

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/09-01/20
Date: 4 November 2021

TRIAL CHAMBER III

Before: Judge Miatta Maria Samba

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR v. PAUL GICHERU

Public

With Confidential, *EX PARTE*, Prosecution only Annex A

**Public redacted version of Prosecution fifth request for the urgent transfer of part
of the record of the case into another case record**

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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**Unrepresented Applicants
(Participation/Reparation)**

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Victims**

**The Office of Public Counsel for the
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REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. Pursuant to regulation 22 of the Regulations of the Registry,¹ the Office of the Prosecutor² requests Trial Chamber III³ to order the Registry to transfer into the case record of the *Prosecutor v. Paul Gicheru*⁴ five confidential filings and their respective annexes, and two confidential decisions⁵ 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. Specifically, the Court Records subject to this application are: (a) Defence responses to the Prosecution's request for the admission of prior recorded testimony of six witnesses;⁷ (b) Decisions for in-court protective measures;⁸ and (c) [REDACTED] submissions⁹ concerning [REDACTED].¹⁰
3. Two reasons underpin this application. *First*, some of the Court Records are related to or were referenced in the applications filed by the Prosecution in this case to introduce evidence under rule 68¹¹ of the Rules of Procedure and Evidence¹² and to request in-court protective measures for several witnesses,¹³ filed on 22 and 25 October 2021 respectively. As such, the Court Records are necessary for the Chamber and the Defence to fully appreciate some of the Prosecution's submissions in these applications. The Prosecution notes that public redacted versions of these Court Records are available; however, additional information in their confidential version will assist in fully comprehending the content of these documents and the references in the above-mentioned Prosecution's filings.

¹ "RoR"

² "Prosecution" or "OTP".

³ "Chamber".

⁴ ICC-01/09-01/20, "*Gicheru* case".

⁵ Together "Court Records".

⁶ ICC-01/09-01/11, "*Ruto and Sang* case" or "Main Case", and "RUTO" and "SANG" respectively.

⁷ "Main Case Defence Responses".

⁸ "Main Case ICPM Decisions".

⁹ "SANG Submissions".

¹⁰ "[REDACTED]".

¹¹ ICC-01/09-01/20-193-Conf and ICC-01/09-01/20-196-Conf ("Rule 68 Applications").

¹² "Rules".

¹³ ICC-01/09-01/20-199-Conf-Exp-Corr ("ICPM Request").

4. *Second*, the Court Records include [REDACTED] filings that contain information that may be material for the preparation of the Accused's defence in that they address allegations that [REDACTED], was interfering with witnesses in Kenya.
5. After careful assessment of the content of the Court Records, the Prosecution considers that most of them can be transferred into the record of the *Gicheru* case as "confidential", with no redactions. However, for the reasons explained in the pertinent section below, some of the annexes to the filings subject of this application should be transferred as confidential *ex parte*, as reflected in Annex A. The Prosecution confirms that any relevant item in these annexes – or information contained therein – is already available or will be made available to the Defence *via* Ringtail as soon as practicable.
6. The Prosecution lists the Court Records to be transferred,¹⁴ including recommendations as to confidentiality classification and redactions, if necessary, in Annex A.

II. CONFIDENTIALITY

7. Under regulation 23*bis* (2) of the Regulations of the Court ("RoC"), this filing is submitted as "confidential" and Annex A as confidential *ex parte*, Prosecution and VWS only, since they concern confidential court records. A public redacted version will be filed within 5 days.

III. SUBMISSIONS

Statutory framework

8. Article 64(10) of the Rome Statute¹⁵ confers upon a Trial Chamber the duty and authority to ensure the maintenance and preservation of the trial record. As per the Presidency's decision not to assign the *Ruto and Sang* case to any specific Trial Chamber,¹⁶ Trial Chamber III is the appropriate and competent judicial body to rule

¹⁴ For completeness reasons, the Prosecution also requests to transfer the public annexes.

