

Annex 1

Public

[REDACTED]

From: Trial Chamber III Communications
Sent: 25 March 2022 11:08
To: OTP KEN art70 [REDACTED]; D32 Gicheru Defence team; Associate Legal Officer-Court Officer
Cc: Trial Chamber III Communications
Subject: Decision on Submitted Materials for P-0341
Attachments: Gicheru - P-0341's formal submission of documentary evidence (OTP); Defence List of items for submission into evidence P-0341.msg; RE Defence List of items for submission into evidence P-0341 - Response OTP.msg; Re Defence List of items for submission into evidence P-0341 Reply Defence.msg

[REDACTED]

Dear Counsel and Registry:

The Prosecution requests to recognise 9 items as formally submitted (Email from the Prosecution, 23 February 2022, at 16:02) and the Defence requests that 12 items are recognised as formally submitted (Email from the Defence, 23 February 2022, 18:26).

On 25 February 2022, the Prosecution submitted a response to the Email of the Defence (Email from the Prosecution, 25 February 2022, at 15:46). Therein, it provides comments to all 12 items and argues against the recognition of three of the items as formally submitted.

On 26 February 2022, the Defence submitted a reply to the response by the Prosecution (Email from the Defence, 26 February 2022, 14:07).

With regard to the items submitted by the Prosecution, the Chamber notes that the Defence does not oppose their recognition as formally submitted.

Further, all items put forward for submission have been discussed in one form or another during the witness's testimony.

Accordingly, the Chamber recognises all items in the Prosecution's email as formally submitted.

The Chamber notes that the Prosecution submits for nine items put forward by the Defence that it does not object to its submissions, 'provided that it is submitted in its entirety and recognized as such for the truth of its content'. In its reply, the Defence explained that it does not submit the items '...to be "recognized" for the truth of their contents but are to be freely assessed by the Chamber against all admissible evidence for their relevance, probative value, and reliability...'.

The Chamber suspects that there is a misunderstanding: it notes that in general all items submitted are recognised in their entirety and for the truth of their contents, barring specific exceptional circumstances. This means that the Chamber will assess the *content* of the items – in light of all the other evidence available (such as witness testimony, other documentary evidence, etc.) – for the purposes of its judgment pursuant to Article 74 of the Rome Statute. This does not mean that the Chamber will always find that the content of a specific item is true, after having considered the entirety of the evidence – but it will take this content into consideration. In essence, the Chamber observes that the Parties are arguing the same point.

Accordingly, the Chamber clarifies that all items are recognised in their entirety and for the truth of their content.

Item 1 (KEN-OTP-0147-1590-R01) and Item 2 (KEN-OTP-0147-2132)

With regard to the items submitted by the Defence, the Chamber notes the Prosecution's comment that two items (item 1, KEN-OTP-0147-1590-R01 and item 2, KEN-OTP-0147-2132) have also been included in the Prosecution's second request to introduce items other than through a witness. Since this request has been ruled upon in the meantime (see, ICC-01/09-01/20-299) and the two items have been recognised as formally submitted, there is no need to recognise them again.

Item 9 (ICC-01/09-01/11-249) and Item 10 (ICC-01/09-01/20-220)

With regard to two items put forward by the Defence (item 9, ICC-01/09-01/11-249 and item 10, ICC-01/09-01/20-220) the Prosecution submits that these are official records of the court and as such do not need to be recognised as formally submitted. The Chamber notes that the two items in questions are a decision of the Chamber in the Main Case (Pre-Trial Chamber II) and the Prosecution's Trial Brief in the current proceedings.

First, the Chamber does not understand why the Defence is requesting that a filing made by one of the parties in the current proceedings needs to be put forward as evidence. The Chamber is always in a position to rely on its own case record. (Additionally, the Chamber notes that the Defence did not even specify whether the confidential or the public-redacted version of the filing in question was put forward.) With regard to official court records of other cases, the Chamber notes that pursuant to Article 69(6) of the Statute it can take judicial notice of facts of common knowledge. In line with previous jurisprudence by this Court, the Chamber finds that this includes court records (see for instance, Trial Chamber VII, *Prosecutor v Jean Pierre Bemba Gombo, et al.*, Decision on Prosecution Request for Judicial Notice, 9 November 2015, ICC-01/05-01/13-1473). Accordingly, there is no need to submit items 9 and 10 into evidence.

