

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/09-01/20

Date: 12 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

Decision on the Prosecutor Request concerning the Defence List of Evidence

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

The Office of the Prosecutor
Ms Fatou Bensouda
Mr James Stewart

Counsel for the Defence
Mr Michael G. Karnavas

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
for Participation/Reparations**

**The Office of Public Counsel
for Victims**

**The Office of Public Counsel
for the Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

PRE-TRIAL CHAMBER A (ARTICLE 70) of the International Criminal Court issues this Decision on the Prosecutor Request concerning the Defence List of Evidence.

I. Procedural history and Submissions

1. On 6 November 2020, the Chamber decided that, pursuant to rule 165(3) of the Rules of Procedure and Evidence (the ‘Rules’), it will make its decision on the confirmation of charges on the basis of written submissions, without a hearing.¹ It further set the calendar for the proceedings, providing the parties with deadlines for their respective filings and submissions.²

2. On 26 February 2021, the Chamber set new dates for the proceedings, postponing the deadlines.³ *Inter alia*, it ordered the Defence to file its list of evidence (the ‘List of Evidence’) by 8 April 2021.⁴

3. On 8 April 2021, the Defence filed a notification in which it informed the Chamber and the Prosecutor that it would not present evidence of its own but that it ‘intends to rely on evidence presented by the Prosecution in its List of Evidence and other evidence disclosed by the Prosecution’ (the ‘Notification’).⁵

4. On 9 April 2021, the Prosecutor filed a motion related to the Notification (the ‘Request’).⁶ The Prosecutor submits that the Defence did not fulfil the Chamber’s order to provide a list of evidence,⁷ arguing that the purpose of a list of evidence is to put the other party and the chamber on notice of the material to be used.⁸ According to the Prosecutor, this obligation also persists when the Defence wishes to use evidence emanating from the Prosecutor.⁹ Consequently, it requests the Chamber, *inter alia*, to

¹ [ICC-01/09-01/20-T-001-Red-Eng](#), p. 10 lines 12-19.

² [ICC-01/09-01/20-T-001-Red-Eng](#), p. 11 lines 1-15.

³ [Decision on the postponement of the date of filing of written submissions and other related deadlines for the confirmation of charges proceedings](#), ICC-01/09-01/20-103.

⁴ [ICC-01/09-01/20-103](#), p. 12.

⁵ [Notification concerning the Defence List of Evidence](#), ICC-01/09-01/20-130, para. 3.

⁶ [Prosecution’s urgent request to order the Defence to file a list of evidence it intends to rely upon in the confirmation proceedings](#), ICC-01/09-01/20-131.

⁷ Request, [ICC-01/09-01/20-131](#), para. 3.

⁸ Request, [ICC-01/09-01/20-131](#), para. 8.

⁹ Request, [ICC-01/09-01/20-131](#), para. 9.

order the Defence to file a list of evidence comprising the specific items it wishes to rely on.¹⁰

5. On the same day, the Defence filed its response to the Request (the ‘Response’).¹¹ It submits that the obligation to provide notice of witnesses and documents does not apply in the same manner in situations where the confirmation hearing is replaced by written submissions pursuant to rule 165(3) of the Rules, and where the Defence does not disclose new evidence and relies on evidence cited in the Prosecution’s document containing the charges.¹²

II. Analysis

6. The Chamber has regard to article 61(6) of the Rome Statute (the ‘Statute’) and rule 121(6) of the Rules.

7. First, it notes and agrees with the prior jurisprudence of the Court that the list of evidence is a managerial tool whose purpose is to enable the opposing party to properly prepare for the hearing and put them in a position to adequately respond. Further, the list of evidence also assists the chamber in its organisation of the proceedings.¹³

8. The Chamber finds that the fact that the confirmation hearing prescribed by article 61(1) of the Statute is replaced with written submissions pursuant to rule 165(3) of the Rules – as done in the current proceedings – does not alter the purpose of the list of evidence. While a response by the other party might be staggered in a written procedure and does not occur within the context of an oral hearing, the Prosecutor still has a legitimate interest in receiving the Defence’s list of evidence in order to properly prepare its response. Accordingly, the Chamber rejects the Defence’s argument¹⁴ that

¹⁰ Request, [ICC-01/09-01/20-131](#), paras 3, 13, 14.

¹¹ [Response to the Prosecution’s urgent request to order the Defence to file a list of evidence it intends to rely upon in the confirmation proceedings](#), 8 April 2021, ICC-01/09-01/20-132.

¹² Response, ICC-01/09-01/20-132, para. 3.

