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

Date: 30 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 with ANNEXES A-D

**Defence Request Regarding Prejudicial Comments Made
by Victims' Legal Representative Sureta Chana during Closing Statement**

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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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

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Registrar

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**Victims Participation and Reparations
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Other

I. Introduction

1. During time allocated to the Victims' Legal Representative for the purpose of making a closing statement during the confirmation of charges hearing on 8 September 2011, Ms. Chana put evidence on the record pertaining to allegations of witness intimidation. The general purport of the allegations held out as evidence was that one Kenyan Honourable Charles Keter had made inciting remarks through the KASS FM radio station, thereby creating tensions in Kenya and a likelihood of violence and further harm to post-election violence victims. This evidence:
 - i. Was in the form of third-hand anonymous hearsay, allegedly sourced by the Victims' counsels from a "field officer";
 - ii. Was untested, unreliable, and highly prejudicial to the Defence; and
 - iii. Fell foul of the Victims' Representative's limited role in the confirmation of charges hearing and obligations under Article 68(3) that victim participation shall not be prejudicial to the rights of the defence and to a fair and impartial trial.
2. The Defence of Mr. Ruto and Mr. Sang have now established that the allegations adduced by Ms. Chana, as sourced by her "field officer" on behalf of victims,¹ were as a matter of fact, untrue, fabricated, and sensational. The said false allegations made by the Victims' Representative were wholly unnecessary for the victims' cause. In its stead the Victims' Representative bordered on being an extension of and holding brief for the Prosecution, albeit on unfounded and concocted facts.
3. The Defence of Mr. Ruto and Mr. Sang submits that the Victims' Representative should not have used the highly publicised forum of the closing submissions to make unauthenticated allegations. Such allegations should not have been raised unless they were supported by concrete evidence and were put forth while seeking a concrete form of relief to the benefit of the Victims, such as a request for protective measures.
4. The Defence of Mr. Ruto and Mr. Sang therefore requests that the Pre-Trial Chamber:

¹ The Victims' Representative explained that the source of the allegations she made was her "field officer". This is in contradistinction from the source being a Victim. A "field officer" would be answerable to the Victim's counsel and to the court, hence has a higher obligation to be responsible and accountable for what is alleged.

- i. Exclude the allegations from their consideration of the confirmation of charges;
- ii. Obtain from the Victims' Representative the full identity and particulars of the alleged "field officer" from whom the counsel sourced the unfounded allegations, with a view to enabling the Court to take such measures as may be deemed fair and just to secure the Court's integrity and to maintain standards expected of parties to an international court;
- iii. Remind the Victims' Representative of the limitations and obligations of her role including those under Article 68(3);
- iv. Direct that the Prosecution and Victims' Representative may not raise nor rely on such issues in their respective post-confirmation briefs;
- v. Note the reality of the sad possibility for a complete falsehood to be held out as a fact in a solemn place as the honourable International court, and to consciously visit the said possibility upon the whole confirmation proceedings.

II. Procedural History

5. On 5 August 2011, the Single Judge issued the *Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings* wherein she decided, *inter alia*, to admit 327 victims as participants in the confirmation of charges hearing and in the related proceedings. She also appointed Ms. Sureta Chana as the common legal representative of all the victims admitted to participate.²
6. In the Victims' Participation Decision, the Single Judge enumerated several procedural rights, derived from Article 68(3) of the Statute, which the victims could exercise through their legal representative at the confirmation of charges hearing. These rights included: attendance and participation at the confirmation of charges hearing; access to the public record of the case; notification of filings and decisions; questioning of witnesses; and filing of written submissions.³ Specifically, the Single Judge recalled Rule 89(1), according to which the victims' participation in the proceedings may include making

² *Prosecutor v. Ruto et al*, ICC-01/09-01/11-249, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 5 August 2011, p. 46-49, letters (a) and (c) of the operative part ("Victims' Participation Decision").