Item 11 (KEN-D32-0001-0001)

The Prosecution objects to the recognition of item 12 (KEN-D32-0001-0001), arguing that the witness did not recognise the item in question. The Chamber notes that the fact that a witness did not recognize an item can be – in principle – a factor to be taken into account for the assessment of the evidence or assessment of the witness. In any case, this is a question of probative value of the submitted evidence, which will be undertaken in the holistic assessment of the entirety of the evidence for purposes of its judgment pursuant to Article 74 of the Statute (as previously explained). Accordingly, the Chamber will recognise the item as formally submitted.

In summary, for P-0341, the Chamber recognises all items requested by the Prosecution and all items requested by the Defence – with the exception of items 1, 2, 9 and 10 of the Defence's items – as formally submitted.

The Registry is directed to proceed in accordance with paragraph 17(iv) of the Directions on the Conduct of the Proceedings, 7 October 2021, ICC-01/09-01/20-189.

Kind regards,

Trial Chamber III

[REDACTED]

From: Trial Chamber III Communications
Sent: 31 March 2022 14:36
To: OTP KEN art70 [REDACTED]; D32 Gicheru Defence team; Associate Legal Officer-Court Officer
Cc: Trial Chamber III Communications
Subject: RE: Decision on Submitted Materials for P-0341

[REDACTED]

Dear Counsel and Registry,

The Chamber notes that the Prosecution informed the Defence and the Chamber that it had made an error in the spelling of one of the ERN of the items it submitted in relation to P-0341's testimony (email to the Chamber and the Defence, 30 March 2022, at 9:23).

The Chamber hereby clarifies that the ERN of item number 3 of the Prosecution's list of submitted items is KEN-OTP-0159-1386. This item will be marked as 'formally submitted'.

Kind regards,

Trial Chamber III

From: Trial Chamber III Communications <TrialChamberIIICommunications [REDACTED]>
Sent: 25 March 2022 11:08
To: OTP KEN art70 [REDACTED]; D32 Gicheru Defence team <D32GicheruDefenceteam [REDACTED]>; Associate Legal Officer-Court Officer <AssociateLegalOfficer-CourtOfficer [REDACTED]>
Cc: Trial Chamber III Communications <TrialChamberIIICommunications [REDACTED]>
Subject: Decision on Submitted Materials for P-0341

Dear Counsel and Registry:

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On 25 February 2022, the Prosecution submitted a response to the Email of the Defence (Email from the Prosecution, 25 February 2022, at 15:46). Therein, it provides comments to all 12 items and argues against the recognition of three of the items as formally submitted.

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Further, all items put forward for submission have been discussed in one form or another during the witness's testimony.

Accordingly, the Chamber recognises all items in the Prosecution's email as formally submitted.

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Accordingly, the Chamber clarifies that all items are recognised in their entirety and for the truth of their content.

Item 1 (KEN-OTP-0147-1590-R01) and Item 2 (KEN-OTP-0147-2132)

With regard to the items submitted by the Defence, the Chamber notes the Prosecution's comment that two items (item 1, KEN-OTP-0147-1590-R01 and item 2, KEN-OTP-0147-2132) have also been included in the Prosecution's second request to introduce items other than through a witness. Since this request has been ruled upon in the meantime (*see*, ICC-01/09-01/20-299) and the two items have been recognised as formally submitted, there is no need to recognise them again.

Item 9 (ICC-01/09-01/11-249) and Item 10 (ICC-01/09-01/20-220)

With regard to two items put forward by the Defence (item 9, ICC-01/09-01/11-249 and item 10, ICC-01/09-01/20-220) the Prosecution submits that these are official records of the court and as such do not need to be recognised as formally submitted. The Chamber notes that the two items in questions are a decision of the Chamber in the Main Case (Pre-Trial Chamber II) and the Prosecution's Trial Brief in the current proceedings.

First, the Chamber does not understand why the Defence is requesting that a filing made by one of the parties in the current proceedings needs to be put forward as evidence. The Chamber is always in a position to rely on its own case record. (Additionally, the Chamber notes that the Defence did not even specify whether the confidential or the public-redacted version of the filing in question was put forward.) With regard to official court records of other cases, the Chamber notes that pursuant to Article 69(6) of the Statute it can take judicial notice of facts of common knowledge. In line with previous jurisprudence by this Court, the Chamber finds that this includes court records (*see for instance*, Trial Chamber VII, *Prosecutor v Jean Pierre Bemba Gombo, et al.*, Decision on Prosecution Request for Judicial Notice, 9 November 2015, ICC-01/05-01/13-1473). Accordingly, there is no need to submit items 9 and 10 into evidence.