¹³ See Pre-Trial Chamber II, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali*, [Decision on the Defence Requests for Leave to Resubmit or Add Evidence and Related Requests](#), ICC-01/09-02/11-330, para. 23; Pre-Trial Chamber I, *The Prosecutor v. Charles Blé Goudé*, [Decision on the ‘Defence request to add recently disclosed material to its list of evidence’](#), 22 September 2014, ICC-02/11-02/11-164, para. 5.

¹⁴ [Response](#), ICC-01/09-01/20-132, para. 3.

the purpose of a list of evidence does not apply in the same sense in proceedings conducted pursuant to rule 165(3) of the Rules.

9. The burden of proof pursuant to article 61(5) of the Statute, which the Defence invokes,¹⁵ also does not affect the Defence's obligations pursuant to article 61(6) of the Statute and rule 121(6) of the Rules. The Defence always has the right not to present any evidence and remain silent. It is the unequivocal duty of the Prosecutor to prove the charges, combined with the obligation to indicate on which evidence it intends to rely on, pursuant to rule 121(3) of the Rules. However, should the Defence choose to exercise its right to present evidence, it has the accompanying obligation prescribed by rule 121(6) of the Rules to provide notice of what these items are in order to ensure that the confirmation hearing (or written submissions) results in a meaningful debate.

10. The Chamber considers that the Defence's obligation to indicate which evidence it intends to present also encompasses items which emanate from the Prosecutor, as held by previous chambers.¹⁶ As indicated by the Defence, the purpose of the list of evidence is 'to provide notice to the opposing party of the witnesses and documents that will be called, disclosed, referenced or used during the hearing.'¹⁷ Even though it can be expected from the Prosecutor to have knowledge of its own documents and items of evidence, the fact that the Defence intends to rely on an item is still of interest and benefit to the Prosecutor. Further, in this Chamber's view, the term 'to present', used in article 61(6) of the Statute and rule 121(6) of the Rules, only refers to the fact that the Defence wishes to rely on an item of evidence, irrespective of its origin. Therefore, the indication that the Defence wishes to rely on an item of Prosecution evidence falls within the purpose of the list of evidence.

11. As to the exact manner in which such notice must be provided, the Chamber is of the view that – for the purposes of the case at hand – the Defence may make a general reference to the Prosecutor's list of evidence. The fact that the Prosecutor intends to use

¹⁵ Notification, [ICC-01/09-01/20-130](#), para. 1.

¹⁶ Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, [Decision Convening a Hearing on the Defence Request for Order to Disclosure Exculpatory Materials](#), 1 November 2006, ICC-01/04-01/06-640, p. 2; Pre-Trial Chamber I, *The Prosecutor v. Charles Blé Goudé*, [Decision on the 'Defence request to add recently disclosed material to its list of evidence'](#), 22 September 2014, ICC-02/11-02/11-164, para. 6 (the chamber authorises the belated addition of five items of evidence emanating from the Prosecutor to the Defence list of evidence).

¹⁷ [Response](#), ICC-01/09-01/20-132, para. 2.

these items for its written submissions indicates that she necessarily assessed and analysed these items with care. Accordingly, it can be expected that the Prosecutor is able to promptly address any argument brought forward by the Defence in its written submissions concerning these items. Consequently, under the specific circumstances, the Chamber is of the view that the Defence's reference to the Prosecutor's list of evidence satisfies the Defence's obligations pursuant to rule 121(6) of the Rules.

12. However, the Chamber finds that this consideration does not apply to 'other evidence disclosed by the Prosecution'¹⁸ which the Defence might wish to use. The Defence has the obligation to indicate specifically which additional items of evidence, other than those referred to in the Prosecutor's list of evidence, it intends to rely on in order to enable the Prosecution to properly prepare its response.

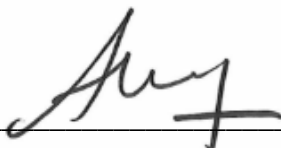
FOR THESE REASONS, THE CHAMBER HEREBY

FINDS that the Defence has the duty to provide a list of the specific pieces of evidence it intends to rely on in its Written Submissions;

FINDS that, for that purpose, the Defence can make a general reference to the Prosecutor's list of evidence; and

ORDERS the Defence to indicate any further evidence disclosed by the Prosecutor which it intends to rely on by 14 April 2021.

Done in both English and French, the English version being authoritative.



Judge Reine Adélaïde Sophie Alapini-Gansou

Dated 12 April 2021

At The Hague, The Netherlands

¹⁸ Notification, [ICC-01/09-01/20-130](#), para. 3.