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**Cour
Pénale
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**International
Criminal
Court**

Original: **English**

No.: **ICC-01/09-01/20**
Date: **22 February 2021**

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*

**Confidential
With Confidential Annex A**

**Prosecution's update on extraction of data and request to retain Mr Gicheru's
mobile telephone as evidence**

Source: Office of the Prosecutor

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Document 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 Mr Anton Steynberg	Counsel for the Defence Mr Michael G. Karnavas
Legal Representatives of the Victims	Legal Representatives of the Applicants
Unrepresented Victims	Unrepresented Applicants (Participation/Reparation)
The Office of Public Counsel for Victims	The Office of Public Counsel for the Defence
States’ Representatives	Amicus Curiae

REGISTRY	
Registrar Mr Peter Lewis	Counsel Support Section
Victims and Witnesses Unit	Detention Section
Victims Participation and Reparations Section	Other

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I. INTRODUCTION

1. As instructed by the Chamber,¹ the Prosecution files herewith an update on the progress to date in extracting and analysing the mobile telephone² and SIM cards seized from Mr Paul Gicheru,³ and a request to retain the Device for further analysis and as evidence.
2. The analysis of the SIM card contained in the Device upon seizure has been completed and, unless otherwise instructed, arrangements will be made to return the SIM card to the Defence.

II. CONFIDENTIALITY

3. Under regulation 23bis (2) of the Regulations, this filing and its annex are submitted as “confidential”, since they concern details of the Prosecutions investigation and the contents of Gicheru’s personal mobile telephone which are confidential in nature.

III. SUBMISSIONS

Progress made as regards the extraction of data

4. Following receipt of the Device from the Registry on 21 December 2020, the Device and the SIM cards therein were registered in evidence⁴ and the Cyber Unit of the Prosecution’s Forensic Science Section were requested to conduct an examination and initial assessment of the device in order to determine, *inter alia*, whether the device and SIM card were accessible, the date on which they were first activated respectively, and an overview of the type and volume of data contained thereon. An overview document produced by the Cyber Unit was provided to the Defence

¹ ‘Decision on Mr Gicheru’s Request for Interim Release’, ICC-01/09-01/20-90-Conf, para. 51; Email from Chamber, received on 17/02/2021 at 12:18.

² “The Device”.

³ “Gicheru”.

⁴ KEN-OTP-0160-0002.

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on 20 January 2021.⁵ It should be noted that Annex A was not produced for evidential purposes, but serves as a convenient record of the initial findings related to the Device which formed the basis for discussions with the Defence.

5. Since the Defence has raised a claim of professional legal privilege in relation to certain contents of the Device,⁶ the Device and its contents have been quarantined by the Cyber Unit and no material contained thereon have been, or will be, provided to the Prosecution team involved in this case.⁷
6. On 21 January 2021⁸ the Parties agreed to adopt a phased approach to the extraction and analysis of the data contained on the phone,⁹ commencing with item 1.b. and 1.c. (the call logs and contact information) which the Prosecution assessed could not contain privileged communication content. This data has been extracted and registered into evidence and will be disclosed to the Defence in the next package of incriminatory evidence. A preliminary review of the contact records has already revealed information relevant to the investigation and the Prosecution considers the further extraction and analysis of the Device contents to be an investigative necessity.
7. Secondly, with the assent of the Defence, items 1.e. and 1.f. (document files and media files) were extracted by the Cyber Unit and provided to the Defence¹⁰ to review for potentially privileged items, which review they undertook to complete by 15 February 2021. As promised, the Defence informed the Prosecution on 15 February that none of the material reviewed was covered by attorney client privilege.¹¹ The Cyber Unit has since provided the Prosecution Team with copies

⁵ Annex A.

⁶ *Per* email received from Defence on 21/12/2020 at 13:06. The Prosecution does not consider it necessary to annex the *inter partes* correspondence with the Defence, unless it is subject to dispute or if the Chamber so orders.

⁷ "Prosecution Team".

⁸ *Per* email received from Defence on 21/01/2021 at 18:52, responding to Prosecution email sent on 20 January 2021 at 11:18.

⁹ *See* ICC-01/09-01/20-96-Conf-AnxC.

¹⁰ ICC-01/09-01/20-96-Conf-AnxA.

¹¹ *Per* email received from Defence on 15/02/2021 at 15:18.

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of this material, which is being reviewed and any relevant content will be registered as evidence and disclosed in the normal course.

8. Thirdly, the Parties agreed that the Prosecution will focus next on items 1.d. (message content) and 1.g. (Gmail messages).¹² Due to the large number of messages and in order to reduce the privilege review burden on the Defence, the Parties agreed that the Defence would review the list of contacts and email addresses and identify those related to Gicheru's professional clients. The related messages will then be extracted and provided to the Defence for a detailed privilege review and the Prosecution will commence reviewing the remaining items for relevant information.
9. As previously stated,¹³ if and when the Defence identifies communications which are claimed to be privileged, the Parties will seek to reach agreement on an appropriate mechanism for independent review. However, if no agreement can be reached, the Chamber may be requested to provide guidance.

Request to retain the Device

10. The Cyber Unit has completed a "logical extraction" of the data contained on the SIM card, which the Prosecution has advised the Defence may be returned to their client.
11. As regards the Device, however, the Cyber Unit advises that there is currently no forensic tool available that would enable them to make a complete forensic copy of the contents of the Device. In particular, the Cyber Unit has to date been unable to extract the contents of the Gmail messages. Unless a solution can be found for this obstacle,¹⁴ the contents of the Gmail messages will have to be reviewed on the

¹² Per email received from Defence on 19/02/2021 at 17:40, responding to Prosecution email sent on the same day at 16:07.

¹³ ICC-01/09-01/20-81-Conf-Red, para 15.

¹⁴ Possibly with the assistance of an external forensic specialist.

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device itself, alternatively screenshots recorded of each individual message, which would be an extremely time-consuming process.

12. Accordingly, the retention of the device is required at least until all relevant contents have been extracted, which is in turn dependent upon the review of any presumptively privileged material. Since the volume of such presumptively privileged material is currently unknown, it is not currently possible to provide a reliable estimate of the expected duration of this process, although in the ordinary course of events this may be expected to take several months.
13. Even once the extraction of all relevant content has been completed, the further retention of the Device may still be necessary for evidentiary purposes, particularly in case any challenges are raised regarding the authenticity or reliability of the resulting evidence or the methodology of the extraction process. However, the Prosecution will in due course explore with the Defence the possibility of making certain stipulations, which may obviate the need to further retain the Device.

IV. CONCLUSION AND RELIEF

14. The Prosecution provides the Chamber with this update on the progress of the extraction of data from the Device and SIM card and requests the Chamber to authorise the retention of the Device as evidence. Unless otherwise instructed, arrangements will be made to return the SIM card to the Defence.



Fatou Bensouda, Prosecutor

Dated this 22rd day of February 2021
At The Hague, The Netherlands