

Annex 1

Public

From: Trial Chamber III Communications
Sent: 01 April 2022 09:22
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-0739
Attachments: Prosecution list of items for submission into evidence - P-0739; Defence List of items for submission into evidence - P-0739; RE: Defence List of items for submission into evidence - P-0739; RE: Prosecution list of items for submission into evidence - P-0739

Dear Counsel and Registry,

The Prosecution requests that 13 items are recognised as formally submitted (Email from the Prosecution, 25 March 2022, 12:08). The Defence requests to recognise 47 items as formally submitted (Email from the Defence, 25 March 2022, at 18:49).

The Prosecution submitted a response to the Email of the Defence (Email from the Prosecution, 28 March 2022, at 17:19), objecting to two items submitted by the Defence. It further submits that a number of items constitute prior recorded testimony for which the requirements of Rule 68 of the Rules have not been met and therefore shouldn't be admitted. It also notes that a number of items have been included in previous requests for recognition as formally submitted.

The Defence submitted a response to the Email of the Prosecution (Email from the Defence, 28 March 2022, 20:31), stating that it has no objections to the items submitted by the Prosecution.

First, with regards to the Prosecution's comments concerning items that have been previously submitted, the Chamber reiterates, as explained in previous decisions on submitted materials, once an item is recognised as formally submitted there is no need to repeat such request. Therefore, the Registry does not need to mark these items a second time as formally submitted.

In respect of the items put forward by the Prosecution for formal submission, the Chamber notes that no objections have been raised by the Defence.

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

Items 7 and 8 Prosecution list and 26 and 27 Defence list (KEN-OTP-0116-0232 and KEN-OTP-0116-0187)

The Chamber notes the Prosecution's remarks with regard to two of its items (item 7, KEN-OTP-0116-0232, and item 8 KEN-OTP-0116-0187) in that it seeks their submission for the limited purpose of: (i) [REDACTED]

However, the Chamber notes that both documents are also requested by the Defence to be recognised as formally submitted, but without any limitations (items 27 and 26 of the Defence list, respectively).

The Chamber recalls the definition of prior recorded testimony as set out in its previous decisions, as well as interpreted by other Chambers of this Court: when persons are questioned in their capacity as witnesses in the context of or in anticipation of legal proceedings these statements fall under Rule 68 of the Rules (*see*, Trial Chamber VII, Decision on Prosecution Rule 68(2) and (3) Requests, ICC-01/05-01/13-1478-Red-Corr, para. 32).

First, the Chamber observes that KEN-OTP-0116-0187 [REDACTED] and seems internally inconsistent (*see also*, ICC-01/09-01/20-T-068-Conf-Eng, p. 54, lines 9-16). The Chamber therefore finds that this item does not constitute prior recorded testimony. Accordingly, it recognises KEN-OTP-0116-0187 as formally submitted, without any limitations.

In respect of KEN-OTP-0116-0232, the Chamber finds that this constitutes prior recorded testimony. However, the Chamber recalls the jurisprudence of other Trial Chambers that Rule 68 is only applicable if the item is submitted for the truth of its content (see, Trial Chamber VII, Decision on Prosecution Rule 68(2) and (3) Requests, ICC-01/05-01/13-1478-Red-Corr, para. 34).

Accordingly, given the limited purposes specified by the Prosecution, the Chamber finds that KEN-OTP-0116-0232 can be recognised as formally submitted for the limited purposes sought.

However, the Chamber notes that both parties have extensively questioned the witness on the document during the witness's testimony (ICC-01/09-01/20-T-066-Conf-Eng, p. 81, line 8 – p.87, line 20; p.90, lines 3-25; ICC-01/09-01/20-T-068-Conf-Eng, p. 55, line 20 – p.56, line 16; p.58, line 10 – p.62, line 3).

In line with the Chamber's previous explanations (Decision on Submitted Material for P-0613, 25 March 2022, at 11:17) these questions and their answers are already on the record of the case and will therefore be considered during the holistic assessment of the evidence.

In summary, the Chamber recognises all items put forward by the Prosecution as formally submitted – with the limitation in respect of item 7 as described above.

Items 2-4, 34 and 36-47 of the Defence list

With regard to the items put forward by the Defence, the Chamber notes that items 2-4, 34 and 36-47 are all prior recorded testimonies. Accordingly, these items must be introduced in accordance with Rule 68 of the Rules of Procedure and Evidence. With regards to items 26 and 27 of the Defence list the Chamber recalls the above and recognises them as formally submitted with the limitations described above.