³ Victims' Participation Decision, paras 85-101.

opening and closing statements, and granted Ms. Chana the opportunity to make a brief closing statement at the end of the hearing.⁴

7. Significantly, in the Victims' Participation Decision, the Single Judge did not grant the victims the right to tender evidence at the confirmation of charges hearing. Ms. Chana did not appeal this decision nor seek reconsideration in any form. Whilst the Single Judge noted that the Victims' Participation Decision was "without prejudice to any other right that the Chamber could grant the victims in the course of the proceedings either *proprio motu* or upon specific and motivated request submitted by the legal representative",⁵ the Chamber never *proprio motu* granted Ms. Chana the right to tender evidence, nor did Ms. Chana submit a specific and motivated request.
8. On 8 September 2011, Ms. Chana made a closing statement, intending to "present the views and concerns of the victims".⁶ After beginning her statement, she was reminded by the Presiding Judge that she should be "limited to the facts as discussed here during the confirmation hearing and the evidence presented, analysed by the parties".⁷ Thereafter, Ms. Chana introduced new and highly prejudicial evidence into the record of the confirmation of charges hearing, in respect of matters which she stated "can, of course, be verified".⁸
9. Ms. Chana publicly stated as follows:

Today, indeed, today I have received some troubling news suggesting that attempts may be underway to create a climate of intimidation in Kenya towards those involved in proceedings before this court, especially Kalenjin and Nandi victims and indeed witnesses. I read out this e-mail, well, for the sake of being completely correct, what I received from a field worker in Kenya this morning, and I quote his e-mail because I just got it very -- today, and I didn't have time to incorporate it. It's addressed to me and it states:

"I spoke this morning to a gentleman who prefers to have his name and location withheld. He informed me that he -- that he had heard a disturbing commentary on the radio station Kass FM on the morning of Tuesday, 6 September 2011, on the radio show that airs from 7.00 a.m. to 9.00 a.m. He informed that Charles Keter, the Member of Parliament for Belgut who was calling in from The Hague, made some very inciteful statements. The gentleman went on to inform me that Mr. Keter was heard to say that,"

⁴ Victims' Participation Decision, para. 89. See also *Prosecutor v. Ruto et al*, ICC-01/09-01/11-294-Anx-Corr, Decision on the Schedule for the Confirmation of Charges Hearing, 25 August 2011 (indicating that Ms. Chana would be given 30 minutes to make closing submissions on behalf of the victims).

⁵ Victims' Participation Decision, para. 85.

⁶ ICC-01/09-01/11-T-12-ENG, 8 September 2011 ("**Transcript**"), p. 15.

⁷ Transcript, p. 19.

⁸ Transcript, p. 29, ln. 5-6.

and it is in quotes:

“‘We have come to establish that this,’”

he means the case before the ICC in brackets,

“‘is pure falsehood hatched by PNU supporters and those who call themselves human rights activists.’”

He goes on:

“Mr. Keter asserted that he had information regarding the identity of the Prosecution witnesses, remarking, ‘We already know who they are.’ He specifically referred to knowing the identity of Prosecution Witness number 006 and 0008. Mr. Keter went on to assert further that, ‘We are aware of the traitors who are back there at home,’ alluding to knowing of other Prosecution witnesses from this Kalenjin community.

He went on to assert that the Kenya Prime Minister was involved in providing accommodation and safe haven to those so-called traitors. Mr. Keter went on to warn that the confirmation of charges would be over by Wednesday or Thursday and that ‘these people will face unspecified consequences.’

The e-mail continues:

“The remarks of Mr. Keter seem to assert that the Prosecution witnesses were mostly Nandi and that, as such, the Nandi people had betrayed the Kalenjin community. According to Mr. Keter: ‘It is not the three people who are being accused but it is the entire Kalenjin community.’ One of the callers into the programme, inflamed by the statements of the Member of Parliament, said, ‘It is you Nandi people who are traitors of our community.’”

These sentiments -- I continue the e-mail:

“These sentiments were supported by another individual who heard the radio show on Tuesday and Wednesday where the sentiments of Mr. Keter were regurgitated. The individual who would also like his identity and location withheld informed that the Nandi people were being painted as traitors of the Kalenjin for allegedly working for the Prosecutor as his witnesses. He stated: ‘I have personally -- I have personally heard and received threats because I was opposed to the post-election violence.’

He went on to assert,

“The situation is getting more and more dangerous for the Nandi and human rights workers on the ground due to these statements which have penetrated the mind of the community. I fear it would be” -- sorry, “it could get very ugly for many people soon especially those who have been dubbed as traitors. I have heard it said, ‘We will give them the treatment deserving of traitors.’”

I say no more other than to read what I have received from my case worker. I think these -- these matters can, of course, be verified.⁹

10. As far as the Defence is aware, Ms. Chana did not verify, either before or after reading this highly prejudicial and defamatory “evidence” into the record of the confirmation of

⁹ Transcript, p. 26 to 29.

charges hearing, whether the intimating remarks allegedly made by Kenyan Member of Parliament Mr. Keter on KASS FM were in fact made by him.

