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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*

Confidential

With Confidential Annexes A and B

**Prosecution's second update on extraction of data from Mr Gicheru's mobile
telephone**

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

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Legal Representatives of the Victims

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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 its second update on its progress in extracting the data contained on the mobile telephone² seized from Mr Paul Gicheru.³

II. CONFIDENTIALITY

2. 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. PROCEDURAL HISTORY

3. On 18 December 2020, the Chamber issued a decision⁴ on a request by the Registry⁵ seeking guidance, in which it also granted a Prosecution request⁶ to transmit the Device to the Office of the Prosecutor in order to “conduct the necessary examination and analysis of the Device for the purposes of its investigations into alleged offences under article 70 of the Statute”.
4. On 29 January 2021, the Chamber issued a decision granting Gicheru’s request for interim release.⁷ Therein, the Chamber ordered the Prosecutor to indicate whether the Device should be returned to the suspect or whether the Prosecutor intends to request that it be retained as evidence.⁸
5. On 22 February 2021, the Prosecution filed a request seeking that the Device be retained as evidence.⁹

¹ ICC-01/09-01/20-105-Conf, para. 11.

² “Device”.

³ “Gicheru”.

⁴ ICC-01/09-01/20-65-Conf, p. 10.

⁵ ICC-01/09-01/20-35-Conf, together with confidential annexes I-VII.

⁶ ICC-01/09-01/20-41-Conf, para. 5.

⁷ ICC-01/09-01/20-90-Conf.

⁸ *Op. cit.*, para. 51.

⁹ ICC-01/09-01/20-101-Conf, and - Conf-AnxA.

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6. On 4 March 2021, the Chamber issued its "Decision on the Prosecutor Request to Retain Paul Gicheru's Telephone"¹⁰ in which it granted the Prosecution's request, finding that "the retention of the Telephone is necessary in order for the Prosecutor to conduct a full analysis and assessment of its content". Additionally, the Chamber ordered the Prosecution to file an update on the extraction of data contained on the Device, once "it has completed the process or has achieved substantial progress".

IV. SUBMISSIONS

7. The Prosecution considers that substantial progress has now been made with the extraction of the data contained on the device and accordingly files this update. To facilitate the update, the Prosecution will refer to the same categories of data contained in the Device as set out in Annex A to the "Prosecution's update on extraction of data and request to retain Mr Gicheru's mobile telephone as evidence".¹¹
8. As previously reported,¹² the data referred to in categories 1.b., c., e., and f. were successfully extracted by the Prosecution's Forensic Science Section ("FSS") and the review of this data, both for privilege and relevance, is largely complete.
9. As regards items 1.d. (message content) and 1.g. (Gmail messages), however, the FFS' Cyber Unit advised that due to technical limitations it was unable to extract the relevant data in-house and advised that assistance from an external forensic expert should be sought. Accordingly, the Prosecution considered that such external examination and analysis of the Device was "necessary [...] for the purposes of its investigations into alleged offences under article 70 of the Statute".¹³

¹⁰ ICC-01/09-01/20-105-Conf.

¹¹ ICC-01/09-01/20-101-Conf-AnxA.

¹² ICC-01/09-01/20-101-Conf, paras. 6-7.

¹³ As per ICC-01/09-01/20-41-Conf, para. 5.

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10. Consequently, on 30 April 2021 the Prosecution requested the Netherlands Forensic Institute ("NFI") to examine the Device to determine whether it could assist in extracting the relevant data.¹⁴
11. On 28 June 2021 the NFI reported that it was able to retrieve a significant amount of data from the device,¹⁵ which was provided directly to the FSS in password protected format. The data has been retained on FSS's secure server pending privilege review, with the exception of some additional (deleted) call log and phone contact information (items 1.b. and c.), which by its nature cannot contain privileged information.
12. The FSS reviewed the data provided and advised that it included not only the message content and Gmail messages referred to above (items 1.d. and 1.g.), but also a number of additional deleted documents (item 1.e.) that had not been recovered during FSS's initial extraction. The details of the dataset prepared for privilege review are as follows:
 - a. Chats - 1,027 entries containing 12,710 messages between 27 Feb 2017 and 02 Nov 2020;
 - b. Gmail - 343 entries dated between 08 May 2014 and 02 Nov 2020;
 - c. Instant Messages - 153 entries dated between 06 Oct 2018 and 01 Nov 2020;
 - d. Documents - 136 newly identified documents, tagged as "Privilege-review-set"; and
 - e. 484 documents, 327 contacts, 3,782 media files, 1 database file, and 1 VCard¹⁶ file. However, the documents and media files are not newly identified items and have already been privilege-reviewed, but are included since they form part of the Chat, Gmail or Instant messages. Similarly, the contacts and VCard file do not require privilege review.

¹⁴ See Annex A.

¹⁵ See Annex B.

¹⁶ Contact information sent by way of a business card attachment in a vcf file format.

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13. On 25 June 2021, the Prosecution notified the Defence of the developments described above and suggested that the materials detailed in paragraph 12 be forwarded to the Defence for an initial privilege review, as per previously agreed. The Prosecution proposed a target date of 23 July 2021 for the completion of this review.
14. On 30 June 2021, the Defence replied, advising *inter alia* that it agreed to the proposed review procedure, but could not commit to the proposed deadline due to the volume of material and the fact that the confirmation of charges decision was expected mid-July.
15. The Prosecution wishes to emphasise that the review of the retrieved material is likely to be a time consuming exercise and, if privilege is claimed on any of the extracted messages or documents, this will likely necessitate some form of external review.¹⁷ Accordingly, it requested the Defence on the same date to make its best efforts to complete the review of at least the message contents by that date, since if charges in the case are confirmed, both Prosecution and Defence will likely face a number of competing priorities in the preparation for trial. The Prosecution wishes to avoid a scenario in which the completion of the analysis and disclosure of this material may delay the commencement of trial.
16. Additionally, the Prosecution pointed out that, given the basis for the privilege claimed, Gicheru should be able to identify and exclude message interlocutors who are *not* clients of his domestic legal practice as an initial step, thus significantly reducing the volume of communications that the Defence is required to review for privilege. The Prosecution further requested the Defence to provide the details of any such excluded contacts/email addresses as an initial step, which would expedite the process by permitting the Prosecution to commence with the review of this data in parallel with the Defence's privilege review.

¹⁷ The details of which are to be agreed upon with the Defence or, if no agreement is possible, decided by the Chamber seized with the case at that time.

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17. On 7 July 2021, the Defence accepted the Prosecution's proposals above and undertook to review the message content as soon as possible.

V. CONCLUSION

18. The Prosecution provides the Chamber with this update on the progress of the extraction of data from the Device. The Prosecution will continue to liaise with the Defence to reach agreement on the modalities and timetable for the review and analysis of the extracted data. In the event that consensus cannot be reached, the Chamber may be requested to intervene.



James Stewart, Deputy Prosecutor

Dated this 13th day of July 2021
At The Hague, The Netherlands