

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/20

Date: 08 December 2021

Date of Submission: 13 December 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

Public redacted version of "Prosecution's sixth request for the transfer of part of the record of the *Ruto and Sang* case into the record of the *Gicheru* case", ICC-01/09-01/20-240-Conf-Exp, 08 December 2021

Source: Office of the Prosecutor

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
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. Pursuant to regulation 22 of the Regulations of the Registry,¹ the Office of the Prosecutor² requests Trial Chamber III³ to order the Registry to transfer into the case record of the *Prosecutor v. Paul Gicheru*⁴ a confidential Victims and Witnesses Unit⁵ filing⁶ that forms part of the case record in the *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*⁷ and is relevant to the proceedings in the *Gicheru* case. Specifically, the Court Record subject to this application is the “Victims and Witnesses Unit’s Report on witness KEN-RDW-P-0072”.⁸
2. Two reasons underpin this application. *First*, the Court Records is referenced in the solemn declaration of P-0730;⁹ and *Second*, the Court Record contains information that may be material for the preparation of the defence of Paul GICHERU,¹⁰ in that it addresses reports [REDACTED]¹¹ [REDACTED] and specifically mentions GICHERU.
3. Given that [REDACTED], the Court Record was subsequently reclassified as “confidential”, and that much of the information is already in the public domain, the Prosecution considers that it can be transferred into the record of the *Gicheru* case with the same classification and without redaction. However, since the filing originates from the VWU and concerns a witness under its care at the time, the Prosecution defers to VWU’s assessment as to classification and redactions.

¹ “RoR”

² “Prosecution” or “OTP”.

³ “Chamber”.

⁴ ICC-01/09-01/20, “*Gicheru* case”.

⁵ “VWU”.

⁶ “Court Record”.

⁷ ICC-01/09-01/11, “*Ruto and Sang* case” or “Main Case”, and “RUTO” and “SANG” respectively.

⁸ ICC-01/09-01/11-1758-Conf; although the filing was originally submitted as “Confidential, ex parte, only available to the Prosecution, the Defence for William Samoei Ruto and the Registry”, it was reclassified as “confidential” [REDACTED].

⁹ KEN-OTP-0159-0884, fn. 102.

¹⁰ “GICHERU”.

¹¹ [REDACTED] designated KEN-RDW-P-0072.

II. CONFIDENTIALITY

4. Under regulation 23bis (2) of the Regulations of the Court,¹² this filing is submitted as “confidential *ex parte*, only available to the Prosecution and the VWU” since it concerns a confidential court record relating to a witness under the VWU’s care at the time. However, the Prosecution considers that if the Chamber grants the Prosecution’s request, the filing may be reclassified as “confidential”. A public redacted version will be filed within 5 days.

III. SUBMISSIONS

Statutory framework

5. Article 64(10) of the Rome Statute¹³ confers upon a Trial Chamber the duty and authority to ensure the maintenance and preservation of the trial record. As per the Presidency’s decision not to assign the *Ruto and Sang* case to any specific Trial Chamber,¹⁴ Trial Chamber III is the appropriate and competent judicial body to rule on the transfer of court records that are relevant to the case currently before it. Indeed, the Chamber has already granted several similar requests for transfer of records from the *Ruto and Sang* case.¹⁵
6. 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 a case record, or parts thereof. The present circumstances constitute such “other reasons”.

¹² “RoC”.

¹³ “Statute”.

¹⁴ ICC-01/09-01/11-2046.

¹⁵ ICC-01/09-01/20-165-Corr, ICC-01/09-01/20-202 and ICC-01/09-01/20-213.

