

Pursuant to Pre-Trial Chamber A's Decision ICC-01/09-01/20-148-Conf, dated 21 May 2021, this document is reclassified as "Confidential"

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Pursuant to TCIII's instruction dated 05.05.2023, this document is reclassified as Public

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 4 May 2021

PRE-TRIAL CHAMBER A (ARTICLE 70)

Before: Judge Reine Adélaïde Sophie Alapini-Gansou

SITUATION IN THE REPUBLIC OF KENYA

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

Secret

Prosecution's Response to the Request to Reclassify Paul Gicheru's Written Submissions on the Confirmation of Charges as "Secret"

Source: Office of the Prosecutor

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

Court to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Anton Steynberg

Counsel for the Defence

Mr Michael G. Karnavas

Legal Representatives of the Victims

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

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Defence for Mr Paul Gicheru¹ requests reclassification of his Written Submissions on the Confirmation of Charges (“Written Submissions”) from “confidential” to “secret”² – to be notified only to the Prosecution’s team in this particular case, the current Prosecutor (Ms. Fatou Bensouda), and the Deputy Prosecutor.³
2. The Prosecution opposes the Request for the reason that (1) it is moot, since the Written Submissions were already filed confidentially; (2) it is unnecessary, since the Defence has already received assurances from the Prosecution that the Prosecutor-elect will not have access to the court record of this case (which includes confidential filings, transcripts of hearings, evidence disclosed by the Defence via e-court, official email communications between the parties and/or with the Chamber) or information pertaining to this case and the *Ruto & Sang* case; and (3) in any case, the Request is not substantiated by an objectively justifiable risk.

II. CONFIDENTIALITY

3. Under regulation 23bis (2) of the Regulations of the Court,⁴ this filing is submitted as secret, since it responds to a filing with similar classification. However, the Prosecution does not consider that the contents require such classification and does not object to the filing being reclassified as confidential.

¹ “Defence” and “Gicheru” respectively.

² A classification provided by Regulation 14 of the Regulations of the Registry.

³ ICC-01/09-01/20-142-SECRET, “Request”.

⁴ “Regulations”.

III. SUBMISSIONS

The Request is moot

4. The Request is moot as, instead of submitting the Written Submissions as “secret” and including in those submissions the legal and factual basis for such classification,⁵ the Defence submitted them as “confidential” on Friday 30 April 2021 at 15:02. As a result, this document has already been distributed to over a hundred court officials, according to the Court Management email distribution list. The Prosecutor-elect by definition is not in office and is not one of the listed recipients of the notification.

The Request is unnecessary

5. The Prosecution regrets that the Chamber has been seized with this Request, as the matter could have been resolved *inter partes*—if indeed it was not already resolved.⁶ The Prosecution has already provided the Defence assurances that the Prosecutor-elect does not have, and upon taking up his duties as Prosecutor, will not have access to the confidential court records of this case (which include confidential filings). The Prosecutor-elect has already informed – and this is in the public domain⁷ – the current Prosecutor that he will recuse himself from any matter in which there may be an actual or perceived conflict of interest, as required by article 42(7), including the current case. Once the Prosecutor-elect takes office, the Deputy Prosecutor, Mr James Stewart, will assume overall responsibility for this case as well as the *Ruto & Sang* case.

⁵ As required by regulation 23bis(1) of the Regulations of the Court.

⁶ *Per* email exchanges of 29 April, ICC-01/09-01/20-142-SECRET-AnxA.

⁷ Statement of the ICC Prosecutor, Fatou Bensouda, on the transition process and related discussions with the Prosecutor Elect: <https://www.icc-cpi.int/Pages/item.aspx?name=210319-statement-prosecutor-transition>.

The Request is unsubstantiated

6. Concerns relating to Gicheru's safety were first raised by the Defence in an email to the Pre-Trial Chamber on 29 April 2021 at 16:22. In this email, the Defence provided no objective support for such a statement.
7. Similarly, the Request contains no information or evidence in support of concerns over Gicheru's security and no objectively justifiable risk is presented. Hence, the Prosecution is left with making assumptions about the reasons underlying these concerns. A reference is made to the killing or disappearance of two witnesses.⁸ The Defence does not attempt to explain how these killings are connected to Gicheru's security concerns. Nor indeed does it explain, let alone substantiate, how members of the Prosecution having access to these Written Submissions would jeopardise Gicheru's safety.
8. As indicated above, the Prosecution has undertaken steps internally, and upon the Prosecutor-elect's own initiative, to ensure that upon his arrival, he is not given access to confidential information and evidence in the present case, including confidential filings. This means that the Prosecutor-elect will not be notified of confidential filings, will not be included on the Registry's Court Management email distribution lists (relating to this case), and will not have access to the Prosecution's internal databases relating to this case. The Prosecution team assigned to this case will only report to the Deputy Prosecutor who, in turn, will not report or receive instruction from the incoming Prosecutor on matters relating to this case.

⁸ One of the two witnesses is P-0397, a witness who is the basis of one of the charges in the DCC, having been corruptly influenced by Mr Gicheru to withdraw from cooperating with the Court. The other is P-0564, Gicheru's alleged associate.

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IV. CONCLUSION

9. For the reasons set out above, the Prosecution respectfully requests the Pre-Trial Chamber to reject the Request as moot, unnecessary and unsubstantiated.



Fatou Bensouda, Prosecutor

Dated this 4th day of May 2021
At The Hague, The Netherlands