

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 8 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*

Public

Prosecution's urgent request to order the Defence to file a list of evidence it intends to rely upon in the confirmation proceedings

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Legal Representatives of the Victims

Legal Representatives of the Applicants

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**Unrepresented Applicants
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**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. On 8 April 2021, the Defence for Mr Paul Gicheru¹ notified the Chamber that it does not intend to “present evidence” within the meaning of Article 61(6)(c) and Rule 121(6), but rather that it “intends to rely on evidence presented by the Prosecution in its List of Evidence *and other evidence disclosed by the Prosecution.*”² The Defence asserts that “[h]aving disclosed the evidence to the Defence, the Prosecution has had ample opportunity to prepare for any Defence reliance on that evidence.”³
2. The Prosecution submits that the Defence misapprehends the purpose underlying the requirement to provide a list of evidence, As a result, the Defence is in breach of the Chamber’s order.
3. Accordingly, the Chamber should order the Defence to urgently remedy this breach by filing a list of the specific items of evidence upon which it will rely in its written submissions for the confirmation proceedings, by no later than 12 April 2021.
4. Since the Prosecution is required to provide its written submissions by 23 April – in only 15 days – this issue needs to be resolved urgently. Therefore, the Prosecution requests the Chamber to order the Defence to file any response to this request by 9 April.

II. SUBMISSIONS

5. On 26 February 2021, the Chamber issued the ‘Decision on the postponement of the date of filing of written submissions and other related deadlines for the confirmation of charges proceedings’ and set new dates for the confirmation proceedings. The Chamber ordered, pursuant to rule 121 of the Rules: (1) the Prosecutor to file its Document containing the charges (the ‘DCC’) and the list of evidence on 12 March 2021 at the latest; (2) *the Defence, if it wishes so, to disclose pieces*

¹ “Defence”.

² ICC-01/09-01/20-130, para. 3 (emphasis added).

³ *Ibid.*

of evidence and file a list of evidence on 8 April 2021 at the latest; (3) both parties to file Written Submissions on 23 April 2021 at the latest; (4) the Prosecutor to file a response on 30 April 2021 at the latest; and (5) the Defence to file a reply on 7 May 2021 at the latest.⁴

The Defence was required to file a list of evidence

6. The Prosecution submits that a proper reading of the Chamber's order reveals that, while the disclosure of evidence by the Defence is optional, *the filing of the list of evidence is not*. Rule 121(6) requires the Defence to provide a list of the evidence it intends to present at the confirmation hearing 15 days before the date of the hearing. However, since the confirmation hearing has been replaced by written submissions, this provision must be interpreted *mutatis mutandis*. The Prosecution submits, therefore, that this rule obliges the Defence to provide a list of the evidence upon which it intends to rely in its written submissions.
7. However, the Defence states that it does not intend to "present evidence" within the meaning of Article 61(6)(c) and Rule 121(6), but rather that it "intends to rely on evidence presented by the Prosecution in its List of Evidence *and other evidence disclosed by the Prosecution*."⁵ The Defence asserts that "[h]aving disclosed the evidence to the Defence, the Prosecution has had ample opportunity to prepare for any Defence reliance on that evidence."⁶
8. In doing so, the Defence misapprehends both the Chamber's order and the purpose of providing such a list of evidence, which is primarily one of notice--both to the Prosecution and to the Chamber. Such notice is required, as a matter of fairness, regardless of the format of the confirmation proceedings. The Prosecution emphasises that, in its clarification email of 1 February 2021, the Chamber indicated that "[t]he purpose of these written submissions [due on 23 April 2021] is mainly

⁴ ICC-01/09-01/20-127, para. 5.

⁵ ICC-01/09-01/20-130, para. 3 (emphasis added).

⁶ *Ibid.*

to afford the Prosecutor an opportunity to make observations on the evidence the defence may present by 26 February 2021 at the latest.”⁷

9. The Prosecution submits that this obligation exists regardless of whether the evidence upon which the Defence intends to rely originates from the Prosecution or from the Defence. Just as the Prosecution is required to provide the Defence with notice as to which items of evidence, among all those disclosed to the Defence, it intends to rely on for the confirmation proceedings, so too must the Defence. Similarly, like the Prosecution, if the Defence fails to list an item of evidence upon which it subsequently wishes to rely it may be prevented from doing so, unless the Chamber extends the time limit to do so under regulation 35(2) of the Regulations of the Court on good cause shown.
10. Thus, it is not enough for the Defence to say – in effect – you should know your evidence, so we are not going to tell you what items we will rely upon. Rather, the Defence must indicate which specific items of evidence it will rely upon – at least insofar as these items are not included in the Prosecution’s list of evidence.
11. Similarly, the lists of evidence also provide the Chamber with notice as to which items of evidence it should focus on in its preparations for the confirmation proceedings. While the Chamber has access to, and may refer to, any of the items of evidence disclosed, it will naturally be guided by the parties as to which items are of the greatest importance. Thus, the filing of a list of evidence by *both* parties is in the interests of judicial economy and expeditious proceedings.
12. Finally, it would be unacceptable for the Defence simply to list every item of evidence disclosed by the Prosecution on its list of evidence. That would, in the Prosecution’s submission, amount to an abuse of process. Rather, what is required of the Defence is to make a good faith attempt to identify those items of evidence which it believes will assist it in its confirmation submissions.

⁷ Email received at 16:28 on 01 February 2021.

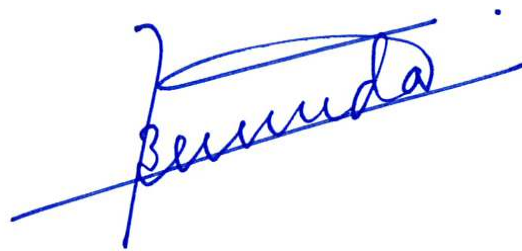
Urgency

13. The Prosecution has only 15 days to prepare its written submissions and thus requests this matter to be resolved as a matter of urgency. Accordingly, the Prosecution requests the Chamber to order the Defence to file its response, if any, by 9 April 2021. If the request is granted, the Prosecution requests that the Chamber order the Defence to file its list of evidence by 12 April 2021

III. RELIEF

14. For the aforementioned reasons, the Prosecution request the Chamber:

- a. To file its response, if any, by 9 April 2021;
- b. To find that the Defence is in breach of its order in paragraph 5 of ICC-01/09-01/20-127; and
- c. To order the Defence to remedy that breach by filing, no later than 12 April 2021 a list of the specific items of evidence upon which it intyends to rely in its written submissions in the confirmation proceedings.



Fatou Bensouda, Prosecutor

Dated this 8th day of April 2021
At The Hague, The Netherlands