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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 Document

Request by the Victims' Representative for access to confidential materials

Source: Victims' Representative

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

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Ms Sureta Chana

Legal Representatives of the Applicants

Unrepresented Victims

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**Victims Participation and Reparations
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Other

Introduction

1. The Single Judge's "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings" of 5 August 2011 (the "5 August 2011 Decision") appointed a common legal representative of all the victims admitted to participate by that decision (the "victims' representative").¹
2. Paragraph 92 of the 5 August 2011 decision states: "In relation to those decisions, filings or evidence that are classified as 'confidential', the Chamber retains the option to decide on a case-by-case basis either *proprio motu* or upon receipt of a specific and motivated request, whether to grant victims' legal representative access thereto".
3. Pursuant to paragraph 92 of the 5 August 2011 decision, the victims' representative now makes the following request for access to the following confidential materials filed in these proceedings by the Prosecution:
 - a. Annex B to the "Prosecution's Amended Document Containing the Charges and List of Evidence submitted pursuant to Article 61(3) and Rule 121(3), (4) and (5)" of 15 August 2011;²
 - b. Annexes A to E to the "Prosecution's submission of comprehensive in-depth analysis chart of evidence included in the list of evidence" of 1 August 2011;³
 - c. Annex A to the "Prosecution's submission of the confidential redacted version of the Article 58 Application" of 26 July 2011;⁴

¹ ICC-01/09-01/11-249.

² ICC-01/09-01/11-261.

³ ICC-01/09-01/11-241.

⁴ ICC-01/09-01/11-224.

- d. Versions of each of the Prosecutor's communications to the Defence of incriminating evidence pursuant to Article 61(3)(b) of the Statute, in the form in which they were provided by the Prosecutor to the Defence;
- e. Versions of each of the Prosecution's communications to the Defence of potentially exculpatory evidence and/or material for the preparation of the Defence, in the form in which they were provided by the Prosecutor to the Defence;
- f. A copy of all the evidence supplied by the Prosecution to the Defence teams, in the form in which it was provided by the Prosecutor to the Defence (both incriminating evidence, and potentially exculpatory evidence).

Applicable legal principles

4. Article 68(3) of the Statute provides:

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. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

5. Rule 121(10) of the Rules of Procedure and Evidence (the "Rules") provides that:

The Registry shall create and maintain a full and accurate record of all proceedings before the Pre-Trial Chamber, including all documents transmitted to the Chamber pursuant to this rule. Subject to any restrictions concerning confidentiality and the protection of national security information, the record may be consulted by the Prosecutor, the person and victims or their legal representatives participating in the proceedings pursuant to rules 89 to 91.

6. In the *Katanga & Ngudjolo* case, the Single Judge of the Pre-Trial Chamber held:

126. The question then arises as to which specific procedural rights are consistent with the procedural framework provided for by the Statute and the Rules for the pre-trial stage of a case before the Court and could therefore be attached to the procedural status of victim pursuant to article 68(3) of the Statute and rules 91 and 92 of the Rules.

127. In the view of the Single Judge, these specific procedural rights can be divided into six groups. The first group is comprised of the right to have access, prior to and during the confirmation hearing, to the record of the case kept by the Registry, including to the evidence filed by the Prosecution and the Defence pursuant to rule 121 of the Rules.

128. The Single Judge considers that this right includes the right to have access to all filings and decisions contained in the record of the case regardless of whether they are classified as public or as confidential. It does not, however, include the right to access those filings and decisions classified as "ex parte" and only available to the Prosecution, the Defence, a different participant, the Registry or a combination thereof.

129. In the view of the Single Judge, this first group also includes the right to be notified on the same basis as the Prosecution and the Defence of all decisions, requests, motions, responses and other procedural documents which are filed in the record of the case and are not classified "ex parte" and only available to the Prosecution, the Defence, a different participant, the Registry or a combination thereof. ...

132. Furthermore, the right to have access to the evidence proposed by the Prosecution and the Defence and contained in the record of the case also falls within this first group. However, this right to have access to the evidence is limited to the format (unredacted versions, redacted versions or summaries, as well as electronic versions with the data required by the e-Court Protocol) in which the evidence is made available to the party which has not proposed it.

...

151. In this regard, the Single Judge notes that in the Lubanga Case, as well as in the present case, the bulk of the evidence filed by the Prosecution and the Defence in the record of the respective cases has been classified as confidential. Therefore, if victims were to be denied access to confidential filings, they would essentially

be prevented from effectively participating in the evidentiary debate held at the confirmation hearing.⁵

7. In the *Katanga & Ngudjolo* case, the Trial Chamber held:

121. The Chamber is of the view that, in order to promote effective participation of victims in the trial, the Legal Representatives must be able to consult all of the public and confidential decisions and documents in the record of the case, with the exception of any document classified as *ex parte*. ...