Item 9 of the Defence list (KEN-OTP-0130-3312)

The Prosecution makes submissions concerning the probative value of the item but does not object to its recognition as formally submitted. The Chamber notes the points raised by the Prosecution and will take them into consideration as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused in its judgment.

Item 14 of the Defence list (KEN-OTP-0087-1126)

The Prosecution objects to the recognition of KEN-OTP-0087-1126. It argues that the witness was not aware of this communication and 'could not confirm any of the actual content'.

The Chamber notes that the Defence discussed the item with the witness and posed follow-up questions arising from the document which the witness answered (ICC-01/09-01/20-T-067-Conf-Eng p. 45, line 2 – p.47, line 9). The points raised by the Prosecution concern the assessment of the evidence which, as previously explained above, will be done as part of the holistic assessment of all evidence.

Accordingly, the Chamber recognises item 14 of the Defence as formally submitted.

Item 20 of the Defence list (KEN-OTP-0160-1465)

The Prosecution submits that P-0739 was not aware of the existence of the item in question and did not confirm any of the content of the item.

The Chamber notes that this item was put to the witness by the Defence and that the witness was questioned about and commented on the content (ICC-01/09-01/20-T-067-Conf-Eng p. 54, line 18 - p. 55, line 14; while a different ERN is mentioned in the transcript, it is clear from the content of the discussion that the item in question in KEN-00TP-0160-1465). The Prosecution raises aspects which regard the assessment of the evidence which, as previously explained, will be done as part of the holistic assessment of all evidence.

Accordingly, the Chamber recognises item 20 of the Defence list as formally submitted.

In summary, for P-0739, the Chamber recognises all items requested by the Prosecution as formally submitted with the limitation for item 7 (which corresponds to item 27 of the Defence list), as explained above. In respect of the items requested by the Defence, the Chamber recognises items 1, 5-33 and 35 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

From: [REDACTED]
Sent: 25 March 2022 12:08
To: Trial Chamber III Communications; Trial Chamber III Legal Officers; D32 Gicheru Defence team
Cc: OTP KEN art70 [REDACTED]; [REDACTED]; Associate Legal Officer-Court Officer
Subject: Prosecution list of items for submission into evidence - P-0739

Dear Trial Chamber III,
 Dear Counsel,

Please find below a list of items for witness P-0739 that 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-0739 the Prosecution provided to the Chamber and the Defence on Thursday, 17 March 2022.

Additionally, the Prosecution seeks to formally submit into evidence the updated Protected Information List (PIL) used during the witness' testimony. Formal disclosure of the updated PIL is still pending.

The Prosecution does not, at this time, seek to formally submit P-0739's witness preparation log and witness clarifications, but in the event that the Defence submits into evidence – and the Chamber recognises as such – any prior statements of P-0739, the Prosecution may seek submission of these documents in its final Bar Table Motion.

Items for submission: P-0739

1. KEN-OTP-0113-0053
2. KEN-OTP-0134-0187
3. KEN-OTP-0134-0189
4. KEN-OTP-0103-3297
5. KEN-OTP-0116-0242
6. KEN-OTP-0116-0254
7. KEN-OTP-0116-0232 (Not for truth of its contents, but to establish the fact that [REDACTED])
8. KEN-OTP-0116-0187 (Not for truth of its contents, but to establish the fact that [REDACTED])
9. KEN-OTP-0135-0466
10. KEN-OTP-0135-0467
11. KEN-D09-0045-0017
12. KEN-D09-0045-0309
13. KEN-OTP-0160-1745 (updated PIL)

Best regards,

[REDACTED]

On behalf of the Prosecution

From: Mascetti, Daria
Sent: 28 March 2022 20:31
To: [REDACTED]; Trial Chamber III Communications; Trial Chamber III Legal Officers; D32 Gicheru Defence team
Cc: OTP KEN art70 [REDACTED]; Associate Legal Officer-Court Officer
Subject: RE: Prosecution list of items for submission into evidence - P-0739

Dear Trial Chamber III,
 Dear Prosecution,

On behalf of Ms. Tomanović, the Defence informs that it has no objections to the Prosecution's list of items for P-0739 to be submitted into evidence.

