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Date: **9 November 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 Document

**Request by the Victims' Representative for authorisation to make a further
written submission on the views and concerns of the victims**

Source: Victims' Representative

Document 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 the Defence

Counsel for William Samoei Ruto
Joseph Kipchumba Kigen-Katwa, David
Hooper and Kioko Kilukumi Musau
Counsel for Henry Kiprono Kosgey
George Odinga Oraro
Counsel for Joshua Arap Sang
Joseph Kipchumba Kigen-Katwa

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

Paolina Massidda

**The Office of Public Counsel for the
Defence**

States' Representatives

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REGISTRY

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**Victims Participation and Reparations
Section**

Fiona McKay

Other

1. The Single Judge's "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings" of 5 August 2011¹ (the "5 August 2011 Decision") appointed a common legal representative of all 327 victims admitted to participate in the confirmation of charges proceedings.
2. Paragraph 101 of the 5 August 2011 Decision stated that:

... the Single Judge considers that the legal representative of the victims admitted to participate in the present proceedings may be authorised by the Chamber to make written submissions on specific issues of law and/or fact. This right may be employed if the legal representative proves, by way of an application to that effect, that the victims' personal interests are affected by the issue(s) at stake and the Chamber deems it appropriate, in light of, inter alia, the stage of the proceedings, the nature of the issue(s) concerned, the rights of the suspects and the principle of fairness and expeditiousness of the proceedings.
3. Pursuant to that decision, the victims' representative requests authorisation to file this additional written submission to inform the Chamber briefly of additional views and concerns expressed by participating victims.
4. It is noted that Article 68(3) of the Statute provides that:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
5. It is submitted that under this provision, the Chamber may authorise the views and concerns of victims to be presented at any stage, subject to the requirement that such views and concerns must be presented "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".
6. The concern which the victims' representative now wishes to present could not have been raised earlier because it is a concern that was communicated to the victims' representative only during the victims' representative's consultations with 126 of her clients on 12 and 18 October 2011, during her

¹ ICC-01/09-01/11-249

most recent mission to Kenya. It was not possible for the victims' representative to consult with these clients earlier. Had that been possible, the victims' representative would have done so, bearing in mind that the 5 August 2011 Decision originally envisaged that the victims' representative would consult with all of her clients by 22 August 2011.

7. If permission is granted to make further submissions, those further submissions will be as follows.

Victims' views and concerns on the confirmation of charges hearing communicated to the Legal Representative

8. The victims' representative submits that it is her duty as a legal representative of participating victims to forward to the Chamber the views and concerns of her clients.
9. In the victims' representative's consultation meetings with her clients in October 2011, the victims appreciated that most of the Prosecution's evidence had been filed confidentially, and that they therefore did not know the full extent or scope of the Prosecution evidence. However, the majority of the victims expressed concerns that the case presented by the Prosecution at the confirmation of charges hearing, as it appeared to the victims and would have appeared to members of the public observing those proceedings, did not fully accord with the victims' own personal experiences of the events in question.
10. A related concern expressed by all the victims was that it was not apparent to them that the Office of the Prosecutor ("OTP") had conducted a meaningful investigation into the eyewitness experiences of victims. These victims said that they had not been interviewed by the OTP and were not aware of anyone in their locality having been interviewed by the OTP. Nor were they aware of the OTP having ever come to their localities to conduct on-site investigations. Some of the victims felt that the failure of the OTP to conduct on-site investigations or to interview victims could explain why the case as presented

by the Prosecution did not fully accord with the victims' own personal experiences.

11. Matters that these victims considered were not adequately reflected in the Prosecution case, but which could have been if victims had been interviewed and on-site investigations conducted, included the following:

- a. Some of the victims felt that the Prosecution had failed to present evidence of the historical origins of the ethnic and political strife between the Kalenjin and Kikuyu, which would have put the post-election violence of 2007/2008 in context. One victim, for example, remarked that there is a misperception that it was in the time of President Kenyatta that Kikuyus were brought from Central Province to settle in other areas especially in the Rift Valley, when in fact most Kikuyus in the Rift Valley were descended from Kikuyus brought there generations earlier in the colonial period as slaves and farm workers. The same victim pointed out that after the 2005 referendum, the ODM became the vehicle of other tribes supposedly fighting against the historical injustices committed by the Kikuyu, hence their claim that it was "41 tribes against one".
- b. The majority of the victims consulted were of the firm opinion that there is a lot of evidence that has yet to be obtained on the crimes, and were concerned about this, having been personally and materially affected by the crimes, and being from the communities affected by the crimes.
 - i. A majority of the victims were concerned that adequate investigation has not been conducted into whether there was involvement in the crimes committed by persons higher up in the then ODM party, including Raila Odinga who was the head of the party. Two victims in particular considered that they had witnessed events on the ground material to this issue.

- ii. Victims expressed concern at the omission from the charges, not only of the crimes of looting and destruction of property, but the crime of rape. They considered that these crimes were rampantly committed during the violence. One of the victims said on this point “Why didn’t [the Prosecution] visit the camps? We know of the rape cases that took place during the violence. Why didn’t he come and obtain the evidence [on this]?” The same victim went on to say that his personal view was that there was stronger evidence than what was displayed by the Prosecution during the confirmation of charges hearing. This victim said that “rape and things like burning and looting were not presented as crimes yet they happened” and that he felt that more needed to be done by the Prosecution.
- iii. Victims considered that they could give evidence relevant to whether the crimes occurred as a spontaneous reaction to the announcement of the results of the Presidential election on 30 December 2007. All the victims consulted, without exception, considered, on the basis of their own experiences, that the attacks were planned and coordinated as opposed to spontaneous and haphazard. The victims consulted were largely of the conviction that the violence had been planned and implemented with the particular aim and purpose of removing Kikuyus from the Uasin Gishu area.