122. As regards access to the evidence, the Chamber is of the view that, in order to give full effect to victim participation during the trial, the Legal Representatives should be authorised to consult the material adduced by the parties. In its Decision of 27 November 2009, it considered that it must grant them leave to consult the material the Prosecutor intends to use when questioning prosecution witnesses at least three days prior to the corresponding testimony. By Decision of 1 December 2009, the Chamber also granted the Legal Representatives leave to access the table of incriminating evidence established by the Prosecutor. Lastly, the Chamber recalls that one of the two Legal Representatives of the Victims, Mr Fidel Nsita Luvengika, was granted access to the confidential case record at the pre-trial stage. At that time, the distinction between the Legal Representatives was made only on the basis of the anonymity of the victims they represented. Since the victims represented by Mr Jean-Louis Gilissen are now no longer anonymous, that access should also be extended to include him. Access to the evidence covers the entire case record. Accordingly, the Legal Representatives of the Victims should have access to the entire record available via the Ringtail system.

123. Nevertheless, the Chamber is of the view that the confidentiality obligation to which the Legal Representatives are bound means that access to the evidence in the case, as set out in the table and registered in the Ringtail system, which is maintained by the Registry and accessible to the Chamber, is restricted to themselves and to them alone: such access cannot be extended to include their clients.⁶

⁵ *Prosecutor v. Katanga & Ngudjolo*, "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case," Pre-Trial Chamber I (Single Judge), ICC-01/04-01/07-474, 13 May 2008 (the "*Katanga* 13 May 2008 Decision"), paras 126-129, 132, 151 (footnotes omitted).

⁶ *Prosecutor v. Katanga & Ngudjolo*, "Decision on the Modalities of Victim Participation at Trial," Trial Chamber II, ICC-01/04-01/07-1788-tENG, 22 January 2010 (the "*Katanga* 22 January 2010 Decision"), paras 121-123 (footnotes omitted).

8. In *Garda* case, the Pre-Trial Chamber held:

5. In addition, as already stated by the Chamber, the personal interests of victims are affected by the outcome of the pre-trial stage of the case insofar as it is directed at either (i) confirming the charges against those allegedly responsible for perpetrating the crimes which caused the victims to suffer harm; or (ii) declining to confirm the charges against those not responsible for such crimes, so that the search for those who are criminally liable can continue.

...

7. ... the Statute and the Rules provide victims with a meaningful role in criminal proceedings before the Court so that they can have a substantial impact on the proceedings. ... Therefore, victims shall be enabled to fully participate in the debate held at the confirmation hearing, bearing in mind its limited scope.⁷

9. In the *Gombo* case, the Trial Chamber held:

47. This Chamber is persuaded that in order to facilitate full participation by victims, it is in the interests of justice that those who have been granted leave to participate are afforded access to the confidential material in the case, relevant to their views and concerns. However, given the obligation of the Court to protect those affected by its activities, it is necessary that this opportunity is subject to the restriction that necessary protective measures or the security of individuals or organisations will not be adversely affected. Therefore, in order to guarantee the effective expression of the views and concerns of participating victims, they are, through their legal representatives, to be notified in a timely manner of public and confidential filings whenever the Trial Chamber has resolved that their interests are engaged. In order to make this approach effective, the parties and participating victims are to inform the Chamber whenever confidential filings may engage the interests of particular participating victims. The legal representatives are not to communicate confidential information to their clients, or anyone else who is not authorised to receive it, without the permission of the Chamber.

48. In a further joint submission, the legal representatives of victims currently participating in this case have requested the notification of certain documents in order to prepare for trial. They request notification, as soon as possible, of: a) the redacted version of the standard application forms of their clients, as notified to the prosecution and the defence for the purposes of Rule 89 of the Rules; b) the non-redacted version of the Second Amended Document containing the charges (filing 594-Conf-Exp-AnxA); c) the Prosecution Summary of its presentation of evidence and related documents (filings 592- AnxA, 595-Conf-Exp-AnxA and B); the d)

⁷ *Prosecutor v. Garda*, "Decision on victims' modalities of participation at the Pre-Trial Stage of the Case," Pre-Trial Chamber I, ICC-02/05-02/09-136, 6 October 2009, paras.

Updated Consolidated Version of the In-Depth Analysis Chart of Incriminatory Evidence (filings 781-Conf-Exp- AnxA and previous versions thereof); and e) the prosecution's witness statements, and attached documents and materials, if any, to be used at trial.

