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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*

Public

"Public Lesser Redacted Version of "Prosecution's Observations on the Provisional Disclosure Schedule in accordance with the Pre-Trial Chamber's Decision of 21 December 2020", ICC-01/09-01/20-81-Conf-Exp, dated 20 January 2021", 30 March 2021

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I. INTRODUCTION

1. In its “Decision Setting the Regime for Evidence Disclosure and Other Related Matters” of 21 December 2020,¹ Pre-Trial Chamber A (Article 70)² ordered the Prosecution to submit its observations on a provisional schedule for the disclosure of evidence by 20 January 2021.³ The Prosecution hereby files its observations in accordance with the Chamber’s order.
2. The present observations include an update on the Prosecution’s rolling disclosure of evidence to date, and upcoming disclosure of evidence for the confirmation proceedings, including evidence collected in the context of current and ongoing investigative activities. It further provides an overview of the Prosecution’s provisional disclosure plan for the post-confirmation phase, in the event that charges are confirmed against Mr Paul Gicheru.⁴

II. CONFIDENTIALITY

3. Pursuant to regulation 23bis(1) of the Regulations of the Court, the Prosecution files this document as confidential *ex parte* due to the fact that it contains information on ongoing or planned investigative activities of a sensitive nature. The Prosecution will file a confidential redacted version simultaneously.

III. SUBMISSIONS

Progress update on pre-confirmation disclosure of evidence

4. As previously indicated, the Prosecution has identified material which it prioritised for review and disclosure⁵ based on relevance to this case and had already initiated the review of these material upon Gicheru’s surrender to the Court.⁶ Shortly after the Chamber’s Disclosure Decision, in which the Chamber

¹ ICC-01/09-01/20-67 (“Disclosure Decision”).

² “Chamber”.

³ Disclosure Decision, para. 29 and disposition.

⁴ “Gicheru.”

⁵ “Priority Material”.

⁶ As reflected in the Prosecution filing ICC-01/09-01/20-49-Conf-Exp, paras. 16-28.

outlined the principles and time frames governing disclosure, including the redactions and confidentiality protocols,⁷ the Prosecution started implementing its rolling disclosure of evidence, in line with the Chamber's observation that "disclosing evidence as early as possible and on a rolling basis will allow the Defence to properly prepare for the filing of its written submissions and to exercise its right as set forth in [...] article 67(1)(b) of the Statute."⁸ The Prosecution is endeavouring to disclose evidence on an ongoing basis as soon as security issues and other conditions precedent permit.

5. On 31 December 2020, the Prosecution formally effected its first disclosure package, containing 146 items of incriminating material related to [REDACTED] P-0800 [REDACTED] as well as two items of potentially exonerating ("PEXO") material.
6. On 7 January 2021, the Prosecution disclosed its second package, containing 103 items of incriminating material related to Witnesses [REDACTED] P-0613 [REDACTED] P-0800 [REDACTED].
7. On 13 January 2021, the Prosecution disclosed its third package, containing 35 items of incriminating material related to P-0516 and 23 items material to the preparation of the defence pursuant to rule 77⁹ of the Rules of Procedure and Evidence.¹⁰
8. A fourth package will be disclosed during week 4 of 2021. It will contain material related to Witnesses P-0516, P-0604, P-0495, [REDACTED], P-0015 and P-0016, as well as PEXO and Rule 77 material identified by the Prosecution.
9. The Prosecution plans to disclose a fifth package including evidence relating to [REDACTED] as soon as his security situation allows.¹¹ In parallel, the Prosecution

⁷ Disclosure Decision, paras. 19-42, 51-53.

⁸ Disclosure Decision, para. 27.

⁹ "Rule 77 material".

¹⁰ "the Rules."

¹¹ [REDACTED]

will continue to identify and disclose additional PEXO and Rule 77 material within the Priority Material on a rolling basis.