Sincerely yours,
 Daria

From: [REDACTED]
Sent: 25 March 2022 12:08
To: Trial Chamber III Communications <TrialChamberIIICommunications[REDACTED]>; Trial Chamber III Legal Officers <TrialChamberIIILegalOfficers[REDACTED]>; D32 Gicheru Defence team <D32GicheruDefenceteam[REDACTED]>
Cc: OTP KEN art70 [REDACTED]
 Associate Legal Officer-Court Officer <AssociateLegalOfficer-CourtOfficer[REDACTED]>
Subject: Prosecution list of items for submission into evidence - P-0739

Dear Trial Chamber III,
 Dear Counsel,

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The Prosecution does not, at this time, seek to formally submit P-0739's witness preparation log and witness clarifications, but in the event that the Defence submits into evidence – and the Chamber recognises as such – any prior statements of P-0739, the Prosecution may seek submission of these documents in its final Bar Table Motion.

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2. KEN-OTP-0134-0187
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5. KEN-OTP-0116-0242
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7. KEN-OTP-0116-0232 (Not for truth of its contents, but to establish the fact that [REDACTED])
8. KEN-OTP-0116-0187 (Not for truth of its contents, but to establish the fact that [REDACTED])

9. KEN-OTP-0135-0466
10. KEN-OTP-0135-0467
11. KEN-D09-0045-0017
12. KEN-D09-0045-0309
13. KEN-OTP-0160-1745 (updated PIL)

Best regards,



On behalf of the Prosecution

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From: [REDACTED]
Sent: 28 March 2022 17:19
To: Amann-Lasnier, Victoria; Trial Chamber III Communications; OTP KEN art70 [REDACTED]
Cc: D32 Gicheru Defence team; [REDACTED] Associate Legal Officer-Court Officer
Subject: RE: Defence List of items for submission into evidence - P-0739

Dear Trial Chamber III,
 Your Honour,

The Prosecution objects to the submission of the following two items:

- Item 14 / KEN-OTP-0087-1126: This is an investigator's report concerning communication [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]. Accordingly, the Prosecution submits that the Defence has not laid the foundation for the submission of this document through this witness.
- Item 20 / KEN-OTP-0160-1465: This is an investigator's report concerning communication [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED] Accordingly, the Prosecution submits that the Defence has not laid the foundation for the submission of this document through this witness.

In addition, the Prosecution notes that item 9 (KEN-OTP-0103-3312) is a press article, based on reports from an anonymous source, which the witness did not recognize. [REDACTED]
 [REDACTED]

[REDACTED] Accordingly, while the Prosecution does not object to the submission of the item, it submits that it is of very low probative value.

The Prosecution notes further that items 2-4, 34 and 36-47 (KEN-OTP-0038-0212, KEN-OTP-0005-0221-R01, KEN-OTP-0135-0458-R01, KEN-OTP-0029-0131, KEN-OTP-0141-0150-R01, KEN-OTP-0141-0154-R01, KEN-OTP-0141-0223-R01, KEN-OTP-0141-0251-R01, KEN-OTP-0141-0307-R01, KEN-OTP-0142-0379-R01, KEN-OTP-0142-0490-R01, KEN-OTP-0142-0618-R01, KEN-OTP-0144-0011-R01, KEN-OTP-0144-0042-R01, KEN-OTP-0144-0139-R01 and KEN-OTP-0159-2047-R01 respectively) are items of prior recorded testimony of the witness, for which the requirements of rule 68 have not been met. Accordingly, as per the Chamber's decisions of 25 March (P-0613) and 28 March 2022 (P-0274), the requirements for the submission of the items have not been satisfied.

Finally, the Prosecution notes that six items on the Defence list of items, namely items 1, 24, 25, 26, 27 and 29 are already included in the list of material for P-0739 that the Prosecution seeks to formally submit into evidence but does not otherwise object to the submission these items and the rest of the items sought to be formally admitted by the Defence.