49. In the Lubanga case, the victims' legal representatives received full disclosure of witness statements and also the confidential version of the Summary of Presentation of Evidence. Given the immediacy of the commencement of trial, and the need for victims to prepare for their participation therein, the Chamber considers that the victims' legal representatives in this case should receive the above documents, in the redacted form provided to the defence as the case may be, no later than 16.00 on 8 July 2010.⁸

10. In the *Muthaura et al.* case, the Single Judge of this Pre-Trial Chamber held:

9. ... determining whether or not it is appropriate to grant any specific rights to the victims is an exercise that cannot be conducted *in abstracto*, but, conversely, shall be performed on a case-by-case basis, upon specific and motivated request by the legal representative and "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial", as stipulated by article 68(3) of the Statute.

10. With specific regard to the rights of the victims to access decisions, filings and evidence that are classified as confidential, the Single Judge has held in the Decision on Victims' Participation that "the Chamber retains the option to decide on a case-by case basis, either *proprio motu* or upon receipt of a specific and motivated request" whether to grant the victims' legal representative access to such material.

11. The Single Judge wishes to stress that, in the event of requests to access material withheld to the victims pursuant to rule 121(10) of the Rules of Procedure and Evidence, as in the present case, the approach established in the Decision on Victims' Participation is designed to avoid situations in which the victims' legal representative aims at collecting, indiscriminately, all material on which the parties intend to rely for the purposes of the confirmation of charges hearing, irrespective of its pertinence to any issue at stake and regardless of findings as to whether victims' interests are affected by that issue.

12. ... [A request for a decision by a victims' representative for access to all *inter partes* confidential material filed in the record of the case] is essentially departing from the approach towards

⁸ *Prosecutor v. Gombo*, "Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings," Trial Chamber III, ICC-01/05-01/08-807-CORR, 12 July 2010, paras 47-49.

victims' rights under article 68(3) of the Statute as well as from the Decision on Victims' Participation. The Single Judge also agrees with the submission of the Prosecutor that "[a]ccess to confidential material should not be granted except on a case-by-case basis, and only when the victims can demonstrate that the material relates to issues specific to their interests and the Chamber determines that the interests of the victims outweigh the need to retain the confidentiality of the information".

13. In the view of the Single Judge, the Request runs contrary to the principle according to which any request pursuant to article 68(3) of the Statute shall demonstrate how the personal interests of victims are affected by the specific issue(s) at stake. Absent any specific issue identified by the victims' legal representative in the present circumstances and having failed to show any impact thereof on the victims' personal interests, the Single Judge considers that the Request remains in the abstract and must be rejected.⁹

How the victims' personal interests are affected

11. As was submitted in the opening statement of the victims' representative at the confirmation of charges hearing, the post-election violence of 2007-2008 was not the first time that Kenya had experienced election-related violence. The concern was expressed on behalf of the victims that such previous instances of election violence had gone unpunished, and that the authorities in Kenya had not displayed a serious resolve to punish those responsible for the violence in 2007-2008. It was stated on behalf of the victims that:

... Against this background, the exercise of jurisdiction by this international court is seen by the victims I represent as finally a basis for hoping that some measure of justice for the crimes visited upon them may realistically be achievable. Thus these proceedings directly affect the personal interests of those I represent, both at the very individual level and also at the family community level. It affects the future of their country and their succeeding generations who will live in it. This is a very serious matter.

The victims I represent are very mature. They understand that justice being done means a fair trial before an independent and

⁹ *Prosecutor v. Muthaura et al.*, "Decision on the Request for Access to Confidential *Inter Partes* Material," Pre-Trial Chamber II (Single Judge), ICC-01/09-02/11-326, 14 September 2011, paras 9-13 (footnotes omitted).

impartial tribunal in accordance with the law. They all know the concept of a person is innocent until proven guilty. What is important to them, however, now, is that the criminal justice process has now engaged seriously, professionally and rigorously with what has occurred.¹⁰

12. The victims have also signalled their intention to seek reparations for the losses they have suffered as a result of the crimes.
13. The personal interests of the victims would therefore clearly be directly affected if the crimes of which they were victims are not diligently and adequately investigated and prosecuted by the Prosecutor of the International Criminal Court.
14. In a case before this Court where charges have been confirmed, if the case is not properly investigated and prosecuted, one possible outcome is that a person who is in fact guilty of a crime might be acquitted, as a consequence of the Prosecution having failed to bring sufficient evidence to establish guilt, notwithstanding that a sufficiency of evidence might have been available if the case had been more diligently and adequately investigated and prosecuted.
15. If this were to occur, the judgment of acquittal would, by virtue of the principle of *ne bis in idem* in Article 20(2) of the Statute, prevent that person from being tried in any other court in respect of that crime. An acquittal by this Court resulting from a lack of diligent and adequate investigation or prosecution by the Prosecutor would thus prevent the case ever being dealt with adequately.
16. By virtue of the above, the diligence and adequacy of the investigation and prosecution by the Prosecutor is a matter having a very direct bearing on the interests of the victims.

