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No.: ICC-01/09-01/11

Date: 28 September 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO,
HENRY KIPRONO KOSGEY AND JOSHUA ARAP SANG

PUBLIC

**Defence Submissions Concerning Reclassification
of Certain Confidential Defence Documents**

Source: Defence for Mr. William Samoei Ruto and Mr. Joshua Arap Sang

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

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Fatou Bensouda, Deputy Prosecutor

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Joseph Kipchumba Kigen-Katwa, Joel
Kimutai Bosek and Philemon K.B. Koech

Legal Representatives of the Victims

Sureta Chana

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

Ms. Silvana Arbia

Counsel Support Section

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Mr. Didier Daniel Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. In accordance with the principle of public proceedings, the Defence for Mr. Ruto and Mr. Sang hereby requests that several items and filings which the Defence initially indicated should be classified as “Confidential” be reclassified as “Public”.
2. Specifically, the Defence seeks reclassification of twenty-eight items of evidence filed on behalf of Mr. Ruto¹ and thirty-nine items of evidence filed on behalf of Mr. Sang². Furthermore, the Defence requests that the confidential lists of evidence for Mr. Ruto and for Mr. Sang,³ and the related disclosure analysis tables⁴ be reclassified as “Public”.

II. Procedural History

3. On 6 April 2011 and 20 April 2011, the Single Judge set the schedule for disclosure of materials in advance of the Confirmation of Charges hearing.⁵
4. The Defence was granted an extension until midnight on 16 August to file its lists of evidence and analysis, and to disclose its actual evidence and the corresponding metadata to the Court.⁶ The Defence materially complied with this deadline.

¹ EVD-PT-D09-00001, EVD-PT-D09-00022, EVD-PT-D09-00025, EVD-PT-D09-00026, EVD-PT-D09-00027, EVD-PT-D09-00028, EVD-PT-D09-00029, EVD-PT-D09-00030, EVD-PT-D09-00031, EVD-PT-D09-00032, EVD-PT-D09-00033, EVD-PT-D09-00034, EVD-PT-D09-00035, EVD-PT-D09-00036, EVD-PT-D09-00037, EVD-PT-D09-00038, EVD-PT-D09-00039, EVD-PT-D09-00040, EVD-PT-D09-00041, EVD-PT-D09-00042, EVD-PT-D09-00043, EVD-PT-D09-00045, EVD-PT-D09-00049, EVD-PT-D09-00050, EVD-PT-D09-00051, EVD-PT-D09-00052, EVD-PT-D09-00053, and EVD-PT-D09-00054.

² EVD-PT-D11-00001, EVD-PT-D11-00002, EVD-PT-D11-00003, EVD-PT-D11-00004, EVD-PT-D11-00006, EVD-PT-D11-00008, EVD-PT-D11-00009, EVD-PT-D11-00012, EVD-PT-D11-00017, EVD-PT-D11-00018, EVD-PT-D11-00019, EVD-PT-D11-00020, EVD-PT-D11-00021, EVD-PT-D11-00022, EVD-PT-D11-00023, EVD-PT-D11-00024, EVD-PT-D11-00025, EVD-PT-D11-00026, EVD-PT-D11-00027, EVD-PT-D11-00028, EVD-PT-D11-00029, EVD-PT-D11-00030, EVD-PT-D11-00031, EVD-PT-D11-00032, EVD-PT-D11-00033, EVD-PT-D11-00034, EVD-PT-D11-00035, EVD-PT-D11-00036, EVD-PT-D11-00037, EVD-PT-D11-00038, EVD-PT-D11-00040, EVD-PT-D11-00041, EVD-PT-D11-00042, EVD-PT-D11-00043, EVD-PT-D11-00044, EVD-PT-D11-00045, EVD-PT-D11-00046, EVD-PT-D11-00047, and EVD-PT-D11-00048.

³ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-268-Conf-AnxA and Conf-AnxB, 17 August 2011.

⁴ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-269-Conf-AnxA; *Prosecutor v. Ruto et al*, ICC-01/09-01/11-273-Conf-AnxA.

⁵ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-44, Decision Setting the Regime for Evidence Disclosure and other Related Matters, 6 April 2011; *Prosecutor v. Ruto et al*, ICC-01/09-01/11-62, Decision on the ‘Prosecution’s application requesting disclosure after a final determination of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties, 20 April 2011.

⁶ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-267, Decision on the Defence Requests for Extension of Time Limit for Disclosure in Compliance with the E-Court Protocol, 16 August 2011.

III. Submissions

Legal Basis for Reclassification

5. The Defence notes the paramount principle of public proceedings as enshrined in Articles 64(7) and 67(1). Furthermore, the Defence recalls that pursuant to Regulation 23bis(3) of the Regulations of the Court, where the basis for the classification no longer exists, whosoever instigated the classification, be it the Registrar or a Participant, shall apply to the Chamber to reclassify the document.

