

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/09-01/20**
Date: **23 August 2021**

PRE-TRIAL CHAMBER III

Before: Judge Miatta Maria Samba

SITUATION IN THE REPUBLIC OF KENYA

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

Public

**Decision on the Prosecution Request to Transfer Part of the *Ruto and Sang* Case
into the Case Record of the *Gicheru* Case**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
for Participation/Reparations**

**The Office of Public Counsel
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REGISTRY

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

TRIAL CHAMBER III of the International Criminal Court, in the case of *The Prosecutor v. Paul Gicheru*, having regard to Articles 61(11) and 64(6)(a) of the Rome Statute (the ‘Statute’), Regulation 42 of the Regulations of the Court and Regulation 22 of the Regulations of the Registry, issues this ‘Decision on the Prosecution Request to Transfer Part of the *Ruto and Sang* Case into the Case Record of the *Gicheru* Case’.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 5 January 2021, the Office of the Prosecution (the ‘Prosecution’) filed a request with Trial Chamber IV which was, at that point in time, the competent chamber for the case *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (the ‘Main Case’).¹ The Prosecution sought that transcripts of several witnesses who testified in the Main Case be transferred into the record of the *Gicheru* case. The Prosecution explained that this was necessary since it considered that this information was material to the defence of Mr Gicheru and was therefore subject to disclosure.
2. On 7 January 2021, the Prosecution amended its motion and included several items in its request for transfer which had been used during the questioning of the witnesses in question and which were necessary for the understanding of the testimonies (the ‘Original Request’).²
3. On 15 January 2021, Trial Chamber IV rejected part of the motion and, after ordering that additional redactions be applied to the transcripts, granted the remainder of the Original Request.³
4. On 16 March 2021, the Presidency issued a decision assigning new judges to the divisions and recomposing chambers. It did not assign any chamber to the Main Case anymore.⁴

¹ Prosecution, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Request for Urgent Transfer, ICC-01/09-01/11-2041-Conf.

² Prosecution, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Addendum to the Prosecution’s “Request for the urgent transfer of case records to Pre-Trial Chamber A (Article 70)” dated 05 January 2021, ICC-01/09-01/11- 2041-Conf, ICC-01/09-01/11- 2042-Conf.

³ Trial Chamber IV, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecution Request for Transfer of Parts of the Record of the Case into Another Case Record, ICC-01/09-01/11-2043-Conf.

⁴ Presidency, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision assigning judges to divisions and recomposing Chambers, ICC-01/09-01/11-2046.

5. On 14 July 2021, the Prosecution filed a request that items related to the testimony of one of the witnesses of the Main Case (the ‘Witness’) be transferred into the record of this case (the ‘Request’).⁵ The Prosecution explains that, while the Witness was mentioned in the Original Request, no transcripts relating to his testimony were included, due to an ongoing updated security assessment. Accordingly, the decision rendered by Trial Chamber IV did not include any item related to the Witness’s testimony.⁶

6. The Prosecution informs the Chamber that all security matters have been resolved now⁷ and that the factual allegations with regard to the Witness are closely related to the current proceedings.⁸ Accordingly, it requests that the transcripts related to the testimony of the Witness (the ‘Transcripts’) and further items that have been used during the Witness’s questioning (the ‘Related Material’)⁹ be transferred into the record of this case.

7. On 15 July 2021, Pre-Trial Chamber A (the ‘Pre-Trial Chamber’) issued its decision on the confirmation of the charges in the current proceedings.¹⁰

8. On 21 July 2021, the record of the case was transferred to the Presidency and on the following day the Presidency constituted, pursuant to Rule 165(2) of the Rule of Procedure and Evidence and Regulation 66 *bis* (2) of the Regulations of the Court, Trial Chamber III and referred to it the case.¹¹

II. ANALYSIS

9. As a preliminary matter, the Chamber notes that no chamber is assigned to the Main Case. Further, it considers that, while the Request had been filed with the Pre-Trial Chamber, the Chamber is now competent to rule on the Request, pursuant to Articles 61(11) and 64(6)(a) of the Statute.

⁵ Prosecution’s Request for the transfer of part of the record of the Ruto and Sang case into the Gicheru case record, ICC-01/09-01/20-151-Conf, with confidential annex A, ICC-01/09-01/20-Conf-AnxA.

⁶ Request, ICC-01/09-01/20-151-Conf, paras 15-16.

⁷ Request, ICC-01/09-01/20-151-Conf, para. 17.

⁸ Request, ICC-01/09-01/20-151-Conf, para. 18.

⁹ The Transcripts are listed in part I and the Related Material is listed in part II of the annex to the Request, ICC-01/09-01/20-151-Conf-AnxA.

¹⁰ Pre-Trial Chamber A, Decision on the confirmation of charges against Paul Gicheru, ICC-01/09-01/20-153-Conf. A public-redacted version was issued on the same day, ICC-01/09-01/20-153-Red.

¹¹ Presidency, Decision constituting Trial Chamber III and referring to it the case of The Prosecutor v. Paul Gicheru, 22 July 2021, ICC-01/09-01/20-157.

10. The Chamber takes note of the submissions of the Prosecution and the factual information concerning the connection of the Witness with the current proceedings. Accordingly, pursuant to Regulations 22 of the Regulations of the Registry, the Chamber grants the Request and orders the transfer of the Transcripts and Related Materials into the record of this case.

11. The Chamber notes that the Witness received protective measures in the Main Case. The aim of these measures is to protect the Witness's identity from the public at large. However, the transfer of the Transcripts and Related Material into the record of this case does not affect this purpose, since, in accordance with Regulation 42(1) of the Regulations of the Court, the confidentiality with regard to the public remains. Accordingly, the Chamber finds that the transfer of the Transcripts and Related Materials falls under Regulation 42(2) of the Regulations of the Court.¹² The Prosecution is instructed to inform the Defence of the nature of the protective measures, pursuant to Regulation 42(2) of the Regulations of the Court.

¹² See, Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on "Prosecution's Urgent Further Request for Disclosure of Evidence in a Related Article 70 Proceeding", 25 May 2014, ICC-01/05-01/08-3074, paras 16-17; Trial Chamber IV, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecution Request for Transfer of Parts of the Record of the Case into Another Case Record, ICC-01/09-01/11-2043-Conf, paras 9-10. *In the same vein*, Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Public redacted version of 'Decision on the variation of protective measures for Witnesses P-0004, P-0113, P-0114, P-0147, and P-0431', 20 February 2020 (confidential version filed on 13 February 2020), ICC-01/12-01/18-586-Red, para. 19.

FOR THESE REASONS, THE CHAMBER HEREBY

ORDERS the Prosecution to inform the Defence pursuant to Regulation 42(2) of the Regulations of the Court of the nature of the protective measures concerning the Witness; and

ORDERS the Registry to transfer the Transcripts and Related Material, as listed in part I and II of filing ICC-01/09-01/20-151-Conf-AnxA, into the record of this case.

Done in both English and French, the English version being authoritative.

A handwritten signature in blue ink, appearing to read 'Miatta', is written over a horizontal line.

Judge Miatta Maria Samba

Dated 23 August 2021

At The Hague, The Netherlands