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TRIAL CHAMBER III

Before: Judge Miatta Maria Samba

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF *THE PROSECUTOR v. PAUL GICHERU*

Public

Public redacted version of 'Prosecution response to the Defence "Request for disclosure of video recording of P-0800's proofing session in the Ruto and Sang case (KEN-OTP-0145-0604)'" ICC-01/09-01/20-271-Conf, dated 1 February 2022

Source: Office of the Prosecutor

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Court to:

The Office of the Prosecutor

Mr James Stewart

Mr Anton Steynberg

Counsel for the Defence

Mr Michael G. Karnavas

Ms Suzana Tomanović

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

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Trial Chamber III¹ should reject the Defence request for disclosure of the video recording of P-0800's preparation session in the *Prosecutor vs. William Samoei Ruto and Joshua Arap Sang*² ("Defence Request").³
2. The Defence Request fails to demonstrate that access to the video-recording in question⁴ – far less the *entire* video-recording – is warranted for the stated purpose: to shed light on P-0800's disclosure during the preparation session [REDACTED] and how this came about.⁵
3. The Defence is already in possession of all evidence accounting for P-0800's [REDACTED], such as: (i) P-0800's witness preparation log; (ii) the transcripts of his testimony in the *Ruto and Sang* case; and (iii) the transcripts of his re-interview with the OTP. The Video-recording contains no additional [REDACTED] that could assist the Defence in its preparation and, as such, should not be disclosed.
4. Finally, the Defence will have the opportunity to question P-0800 about this matter during his testimony.

II. CONFIDENTIALITY

5. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this filing is submitted as "Confidential" because it is a response to a filing classified as such. A public redacted version will be filed shortly.

¹ "Chamber".

² "*Ruto and Sang* case" or "Main Case".

³ ICC-01/09-01/20-267-Conf.

⁴ "Video-recording".

⁵ ICC-01/09-01/20-267-Conf, para. 4.

- [REDACTED]
- [REDACTED]¹²
8. The Prosecution reflected all information provided by P-0800 in the witness preparation log, which was drafted immediately after the preparation session and disclosed thereafter to the Defence in the *Ruto and Sang* case. This document was also disclosed to the Defence in this case on 10 March 2021.
9. During his testimony in the *Ruto and Sang* case, P-0800 was questioned about this [REDACTED] by both the Prosecution¹³ and the Defence.¹⁴ The Defence in this case was granted access to the transcripts of that testimony on 15 January 2021.¹⁵
10. Moreover, between 12 and 14 July 2021, as part of its investigative activities in the *Gicheru* case, the Prosecution re-interviewed P-0800¹⁶ and asked him about [REDACTED] [REDACTED],¹⁷ among others. In this audio-recorded interview, P-0800 explained [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]¹⁹ [REDACTED]
- [REDACTED]²⁰ [REDACTED]
- [REDACTED]²¹ [REDACTED]

¹² KEN-OTP-0145-0604, at 0613-0614, para. 91

¹³ ICC-01/09-01/20-T-019-CONF-Red-ENG ET, p. 71, lns. 19-25 and p. 72.

¹⁴ ICC-01/09-01/20-T-020-CONF-Red-ENG ET, p. 44, lns. 11-24; ICC-01/09-01/20-T-028-CONF-Red-ENG ET, p. 6.

¹⁵ ICC-01/09-01/11-2043-Conf.

¹⁶ KEN-OTP-0160-0290, KEN-OTP-0160-0308, KEN-OTP-0160-0332, KEN-OTP-0160-0338, KEN-OTP-0160-0354, KEN-OTP-0160-0374, KEN-OTP-0160-0382, KEN-OTP-0160-0400, KEN-OTP-0160-0423, KEN-OTP-0160-0432, KEN-OTP-0160-0448, KEN-OTP-0160-0468, KEN-OTP-0160-0489, KEN-OTP-0160-0506, KEN-OTP-0160-0529, KEN-OTP-0160-0555, KEN-OTP-0160-0582.

¹⁷ KEN-OTP-0160-0290 ; KEN-OTP-0160-0308.

¹⁸ KEN-OTP-0160-0290 at 0302-0303; KEN-OTP-0160-0308 at 0309.

¹⁹ KEN-OTP-0160-0290 at 0304-0305; KEN-OTP-0160-0308 at 0310, 0311, lns.178-181.

²⁰ KEN-OTP-0160-0290 at 0306, ln. 569.

²¹ KEN-OTP-0160-0308 at 031.

- [REDACTED]
- [REDACTED] 3
11. The Prosecution disclosed the full verbatim transcripts of P-0800's re-interview to the *Gicheru* Defence on 19 October 2021.
 12. On 25 January 2022, the Defence emailed the Prosecution requesting disclosure of the Video-recording. The Prosecution refused the request on the basis that, *inter alia*, any relevant information emerging from P-0800's preparation session is reflected in the session's log, which was disclosed to the Defence along with all subsequent interviews; and that the Defence failed to establish that the video recording of P-0800's preparation session contains any relevant information beyond what was already disclosed.²⁴
 13. On 27 January 2022, the Defence sought an order from the Chamber to obtain the disclosure of the Video-recording.²⁵ The Chamber instructed the Prosecution to respond by 1 February 2022.²⁶

Prosecution's Submissions

14. The purpose of witness preparation sessions is to assist witnesses before their testimony and to provide an opportunity for them to clarify their evidence, in order to facilitate a "focused, efficient and effective questioning"²⁷ in Court. They are not intended to seek new evidence. Where disclosable information nevertheless arises during these preparations session, relevant protocols provide that the calling party shall disclose that information to the non-calling party.²⁸ The

²² KEN-OTP-0160-0308 at 0316-0318.