¹⁵ "Statute".

¹⁶ ICC-01/09-01/11-2046.

on the transfer of court records that are relevant to the case currently before it. Indeed, the Chamber has already granted two similar requests for transfer of records from the *Ruto and Sang* case.¹⁷

9. 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 alia*, a joinder or separation of trials under rule 136”. The use of “*inter alia*” indicates that there may be reasons other than joinder or separation of trials for which a Chamber may order the transfer of a case record, or parts thereof. The present circumstances constitute such “other reasons”.

Background

10. On 22 and 25 October 2021 respectively, the Prosecution filed its Rule 68 Applications and an ICPM Request. On 25 October, the Prosecution also filed a request to transfer two court records from the *Ruto and Sang* case into the *Gicheru* case record on the grounds that such records are relevant to understand the Prosecution’s submissions in some of the Rule 68 Applications.¹⁸ On 26 October 2021, the Chamber granted the Prosecution request and ordered the Registry to transfer the records into the *Gicheru* case record.¹⁹
11. On 21 April and 9 October 2021, the Gicheru Defence requested the Prosecution to disclose information in its possession regarding any allegations of witness interference [REDACTED]. While most of the material relevant to this issue has already been divulged to the Defence, the Prosecution has continued to discharge its disclosure obligations, and in this context it has identified [REDACTED] confidential submissions filed by the [REDACTED] Defence in the *Ruto and Sang* case that fall within the scope of the Gicheru Defence’s request.

¹⁷ ICC-01/09-01/20-165 and ICC-01/09-01/20-202.

¹⁸ ICC-01/09-01/20-200-Conf.

¹⁹ ICC-01/09-01/20-202.

Reasons for transfer of the Court Records

(i) Main Case Defence Responses

12. Following the submission of the Rule 68 Applications, the Chamber granted the Prosecution's request to transfer two court records from the *Ruto and Sang* case into the *Gicheru* case record. The Prosecution informed that, *inter alia*, it had referenced these court records in some of its Rule 68 Applications,²⁰ and therefore their transfer was necessary to fully comprehend the Prosecution's submissions therein.²¹
13. Similarly, the Prosecution now requests the Chamber to transfer into the record of the *Gicheru* case the Main Case Defence Responses. Not only will these Responses assist the Chamber and the Defence in more fully understanding the Rule 68 Applications, but also they contain information that may be material for the preparation of the Defence since, *inter alia*, some of the witnesses referred to in these Responses²² are relevant to the allegations against Gicheru.²³
14. The Prosecution has carefully assessed the nature and content of the Main Case Defence Responses and concluded that they can be transferred to the record of the *Gicheru* case as confidential, without redactions. As to the confidential annexes to these Responses – 27 out of 34 annexes in total –, the Prosecution confirms that most of the information contained therein is either irrelevant to the current proceedings, or is already in the Defence's possession, or will be provided to them *via* Ringtail, with the appropriate level of redactions. As a result, the Prosecution requests the transfer of all of these annexes but one as confidential *ex parte*, available to the Prosecution only; and to transfer the remaining annex as confidential with redactions to its content, as detailed in Annex A.²⁴

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

²¹ ICC-01/09-01/20-202.

²² [REDACTED].

²³ The Prosecution notes that on 6 October 2021, the Defence requested the Prosecution to arrange for them to obtain access to the non-redacted versions of these filings.

²⁴ See Annex A, Section (i).

