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**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/20
Date: 25 October 2021

TRIAL CHAMBER III

Before: Judge Miatta Maria Samba

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR v. PAU GICHERU

Confidential

Fourth Request for the urgent transfer of part of the record of the case into another case record

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 Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

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REGISTRY

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

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I. INTRODUCTION

1. Pursuant to regulation 22 of the Regulations of the Registry,¹ the Office of the Prosecutor requests Trial Chamber III³ to order the Registry to transfer into the case record of the *Prosecutor v. Paul Gicheru*⁴ one confidential filing and its annexes and one confidential decision with its annex⁵ that form part of the case record in the *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*⁶ and are relevant to the proceedings in the *Gicheru* case.
2. The transfer of these Court Records into the record of the *Gicheru* case is necessary as they are referenced in the applications the Prosecution submitted to the Chamber pursuant to rule 68 of the Rules of Procedure and Evidence⁷ on 22 October 2021.⁸ Additionally, the Court Records may contain information relevant for the preparation of the Defence.
3. The Prosecution has assessed the content of the Court Records and considers that they may be transferred to the record of the *Gicheru* case as confidential, without redactions.

II. CONFIDENTIALITY

4. Under regulation 23bis (2) of the Regulations of the Court ("RoC"), this filing and its annex are submitted as "confidential" since they concern confidential court records.

¹ "RoR"

"Prosecution" or "OTP".

³ "Chamber".

⁴ ICC-01/09-01/20, "*Gicheru* case".

⁵ Collectively "Court Records": ICC-01/09-01/11-1866-Conf (including all of its annexes) and ICC-01/09-01/11-1938-Conf-Corr, including ICC-01/09-01/11-1938-Conf-Anx-Corr.

⁶ "*Ruto and Sang* case".

⁷ "Rules".

⁸ "Rule 68 Applications".

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III. SUBMISSION

Statutory framework

5. Article 64(10) of the Rome Statute⁹ confers upon a Trial Chamber the duty and authority to ensure the maintenance and preservation of the trial record. The Prosecution submits that the Trial Chamber seized with a case has a residual power to exercise this authority despite the termination of the trial proceedings.¹⁰ In this case, such residual power rests with Trial Chamber IV, by virtue of the Presidency's decision to re-assign the *Ruto and Sang* case to it.¹¹
6. Regulation 22 of the RoR provides that: "Following an order of the Chamber, all or part of one situation or case record shall be transferred to another situation or case record, for reasons relating to, *inter alii* , a joinder or separation of trials under rule 136". The use of "*inter alii* " indicates that there may be reasons other than joinder or separation of trials for which a Chamber may order the transfer of part of a case record. The present circumstances constitute such "other reasons".

Background

7. On 30 September 2021, the Chamber directed the Prosecution to file rule 68 applications by 22 October 2021, in advance of the start of the trial on 15 February 2022.¹ The Prosecution referenced these Court Records in its Rule 68 Applications.¹³

Reasons for transfer of the Court Record

8. The Court Records refer to the introduction into evidence of the prior recorded testimony of six witnesses in the *Ruto and Sang* case. Four of these witnesses¹⁴ are

⁹ "Statute".

¹⁰ See for instance ICC-01/09-02/11-1005, para. 11.

¹¹ ICC-01/11-59.

¹ ICC-01/09-01/20-185, para. 20.

¹³ See ICC-01/09-01/20-194-Conf; ICC-01/09-01/20-196-Conf; ICC-01/09-01/20-197-Conf.

¹⁴ P-0397, P-0495, P-0516, P-0604.

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relevant to the *Gicheru* proceedings and the Prosecution seeks to introduce the prior recorded testimonies of two of them¹⁵ in the Rule 68 Applications. As mentioned, the Prosecution made reference to some of the Court Records in its submissions in the Rule 68 Applications.¹⁶

9. The Prosecution submits that the Court Records will assist in understanding the Prosecution's arguments in its Rule 68 Applications in the *Gicheru* case and thus they should be made available to the Chamber and the *Gicheru* Defence through their transfer into the record of this case, with the appropriate level of confidentiality.
10. In addition, the Court Records may contain information material for the preparation of the Defence, which has also requested access to unredacted versions of the Prosecution and Defence filings.

Confidentiality and protective measure

11. The Court Records were originally classified as "confidential", as they included sensitive information related to the Article 70 investigation into allegations of witness interference in the *Ruto and Sang* case. In addition, the Court Records contained witnesses' information that, at the time, was of a sensitive nature.
12. The Prosecution has re-assessed the content of the Court Records in light of the current state of the proceedings in the *Gicheru* case and concluded that they can be transferred to the record of this as "confidential".
13. The Prosecution accordingly requests the Chamber to order the Registrar to transfer into the record of the *Gicheru* case, as "confidential", ICC-01/09-01/11-1866-Conf — including all annexes — and ICC-01/09-01/11-1938-Conf-Corr, including ICC-01/09-01/11-1938-Conf-Anx-Corr.

Urgency

¹⁵ P-0397 and P-0495.

¹⁶ See ICC-01/09-01/20-194-Conf; ICC-01/09-01/20-196-Conf; ICC-01/09-01/20-197-Conf.

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14. This request is urgent because the Prosecution relies upon the Court Records in its Rule 68 Applications. The Prosecution considers it necessary that the Chamber and the Defence have access to this material as soon as possible. Therefore, the Prosecution respectfully requests the Chamber to order their transfer into the record of the *Gicheru* case on an expedited basis.

IV. RELIEF

15. The Prosecution accordingly requests the Chamber to order the Registrar to transfer the following items, as "confidential," into the records of the *Gicheru* case as soon as practicable:

- i. ICC-01/09-01/11-1866-Conf, including all annexes; and
- ii. ICC-01/09-01/11-1938-Conf-Corr, including ICC-01/09-01/11-1938-Conf-Anx-Corr .



Mr James Stewart, Deputy Prosecutor

Dated this 25th day of October 2021
At The Hague, The Netherlands