²³ KEN-OTP-0160-0308 at 0319.

²⁴ Prosecution's e-mail to the Defence dated 25 January 2022 at 18:16. *See* ICC-01/09-01/20-267-Conf-AnxA.

²⁵ ICC-01/09-01/20-267-Conf.

²⁶ E-mail communication by Trial Chamber III to the Parties dated 27 January 2022 at 11:58.

²⁷ ICC-01/09-01/11-524-Anx, p. 2.

²⁸ ICC-01/09-01/11-524-Anx, pp. 13, 14 and 30.

manner in which new information is provided to the non-calling party is through disclosure of a written document reflecting the whole content of the preparation session.

15. Video recordings of witness preparation sessions are kept as safeguards in the event of allegations of coaching of witnesses or other improper interference with the witness' evidence.²⁹ The protocol in the *Gicheru*, for instance, does not include disclosure of the video-recordings in the ordinary course, nor was this the practice in the *Ruto and Sang* case.
16. Subject to the normal disclosure obligations, these video-recordings should not be disclosed unless there is "some indication of impropriety in the conduct of the session or other material reasons warranting such access. The video recordings are not to be revealed simply to verify the content of the preparation note."³⁰ The Defence Request does not put into question the integrity of P-0800's witness preparation in the Main Case.
17. The Prosecution acknowledges that the Video-recording may be subject to disclosure in this case if it contains information, *in addition to* the information recorded and disclosed after the preparation session, which may be material to the preparation of the Defence. However, the Defence Request fails to substantiate that the Video-recording contains such additional information, and in the Prosecution's assessment it does not.
18. *First*, all information provided by P-0800 during the preparation session was accurately reflected in the preparation's log. If the Chamber so wishes, the

²⁹ See *Prosecutor v. Muthaura and Kenyatta*, ICC-01/09-02/11-588, para. 50.

³⁰ See *Prosecutor v. Ntaganda*, Oral Decision Trial Chamber VI, ICC-01/04-02/06-T-71-Red3-ENG, p. 38, l. 21 - p. 39, l. 1. The threshold applied in the *Kenyatta* was even higher: The party making such a request shall satisfy the Chamber that there is a "concrete and credible basis" for the request, *Prosecutor v. Muthaura and Kenyatta*, ICC-01/09-02/11-588, para. 50. See also oral decision of TC V(A) applying the same standard, ICC-01/09-01/11-T-77-Red-ENG, p. 2, lns. 8-21.

Prosecution will provide the relevant part of the Video-recording to the Chamber for review.

19. *Second*, the Defence has access to P-0800's testimony in the *Ruto and Sang* case, where the [REDACTED] direct and cross-examination of the witness. Notably, nothing in that questioning prompted the Defence in that case to seek access to the Video-recording.
20. *Third*, the Defence is in possession of the transcripts of P-0800's re-interview with the OTP in July 2021, where [REDACTED] was also extensively discussed.³¹
21. Contrary to the Defence's allegations,³² all the abovementioned material provides sufficient evidence of: (a) how the new information [REDACTED] came about; (b) the extent to which P-0800 explained himself; and (c) any contradictions P-0800 may have made [REDACTED]. Moreover, the Defence will be able to cross-examine the witness at trial on this and any other portions of the witness' evidence.
22. Additionally, while the Defence relies only on this single issue, it nevertheless seeks disclosure of the entire Video-recording, but fails to provide any justification as to why this would be necessary, giving the impression of a fishing expedition.
23. Finally, the Defence assertion that the Prosecution will not be prejudiced by the disclosure of the Video-recording is incorrect.³³ If ordered to disclose, the Prosecution will need to review for possible redactions many hours of video material spanning five days at a time when its focus should be on trial preparation.

³¹ See paras. 10-11 above.

³² Defence Request, para. 4.

³³ Defence Request, para. 7.

24. For all the foregoing reasons, the Prosecution submits that the Defence is in possession of all material information relevant to the issue at hand and such to its preparation.

IV. CONCLUSION AND RELIEF SOUGHT

25. The Defence fails to substantiate that disclosure of the video recording of P-0800's preparation session is warranted. The witness preparation log, coupled with the transcripts of P-0800's testimony in the *Ruto and Sang* case and P-0800's re-interview with the OTP in July 2021 provide all material information necessary to assess P-0800's account and credibility.

26. The Defence Request should accordingly be rejected.



James Stewart, Deputy Prosecutor

Dated this 1st day of February 2022
At The Hague, The Netherlands