

**Cour
Pénale
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**International
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Court**

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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

With Confidential, *EX PARTE* Prosecution only Annexes A-I

Public redacted version of "Prosecution's submission of further information and evidence supporting its Response to the Defence 'Request to Exclude Audio-Recordings Collected in Violation of Part 9 of the Statute'", ICC-01/09-01/20-264-Conf-Exp, 24 January 2022

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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 Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
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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. As instructed by Pre-Trial Chamber III,¹ the Prosecution submits herewith further information and evidence regarding the factual assertions made in the “Response to the Defence ‘Request to Exclude Audio-Recordings Collected in Violation of Part 9 of the Statute’”.²

II. CONFIDENTIALITY

2. This filing and Annexes A-I thereto are submitted as “confidential, *ex parte*, Prosecution only” under regulation 23bis (1) and (2) of the Regulations of the Court (“Regulations”) since they pertain to a filing submitted with similar classification and contain unredacted, confidential and highly sensitive information concerning cooperation with States Parties which, if they were to become publicly known, could seriously harm cooperation with the relevant States Parties and prejudice other ongoing investigations. A confidential redacted version is filed simultaneously.

3. In particular Annexes A and B refer to confidential meetings and communications [REDACTED]. Similarly, Annex H refers to negotiations conducted with [REDACTED]. For these reasons, the Prosecution deems it necessary to redact for the Defence all but the critical portions of these documents.

4. Similarly, as regards Annexes C and D, these Memoranda of Understanding (“MoUs”) were concluded as part of the cooperation negotiations with the relevant States Parties in the expectation of confidentiality and should not be disclosed except to the extent strictly necessary. The Prosecution considers it essential to preserve confidentiality of these documents to the extent possible and thus to disclose to the Defence only those portions relevant to the issues at hand.

5. Annexes E and E1 contain copies of the notification letters sent to [REDACTED]. Annexes F and G are RFA’s sent for the purposes of the article 70

¹ “Chamber”, *per* email received at 13:08 on 18 January 2022.

² ICC-01/09-01/20-258-Conf-Red, “Prosecution Response”.

investigation to [REDACTED]. Although less sensitive than the above, the Prosecution considers it necessary to redact certain identities and contact details that are not germane to the present litigation.

6. Annex I is a confidential [REDACTED] [REDACTED], that was submitted as [REDACTED] [REDACTED]

7. While the Prosecution has no reason to doubt that Defence counsel will respect the confidentiality protocol, the Prosecution submits that [REDACTED] [REDACTED]. Once this information is disclosed [REDACTED] the Prosecution will lose control over its possible further dissemination. Accordingly, applying the “need to know” principle is the best way to preserve confidentiality.

8. Given the extremely sensitive nature of the information discussed in this filing, the Prosecution exceptionally requests leave not to file a public redacted version. The extent of the redactions that would be required would make such a filing of marginal utility.

III. INFORMATION REQUESTED

(i) Information regarding breaches in confidentiality of cooperation with the Court

9. The Chamber ordered the Prosecution to provide evidence of [REDACTED] [REDACTED] [REDACTED] As regards [REDACTED] [REDACTED] the Prosecution is not in possession of such evidence, nor would such evidence be readily available in the normal course of events. Since this would amount to a serious breach of cooperation obligations under article 86(3) of the Statute, it is not something that would be likely to happen overtly. Additionally, given the information

detailed below, the Prosecution took precautionary measures to avoid the risk [REDACTED]

10. However, as appears from [REDACTED],³ [REDACTED]

11. [REDACTED]

[REDACTED] this was not a workable – or permissible – option for RFAs, since it is required under article 93(1) that RFAs demonstrate that the information requested is needed “for the purposes of an investigation or prosecution”. This requires providing sufficient details of an investigation from which it may be assessed that the requested information is *prima facie* necessary for this purpose. Additionally, any RFA pertaining to an article 70 investigation must include a notification that the information sought was required for such an investigation.⁴ Finally, any RFAs requesting compulsory measures requiring authorisation by domestic courts – such as phone intercepts or the provision of call data records – would also have to provide sufficient details to satisfy such courts that the legal requirements to authorise such measures were met.⁵

12. [REDACTED]

³ See Annex A.

⁴ Rule 167(1).

⁵ See for instance the [REDACTED] RFAs [REDACTED]; Annexes F and G.