Item 11 (KEN-D32-0001-0001)

The Prosecution objects to the recognition of item 12 (KEN-D32-0001-0001), arguing that the witness did not recognise the item in question. The Chamber notes that the fact that a witness did not recognize an item can be – in principle – a factor to be taken into account for the assessment of the evidence or assessment of the witness. In any case, this is a question of probative value of the submitted evidence, which will be undertaken in the holistic assessment of the entirety of the evidence for purposes of its judgment pursuant to Article 74 of the Statute (as previously explained). Accordingly, the Chamber will recognise the item as formally submitted.

In summary, for P-0341, the Chamber recognises all items requested by the Prosecution and all items requested by the Defence – with the exception of items 1, 2, 9 and 10 of the Defence’s items – as formally submitted.

The Registry is directed to proceed in accordance with paragraph 17(iv) of the Directions on the Conduct of the Proceedings, 7 October 2021, ICC-01/09-01/20-189.

Kind regards,

Trial Chamber III

[REDACTED]

From: [REDACTED]
Sent: 23 February 2022 16:02
To: Trial Chamber III Communications; D32 Gicheru Defence team
Cc: OTP KEN art70 [REDACTED]; [REDACTED] Associate Legal Officer-Court Officer
Subject: Gicheru - P-0341's formal submission of documentary evidence (OTP)

Dear Trial Chamber III,
Dear Counsel,

Please find below a list of items for witness P-0341 the Prosecution seeks to formally submit into evidence as per paragraph 17 (i) of the Directions on the Conduct of the Proceedings (ICC-01/09-01/20-189). These items are also included in the list of material for P-0341 the Prosecution provided to the Chamber and the Defence on Wednesday 16 February 2022.

Further, the Prosecution seeks to formally submit into evidence P-0341's Protected Information List in Swahili and English (items 8 and 9 on the list below) used during his testimony by both parties. These two items will be formally disclosed and released in eCourt as soon as possible, together with P-0341's preparation and clarifications logs.

Items of evidence for submission: P-0341

1. KEN-OTP-0150-0285-R01
2. KEN-OTP-0150-0289-R01
3. KEN-OTP-0150-1386
4. KEN-OTP-0150-0300
5. KEN-OTP-0155-4982
6. KEN-OTP-0038-0207-R01
7. KEN-OTP-0152-0091
8. KEN-OTP-0159-1985
9. KEN-OTP-0159-1990

Best regards,

[REDACTED]
On behalf of the Prosecution

From: Karnavas, Michael [REDACTED]
Sent: 26 February 2022 14:07
To: Zago, Alice; Trial Chamber III Communications
Cc: [REDACTED]; Associate Legal Officer-Court Officer; OTP KEN art70 [REDACTED]; D32 Gicheru Defence team
Subject: Re: Defence List of items for submission into evidence / P-0341

Dear Honorable Single Judge of Trial Chamber III,

Dear Prosecution,

In reply to the OTP's objections concerning P-0341, materials submitted for use during the questioning of witnesses are not to be "recognized" for the truth of their contents but are to be freely assessed by the Chamber against all admissible evidence for their relevance, probative value, and reliability (Rome Statute, Article 64(9), Rule 63(2)). When prior recorded testimony and other documents are read out to a witness or referred to during the questioning, they form an integral part of the witness's oral testimony. As such, they are to be assessed for coherence with the witness's in-court testimony along with several factors including the witness's demeanor when testifying, willingness to respond to questions, spontaneity, chronological pattern, accuracy, and consistency (see ICC-01/05-01/13-1989-Red, paras. 202-205). Simply put, the Trial Chamber is to determine the appropriate weight, if any, that these materials are to be accorded, not the OTP.

Sincerely yours,

Michael G. Karnavas

From: Zago, Alice [REDACTED]
Sent: 25 February 2022 14:45
To: Trial Chamber III Communications <TrialChamberIIICommunications@icc-01/09-01/20-339-otp-kn>
Cc: [REDACTED]; Associate Legal Officer-Court Officer <AssociateLegalOfficer-CourtOfficer@icc-01/09-01/20-339-otp-kn>; D32 Gicheru Defence team <D32GicheruDefenceteam@icc-01/09-01/20-339-otp-kn>
Subject: RE: Defence List of items for submission into evidence / P-0341

Dear Trial Chamber III,
 Your Honour,

The Prosecution responds as follows to the Defence list of material to be submitted into evidence, sent on 23 February 2022:

- Item 1/KEN-OTP-0147-1590-R01: The Prosecution does not object to the formal submission into evidence of this item provided that it is submitted in its entirety and recognized as such for the truth of its content. The Prosecution notes that it had requested the formal submission of this item into evidence in its Second Bar Table Motion, ICC-01/09-01/20-274-Conf-AnxA, p. 5.

