

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/09-01/20**
Date: **26 October 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

Decision on the Prosecution's Fourth Request for Transfer of Records

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

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Unrepresented Victims

**Unrepresented Applicants
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**Victims Participation and
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TRIAL CHAMBER III of the International Criminal Court, in the case of *The Prosecutor v. Paul Gicheru*, having regard to Articles 64(6)(e), 64(10) and 68(1) of the Rome Statute (the ‘Statute’), Regulation 42(2) of the Regulations of the Court and Regulation 22 of the Regulations of the Registry, issues this ‘Decision on the Prosecution’s Fourth Request for Transfer of Records’.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 25 October 2021, the Office of the Prosecutor (the ‘Prosecution’) filed a request to transfer court records from the case record of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (the ‘Main Case’) into the record of the *Gicheru* case (the ‘Request’).¹

2. The Prosecution explains that on 22 October 2021 it filed several requests pursuant to Rule 68 of the Rule of Procedure and Evidence (the ‘Rules’). In order for the Defence to fully understand these requests, it considers it necessary that two filings from the records of the Main Case and their annexes (the ‘Main Case Record Filings’)² should be made available to the Defence. This is required since these filings concern witnesses which are also subject of or related to the Rule 68 requests and these requests make reference to the Main Case Record Filings.³ For the same reasons, according to the Prosecution, these filings also fall under its disclosure obligations under Rule 77 of the Rules.⁴

3. Also on 25 October 2021, on request of the Chamber,⁵ the Prosecution clarified its Request that the existing ‘confidential *ex parte*’ classification of several annexes of one of the Main Case Record Filings should be maintained and that it would proceed to effect disclosure of the relevant documents with necessary redactions to the Defence as soon as practicable.⁶

¹ Fourth Request for the urgent transfer of part of the record of the case into another case record, ICC-01/09-01/20-200-Conf.

² Filings ICC-01/09-01/11-1866-Conf and corresponding annexes A1 to C3 and ICC-01/09-01/11-1938-Conf- and corresponding annex ICC-01/09-01/11-1938-Conf-Anx-Corr.

³ Request, ICC-01/09-01/20-200-Conf, para. 9.

⁴ Request, ICC-01/09-01/20-200-Conf, para. 10.

⁵ Email from the Chamber to the parties, 25 October 2021, at 17:16.

⁶ Email from the Prosecution to the Chamber, 25 October 2021, at 21:23.

4. On 26 October 2021, also on request of the Chamber,⁷ the Defence indicated that it does not oppose the Request.⁸

II. ANALYSIS

5. As a preliminary matter, the Chamber notes that no public-redacted version of the Request has been filed. Recalling its statements made in the decision on the conduct of the proceedings,⁹ the Chamber hereby orders the Prosecution to either request reclassification of its filing as ‘public’ or file a public-redacted version of its Request forthwith.

6. The Chamber recalls its previous decision on a similar request by the Prosecution¹⁰ and also takes note of the submissions made in the Request. Accordingly, pursuant to Regulation 22 of the Regulations of the Registry, the Chamber grants the Request and orders the Registry to transfer the Main Case Record Filings into the record of this case.

7. Taking into account the clarification provided by the Prosecution, the Chamber instructs the Registry to maintain the current classification of the Main Case Record Filings, and orders that the Prosecution disclose redacted versions of the confidential *ex parte* annexes to the Defence as soon as possible.

8. The Chamber notes the non-public classification of the Main Case Record Filings and that part of the motivation of this classification was the protection of the witnesses mentioned in the filings. As previously explained, the transfer of the concerning filings 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 continues to exist.¹¹ Accordingly, as previously found by this and other Chambers,¹² the transfer of the Main Case Record Filings falls under Regulation 42(2)

⁷ Email from the Chamber to the parties, 25 October 2021, at 17:16.

⁸ Email from the Defence to the Chamber, 26 October 2021, at 12:04.

⁹ Directions on the Conduct of the Proceedings, ICC-01/09-01/20-189, para. 46.

¹⁰ Decision on the Prosecution Request to Transfer Part of the Ruto and Sang Case into the Case Record of the Gicheru Case, 24 August 2021, ICC-01/09-01/20-165-Corr.

¹¹ Decision on the Prosecution Request to Transfer Part of the Ruto and Sang Case into the Case Record of the Gicheru Case, 24 August 2021, ICC-01/09-01/20-165-Corr., para. 11.

¹² Decision on the Prosecution Request to Transfer Part of the Ruto and Sang Case into the Case Record of the Gicheru Case, 24 August 2021, ICC-01/09-01/20-165-Corr., para. 11; Trial Chamber III, *The*

of the Regulations of the Court. 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.

FOR THESE REASONS, THE CHAMBER HEREBY

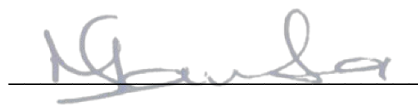
GRANTS the Request;

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 witnesses mentioned in the Main Case Record Filings;

ORDERS the Registry to transfer the Main Case Record Filings, as described in paragraph 2 of the Decision, into the record of this case; and

ORDERS the Prosecution to disclose redacted versions of the confidential *ex parte* annexes of the Main Case Record Filings to the Defence as soon as possible.

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



Judge Miatta Maria Samba

Dated 26 October 2021

At The Hague, The Netherlands

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.