Some of the victims spoke of having received threats of the attack well in advance of the elections. One victim said that it was as early as September 2007 that he began receiving threats that Kikuyus would be removed from the Uasin Gishu area. He stated how even at the polling station Kikuyus were subtly threatened by an area Councillor who said “Vote now, but after voting you’d better know what you’ll do.”

Another victim commented that he had attended several campaign rallies for the ODM in 2007 prior to the elections. In one of the rallies, the victim heard a statement uttered in Kalenjin to the effect that if the votes were not for the three R's (Raila, Ruto and Rajab –the council aspirant), the Kikuyus living in the area would walk to Othaya. The same victim added how, in another rally, he had heard remarks that there was a bus for Kikuyus and it was filled with fuel.

One victim said that at the time they were voting, the Kalenjin made certain distinctive sounds that were heard from one area to the next almost simultaneously.

Another victim said: "There were certain peculiar leaves that they placed on the roofs of their houses which were meant to identify which was a Kalenjin home and which was not. Any premises that did not have these leaves were raided and robbed."

Several of the victims pointed to the fact that the violence was visited upon them in a manner similar to the ethnic violence they had experienced in the previous cycles of electoral violence in 1992 and 1997. One of the victims described how he was caught in clashes of 1992 where Kalenjin men took his cattle: "The people who did this wore red 'Shukas' [a traditional sheet-like wrapping commonly worn over the upper torso] and white shorts. In 2007 – 2008 they came to my home and burnt my house at around 9:00 am. They were dressed in the same manner [red 'Shukas' and white shorts]."

Another victim stated "I was in the 1992 attack. In 1997 I was given protection by the area Chief. The Chief was beaten because he protected me [...] Before the 2008 violence, I had been warned. I was told one week before the 30th [December 2007] by several

public officials including the area Councillors and the chief to stay in my house. They burnt my house the day before the results were announced. They came burning our houses and were calling us by name.” The same victim also said that, several weeks before the violence, he had been warned by a Kalenjin Judge who lived in the area not to buy more land in the area at that time. The victim pointed out that he was warned both in 1997 and 2007 well before the attacks happened – an indication that he considers makes it unlikely the violence happened abruptly. “You cannot say it wasn’t planned when they had bought paraffin, powerful torches and sharp machetes for that day”.

Legal Remedy

12. The victims’ representative submits that in cases where, at the confirmation of charges hearing, the Chamber considers that a case has not been sufficiently investigated by the Prosecution, there are two main ways of proceeding.
13. First, the Chamber may, pursuant to Article 61(7)(c)(i) of the Statute, adjourn the hearing and request the Prosecutor to consider providing further evidence or conducting further investigation with respect to a particular charge.
14. Secondly, in cases where there is sufficient evidence to justify the confirmation of charges according to the relevant threshold “substantial grounds to believe” (notwithstanding that the Chamber does not consider that the case has been adequately investigated by the Prosecution), the Chamber could confirm the charges but request the Prosecutor to consider providing further evidence or conducting further investigation prior to the trial. In that event, the Prosecution could, if appropriate, subsequently apply to the Pre-Trial Chamber under Article 61(9) of the Statute to amend the charges prior to the trial.

15. It is submitted that the Court has a legal duty to search for the truth. This is reflected, for instance, in Article 69(3) of the Statute, which provides that “The Court shall have the authority to request the submission of all evidence that it considers necessary *for the determination of the truth*” (emphasis added).

16. The Court has also recognised the victims’ right to the truth about the crimes that they suffered and the victims’ meaningful contribution to help the Chamber establish the facts. It was stated in the case of Prosecutor v. Katanga & Ngudjolo that:

The victims’ core interest in the determination of the facts, the identification of those responsible and the declaration of their responsibility is at the root of the well-established right for the truth for the victims of serious violations of human rights.²

... when the right to truth is to be satisfied through criminal proceedings, victims have a central interest in that the outcome of such proceedings: (i) bring clarity about what indeed happened; (ii) close possible gaps between the factual findings resulting from the criminal proceedings and the actual truth.³

The Chamber is of the view that the only legitimate interest the victims may invoke when seeking to establish the facts which are the subject of the proceedings is that of contributing to the determination of the truth by helping the Chamber to establish what exactly happened. They may do so by providing it with their knowledge of the background of the case or by drawing its attention to relevant information of which it was not aware.⁴

17. Having not seen all of the Prosecution evidence, the victims’ representative is not in a position to express a view on which of the two courses referred to above would be the more appropriate. However, it is submitted that it would have serious implications for the legal duty to search for the truth if the issues in this case were to be determined without any further investigation into the matters referred to above.

² *Prosecutor v. Katanga & Ndugjolo*, ICC-01/04-01/07-474, “Decision on the Set of Procedural Rights Attached to the Procedural Status of Victim at the Pre-Trial Stage of a Case”, 13 May 2008, para. 32

³ *Ibid.*, para. 34

⁴ *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-1788tENG, “Decision on the Modalities of Victim Participation at Trial”, 22 January 2010, para. 60

18. The victims' representative would therefore request the Chamber, when reaching its decision under Article 67(1), to have regard to the victims' concerns expressed above.

A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke, positioned above a horizontal line.

Sureta Chana

Dated this 9th day of November 2011

At London, United Kingdom