[REDACTED]

[REDACTED], the concerns expressed in the Prosecution Response were grounded on a reasonable apprehension of risk, supported by objective facts. Additionally, in a subsequent interaction with [REDACTED], [REDACTED] cautioned that [REDACTED]

[REDACTED]⁶

13. [REDACTED]

[REDACTED]

[REDACTED]. [REDACTED]

[REDACTED]

[REDACTED]⁷ the Prosecution assessed that [REDACTED] would [REDACTED] and would present an unacceptable risk [REDACTED]. [REDACTED].⁸

(ii) **Information regarding arrangements for notification of the presence of Prosecution staff on State territory**

14. The Chamber ordered the Prosecution to provide information or evidence of the established practices regarding notification of the presence of OTP investigators on the territories of the relevant states for the purpose of conducting voluntary witness interviews and meetings. In relation to [REDACTED] these were founded on Memoranda of Understanding (“MoUs”)⁹ pre-dating [REDACTED] and [REDACTED].

While MoUs may not derogate from States Parties’ cooperation obligations under the

⁶ Prosecution Response, para. 17.

⁷ See for instance [REDACTED]; See also Annex I [REDACTED]

⁸ [REDACTED].

⁹ Annexes C and D respectively.

Statute and rules, these are minimum levels of cooperation and the countries concerned are free to agree bilaterally to additional or greater cooperation measures.

15. [REDACTED]¹⁰ [REDACTED]

[REDACTED]

[REDACTED]¹¹ [REDACTED]

[REDACTED]

[REDACTED]¹² [REDACTED]

16. [REDACTED]¹³ [REDACTED]

[REDACTED]

17. [REDACTED]

[REDACTED]

[REDACTED]¹⁴ [REDACTED]

[REDACTED]

[REDACTED]

¹⁰ Annex C.
¹¹ Emphasis added.
¹² Annex A, p. 2.
¹³ Annex D.
¹⁴ Annex E1.

Subsequently, all notifications record that they were provided in accordance with “agreed procedures”.¹⁵ This practice was consistently followed without demur from the [REDACTED] authorities.

(iii) **Information regarding RFAs, communications and notifications concerning OPC recordings**

18. The Chamber ordered the Prosecution to provide all RFAs sent to the relevant authorities which form the basis of the investigations at issue and all ensuing communication and consultations that may have ensued, including the communications and letters referenced in Annex A of the Prosecution Response and any replies thereto. The Prosecution understands the “the investigations at issue” to refer to the one party consent recordings¹⁶ conducted by the relevant Prosecution witnesses, at its request.

19. As advised in the Prosecution Response,¹⁷ the Prosecution did not submit any RFAs in relation to the OPC recordings, since it considered these to be non-compulsory measures that could be executed directly on the territories of the relevant States Parties under article 99(4) and which did not require their assistance. Nor did it consult with the relevant states concerning the OPC Recordings, for the reasons advanced in its Response,¹⁸ and elucidated above.¹⁹ Accordingly, there is no correspondence with the relevant States Parties on this issue.

20. The notifications referred to in Annex A of the Prosecution Response are attached in Annex E hereto, grouped by country.

21. As regards [REDACTED], as noted in Annex A of the Prosecution Response, no written notifications were sent, but [REDACTED] consult directly with [REDACTED] authorities regarding [REDACTED]

¹⁵ See subsequent notification letters in Annex E.

¹⁶ “OPC Recordings”.

¹⁷ Prosecution Response, para. 42.

¹⁸ Prosecution Response, paras. 17, 26 and 41.

¹⁹ See Section (i) above.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

22. A contemporaneous email [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] There is no specific mention of OPC Recordings being discussed.²⁰

(iv) Information regarding RFAs, communications and notifications regarding Article 70 investigations

23. The Chamber ordered the Prosecution to provide any communications in which the Prosecution informed the relevant authorities of the fact that the Prosecution was conducting Article 70 investigations on their territories. As mentioned in the Prosecution Response,²¹ and detailed in Annex A thereto, the Prosecution did not specifically advise the relevant authorities of this fact at the time concerned. However, as already explained, these activities related also to the *Ruto and Sang* case and not only the Article 70 investigation.²²

24. The Prosecution notes that rule 167(1) requires that any request for “international cooperation or judicial assistance” in relation to an offence under article 70 shall indicate that the basis for such request is an investigation or prosecution under article 70. However, there is no specific requirement to do so in regard to notifications to a State Party as to the presence of OTP investigators for the purposes of article 99(

²⁰ Annex H.

²¹ Prosecution Response, para. 42.

²² *Ibid.*

4) measures, nor is this regulated by the MoUs with [REDACTED] In this regard, the Prosecution observes that, in contrast, [REDACTED] RFAs to [REDACTED] pertaining to the article 70 investigation, explicitly mentioned this fact.²³

IV. CONCLUSION AND RELIEF SOUGHT

25. As ordered by the Chamber, the Prosecution submits herewith the available information and evidence on the factual details of the Prosecution's investigations referred to in the Prosecution Response.



James Stewart, Deputy Prosecutor

Dated this 24th day of January 2022

At The Hague, The Netherlands

²³ Annexes F and G.