Background

7. On 22 September 2014, the VWU filed a submission providing information about a protection assessment for proposed Ruto Defence Witness 72.¹⁶
8. On 30 October Trial Chamber V(A)¹⁷ issued its decision on the VWU Submission ordering the VWU to provide the relevant information contained in the Submission to the parties in the *Ruto and Sang* case.¹⁸
9. On 12 December 2014, the VWU filed the Court Record.¹⁹
10. On 1 December 2021 the Defence emailed the Prosecution requesting, among others, the disclosure of the Court Record.
11. Noting that the Court Record was a filing submitted by the VWU, originally as “confidential, *ex parte*”, on 2 December 2021 the Prosecution sought the VWU’s views on the request.
12. On the same day, the VWU responded that the Defence should address their request to the Chamber, to which the VWU would respond as necessary, but requested some further information regarding the context of the request, which the Prosecution provided on 3 December 2021.
13. On 7 December 2021 the Prosecution followed up with the VWU to confirm whether it still maintained its position regarding the Defence request, which the VWU, in essence, confirmed.
14. On the same day the Prosecution responded that, given its assessment that the Court Record contained information material to the preparation of the Defence, it considered that the Prosecution was obliged to make the request, but that it would

¹⁶ ICC-01/09-01/11-1531-Conf-Exp; the “VWU Submission”.

¹⁷ “TC V(A)”.

¹⁸ ICC-01/09-01/11-1624-Conf-Exp; On 7 January 2015 it was reclassified as “confidential” (ICC-01/09-01/11-1624-Conf) and on 4 December 2017 as “public” (ICC-01/09-01/11-1624).

¹⁹ ICC-01/09-01/11-1758-Conf-Exp. On 7 January 2015 it was reclassified as “confidential”, ICC-01/09-01/11-1758-Conf.

apprise the Chamber of its consultations with the VWU on the issue and notify the VWU in the filing.

Reasons for transfer of the Court Records

15. The Court Record concerned is the Victims and Witnesses Unit's Report on witness KEN-RDW-P-0072.²⁰ This was filed pursuant to a decision by TC V(A) which has since been reclassified as "public", and is thus accessible to the *Gicheru* Defence.²¹
16. The Prosecution notes that the original *ex parte* VWU Submission does not appear to have been reclassified and is thus not accessible to the Prosecution. Nevertheless, since TC V(A) ordered the VWU to notify the *Ruto and Sang* parties of the relevant information, which it did in the Court Record, the Prosecution does not expect that the VWU Submission would contain any additional information that would be relevant to the preparation of the *Gicheru* Defence.
17. Two reasons underpin this application. *First*, the Court Records is referenced in the solemn declaration of P-0730;²² and *second*, the Court Record contains information that may be material for the preparation of GICHERU's defence in that it addresses [REDACTED] and specifically mentions GICHERU.

Confidentiality and protective measures

18. The Prosecution has assessed the nature and content of the Court Record and considers that it can be transferred into the record of the *Gicheru* case with the same "confidential" classification and without redaction. [REDACTED] and the Court Record was subsequently reclassified as "confidential" and available to all parties in the *Ruto and Sang* case. Additionally, the Prosecution notes that the

²⁰ ICC-01/09-01/11-1758-Conf.

²¹ ICC-01/09-01/11-1624. The Prosecution accordingly considers that there is no need to transfer this order into the record of the *Gicheru* case.

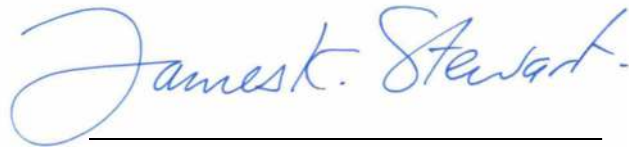
²² KEN-OTP-0159-0884, footnote 102.

Decision of TC V(A) of 31 October 2014, which is available publicly, refers in some detail to the relevant information contained in the Court Record.

19. However, since the filing originates from the VWU and concerns a witness under its care at the time, the Prosecution defers to the VWU's assessment as to classification and redactions.²³

IV. RELIEF

20. The Prosecution accordingly requests the Chamber to order the Registrar to transfer the Court Record into the record of the *Gicheru* case as soon as practicable.



Mr James Stewart, Deputy Prosecutor

Dated this 8th day of December 2021
At The Hague, The Netherlands

²³ VWU has advised that it is already assessing the need for redactions.