

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 14 October 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

**SITUATION IN THE REPUBLIC OF KENYA
IN THE CASE OF THE PROSECUTOR V. WILLIAM SAMOEI RUTO, HENRY
KIPRONO KOSGEY AND JOSHUA ARAP SANG**

Public

**Decision on the "Defense Submissions Concerning Reclassification of Certain
Confidential Defence Documents"**

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

The Office of the Prosecutor

Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor

Counsel for William Samoei Ruto

Joseph Kipchumba Kigen-Katwa, David Hooper and Kioko Kilukumi Musau

Counsel for Henry Kiprono Kosgey

George Odinga Oraro, Julius Kemboy and Allan Kosgey

Counsel for Joshua Arap Sang

Joseph Kipchumba Kigen-Katwa, Joel Bosek and Philemon Koech

Legal Representatives of the Victims

Sureta Chana

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar

Silvana Arbia, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court”)¹ hereby issues this Decision on the “Defence Submissions Concerning Reclassification of Certain Confidential Defence Documents” (the “Request for Reclassification”).²

1. On 8 March 2011, the Chamber, by majority, decided to summon William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (collectively the “Suspects”) to appear before it.³ Pursuant to this decision, the Suspects voluntarily appeared before the Court at the initial appearance hearing held on 7 April 2011 during which, *inter alia*, the Chamber set the date for the commencement of the confirmation of charges hearing for 1 September 2011.⁴

2. On 6 April 2011, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, wherein she decided that “when submitting any evidence to the Registry, the parties shall provide the following accompanying documentation”: (i) a list of evidence and (ii) an analysis of each piece of evidence reflecting its relevance.⁵

3. On 20 April 2011, the Single Judge issued the “Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties” (the “20 April 2011 Calendar Decision”), wherein the Defence was ordered to disclose to the Prosecutor the evidence they intend to present at the confirmation of charges hearing and the list of this evidence, no later than 16 August 2011.⁶

¹ Pre-Trial Chamber II, “Decision Designating a Single Judge”, ICC-01/09-01/11-6.

² ICC-01/09-01/11-341.

³ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang”, ICC-01/09-01/11-1.

⁴ ICC-01/09-01/11-T-1-ENG.

⁵ Pre-Trial Chamber II, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, ICC-01/09-01/11-44, pp. 10-11.

⁶ Pre-Trial Chamber II, “Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties”, ICC-01/09-01/11-62, p. 13.

4. On 16 August 2011, the Defence team of Mr. Ruto and Mr. Sang – pursuant to rule 121(6) of the Rules of Procedure and Evidence and in compliance with the 20 April 2011 Calendar Decision – disclosed the respective evidence they intended to rely on for the purposes of the confirmation of charges hearing, together with the lists of such evidence⁷ and the in-depth analysis charts.⁸

5. On 1 September 2011, as scheduled, the confirmation of charges hearing commenced.⁹

6. On 8 September 2011, during the closing session of the confirmation of charges hearing, the Chamber granted the Defence teams of the Suspects up until 24 October 2011 to submit their final written observations on the issues discussed during the confirmation hearing.¹⁰

7. On 28 September 2011, the Chamber received the Request for Reclassification, wherein the Defence of Mr. Ruto and Mr. Sang request that their lists of evidence, in-depth analysis charts as well as 28 and 39 items of evidence, respectively, be reclassified as public.¹¹ The Defence had initially filed these documents and items as confidential.¹²

8. In their submissions, the Defence teams of Mr. Ruto and Mr. Sang recall “the paramount principle of public proceedings as enshrined in Articles 64(7) and 67(1)” of the Rome Statute (the “Statute”).¹³ Additionally, they mention “that pursuant to Regulation 23*bis*(3) of the Regulations of the Court, where the basis for classification

⁷ ICC-01/09-01/11-268, ICC-01/09-01/11-268-Conf-AnxA and ICC-01/09-01/11-268-Conf-AnxB.

⁸ ICC-01/09-01/11-269, ICC-01/09-01/11-269-Conf-AnxA and ICC-01/09-01/11-273-Conf-AnxA.

⁹ ICC-01/09-01/11-T-5-ENG.

¹⁰ ICC-01/09-01/11-T-12-ENG, p. 77.

¹¹ ICC-01/09-01/11-341, para. 10.

¹² ICC-01/09-01/11-268-Conf-AnxA (list of evidence of Mr. Ruto), ICC-01/09-01/11-268-Conf-AnxB (list of Evidence of Mr. Sang), ICC-01/09-01/11-269-Conf-AnxA (in-depth analysis charts of Mr. Ruto and Mr. Sang) as supplemented by ICC-01/09-01/11-273-Conf-AnxA.

¹³ ICC-01/09-01/11-341, para. 5.

no longer exists, whosoever instigated the classification, be it the Registrar or a Participant, shall apply to the Chamber to reclassify the document".¹⁴

9. Furthermore, the Defence of Mr. Ruto and Mr. Sang indicate that although they had initially classified the said documents and items as confidential "out of an abundance of caution [...] this caution is no longer necessary and [...] disclosure of this information would not endanger any ongoing investigation".¹⁵ Lastly, they point out that "many of the evidentiary items are from a publicly available source or became public knowledge during the Confirmation of Charges hearing".¹⁶

10. The Single Judge notes article 67(1) of the Statute and regulation 23*bis*(3) of the Regulations of the Court.

11. The Single Judge reviewed the material referred to in the Request for Reclassification and considered the submissions of the Defence of Mr. Ruto and Mr. Sang. The Single Judge, cognizant of the principle of publicity of the proceedings and mindful of the deadline of 24 October 2011 for the submission by the Defence of the Suspects of their final written observations on the confirmation of charges hearing, considers that it is appropriate in the present circumstances to reclassify the documents and items of evidence proposed by the Defence of Mr. Ruto and Mr. Sang as public.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

a) **orders** the Registrar to reclassify documents ICC-01/09-01/11-268-Conf-AnxA, ICC-01/09-01/11-268-Conf-AnxB, ICC-01/09-01/11-269-Conf-AnxA and ICC-01/09-01/11-273-Conf-AnxA as public;

¹⁴ ICC-01/09-01/11-341, para. 5.

¹⁵ ICC-01/09-01/11-341, para. 7.

¹⁶ ICC-01/09-01/11-341, para. 8.

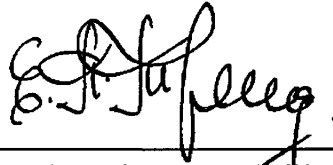
b) **orders** the Registrar to reclassify the following items of evidence, among those disclosed by the Defence of Mr. Ruto, as public:

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;

c) **orders** the Registrar to reclassify the following items of evidence, among those disclosed by the Defence of Mr. Sang, as public:

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.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Friday, 14 October 2011

At The Hague, The Netherlands