- Item 2/KEN-OTP-0147-2132: The Prosecution does not object to the formal submission into evidence of this item provided that it is submitted in its entirety and recognized as such for the truth of its content. The Prosecution notes that it had requested the formal submission of this item into evidence in its Second Bar Table Motion, ICC-01/09-01/20-274-Conf-AnxA, p. 10.
- Item 3/ KEN-OTP-0150-0255: The Prosecution does not object to the formal submission into evidence of this item provided that it is submitted in its entirety and recognized as such for the truth of its content.
- Item 4/KEN-OTP-0150-1025: The Prosecution does not object to the formal submission into evidence of this item provided that it is submitted in its entirety and recognized as such for the truth of its content.
- Item 5/KEN-OTP-0153-0027: The Prosecution does not object to the formal submission into evidence of this item provided that it is submitted in its entirety and recognized as such for the truth of its content.
- Item 6/ KEN-OTP-0153-0031: The Prosecution does not object to the formal submission into evidence of this item provided that it is submitted in its entirety and recognized as such for the truth of its content.
- Item 7/KEN-OTP-0159-1803: The Prosecution does not object to the formal submission into evidence of this item provided that it is submitted in its entirety and recognized as such for the truth of its content.
- Item 8/KEN-OTP-0160-1436: The Prosecution does not object to the formal submission into evidence of this item provided that it is submitted in its entirety and recognized as such for the truth of its content.
- Item 9/ICC-01/09-01/11-249: The Prosecution submits that this is an ICC official court record and, as such, does not need to be submitted into evidence in this case. The Trial Chamber can simply take judicial notice of it and of its content.
- Item 10/ICC-01/09-01/20-220: The Prosecution submits that this is an ICC official court record and, as such, does not need to be submitted into evidence in this case. The Trial Chamber can simply take judicial notice of it and of its content.
- Item 11/KEN-D32-0001-0001: The Prosecution objects to the formal submission into evidence of this item as the witness did not recognize it.
- Item 12/KEN-OTP-0160-1571: The Prosecution does not object to the formal submission into evidence of this item provided that it is submitted in its entirety and recognized as such for the truth of its content.

Best regards,
 Alice Zago
 On behalf of the Prosecution

From: Amann-Lasnier, Victoria [REDACTED]
Sent: 23 February 2022 18:26
To: Trial Chamber III Communications <[TrialChamberIIICommunications](#)> [REDACTED]; OTP KEN art70 [REDACTED]
Cc: D32 Gicheru Defence team <[D32GicheruDefenceteam](#)> [REDACTED]; Associate Legal Officer-Court Officer <[AssociateLegalOfficer-CourtOfficer](#)> [REDACTED]
Subject: Defence List of items for submission into evidence / P-0341

Dear Honorable Single Judge of Trial Chamber III,
Dear Prosecution,

On behalf of Mr. Karnavas, please find enclosed the List of items the Defence formally requests to be submitted into evidence for Witness P-0341 in accordance with paragraph 17 of the Directions (ICC-01/09-01/20-189).

Sincerely yours,
Victoria Amann-Lasnier

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[REDACTED]

From: Zago, Alice
Sent: 25 February 2022 15:46
To: Trial Chamber III Communications
Cc: [REDACTED]; Associate Legal Officer-Court Officer; OTP KEN art70 [REDACTED]; D32 Gicheru Defence team
Subject: RE: Defence List of items for submission into evidence / P-0341

Dear Trial Chamber III,
Your Honour,

The Prosecution responds as follows to the Defence list of material to be submitted into evidence, sent on 23 February 2022:

- Item 1/KEN-OTP-0147-1590-R01: The Prosecution does not object to the formal submission into evidence of this item provided that it is submitted in its entirety and recognized as such for the truth of its content. The Prosecution notes that it had requested the formal submission of this item into evidence in its Second Bar Table Motion, ICC-01/09-01/20-274-Conf-AnxA, p. 5.
- Item 2/KEN-OTP-0147-2132: The Prosecution does not object to the formal submission into evidence of this item provided that it is submitted in its entirety and recognized as such for the truth of its content. The Prosecution notes that it had requested the formal submission of this item into evidence in its Second Bar Table Motion, ICC-01/09-01/20-274-Conf-AnxA, p. 10.
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- Item 5/KEN-OTP-0153-0027: The Prosecution does not object to the formal submission into evidence of this item provided that it is submitted in its entirety and recognized as such for the truth of its content.
- Item 6/ KEN-OTP-0153-0031: The Prosecution does not object to the formal submission into evidence of this item provided that it is submitted in its entirety and recognized as such for the truth of its content.
- Item7/KEN-OTP-0159-1803: The Prosecution does not object to the formal submission into evidence of this item provided that it is submitted in its entirety and recognized as such for the truth of its content.
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- Item 9/ICC-01/09-01/11-249: The Prosecution submits that this is an ICC official court record and, as such, does not need to be submitted into evidence in this case. The Trial Chamber can simply take judicial notice of it and of its content.
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Best regards,
 Alice Zago
 On behalf of the Prosecution

