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**Cour
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**International
Criminal
Court**

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Date: 14 July 2021

PRE-TRIAL CHAMBER A (ARTICLE 70)

Before: Judge Reine Adélaïde Sophie Alapini-Gansou

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR v. PAUL GICHERU

**Confidential
With Confidential Annex A**

**Prosecution's Request for the transfer of part of the record of the *Ruto and Sang*
case into the *Gicheru* 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:

The Office of the Prosecutor

Mr James Stewart

Mr Anton Steynberg

Counsel for the Defence

Mr Michael G. Karnavas

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**

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I. INTRODUCTION

1. Pursuant to regulation 22 of the Regulations of the Registry,¹ the Office of the Prosecutor² requests Pre-Trial Chamber A (Article 70)³ to order the Registry to transfer into the case record of the *Prosecutor v. Paul Gicheru*⁴ eight transcripts of Witness P-0604's⁵ in-court testimony and certain associated items related to it 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. The Prosecution files this request with this Chamber since the *Ruto and Sang* case is not presently assigned to any Trial Chamber and this Chamber is accordingly best placed to deal with it.
2. On 5 January 2021 the Prosecution filed a motion before Trial Chamber IV⁷ requesting that the transcripts of seven witnesses who testified in the *Ruto and Sang* case be transferred into the record of the *Gicheru* case.⁸ P-0604 was one of these witnesses. However, due to pending security concerns, the transcripts containing his testimony were not included in the list of transcripts identified in Annex A to the Prosecution Request.
3. The Prosecution has now finalised the necessary security assessments related to P-0604 and concluded that the eight transcripts of his testimony in the *Ruto and Sang* case (the 'Transcripts') can be transferred to the *Gicheru* case record, without any redactions to their content. The Prosecution also requests the Chamber to authorize the transfer, via eCourt, of two Personal Information Sheets ("PIS") and the items of Defence evidence introduced to the witness during his testimony in the *Ruto and Sang* case (the "Relevant Items"). The Transcripts and Relevant Items are listed in

¹ "RoR".

² "Prosecution" or "OTP".

³ "Chamber".

⁴ ICC-01/09-01/20, "*Gicheru* case".

⁵ "P-0604".

⁶ "*Ruto and Sang* case".

⁷ "TC IV".

⁸ ICC-01/09-01/11-2041-Conf ("Prosecution Request").

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Annex A.⁹ Regarding items of Prosecution evidence relied upon during the witness's testimony, these need not be transferred to the record of the *Gicheru* case as the Prosecution has either already disclosed them to the Defence in that case, or will do so in due course.

4. The transfer of the Transcripts and Relevant Items into the record of the *Gicheru* case is necessary as they are deemed to contain information that may be material to the preparation of Mr Paul Gicheru's¹⁰ defence.

II. CONFIDENTIALITY

5. Under regulation 23bis (2) of the Regulations, this filing is submitted as "confidential" as it concerns the transfer of confidential court transcripts.

III. SUBMISSIONS

Statutory framework

6. Article 64(10) of the Rome Statute¹¹ confers upon a Trial Chamber the duty and authority to ensure the maintenance and preservation of the trial record. The Trial Chamber seized with a case has a residual power to exercise this authority despite the termination of the trial proceedings.¹² In most circumstances, such residual power would rest with the original Trial Chamber, or such Trial Chamber, to which the Presidency subsequently decides to re-assign the case.¹³ However, in its most recent decision on 15 March 2021,¹⁴ the Presidency elected not to assign the *Ruto and Sang* case to any specific Trial Chamber.
7. In the circumstances, the Prosecution submits that the Pre-Trial Chamber A is the most appropriate and competent Chamber with which to seize this issue, since it

⁹ See Annex A, Parts I and II.

¹⁰ "Gicheru".

¹¹ "Statute".

¹² See for instance ICC-01/09-02/11-1005, para. 11.

¹³ ICC-01/11-59.

¹⁴ ICC-01/09-01/11-2046.

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concerns the disclosure of relevant information to the Defence in the case currently before it. In terms of Article 61(3), the relevant Pre-Trial Chamber is authorised to “issue orders regarding the disclosure of information for the purposes of the hearing”. Although the confirmation submission *in lieu* of an oral hearings have been completed, the confirmation decision has not yet been rendered and, in light of the Prosecutions ongoing obligation to disclose material under rule 77, the Prosecution submits that the Chamber is competent to rule on this request. Additionally, regulation 46(2) of the Regulations of the Court provides that a Pre-Trial Chamber “shall be responsible for any matter, request or information arising out of the situation assigned to it [...]”.

8. 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 part of a case record. The present circumstances constitute such “other reasons”. Regulation 22 does not limit this power to any particular division or Chamber.
9. Alternatively, should the Chamber consider that it is not competent to rule on the request, the Prosecution requests that the Chamber issue a direction as to the appropriate forum in which the request should be filed.

Background

10. On 9 February 2015, the Prosecution sought the arrest and surrender of Gicheru, among others, for alleged offences against the administration of justice under article 70 of the Statute, arising from the *Ruto and Sang* case,¹⁵ and on 10 March 2015 the Pre-Trial Chamber II issued a warrant for his arrest.¹⁶

¹⁵ Article 58 Application, ICC-01/09-144-Conf-Red.

