request.

As I explain in the response to the submissions made by the Republic of Kenya and the Kingdom of the Netherlands, Article 70 offenses relate to conduct that goes against the ICC as a judicial institution – interfering with the ICC's administration of justice. Article 5 crimes, however, are in an entirely different category, requiring explicit involvement of the State(s) in question. Because of this distinction, the principle of complementary – which requires that the State be unwilling or unable to investigate, charge, and prosecute alleged Article 5 crimes falling within the ICC's jurisdiction to trigger the ICC's intervention – does not apply to Article 70 offenses.

Presumably, recognizing the distinction between crimes and offenses, and having confidence that Mr. Gicheru would neither pose a flight risk nor a danger to anyone or himself, the ICC

Prosecutor has no objections to (I am more inclined to say support) Mr. Gicheru's request for provisional release – provided the Kenyan authorities agree to any conditions of cooperation requested of them. The Prosecutor's non-opposition to Mr. Gicheru being provisionally released is highly advantageous, virtually guaranteeing that the Single Judge will grant the request. Judges or Chambers are likely to grant provisional release when the Prosecutor does not oppose it.

As I recounted, in a previous Article 70 case I was involved in, the Prosecutor adamantly opposed any provisional release, even after the trial and while the accused awaited sentencing and the appeal, despite the fact that they had spent 11 months in pre-trial detention. Were Mr. Gicheru to remain in detention, not only would it have a negative impact on his wellbeing, but it would also place an unnecessary and challenging burden on his Defence Team, potentially compromising his ability to put forth the best possible defence in demonstrating the Prosecutor's lack of evidence in support of the alleged offenses. As I noted, it is essential that Mr. Gicheru be released so he can meaningfully assist in his own defence. If he is back in Kenya, he can assist his Defence Team, which, as I indicated, intends to travel to Kenya to conduct its investigations and have unrestricted contact with Mr. Gicheru.

Considering the rather difficult experience the Republic of Kenya and Kenyan authorities have had with the ICC, it is understandable that certain protocols that were thoughtfully put in place for the protection of Kenyan nationals under investigation or prosecution by the ICC should be given due deference and, when applicable, followed. As I noted, however, in the present instance, the protocols seem to be effectively unimportant and unrelated, since the offenses under Article 70 relate to conduct against the ICC's administration of justice. That said, out of an abundance of caution, and lest an unwelcomed precedent be set which could jeopardize other suspects and accused in Article 5 or Article 70 cases, conceivably, it might have been more prudent for Mr. Gicheru to have formally expressed his consent to surrender to the ICC and acquiesce to its jurisdiction pursuant to the statutory requirements of the International Crimes Act.

Mr. Gicheru understands that his surrender to the ICC effectively amounts to a *de facto* if not a *de jure* consent. Nonetheless, once he became apprised of the Attorney General's response to the Single Judge, he signed a consent, which, as I noted, have tried to have transmitted to the Attorney General through the CSS. Naturally, we hope that this consent will cure any defects raised by the Attorney General, satisfy any requirements of the High Court, and enable the Republic of Kenya to provide a positive response to the Single Judge's request concerning Mr. Gicheru's request to be provisionally released to Kenya.

Our meeting ended with the understanding that you would see to it that Mr. Gicheru's consent and other related documents presented to you would be forwarded to the Attorney General. We are grateful.

As an aside, we also discussed Mr. Gicheru's wellbeing in detention, with a request being made by you to see if the CSS could facilitate either video or telephonic contact with Mr. Gicheru, since your previous request has yet born no fruit. Further to this request, I sent an email to the CSS alerting them to the less-than forthcoming actions by the ICC Detention

Center and requesting its immediate assistance. To be on the safe side (though I am sure they are acquainted with you), I provided your name and contact number.

On behalf of Mr. Gicheru, kindly accept our sincerest appreciation for the attentiveness you and your colleagues have shown and your expressed assurances to assist in ensuring that the Attorney General is fully briefed and in possession of the documents we have prepared for him. On a personal note, I am also gratified by your expressed concerns over Mr. Gicheru's physical and mental wellbeing, and for the request that I pass on to him your sincerest concerns and best wishes.

Please do not hesitate to contact me concerning this or any other matter related to Mr. Gicheru.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'M. Karnavas', with a stylized flourish at the end.

Michael G. Karnavas
Counsel for Mr. Paul Gicheru

From: Mascetti, Daria
Sent: 23 December 2020 10:35
To: Reine.Alapini-Gansou@icc-cpi.int
Cc: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED];
[REDACTED]

Subject: Message to the Honorable Single Judge of Pre-Trial Chamber A from Counsel representing Mr. Gicheru

Please find below an email to the Honorable Single Judge of Pre-Trial Chamber A from Counsel representing Mr. Gicheru:

To the Honorable Single Judge of Pre-Trial Chamber A,

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With the Prosecution not opposing Mr. Gicheru's request, with Mr. Gicheru having traveled to the Netherlands for the expressed reason of surrendering himself to the ICC in light of his arrest warrant, with Mr. Gicheru's submission of a signed consent to the Attorney General of Kenya as suggested, and with the High Court of Kenya being requested to reconsider its 16 November 2017 Judgment – even though the issue of whether ICC has jurisdiction over the alleged article 70 offences is moot – there should be no obstacles preventing Kenya's cooperation in this matter.

Recognizing the complexities involved issuing decisions concerning provisional release, it is with the greatest respect that I make this inquiry. To the extent Her Honor can provide any guidance, it is most appreciated.

Sincerely yours,

Michael G. Karnavas
Counsel for Mr. Paul Gicheru