10. As regard the identification and disclosure of potential Rule 77 and PEXO material within the broader Kenya evidence collection,¹² the Prosecution is liaising with the Defence to provide the Prosecution with “any themes, phrases or keywords that [Gicheru] considers relevant to his defence”.¹³ Receipt of such information would assist the Prosecution to provide the Defence with the most relevant evidence in the most timely manner—and conversely avoid overburdening the Defence with evidence of only tangential or hypothetical relevance.¹⁴ Should the Defence provide such information prior to the end of January, the Prosecution will endeavour to conduct a review based on this information and disclose any PEXO or Rule 77 material prior to the disclosure deadline.
11. The Prosecution therefore expects to complete the review and disclosure of evidence required for the confirmation proceedings, including (at least) the bulk of Rule 77 and PEXO material, prior to the 12 February 2021 deadline, save for any new evidence collected in the context of its current investigative activity as detailed below.

Disclosure of evidence collected in the context of current investigative activity

12. As foreshadowed in the “Prosecution’s Progress Report on Investigation, Disclosure and Security of Witnesses” dated 18 November 2020,¹⁵ the Prosecution resumed its evidence collection plan as soon as Gicheru surrendered to the Court and commenced certain discrete investigative activities aimed to further consolidate the evidence against him.¹⁶ The Prosecution will disclose to the

¹² i.e. the remaining material in the Kenya evidence collection that did not meet the Prosecutions initial relevance criteria.

¹³ As already foreshadowed in the Prosecution’s filing ICC-01/09-01/20-49-Conf-Red, para. 26.

¹⁴ This is in line with the Chamber’s admonition that “the most important factor in both safeguarding the rights of the defence and enabling the Chamber to exercise its functions is not for the Prosecutor to disclose the greatest volume of evidence, but for it to disclose the evidence which is of true relevance to the case, whether that evidence be incriminating or exculpatory.” Disclosure Decision, para. 31.

¹⁵ ICC-01/09-01/20-49-Conf-Exp, paras. 10-15.

¹⁶ ICC-01/09-01/20-49-Conf-Exp, para. 12.

Defence evidence collected as a result of these investigative activities on a rolling basis as soon as possible after collection and within the deadlines set by the Chamber.

13. In particular, the Prosecution completed the re-interview of P-0516 on 13 January 2021. It is currently working to produce transcriptions of the audio recorded interview,¹⁷ which will be disclosed as soon as they are finalised and prior to the 12 February 2021 disclosure deadline.
14. Further, the Prosecution intends to: (i) continue the forensic examination of Gicheru's mobile phone,¹⁸ which is currently underway; (ii) interview potential Witness [REDACTED], who is believed to have received payments from Gicheru based on evidence obtained from [REDACTED]; and (iii) implement the necessary security measures in respect of [REDACTED], who provided a statement regarding payments received from Gicheru subsequent to the Prosecution's article 58 request.¹⁹ The Prosecution is making efforts to complete these activities and disclose any new evidence collected as a result as soon as possible. If the evidence described under (ii) and (iii) above can be obtained and disclosed prior to the relevant deadlines, it will likely form the basis for two additional counts of corruptly influencing a witness under article 70(1)(c).
15. As regards the analysis of Gicheru's mobile phone, the Prosecution's Cyber Unit of the Forensic Science Section has performed an initial assessment and determined that the contents are accessible. Nonetheless, no further analysis has been conducted pending resolution of a Defence assertion that certain contents may be subject to legal professional privilege related to Gicheru's domestic law practice in Kenya, but unrelated to the present charges. The Prosecution and Defence are consulting *inter partes* to find a mutually agreeable procedure to assess and safeguard any privileged material, but if no agreement can be reached the

¹⁷ Both English and Swahili portions.

¹⁸ As per ICC-01/09-01/20-65-Conf and [REDACTED].

¹⁹ ICC-01/09-144-US-Exp; ICC-01/09-144-Conf-Red.

Chamber's intervention may be sought. It is unlikely that this assessment will be concluded prior to the confirmation proceedings, although the Prosecution will prioritise the assessment of those types of data less likely to contain privileged material in an effort to complete at least part of the review.