Kind regards,

[REDACTED]
 On behalf of the Prosecution

From: Amann-Lasnier, Victoria [REDACTED]
Sent: 25 March 2022 18:49

To: Trial Chamber III Communications <TrialChamberIIICommunications[REDACTED]>; OTP KEN art70 [REDACTED]
[REDACTED]
Cc: D32 Gicheru Defence team <D32GicheruDefenceteam[REDACTED]>
[REDACTED] Associate Legal Officer-Court Officer <AssociateLegalOfficer-CourtOfficer[REDACTED]>
Subject: Defence List of items for submission into evidence - P-0739

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

On behalf of Ms. Tomanović, please find enclosed the List of items the Defence formally requests to be submitted into evidence for Witness P-0739 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
Sent: 25 March 2022 18:49
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-0739
Attachments: 220325 - Defence List of items for submission.pdf

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

On behalf of Ms. Tomanović, please find enclosed the List of items the Defence formally requests to be submitted into evidence for Witness P-0739 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 admitted into evidence for Witness P-0739

	ERN Number	Title	Type	Date	Relevant excerpt if necessary	Admission into evidence
1.	KEN-OTP-0103-3297	REF. I withdraw as a witness	Correspondence - Letter	Undated		Yes
2.	KEN-OTP-0038-0212	STATEMENT FORM / [REDACTED]	Non ICC Statement (Note / Screening / Transcript)	[REDACTED]		Yes
3.	KEN-OTP-0005-0221-R01	Untitled (Unmarked Statement)	Non ICC Statement (Note / Screening / Transcript)	[REDACTED]		Yes
4.	KEN-OTP-0135-0458-R01	Untitled (Marked Statement)	Non ICC Statement (Note / Screening / Transcript)	[REDACTED]		Yes
5.	KEN-OTP-0149-0036	[REDACTED]	Correspondence - Letter	[REDACTED]		Yes

6.	KEN-OTP-0149-0029	[REDACTED]	Internal guidelines / instruction / orders	[REDACTED]		Yes
7.	KEN-OTP-0105-0138-R01	[REDACTED] [REDACTED]	ICC Investigation notes / report / correspondence	[REDACTED]/2011		Yes
8.	KEN-OTP-0149-0033	[REDACTED] [REDACTED] [REDACTED] redacted.pdf	Internal guidelines / instruction / orders	[REDACTED]		Yes
9.	KEN-OTP-0103-3312	ICC witness [REDACTED] [REDACTED]	Media / press article	[REDACTED]		Yes
10.	KEN-OTP-0160-1468-R01	INVESTIGATORS' NOTE / [REDACTED]	ICC Investigation notes / report / correspondence	[REDACTED] 2012		Yes
11.	KEN-OTP-0088-0464	Translation of Evidence / [REDACTED]	Translation - ENG	[REDACTED] 2012		Yes
12.	KEN-OTP-0139-0052	INVESTIGATOR'S REPORT / [REDACTED] [REDACTED] [REDACTED] [REDACTED]	ICC Investigation notes / report / correspondence	[REDACTED] 2012		Yes
13.	KEN-OTP-0139-0051	INVESTIGATOR'S REPORT / Meeting with [REDACTED]	ICC Investigation notes / report / correspondence	[REDACTED] 2012		Yes
14.	KEN-OTP-0087-1126	[REDACTED] [REDACTED]	ICC Investigation notes / report / correspondence	[REDACTED]		Yes
15.	KEN-OTP-0139-0050-R01	INVESTIGATOR'S REPORT / Meeting with [REDACTED]	ICC Investigation notes / report / correspondence	[REDACTED] 2013		Yes

16.	KEN-OTP-0133-0586-R01	Information	Communication - E-mail	████ 2013		Yes
17.	KEN-OTP-0139-0048-R01	INVESTIGATOR'S REPORT / ██████████	ICC Investigation notes / report / correspondence	████ 2013		Yes
18.	KEN-OTP-0106-0427	INVESTIGATOR'S REPORT / Rule 77 information provided ██████████	ICC Investigation notes / report / correspondence	██████████		Yes
19.	KEN-OTP-0116-0257	████████████████████ ████████████████████ ██████████	ICC Statement - Acknowledgement	████ 2013		Yes
20.	KEN-OTP-0160-1465	INVESTIGATOR'S REPORT / Phone call with ██████████ to facilitate a meeting with ██████████	ICC Investigation notes / report / correspondence	████ 2013		Yes
21.	KEN-OTP-0139-0039-R01	INVESTIGATOR'S REPORT / Meeting with ██████████ ██████████	ICC Investigation notes / report / correspondence	████ 2013		Yes
22.	KEN-OTP-0116-0258	Request for Assistance to ██████████	Correspondence - Letter	████ 2013		Yes
23.	KEN-OTP-0139-0036-R01	INVESTIGATOR'S REPORT / ██████████	ICC Investigation notes / report / correspondence	████/2013		Yes
24.	KEN-D09-0045-0017	ICC ██████ Clip 3	Audio / Video Material	██████████		Yes
25.	KEN-D09-0045-0309	TRANSCRIPTION / TRANSLATION OF AUDIO / VIDEO MATERIAL KEN- D09-0045-0017	Translation - ENG	██████████		Yes

