

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/09-01/20**
Date: **15 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

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

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
Ms Suzana Tomanović

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
for Participation/Reparations**

**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

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 Sixth Request for Transfer of Records’.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 8 December 2021, following a request for disclosure by the Defence, the Office of the Prosecutor (the ‘Prosecution’) filed a further request to transfer a court record 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 court record sought to be transferred is a confidential filing from the Victims and Witnesses Unit (the ‘VWU’), specifically a report on witness KEN-RDW-P-0072 (the ‘Report’),² which is referenced in the solemn declaration of P-0730 and contains information that ‘may be material for the preparation of the defence of [the Accused]’.³

3. As to the classification of the Report, the Prosecution submits that given its nature and content, it can be transferred with ‘the same “confidential” classification and without redaction’.⁴ However, it notes that ‘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’.⁵

4. On 8 December 2021, the Chamber sought submissions from the VWU with respect to classification and redactions of the Report.⁶ On 13 December 2021, the VWU notified the Chamber of proposed redactions.⁷

¹ 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, 8 December 2021, ICC-01/09-01/20-240-Conf-Exp (the ‘Request’).

² *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Victims and Witnesses Unit’s Report on witness KEN-RDW-P-0072, 12 December 2014, ICC-01/09-01/11-1758-Conf.

³ Request, paras 1-2.

⁴ Request, para. 18.

⁵ Request, para. 19.

⁶ Email from the Chamber to the VWU, dated 8 December 2021 at 17:18.

⁷ Email from the VWU to the Chamber, dated 13 December 2021 at 10:49; Email from the VWU to the Chamber, dated 13 December 2021 at 13:52; Email from the VWU to the Chamber, dated 13 December 2021 at 14:11.

II. ANALYSIS

5. The Chamber recalls its previous decision on prior applications of a similar nature by the Prosecution 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 Report into the record of this case. The Registry is instructed to classify the Report as ‘confidential, *ex parte* Prosecution and VWU’. Furthermore, the VWU is ordered to file a confidential, redacted version of the Report into the *Gicheru* case file.

6. The Chamber notes the non-public classification of the Report and that part of the motivation for this classification was the protection of the witnesses mentioned in that filing. As previously explained, the transfer of the Report 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.⁸ Accordingly, as previously found by this and other Chambers, the transfer of the Report falls under Regulation 42(2) of the Regulations of the Court.⁹ The Prosecution is therefore instructed to inform the Defence of the nature of the protective measures concerning the witnesses mentioned in the Report.

⁸ [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

⁹ [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”](#), 27 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*, [Decision on the variation of protective measures for Witnesses P-0004, P-0113, P-0114, P-0147, and P-0431](#), 13 February 2019, ICC-01/12-01/18-586, para. 19.

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the Request;

ORDERS the Registry to transfer the Report into the record of this case with the level of classification ‘confidential, *ex parte* Prosecution and VWU’;

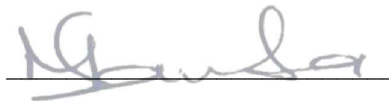
ORDERS the VWU to file a confidential, redacted version of the Report into the *Gicheru* case file;

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 Report;

ORDERS the Registry to reclassify the Request as ‘confidential’; and

ORDERS the Prosecution to file a public redacted version of the Request.

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

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

Judge Miatta Maria Samba

Dated 15 December 2021

At The Hague, The Netherlands