11. The Defence has obtained the recording of the 6 September 2011 morning KASS FM broadcast. The full recording, in Kalenjin, is served as an audio file in conjunction with this filing as Annex A. An independent and certified transcript of the English translation of the recording is attached as Annex B. A news article from the Kenyan press which contains an English translation summary of the broadcast is attached as Annex C. A news article from the Kenyan press stating that Hon. Keter is pursuing this issue against Ms. Chana through the Kenyan judicial process is attached as Annex D. The contents of the broadcast do not verify the allegations read into the record by Ms. Chana. In fact, the contents of the broadcast prove that Mr. Keter did not make such remarks as alleged.

III. Applicable Legal Principles

General Principles of Victims' Participation

12. According to Article 68(3) of the Statute, where their personal interests are affected, victims may present their views and concerns at "stages of the proceedings determined to be appropriate by the Chamber and **in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial**".
13. The Single Judge has previously noted that Article 68(3) of the Statute constitutes the general legal basis for victims to be granted the right to express their "views and concerns" upon an application justifying the existence of the conditions envisaged in the said provision. In particular, in order for the Chamber to grant them rights under the said legal basis, victims must justify that their personal interests are affected by the specific issue(s) under consideration. An assessment thereof cannot thus be conducted *in abstracto*, but, conversely, shall be performed on a case-by-case basis, upon specific and motivated request submitted by the legal representative of the victims. The Single Judge further noted that the Chamber retains discretion in the determination of the manner of victims' participation in the proceedings which shall be established ensuring that no prejudice to the rights of the suspects to a fair and impartial trial be caused.¹⁰

¹⁰ Victims' Participation Decision, para. 84.

14. Furthermore, Rule 91 of the Rules addresses victims' participation in the proceedings through their legal representatives.

Victims' Representative Not Permitted to Introduce Evidence

15. Jurisprudence at the ICC has uniformly confirmed that anonymous victims may not tender evidence or make evidential allegations.¹¹ Due to the limited scope of the confirmation of charges hearing and the fact that Article 61(5) places the burden on the Prosecution (and not any other participating party) to meet the evidential threshold, ICC jurisprudence has also precluded victims, both anonymous and non-anonymous, from tendering evidence at the confirmation of charges hearing.¹²

16. Likewise, the Victims' Representative was not authorized to introduce evidence during the *Ruto et al* confirmation of charges hearing. Though the Single Judge had not accepted Defence submissions that anonymous victims should not be permitted to question witnesses or submit observations on the evidential foundation at all, the Single Judge nonetheless had determined that any request by the Victims' Representative to question witnesses or submit observations would be scrutinized, taking into consideration: (i) the victims' personal interests as alleged by the legal representative, (ii) the scope of the procedural rights requested, and (iii) the principle of fairness and expeditiousness of the proceedings.¹³

17. Furthermore, the ICC Appeals Chamber has held that if the victims (irrespective of anonymity) are to submit evidence at the trial stage, the evidence must be necessary for the determination of the truth, the victims must establish how their personal interests are affected by the issue in question, the evidence must be relevant to the determination of the charges,¹⁴ the submission of evidence must not be prejudicial to the rights of the defence and a fair and impartial trial, the evidence in question must be disclosed to the defence

¹¹ *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-1788-tEN, 22 January 2010 at paras 91-93; *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-474, Decision on the Set of Procedural Rights Attached to the Procedural Status of Victims at the Pre-Trial Stage of the Case, 13 May 2008 ("**Katanga Procedural Rights Decision**"), paras. 180-182; *Prosecutor v. Lubanga*, ICC-01/04-01/06-462-tEN, Decision on Arrangement for Participation of Victims: a/0002/06, a/0003/06 at the Confirmation Hearing, 22 September 2006.

¹² *Katanga Procedural Rights Decision*, paras 101 and 103; *Prosecutor v. Bemba*, ICC-01/05-01/08-320, Fourth Decision on Victims' Participation, 12 December 2008, para. 96.

¹³ Victims' Participation Decision, para. 126.

