

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/09-01/20**
Date: **9 November 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 Fifth 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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**The Office of Public Counsel
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Detention Section

**Victims Participation and
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Other

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 Fifth Request for Transfer of Records’.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 4 November 2021, the Office of the Prosecutor (the ‘Prosecution’) filed a further 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 it has filed several requests pursuant to Rule 68 of the Rule of Procedure and Evidence (the ‘Rules’) and a request for in-court protective measures for Prosecution witnesses. In order for the Defence to fully understand those requests, the Prosecution considers it necessary that three filings from the record of the Main Case and their annexes should be made available to the Defence.² It further submits that, for the same reasons, these filings fall also under Rule 77 of the Rules.³

3. Additionally, it considers that two further filings from the Main Case may fall under Rule 77 of the Rules.⁴ Accordingly, the Prosecution requests that they also be transferred (together with the records mentioned in paragraph two, ‘Main Case Records’).

4. As to the classification of the transferred records, the Prosecution submits that some of the records need to be transferred as ‘confidential *ex parte*, Prosecution only’, but assures that the information contained therein is already available to the Defence or will be made available forthwith. The remainder of the Main Case Records, according to the Prosecution, can be transferred as ‘confidential’ with redactions as indicated in

¹ Prosecution fifth request for the urgent transfer of part of the record of the case into another case record, ICC-01/09-01/20-207-Conf, with confidential Annex A, ICC-01/09-01/20-207-Conf. A public-redacted version was filed on the same day, [ICC-01/09-01/20-207-Red](#).

² Request, [ICC-01/09-01/20-207-Red](#), paras 3 and 12.

³ Request, [ICC-01/09-01/20-207-Red](#), para. 13.

⁴ Request, [ICC-01/09-01/20-207-Red](#), paras 4 and 17-18.

the annex to the Request.⁵ In this regard, in the annex of its Request, the Prosecution indicates the classification applicable to each of the records it wishes to be transferred.⁶

5. On 9 November 2021, the Defence indicated that it does not oppose the Request.⁷

II. ANALYSIS

6. As a preliminary matter, the Chamber notes that the Request has been filed as ‘urgent’. The Prosecution justifies this urgency with the fact that part of the Main Case Records were referenced by the Prosecution in requests pending before this Chamber and that it ‘considers it desirable that the Chamber and the Defence have access to these records as soon as possible’.⁸ The Chamber notes that this is not the first request for transfer of records and that the Prosecution previously sought other records to be transmitted for the exact same reasons.⁹

7. The urgency invoked with the Chamber seems to stem from the fact that the Prosecution did not include the current records in its previous request, despite it being foreseeable. While the Chamber does not consider that any prejudice to the Defence has occurred, it reminds the Prosecution to display the appropriate and necessary standard of diligence when making its submissions.

8. As to the subject of the Request, the Chamber recalls its previous decisions on prior similar applications 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 Records into the record of this case. The Registry is instructed to apply the level

⁵ Request, [ICC-01/09-01/20-207-Red](#), paras 5, 16, 18 and 21.

⁶ Request, [ICC-01/09-01/20-207-Red](#), para. 6.

⁷ Email from the Defence to the Chamber on 9 November 2021, at 12:20.

⁸ Request, [ICC-01/09-01/20-207-Red](#), para. 22.

⁹ Fourth Request for the urgent transfer of part of the record of the case into another case record, 25 October 2021, ICC-01/09-01/20-200-Conf; Decision on the Prosecution’s Fourth Request for Transfer of Records, 26 October 2021, [ICC-01/09-01/20-202](#).

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](#); Decision on the Prosecution’s Fourth Request for Transfer of Records, 26 October 2021, [ICC-01/09-01/20-202](#).

of confidentiality as indicated in the annex of the Request and also implement the redactions specified therein.¹¹

9. The Chamber notes the non-public classification of the Main Case Records 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 concerned 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.¹² Accordingly, as previously found by this and other Chambers,¹³ the transfer of the Main Case Record Filings falls under Regulation 42(2) 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.

¹¹ In accordance with an email sent by the Prosecution to the Chamber on 5 November 2021, at 16:35, filing ICC-01/09-01/11-588-Conf-AnxA is to be classified as ‘confidential ex parte, Prosecution only’.

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.

¹³ 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 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.

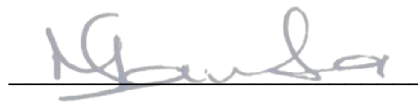
FOR THESE REASONS, THE CHAMBER HEREBY

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 Records; and

ORDERS the Registry to transfer the Main Case Records into the record of this case with the level of confidentiality and redactions as indicated in the annex of the Request,.

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

A handwritten signature in blue ink, appearing to read 'Miatta', is positioned above a solid horizontal line.

Judge Miatta Maria Samba

Dated 9 November 2021

At The Hague, The Netherlands