From: Amann-Lasnier, Victoria [REDACTED]
Sent: 23 February 2022 18:26
To: Trial Chamber III Communications <[TrialChamberIIICommunications](#)[REDACTED]>; OTP KEN art70 [REDACTED]
Cc: D32 Gicheru Defence team <[D32GicheruDefenceteam](#)[REDACTED]>; [REDACTED]
 [REDACTED] Associate Legal Officer-Court Officer <[AssociateLegalOfficer-CourtOfficer](#)[REDACTED]>
Subject: Defence List of items for submission into evidence / P-0341

Dear Honorable Single Judge of Trial Chamber III,
 Dear Prosecution,

On behalf of Mr. Karnavas, please find enclosed the List of items the Defence formally requests to be submitted into evidence for Witness P-0341 in accordance with paragraph 17 of the Directions (ICC-01/09-01/20-189).

Sincerely yours,
 Victoria Amann-Lasnier

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[REDACTED]

From: Amann-Lasnier, Victoria [REDACTED]
Sent: 23 February 2022 18:26
To: Trial Chamber III Communications; OTP KEN art70 [REDACTED]
Cc: D32 Gicheru Defence team; [REDACTED]; Associate Legal Officer-Court Officer
Subject: Defence List of items for submission into evidence / P-0341
Attachments: 220223 - Defence List of Evidence for admission into evidence.pdf

Dear Honorable Single Judge of Trial Chamber III,
Dear Prosecution,

On behalf of Mr. Karnavas, please find enclosed the List of items the Defence formally requests to be submitted into evidence for Witness P-0341 in accordance with paragraph 17 of the Directions (ICC-01/09-01/20-189).

Sincerely yours,
Victoria Amann-Lasnier

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ICC-01/09-01/20

THE PROSECUTOR v. PAUL GICHERU

List of items the Defence formally requests to be submitted into evidence for Witness P-0341

	ERN Number	Title	Type	Date	Relevant excerpt if necessary	Admission into evidence
1.	KEN-OTP-0147-1590	INVESTIGATOR'S REPORT / Meeting with ██████████	ICC Investigation notes / report / correspondence	██████████		Yes
2.	KEN-OTP-0147-2132	██████████ ██████████	Communication - E-mail	██████████		Yes
3.	KEN-OTP-0150-0255	WITNESS STATEMENT	ICC Statement - General	██████████		Yes
4.	KEN-OTP-0150-1025	INVESTIGATOR'S REPORT / Skype call to ██████	ICC Investigation notes / report / correspondence	██████████		Yes
5.	KEN-OTP-0153-0027	INVESTIGATOR'S REPORT / Information received from ██████ ██████████ ██████████	ICC Investigation notes / report / correspondence	██████████		Yes

6.	KEN-OTP-0153-0031	INVESTIGATOR'S REPORT / Arrangements made to meet with [REDACTED]	ICC Investigation notes / report / correspondence	[REDACTED]		Yes
7.	KEN-OTP-0159-1803	Transcript of interview / Audio Recordings of Witness Interview / KEN-OTP-0160-0212 - Track 2	ICC Statement - ICC transcribed statement	[REDACTED]		Yes
8.	KEN-OTP-0160-1436	INVESTIGATION REPORT / [REDACTED]	ICC Investigation notes / report / correspondence	[REDACTED]		Yes
9.	ICC-01/09-01/11-249	Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings	ICC Court Record	5/11/2011	Para. 59	Yes
10.	ICC-01/09-01/20-220	Prosecution Trial Brief	ICC Court Record	15/11/2021	Para. 269	Yes
11.	KEN-D32-0001-0001	Kenya: [REDACTED]	Media article	18/3/2003		Yes
12.	KEN-OTP-0160-1571	Witness clarification log	ICC witness preparation log / clarification	19/2/2022		Yes