¹⁴ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1432, Judgement on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, para. 97 ("Evidence to be tendered at trial which does not pertain to the guilt or innocence of the accused would most likely be considered inadmissible and irrelevant").

sufficiently in advance of the proceedings, and measures must be taken to respect the right of the defence to adequate time and facilities.¹⁵

18. In essence, the jurisprudence of the Court is clear -- there should be only one Prosecutor.¹⁶

Proper Substantiation Required for Allegations

19. In the *Lubanga* trial, the Chamber found, in regard to Prosecution allegations of witness interference from the defendant, that it was improper for the Prosecution to raise allegations in Court which were not supported by well-founded evidence or which were not properly substantiated.¹⁷ The Trial Chamber further found that by making public accusations that the defendant has engaged in intimidating behaviour, which had no basis in the evidence or rulings of the Chamber, that the Prosecution had “discouraged others from participating in the Court’s cases, thereby damaging the legitimacy of the institution, and its ability to function”.¹⁸

20. The ad hoc tribunals have recognized that due to the potentially defamatory effect of raising allegations against a witness or participant in the proceedings, the parties will not be permitted to raise such allegations in court unless they have a proper evidential foundation for doing so. It requires more than a “mere hunch, innuendo or unsubstantiated hearsay”.¹⁹

21. The Code of Professional Conduct, which binds the Victims’ Representative as counsel, states that Counsel shall take all necessary steps to ensure that her actions are not prejudicial to the ongoing proceedings (Article 24(1)) and that Counsel is personally responsible for the conduct and presentation of her case and shall exercise personal judgement on the substance and purpose of statements made.

¹⁵ *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-2288, Judgement on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled ‘Decision on the Modalities of Victim Participation at Trial’, 16 July 2010, paras 1 and 40.

¹⁶ *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-T-43-ENG, 4 July 2008, p. 70.

¹⁷ *Prosecutor v. Lubanga*, ICC-01/04-01/06-T-122-ENG, 9 February 2009, p. 51-53 and 55-56 (“If there is to be a suggestion that something improper has taken place either in court or out of court, the suggestion must have foundation which can be explained to the judges either in open court or *ex parte*. **We should not be the recipients of allegations which cannot be substantiated**”).

¹⁸ *Prosecutor v. Lubanga*, ICC-01/04/01-06-2433, Decision on the Press Interview with Ms Le Fraper du Hellen, 12 May 2010, para. 51.

¹⁹ *Prosecutor v. Krajisnik*, IT-00-39-T, Decision on Cross-Examination of Milorad Davidovic, 15 December 2005, para. 9; see also *Prosecutor v. Gotovina et al*, IT-06-90, Transcript, 30 September 2009, p. 22352-5.

IV. Submissions

22. The email Ms. Chana read during her closing submissions on behalf of the victims was irrelevant to question before the Chamber, namely whether the evidence adduced by the Prosecution was sufficient to confirm the charges against Mr. Ruto, Mr. Kosgey and Mr. Sang. It was a highly prejudicial attempt to put evidence on the record at the confirmation of charges hearing. Leading evidence in these circumstances falls outside the Victims' Representative's mandate and the Single Judge's decision on modalities, in which Ms. Chana's role was restricted to expressing the views and concerns of the victims concerning the substance of the charges in a manner which is not inconsistent with the rights of the suspects.
23. In reporting this third-hand hearsay from an unidentified field worker regarding the "climate of intimidation" in Kenya, Ms. Chana essentially put before the Chamber evidential allegations concerning the existence of a KASS FM radio interview with a Kenyan Member of Parliament for Belgut, Mr. Charles Keter. The email stated that Mr. Keter was heard making "inciteful" statements over the radio on 6 September between 7:00am and 9:00am,²⁰ including making threats against Kalenjin "traitors" or witnesses who would "face unspecified consequences".²¹
24. Ms. Chana acknowledged that she had only recently received the email from her field worker and had not had time to "incorporate it" into her submissions. Her unidentified field worker had in turn received information from unknown persons – it is not clear whether any of them are victims accepted by the Chamber for participation in the confirmation of charges hearing, or whether they are witnesses, or whether they are completely unrelated to the case. These persons allegedly heard something on the radio. Yet the allegations have no evidential foundation, and Judges of the ICC have consistently held that anonymous hearsay must be corroborated at the confirmation stage.²² As such, these allegations should be disregarded by the judges of the Pre-Trial Chamber entirely.

²⁰ The Defence finds it ironic that this is the time that Joshua Sang's program, Lene Emet, is typically broadcast on Kass FM. On 6 September, of course, Mr. Sang was present before the Judges in The Hague.

²¹ Transcript, p. 27-28.

