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**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/09-01/20**

Date: **1 April 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**

**Confidential Redacted Version of Prosecution's filing of a list of new evidence
pursuant to rule 121(5)**

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:

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Legal Representatives of the Applicants

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**Victims Participation and Reparations
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Other

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I. INTRODUCTION

1. Pursuant to Rule 121(5) of the Rules of Procedure and Evidence,¹ the Prosecution hereby files a list of three items (Annex A) constituting new evidence upon which it intends to rely for its confirmation submissions. The said items were disclosed to the Defence on 31 March 2021.²

II. CONFIDENTIALITY

2. Under regulation 23bis (2) of the Regulations, this filing is submitted as confidential, *ex parte*, only available to the Prosecution, since it contains witness security related information and details of protective measures. A confidential redacted version will be filed simultaneously.

III. PROCEDURAL HISTORY

3. On 21 December 2020, the Pre-Trial Chamber A (Article 70)³ issued its “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”,⁴ in which it determined the procedures for the disclosure of evidence between the parties and other related matters for the purpose of the organisation of the confirmation proceedings in the case against Mr Paul Gicheru.⁵
4. On 26 February 2021, the Chamber issued the “Decision on the postponement of the date of the filing of written submissions and other related deadlines for the confirmation of charges proceedings”,⁶ setting new dates for the confirmation proceedings.

¹ “Rules”.

² ICC-01/09-01/20-128.

³ “Chamber”.

⁴ ICC-01/09-01/20-67.

⁵ “Gicheru”.

⁶ ICC-01/09-01/20-103.

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5. On 12 March 2021, the Prosecution submitted its Document Containing the Charges against Gicheru and its List of Evidence,⁷ in accordance with the Chamber's confirmation proceedings schedule,⁸ as amended.
6. On 26 March 2021, the Chamber issued its "Order related to the confirmation of charges",⁹ providing clarifications and orders concerning the conduct of the confirmation proceedings.
7. On 31 March 2021, the Prosecution disclosed to Gicheru's Defence the items listed in Annex A and filed its "Prosecution's Seventh Communication of the Disclosure of Evidence".¹⁰

IV. SUBMISSIONS

8. Rule 121(5) provides that "[w]here the Prosecutor intends to present new evidence at the hearing, he or she shall provide the Pre-Trial Chamber and the person with a list of that evidence no later than 15 days before the date of the hearing". In the present case, the date of the hearing is replaced by the date set by the Chamber for the parties' Written Submissions on 23 April 2021.¹¹ The current filing is thus within the statutory timeframe which extends until 8 April 2021.
9. In its "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", the Chamber elaborated on the meaning of the term 'new evidence'.¹² It highlighted that 'new evidence' refers to "information, material or evidence which came into the Prosecutor's control or possession after the deadline provided for in rule 121(3) of the Rules".¹³
10. The three items listed in Annex A constitute new evidence within the meaning of rule 121(5) and in line with the Chamber's interpretation. The list of new evidence comprises of transcripts of a focused re-interview of P-0341 conducted on 13

⁷ ICC-01/09-01/20-125 and accompanying annexes.

⁸ ICC-01/09-01/20-103, disposition.

⁹ ICC-01/09-01/20-127.

¹⁰ ICC-01/09-01/20-128.

¹¹ ICC-01/09-01/20-127, paras. 10-11.

¹² ICC-01/09-01/20-67, para. 25.

¹³ ICC-01/09-01/20-67, para. 25.

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March 2021. The re-interview was necessary, in the exercise of due diligence and the Prosecution's obligations under article 54(1)(a), for the purpose of addressing new information recently obtained during the P-0274's interview of 4 February 2021.

11. As explained in the "Prosecution's Response to the Defence 'Request for Extension of Time Limits to File the Defence List of Evidence and Response to the Document Containing the Charges'",¹⁴ [REDACTED] it was not possible for the Prosecution to interview him [REDACTED]. Arrangements were put in place to [REDACTED]¹⁵ and re-interview by the Prosecution.
12. [REDACTED]. [REDACTED]. [REDACTED].
13. The Prosecution was able to conduct a focussed, audio recorded interview under section 112 and rule 55(2) on 13 March 2021. Once the audio files arrived back in The Hague, they were registered in evidence on 16 March 2021 and prioritised for transcription. The resultant transcripts were registered on 25 March and disclosed to the Defence on 31 March.
14. Accordingly, the evidence listed in Annex A comprises "new evidence" for the purposes of rule 121(5). This evidence was obtained and disclosed as expeditiously as possible, given the security situation of the witness and unavoidable Covid-19 related travel delays.
15. The scope of the new evidence is limited, comprising three interview transcripts totalling 67 pages, mostly dealing with formal procedural warnings and only addressing very narrow substantive issues. No amendment of the charges is required. In the circumstances, no significant prejudice will be occasioned to the Defence through the addition of these new items of evidence, seven days prior to the deadline for the filing of the Defence's list of evidence and 22 days prior to the confirmation proceedings.

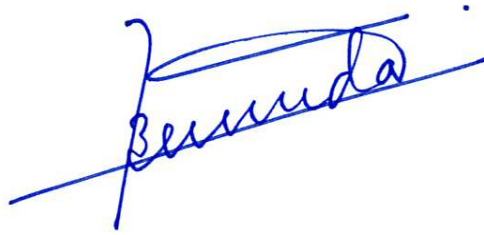
¹⁴ ICC-01/09-01/20-97-Conf-Exp, paras. 20-22 and Annex A.

¹⁵ [REDACTED].

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V. CONCLUSION

16. In light of the foregoing, the Prosecution hereby files a list of three items (Annex A), constituting new evidence upon which it intends to rely for its confirmation submissions.



Fatou Bensouda, Prosecutor

Dated this 1st day of April 2021
At The Hague, The Netherlands