

**Cour
Pénale
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**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/15
Date: 12 November 2020

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 AND PHILIP
KIPKOECH BETT***

Confidential

**Prosecution's Response to the "Report of the Registry on the Arrest and Surrender
of Mr Paul Gicheru and Request for Guidance on Mr Paul Gicheru's belongings"**

Source: Office of the Prosecutor

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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Mr Paul Gicheru

I. INTRODUCTION

1. The Prosecution responds herewith to the "Report of the Registry on the Arrest and Surrender of Mr Paul Gicheru¹ and Request for Guidance on Mr Paul Gicheru's belonging" filed on 5 November 2020.²
2. In its Report, the Registry informed Pre-Trial Chamber A,³ *inter alia*, of the arrest of Gicheru and the seizure of certain items from him,⁴ including a mobile telephone ("the Device"), and sought the Chamber's guidance on any action in relation to these objects.
3. The Prosecution requests the Chamber to order the Registry to transmit the Device to the Prosecution so that it can conduct the necessary examination and analysis of the Device for the purposes of its investigations into alleged offences under article 70 of the Statute.

II. CONFIDENTIALITY

4. Pursuant to regulation 23bis(2) of the Regulations of the Court ("RoC"), this submission is filed as confidential as it relates to previous filings of a similar classification.

III. PROCEDURAL HISTORY

5. On 10 March 2015, the former Single Judge for Pre-Trial Chamber II⁵ issued a warrant of arrest for Gicheru, being satisfied that the conditions under article 58(1) of the Statute were fulfilled.⁶ She also granted the Prosecution's

¹ "Gicheru".

² ICC-01/09-01/15-35-Conf; "Report" or "Registry Report".

³ "The Chamber".

⁴ As ordered by the former Single Judge of Pre-Trial Chamber II ("PTC II"), "Decision on the 'Prosecution's Application under Article 58(1) of the Rome Statute", ICC-01/09-01/15-1-Conf-Exp or "Arrest Warrant Decision" or "Article 58 Decision".

⁵ "PTC II".

⁶ ICC-01/09-01/15-1-Conf-Exp.

request for the suspects to be searched upon arrest and relevant evidence seized.⁷

6. On 2 November 2020, the President of the Pre-Trial Division constituted Pre-Trial Chamber A (Article 70), composed of Judge Reine Adélaïde Sophie Alapini-Gansou, to exercise the powers and functions of the Pre-Trial Chamber in the case of *The Prosecutor v. Paul Gicheru and Philip Kipkoech Bett*.⁸
7. On 5 November 2020, the Registry filed the Registry Report informing the Chamber, *inter alia*, of Gicheru's arrest and the seizure of certain items from him, in compliance with the Arrest Warrant Decision, including the Device. The Registry further sought the Chamber's guidance on any action in relation to these objects.

IV. SUBMISSIONS

8. As foreshadowed in "Prosecution's response to 'The Accused Person's [Urgent] Request for Interim Release under the Provisions of Article 60(2) of the Rome Statute'",⁹ the Prosecution observes that the items listed in the Registry Report,¹⁰ including the Device, were seized pursuant to an order for search and seizure issued by the previous Single Judge at the Prosecution's request.¹¹ More specifically, PTC II ordered that appropriate measure be taken for, *inter alia*, "the seizure of any relevant evidence, such as cell phones [...] **which are, on reasonable grounds, believed to be used in, connected with, or to provide evidence of, the offences for which these warrants of arrests are issued**".¹² The Prosecution considers that the Device may contain information pertinent to its investigation.

⁷ *Ibid.*, paras. 30-31.

⁸ ICC-01/09-01/15-32.

⁹ ICC-01/09-01/15-39-Conf, para. 24.

¹⁰ Report, para. 11.

¹¹ Arrest Warrant Decision, paras. 30-31; *See also* Registry Report, para. 5.

¹² Arrest Warrant Decision, p. 19 (emphasis added).

9. As described in the Prosecution's Arrest Warrant application, attempts to interfere with Prosecution witnesses in *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* case took place both through the use of telephones and in person. Additionally, the evidence suggests that various members of the criminal scheme communicated with each other by telephone. As such, telephone communications have been identified by the Prosecution as a relevant line of investigation.
10. The Prosecution therefore submits that there is a reasonable basis to believe that the Device may contain evidence relevant to the offences under article 70 of the Statute for which he has been arrested, such as a list of contacts, call logs, SMS communications, social media or other messaging App communications, recordings, documents, e-mails, photos, videos, etc. The Prosecution submits that it should be permitted to examine the Device in order to access, analyse and collect any relevant content in accordance with its obligations under article 54(1)(a) of the Statute. The Prosecution also wishes to produce a forensic copy of the Device's memory to protect the content from future alteration, whether deliberate or inadvertent, in order to preserve a reliable and authentic copy for use at in confirmation proceedings and any subsequent trial.
11. Upon examination of the Device and any material found on it, the Prosecution will be in position to advise the Chamber as to whether and when it may return the Device to Gicheru, alternatively to request the Chamber to authorise it to retain the Device as evidence in the case. This would be dependent upon whether any relevant information is found as well as the technical complexity of the inspection in case the Device is protected by password or other means.
12. The Prosecution notes that Gicheru has elected to conduct his own defence in this case to date and has not advised the Prosecution that he has engaged any defence counsel nor sought any independent legal advice. Thus, the

Prosecution does not anticipate that any privileged information may be found on the Device. However, should Gicheru consider that the Device indeed contains material that is privileged under the provision of rule 73 of the Rules of Procedure and Evidence, the Prosecution invites him to indicate, either by response to this filing or *inter partes*, of the nature of such information and where on the Device it may be located, so that the Prosecution can take the appropriate measures to quarantine the information from review.

13. The Prosecution does not object to the return to Gicheru of the remaining items seized from him, subject to any restrictions that may be imposed by the Detention Center.

V. CONCLUSION AND RELIEF SOUGHT

14. In light of the foregoing, the Prosecution respectfully requests the Chamber to order the Registry to transmit the Device, as seized upon Gicheru's surrender, to the Office of the Prosecution for the purpose of conducting investigative activities as described in this filing to meet its obligations under article 54(1)(a).



Fatou Bensouda, Prosecutor

Dated this 12th day of November 2020
At The Hague, The Netherlands