16. As regards the interview referred to in paragraph 14 (ii) above, COVID-19 restrictions have significantly complicated the scheduling of the interview. However, the Prosecution assesses that it will be possible to complete this interview during weeks 7-8, and disclose the resulting evidence before 1 March 2021, in line with the disclosure deadline relating to new evidence under rule 121(5) and the Chamber's Disclosure Decision.²⁰
17. The Prosecution will promptly apprise the Chamber of any developments affecting the schedule of the activities described above. Similarly, in the event that new evidence is identified or made available, including of exonerating nature, which the Prosecution would be obligated to pursue under article 54(1)(a) of the Statute, the Prosecution will inform the Chamber accordingly.

Court records transferred and requested to be transferred from the Ruto & Sang case

18. On 5 January 2021, the Prosecution requested the transfer of case records relating to Witnesses [REDACTED] P-0613 [REDACTED] P-0800 [REDACTED] P-0495, P-0516, P-0536, P-0604 and P-0016 from *the Prosecutor v. William Samoei Ruto and Joshua Arap Sang* case²¹ to the record of this case.²² These records include the transcripts of in-court testimony and associated exhibits and material used during the testimony of these witnesses in the *Ruto and Sang* case, which are relevant to the present case. While this does not technically constitute disclosure by the

²⁰ Disclosure Decision, para. 25.

²¹ "*Ruto and Sang* case".

²² [REDACTED]

Prosecution, it will nevertheless provide the Defence access²³ to relevant evidence that may be relied upon for the conformation of charges.

19. On 7 January 2021, Trial Chamber IV issued a decision with regard to the transcripts and material related to P-0516 on an expedited basis. This material was transferred to the record of the *Gicheru* case on 12 January 2012, but reclassified by the Chamber as “confidential *ex parte*” at the Prosecution’s request. Subsequently, on 15 January 2021, the Prosecution requested the Chamber to reclassify the material as “confidential”, since the basis of the *ex parte* classification no longer existed.
20. On 15 January 2021, Trial Chamber IV authorised the transfer of the remainder of the requested material.²⁴ The Prosecution has determined that there is currently no reason to restrict Defence access to these transcripts, but is still reviewing the related documents. However, the Prosecution expects to complete this review well before CMS will be in a position to effect the transfer and, if necessary, may submit a request to restrict Defence access to individual documents until the conditions precedent for disclosure are met.

Disclosure plan envisaged by the Prosecution following the confirmation disclosure deadlines

21. Apart from the Prioritised Material, the Prosecution has a further 31,956 items (177,997 pages) in its evidence management database (Ringtail) relating to the Kenya situation as a whole, out of which 9,506 were disclosed to the Defence in the *Ruto and Sang* case.²⁵
22. As indicated previously, the Prosecution intends to continue reviewing the remaining items in the Kenya collection and disclose them to the Defence on a rolling basis.²⁶ In particular, the Prosecution will continue to review the collection

²³ Once the necessary conditions for access have been met.

²⁴ [REDACTED]

²⁵ These figures exclude duplicates, Pre-Registration Forms, electronic data (photographs of physical items), and physical items, such as books, CDs, mobile telephones, original documents, etc.

²⁶ ICC-01/09-01/20-49-Conf-Exp, para.26.

vis-à-vis its ongoing obligations to identify and disclose PEXO and Rule 77 material. For this purpose, the Prosecution will continue to identify and prioritise material for review based on searches of themes, phrases and keywords in consultation with the Defence.²⁷

IV. CONCLUSION

23. The Prosecution respectfully submits these observations on the progress of its disclosure of evidence to the defence, as well as on its provisional disclosure plan for the post-confirmation stage. These updates reflect the Prosecution's best estimates based on currently available information, in particular as regards ongoing investigative activities.
24. Barring any unforeseen developments, the Prosecution expects to disclose all incriminating material to be relied upon for the confirmation of charges and the bulk of all Rule 77 and PEXO material by the relevant deadlines.



Ms Nazhat Shameen Khan, Deputy Prosecutor

Dated this 8th day of February 2023
At The Hague, The Netherlands

²⁷ As outlined in para. 10 above.