26.	KEN-OTP-0116-0187-R01	[REDACTED]	Non ICC Statement (Note / Screening / Transcript)	Undated		Yes
27.	KEN-OTP-0116-0232-R01	[REDACTED]	Non ICC Statement (Note / Screening / Transcript)	[REDACTED]		Yes
28.	KEN-OTP-0116-0243	Untitled	Correspondence - Letter	22/12/2011		Yes
29.	KEN-OTP-0116-0254	Ref. I withdraw as a witness Kenya Case 1 Chamber (V)a	Correspondence - Letter	[REDACTED]		Yes
30.	KEN-OTP-0135-0467	Annex 2	Sketch	[REDACTED]		Yes
31.	KEN-OTP-0148-0121	Investigator's report	ICC Investigation notes / report / correspondence	[REDACTED] 2015		Yes
32.	KEN-OTP-0148-0986	Extraction Report / [REDACTED]	Forensic Records or Reports	[REDACTED]		Yes
33.	KEN-OTP-0160-1474	INVESTIGATION REPORT / Phone Calls with [REDACTED]	ICC Investigation notes / report / correspondence	10/1/2022		Yes
34.	KEN-OTP-0029-0131	WITNESS STATEMENT	ICC Statement - General ICC Statement - ICC transcribed statement	10-14/7/2010		Yes
35.	KEN-OTP-0029-0158	Exhibit 4	Sketch	[REDACTED] 7/2010		Yes

36.	KEN-OTP-0141-0150-R01	Transcript of Interview / KEN-OTP-██████ audio recorded interview Day ███	ICC Statement - ICC transcribed statement	12/07/2014		Yes
37.	KEN-OTP-0141-0154-R01	Transcript of Interview / KEN-OTP-██████ audio recorded interview Day ███ / KEN-OTP-0135-0439 - Track 1	ICC Statement - ICC transcribed statement	15/07/2014		Yes
38.	KEN-OTP-0141-0223-R01	Transcript of Interview / KEN-OTP-██████ audio recorded interview Day ███ / KEN-OTP-0135-0440 - Track 1	ICC Statement - ICC transcribed statement	16/07/2014		Yes
39.	KEN-OTP-0141-0251-R01	Transcript of Interview / KEN-OTP-██████ audio recorded interview Day ███ / KEN-OTP-0135-0440 - Track 2	ICC Statement - ICC transcribed statement	16/07/2014		Yes
40.	KEN-OTP-0141-0307-R01	Transcript of Interview / KEN-OTP-██████ audio recorded interview Day ███ / KEN-OTP-0135-0440 - Track 4	ICC Statement - ICC transcribed statement	16/07/2014		Yes
41.	KEN-OTP-0142-0379-R01	Transcript of Interview / KEN-OTP-██████ Interview Day ███ / KEN-OTP-0135-0456 - Track 1	ICC Statement - ICC transcribed statement	25/07/2014		Yes
42.	KEN-OTP-0142-0490-R01	Transcript of Interview / KEN-OTP-██████ Interview Day ███ / KEN-OTP-0135-0456 - Track 5	ICC Statement - ICC transcribed statement	25/07/2014		Yes
43.	KEN-OTP-0142-0618-R01	Transcript of Interview / KEN-OTP-██████ Interview Day ███ / KEN-OTP-0135-0457 - Track 4	ICC Statement - ICC transcribed statement	26/07/2014		Yes

44.	KEN-OTP-0144-0011-R01	Transcript of Interview / KEN-OTP- Interview Day / KEN-OTP-0135-0465 - Track 1	ICC Statement - ICC transcribed statement	27/07/2014		Yes
45.	KEN-OTP-0144-0042-R01	Transcript of Interview / KEN-OTP- Interview Day / KEN-OTP-0135-0465 - Track 2	ICC Statement - ICC transcribed statement	27/07/2014		Yes
46.	KEN-OTP-0144-0139-R01	Transcript of Interview / KEN-OTP- Interview Day / KEN-OTP-0135-0465 - Track 5	ICC Statement - ICC transcribed statement	27/07/2014		Yes
47.	KEN-OTP-0159-2047-R01	Transcript of Interview / Introduction.MP3	ICC Statement - ICC transcribed statement	5/3/2022		Yes