

Annex

Public

**Transmission of Observations Submitted by the Kenyan Authorities pursuant to
Pre-Trial Chamber A's Order ICC-01/09-01/20-76 of 31 December 2020**

No. ICC-01/09-01/20

21 January 2021



REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY-GENERAL
&
DEPARTMENT OF JUSTICE

Our Ref: AG/SEC/14/209/6 VOL I (54)

18th January, 2021

Judge Reine Adélaïde Sophie Alapini-Gansou
Pre-Trial Chamber A
International Criminal Court
The Hague
The Netherlands

"PUBLIC FILING"

Your Honour,

RE: ORDER INVITING FURTHER OBSERVATIONS FROM THE REPUBLIC OF
KENYA

Introduction

1. The Honourable the Attorney General of the Republic of Kenya has the honour to refer to the order dated Thursday, the 31st December, 2020, (the Order) by the Pre-Trial Chamber A of the International Criminal Court (the Court) in the case of the *Prosecutor v Paul Gicheru*.
2. In paragraph 16 of the Order, the Pre-Trial Chamber A, *inter alia*, "renews its invitation to 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 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

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Gicheru travelling between Kenya and the Netherlands for the purposes of the proceedings in the present case.”

3. Kenya recalls its observations communicated by its letter dated the 24th November, 2020, under Ref. AG/SEC/14/209/6 VOL I (53), by which Kenya noted, *inter alia*, that “*Mr. Gicheru did not comply with [the] statutory procedure prior to his voluntary surrender to the Court.*” Kenya observed that “*[i]n any case, however...the opportunity is still available for Mr. Gicheru to comply with the relevant statutory requirements and provide the High Court 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.*”
4. Kenya has also taken note of the observations made by the Defence to the effect, *inter alia*, that “*on 30th November 2020, it requested the Division of External Operations 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.*” The Office of the Attorney General of Kenya confirms receipt of the aforementioned documents. Kenya also 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.*”
5. In view of the foregoing, Kenya wishes to submit the following further observations in pursuance of the invitation by the Pre-Trial Chamber A:

Kenya’s Observations

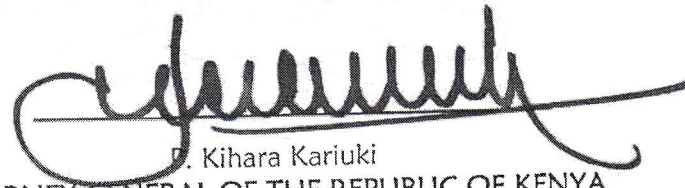
6. Article 86 of the Rome Statute (the Statute) sets out a general obligation to cooperate. The Article directs that “*States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.*”
7. Article 88 of the Statute requires States Parties to ensure that there are procedures available under their national law for all of the forms of cooperation which are specified in Part 9 of the Statute.
8. In this regard, Kenya enacted the International Crimes Act (the Act) to domesticate the Statute. Section 23 of the said Act provides as follows in relation to the execution of requests for assistance from the Court:

“Execution of requests

- (1) *If the ICC makes a request for assistance, the request shall be dealt with in accordance with the relevant procedure under the law of Kenya (as provided in this Act).*

(2) *If the request for assistance specifies that it should be executed in a particular manner that is not prohibited by Kenyan law or by using a particular procedure that is not prohibited by Kenyan law, the Attorney-General or the Minister, as the case may be, shall use his best endeavours to ensure that the request is executed in that manner or using that procedure, as the case may require."*

9. Noting the contents of the foregoing provision of the Act, Kenya wishes to observe 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 clarity, detail and scope. As indicated hereinabove, Kenyan law requires that any requests for assistance be dealt with in accordance with the relevant procedure under the law of Kenya. Therefore, an unequivocal and clear scope of the specific conditions for Mr. Gicheru's release in order for Kenya to activate its domestic administrative and judicial procedures accordingly, prior to making any undertaking to the Chamber on its enforcement ability, is critically essential.
10. In 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.
11. Kenya thanks the Pre-Trial Chamber A of the Court and takes the opportunity of this correspondence to renew to it the assurances of its highest consideration.



D. Kihara Kariuki
ATTORNEY GENERAL OF THE REPUBLIC OF KENYA