¹⁶ ICC-01/09-01/20-1.

11. On 2 November 2020, Gicheru surrendered to the Court and on 12 March 2021 the Prosecution filed the Document Containing the Charges against him for alleged offences against the administration of justice.¹⁷
12. On 5 January 2021, the Prosecution filed the Prosecution Request, in which it requested TC IV to order that the transcripts of seven witnesses who testified in the *Ruto and Sang* case be transferred into the record of the *Gicheru* case after the implementation of specified redactions. In said Request, the Prosecution explained that the seven witnesses are considered relevant to the allegations against Gicheru and, accordingly, their evidence be material to the preparation of his defence in the *Gicheru* case. The transcripts of the witnesses' testimony were listed in Annex A of the Prosecution Request.
13. On 7 January 2021, the Prosecution filed an Addendum to the Prosecution Request¹⁸ requesting TC IV to additionally order the transfer of the items that were used by the parties during the testimonies of six of the seven witnesses indicated in the Prosecution Request.
14. On 15 January 2021, the TC IV granted the Prosecution Request,¹⁹ and ordered the Registry to implement certain redactions²⁰ and transfer the transcripts and the related material into the record of the *Gicheru* case.²¹
15. On 30 April 2021, the Chamber requested the Prosecution to provide certain clarifications relating to P-0604.²² The Chamber noted that, while the witness was among the seven witnesses the Prosecution had identified in its Prosecution Request, none of the transcripts listed in Annex A to said Request related to P-0604's testimony in the *Ruto and Sang* case. Therefore, the transcripts of P-0604's

¹⁷ ICC-01/09-01/20-125-Conf-AnxA-Corr3.

¹⁸ ICC-01/09-01/11-2041-Conf, ICC-01/09-01/11-2042-Conf.

¹⁹ As amended by the Addendum.

²⁰ ICC-01/09-01/11-2043-Conf-Exp-AnxII.

²¹ ICC-01/09-01/11-2043-Conf.

²² Email communication from Mr Thomas Koerner sent on 30 April at 11:12.

testimony and related material were not transferred to the record of the *Gicheru* case pursuant to the TC IV's decision of 15 January 2021.

16. On the same day, the Prosecution explained the transcripts in questions had to be removed from Annex A to the Prosecution Request because an updated assessment of P-0604's security situation was still in the process of being finalized at the time of filing the Request. The Prosecution undertook to submit a new request to transfer the relevant transcripts of P-0604's testimony and related documents in due course.²³

Reasons for transfer

17. Since the security concerns related to P-0604 have now been resolved, the Prosecution is in a position to request the transfer the transcripts of his testimony in the *Ruto and Sang* case and Relevant Items into the record of the *Gicheru* case.
18. P-0604 is alleged to have been subject to corrupt influence by Gicheru and his associates, and himself being involved in corruptly influencing Prosecution witnesses on their behalf. Consequently, the transcripts of P-0604's testimony in the *Ruto and Sang* case are deemed relevant to the *Gicheru* case under rule 77 of the Rules of Procedure and Evidence.²⁴ The Prosecution thus requests the Chamber to order the transfer of the Transcripts listed in Part I of Annex A , without further redactions, to the record of the *Gicheru* case.²⁵
19. As to the Relevant Items, they were introduced to P-0604 during his in-court testimony in the *Ruto and Sang* case. The Prosecution submits that they are an integral part of his testimony and, as such, they should be transferred together with the transcripts. For reasons of practicality, the Prosecution requests the Chamber

²³ Email communication sent on 30 April at 13:48 to Mr Thomas Koerner.

²⁴ "Rules".

²⁵ Annex A, Part I.

to order the Registry's Court Management Services ("CMS") to transfer the Relevant Items listed in Part II of Annex A *via* eCourt.²⁶

20. Following the disclosure practice in the *Gicheru* case, and mindful of the TC IV's recommendation in its 15 January 2021 decision,²⁷ the Prosecution undertakes to disclose the Prosecution material introduced to P-0604 during his testimony in the *Ruto and Sang* case *via* Ringtail, to the extent that such material has not already been disclosed during the Prosecution's pre-confirmation disclosure in this case. A list of the OTP items that have already been disclosed and of those still subject to disclosure in the *Gicheru* case is included in Part III of Annex A.

21. For the abovementioned reasons, the Prosecution asks to Chamber to order the transfer of the Transcripts and authorize the transfer *via* eCourt of the Relevant Items so that disclosure may be effected in the *Gicheru* case.

IV. RELIEF

22. The Prosecution accordingly requests the Chamber to:

- a) Order the Registry to transfer the transcripts listed in Annex A, Part I to the case record of the *Gicheru* case; and
- b) Order CMS to transfer *via* eCourt the items listed in Annex A, Part II to the case records of the *Gicheru* case.



Mr James Stewart, Deputy Prosecutor

Dated this 14th day of July 2021
At The Hague, The Netherlands

²⁶ See Annex A, Part II.

²⁷ See ICC-01/09-01/11-2043-Conf, para. 8.