Explanation of Request for Reclassification

6. The Defence requests that these evidentiary items and the related lists of evidence and analysis, which are currently classified as “Confidential”, be reclassified as “Public”.
7. Initially, in the rush to meet the disclosure deadline, the Defence had classified its witness statements and several other pieces of evidence and analysis as “Confidential” out of an abundance of caution. It has become clear that this caution is no longer necessary and that the disclosure of this information would not endanger any ongoing investigations. Thus the proper approach is to reclassify the information as “Public”.
8. Many of the evidentiary items are from a publicly available source or became public knowledge during the Confirmation of Charges hearing. For instance, the names of certain Defence witnesses who made statements were mentioned in open session.⁷ Additionally, with respect to a set of photographs classified as “Confidential”, Defence Counsel explained that generally speaking, “We have no document confidential. We are ready to have it disclosed”.⁸
9. The Defence wishes to openly rely on this evidence in its post-confirmation brief, but the Defence first wants to ensure that any public reference to this material is in conformity with its classification before the Court.

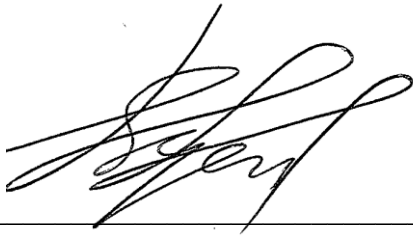
⁷ See, for example, *Prosecutor v. Ruto et al*, ICC-01/09-01/11-T-9-CONF-ENG, 5 September 2011, p. 67.

⁸ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-T-9-CONF-ENG, 5 September 2011, p. 63-64.

IV. Conclusion & Request for Relief

10. The Defence therefore requests that the Pre-Trial Chamber reclassify the following “Confidential” materials and filings as “Public”:

- a. Evidence on behalf of Mr. Ruto: EVD-PT-D09-00001, EVD-PT-D09-00022, EVD-PT-D09-00025, EVD-PT-D09-00026, EVD-PT-D09-00027, EVD-PT-D09-00028, EVD-PT-D09-00029, EVD-PT-D09-00030, EVD-PT-D09-00031, EVD-PT-D09-00032, EVD-PT-D09-00033, EVD-PT-D09-00034, EVD-PT-D09-00035, EVD-PT-D09-00036, EVD-PT-D09-00037, EVD-PT-D09-00038, EVD-PT-D09-00039, EVD-PT-D09-00040, EVD-PT-D09-00041, EVD-PT-D09-00042, EVD-PT-D09-00043, EVD-PT-D09-00045, EVD-PT-D09-00049, EVD-PT-D09-00050, EVD-PT-D09-00051, EVD-PT-D09-00052, EVD-PT-D09-00053, and EVD-PT-D09-00054;
- b. Evidence on behalf of Mr. Sang: EVD-PT-D11-00001, EVD-PT-D11-00002, EVD-PT-D11-00003, EVD-PT-D11-00004, EVD-PT-D11-00006, EVD-PT-D11-00008, EVD-PT-D11-00009, EVD-PT-D11-00012, EVD-PT-D11-00017, EVD-PT-D11-00018, EVD-PT-D11-00019, EVD-PT-D11-00020, EVD-PT-D11-00021, EVD-PT-D11-00022, EVD-PT-D11-00023, EVD-PT-D11-00024, EVD-PT-D11-00025, EVD-PT-D11-00026, EVD-PT-D11-00027, EVD-PT-D11-00028, EVD-PT-D11-00029, EVD-PT-D11-00030, EVD-PT-D11-00031, EVD-PT-D11-00032, EVD-PT-D11-00033, EVD-PT-D11-00034, EVD-PT-D11-00035, EVD-PT-D11-00036, EVD-PT-D11-00037, EVD-PT-D11-00038, EVD-PT-D11-00040, EVD-PT-D11-00041, EVD-PT-D11-00042, EVD-PT-D11-00043, EVD-PT-D11-00044, EVD-PT-D11-00045, EVD-PT-D11-00046, EVD-PT-D11-00047, and EVD-PT-D11-00048;
- c. Lists of Evidence for Mr. Ruto and Mr. Sang: *Prosecutor v. Ruto et al*, ICC-01/09-01/11-268-Conf-AnxA and Conf-AnxB, 17 August 2011; and
- d. Disclosure Analysis Tables for Mr. Ruto and Mr. Sang: *Prosecutor v. Ruto et al*, ICC-01/09-01/11-269-Conf-AnxA and *Prosecutor v. Ruto et al*, ICC-01/09-01/11-273-Conf-AnxA.



Joseph Kipchumba Kigen-Katwa

On behalf of Mr. Joshua Arap Sang and Mr. William Samoei Ruto

Dated this 28th day of September 2011

In Nairobi, Kenya