²² See for example, *Prosecutor v. Lubanga*, ICC-01/04-01/06-774, Decision on the Confirmation of Charges, 29 January 2007, paras 101-106; *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-717, Decision on the Confirmation of the Charges, 30 September 2008, para. 70; *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Decision on the Confirmation of the Charges, 15 June 2009, paras 50-54; *Prosecutor v. Abu Garda*, ICC-02/05-02/09-243-Red, Public Redacted Version of the Decision on Confirmation of Charges, 8 February 2010, paras 49-52.

25. The contents of the allegations do not concern the charges or the evidence on the record. Nor were the allegations raised by Ms. Chana as part of an application for protective measures for victims or as part of any specific request concerning their security. Instead, the allegations related in some vague way to the security of Prosecution witnesses. Thus, she breached the requirement established by the Appeals Chamber that the Court must actively ensure that the role of the victims' representative does not usurp or duplicate the role of the Prosecutor.²³
26. The allegations were seemingly raised instead in an attempt to suggest that the suspects pose a current threat to the people of Kenya, or at least that individuals close to them are using KASS FM as a medium through which to propagate a certain message of intimidation, ultimately to the benefit of the suspects. Or to impugn KASS FM and persons associated with the suspects and to imply that there was a breach of confidentiality. Such unfounded allegations are wholly improper and have prejudiced the Defence.
27. The Defence was not able to object to these allegations when they were raised during the currency of the closing submissions.²⁴ While the Defence was able to comment on it during its own closing submissions, it was handicapped in its ability to substantively respond because of the complete lack of notice it had in respect of these allegations. Independent of the issue of the alleged's anonymity, the manner in which the allegations were raised ran contrary to all principles of notice. The Victims' Representative did not request authorization from the Pre-Trial Chamber to tender such evidence, which would have allowed the Defence to respond to the procedural correctness of such a request. The Victims' Representative did not establish any affected personal issue of any victim which had arisen during the confirmation hearing. The Victims' Representative did not disclose any information to the Defence in advance, such that the Defence could investigate or respond in a timely and effective manner to the allegations. This ambush-type approach adopted by the Victims' Representative to the closing arguments should not be condoned.

²³ *Prosecutor v. Lubanga*, ICC-01/04-01/06-925, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, 13 June 2007, para. 28 ("[A]n assessment will need to be made in each case as to whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor").

²⁴ By the time Ms. Chana read this email, the Presiding Judge had stated that further "interruption" would not be granted to Defence counsel should he wish to make any further objection during the Victims' Representative's closing submissions. Transcript, p. 25.

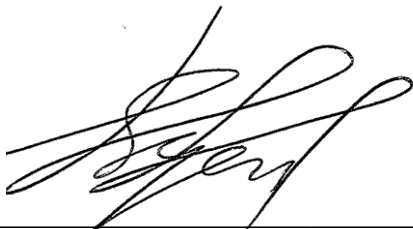
28. The Victims' Representative should not be allowed to publicly propagate scurrilous rumours and innuendo from untested sources. They have a personal responsibility in respect of the Code of Conduct, specifically Articles 24(1) and 24(2) to ensure that any allegations made are founded and that raising them in a public manner will not prejudice the overall fairness of the proceedings.

29. In an attempt to retroactively limit the damage done by these allegations, the Defence obtained from KASS FM the broadcast of 6 September in which Mr. Keter granted an interview. The translation of the transcript of the broadcast clearly demonstrates that the "inciteful" remarks and "threats" were not uttered by Mr. Keter.

IV. Conclusion & Request for Relief

30. Given the prejudicial and unfounded nature of the allegations brought to the Pre-Trial Chamber's attention by Ms. Chana, the Defence respectfully requests that the Pre-Trial Chamber:

- i. Remind the Victims' Representative of the limitations of her role under Article 68(3) and her obligations under the Code of Professional Conduct;
- ii. Obtain from the Victims' Representative the full identity and particulars of the alleged "field officer" from whom the counsel sourced the unfounded allegations, with a view to enabling the Court to take such measures as may be deemed fair and just to secure the Court's integrity and to maintain standards expected of parties to an international court;
- iii. Exclude the allegations from their consideration of the confirmation of charges; and
- iv. Direct that the Prosecution and Victims' Representative may not raise such issues in their respective confirmation final briefs.



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua Arap Sang and Mr. William Samoei Ruto

Dated this 30th day of September 2011

In Nairobi, Kenya