(ii) *Main Case ICPM Decisions*

15. On 22 October 2021, the Prosecution submitted its ICPM Request. Therein, the Prosecution referenced confidential decisions issued by Trial Chamber V(A) in the Main Case granting protective measures to witnesses [REDACTED], among other witnesses in that case.²⁵
16. The Prosecution notes that on 2 November 2021, the Defence indicated that it would leave the adjudication of the ICMP Request entirely to the discretion of the Chamber.²⁶ However, the Prosecution believes that the transfer of the Main Case ICMP Decisions remains relevant and appropriate in the circumstances as they may assist the Chamber when considering the Prosecution's arguments in its ICPM Request. As such, they should also be transferred to the *Gicheru* case record as confidential, with redactions as detailed in Annex A.²⁷

(iii) *[REDACTED] Submissions*

17. On 13 April and 9 September 2021, the Defence requested the Prosecution to disclose information in its possession concerning [REDACTED] alleged participation in witness interference in the Main Case. Accordingly, the Prosecution reviewed and disclosed several items of evidence falling within the scope of the Defence requests, representing what the Prosecution considers to be the bulk of evidence pertinent to this issue that was in its possession. However, in its ongoing disclosure review, the Prosecution has identified [REDACTED] relevant submissions that the [REDACTED] Defence filed confidentially in the record of the Main Case. The submissions address claims that [REDACTED] threatened witnesses believed to have given testimony related to the PEV in Kenya.
18. Although most of the events referred to in the [REDACTED] Submissions fall outside the temporal scope of the charges in the *Gicheru* case, the Prosecution

²⁵ ICC-01/09-01/20-199-Conf-Exp-Corr, footnotes 19 and 25.

²⁶ E-mail communication from the Defence team to Trial Chamber III at 09:46.

²⁷ See Annex A, Section (ii).

considers that the information contained therein may nevertheless be material to the preparation of the defence.²⁸ As a result, the Prosecution requests the Chamber to transfer the [REDACTED] Submissions and their annexes but one as confidential, and to transfer the remaining annex as confidential, *ex parte* Prosecution only.²⁹

Confidentiality and protective measures

19. The Court Records were originally classified as “confidential”³⁰ in the Main Case as they included sensitive information related to, *inter alia*: (a) the then on-going article 70 investigation; (b) witnesses’ personal details; and (b) allegations against [REDACTED].
20. The Prosecution has carefully assessed the content of the Court Records, including their annexes, and considers that most of them may be transferred into the record of the *Gicheru* case as confidential, with no redactions. However, as noted in the pertinent sections above and further explained in Annex A, some of the annexes included in this application should be transferred as confidential *ex parte*.
21. To ensure consistency with the practice followed in this case, the Prosecution will resort to disclosure *via* Ringtail of any items in the *ex parte* annexes in its possession that are relevant to the *Gicheru* case, and that have not yet been disclosed to the Defence. However, where a relevant item is not in the Prosecution’s evidence collection, the Prosecution considers it necessary to request its transfer into the record of the case subject to redactions, as necessary. In the current application, this situation only applies to one annex, which the Prosecution requests to be transferred as confidential with redactions to its content, as detailed in Annex A.

²⁸ On 13 October 2021, the Prosecution advised the Defence that it would need to seek the authorization of the Chamber before the material contained in these Submissions could be made available to them.

²⁹ See Annex A, Section III.

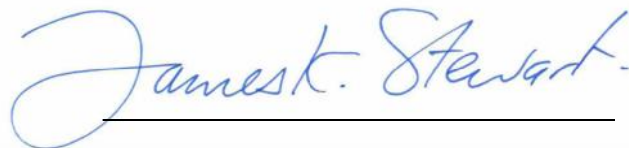
³⁰ With the exception of some public annexes.

Urgency

22. This request is urgent because, as noted, some of the Court Records are related to, or were referenced in, the Prosecution's Rule 68 Applications and in its ICPM Request. Moreover, the Court Records concerning allegations against [REDACTED] might be relevant to the preparation of the Defence. The Prosecution considers it desirable that the Chamber and the Defence have access to these records 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, with the suggested level of classification.

IV. RELIEF

23. The Prosecution accordingly requests the Chamber to order the Registrar to transfer the Court Records, as indicated in Annex A to this applications, into the records of the *Gicheru* case as soon as practicable.



Mr James Stewart, Deputy Prosecutor

Dated this 4th day of November 2021
At The Hague, The Netherlands