¹⁰ Transcript, 1 September 2011, page 82, line 24, to page 83, line 12.

The matters of concern to the victims

17. During the course of the confirmation hearing, the Defence made repeated attacks on the competence and diligence of the investigation in this case by the Prosecutor. Non-exhaustive examples of such Defence attacks include the following:

2 September 2011 (Mr Hooper)

... there's a further issue that concerns us which we've touched on already and that is the failure of the Prosecutor, we say, to investigate exculpatory matters. We've referred to it before. The duty, we know, is the duty imposed on the Prosecutor, a mandatory duty imposed by Article 54, and I'll read it out. We're familiar with it, but it's so central to the logic behind this court.¹¹

There's no evidence here that the Prosecutor's approached any of the notables and the people that you or I given a week's investigation duties in Kenya would do. This isn't clever stuff. It's basic stuff. And if you went to a locality, Eldoret, or wherever it was, you'd go and knock on certain doors if you're looking for information. And it's our submission that if you'd done that, you'd have some across a fair fistful of statements from people on the way of an exonerating nature, and the fact that there isn't even one is a very, I think, brave question mark against the nature of the Prosecution's investigation.¹²

And this is an investigation at the international level, and the Defence surely have a reasonable expectation that that kind of vigorous inquiry would be conducted. It would be done at a national level on serious crime. Why is it not done here?¹³

5 September 2011 (Mr Oraro)

Now, what I would like to humbly conclude with, is to say that the violence in Kenya was very unfortunate, and all of us Kenyans regret what happened. So long as proper investigation can be done and culprits made to account, it would be for the benefit of Kenyans and for the benefit of those -- all of those who are interested in Kenya. In my humble submission, as we have pointed out, and I would not -- I'm not suggesting that any -- any person has been properly investigated, but restricting myself to Mr. Kosgey, I would wish to humbly state that no such

¹¹ Transcript, 2 September 2011, p 113 lines 16 to 21.

¹² Transcript, 2 September 2011, p 114 line 21 to p 115 line 4.

¹³ Transcript, 2 September 2011, p 116 lines 13-16.

investigation had been carried out in respect of Mr. Kosgey, and it would be really unfortunate if the charges against him are confirmed on the basis of the evidence so far disclosed by the Prosecution, which is not only unsatisfactory, but has denied him that fundamental right of fully placing before this Chamber all the necessary best evidence in his possession so that if the case is confirmed, it can go forward with the realisation of a proper trial for a man against whom there is sufficient evidence to establish substantial case to believe.¹⁴

5 September 2011 (Mr Kigen-Katwa)

Madam President, we have not on our part given that up the Prosecution did not investigate¹⁵

6 September 2011 (Ms Hambrick)

... the Prosecution, realising the inherent weaknesses in its case, deliberately did not investigate or disclose exculpatory evidence per their obligation under Article 54.¹⁶

You may ask, then, given the dearth of credible evidence that has been presented by the Prosecution, why does this case exist? Simply put, it is because of this failure to investigate. In our submission, there has been, at best, a dereliction of duty on the part of the Prosecution with respect to the case against Mr. Ruto, Mr. Kosgey, and Mr. Sang.¹⁷

We submit that the Prosecution's case is built around statements obtained from career witnesses, i.e., which is who have spoken to every commission, every court investigating post-election violence in Kenya. The Prosecution has failed to independently investigate the post-election violence, instead relying primarily on the work of these organisations.¹⁸

8 September 2011 (Mr Kilukumi)

... we submit that the Prosecutor did not carry out any genuine investigations whatsoever. He landed in the Republic of Kenya, armed himself with the reports from human rights group, Human Rights Watch in particular, armed himself with reports from the Kenya National Commission of Human Rights, armed himself with the report of the Commission into Post-Election Violence,

¹⁴ Transcript, 5 September 2011, p 47 line 21 to p 48 line 11.

¹⁵ Transcript, 5 September 2011, p 67 lines 16-17.

¹⁶ Transcript, 6 September 2011, p 25 lines 4-6.

¹⁷ Transcript, 6 September 2011, p 27 lines 16-20.

¹⁸ Transcript, 6 September 2011, p 29 lines 14-18.

popularly known as the Waki Report, and he found standby witnesses, witnesses, if you read the transcript carefully, every of those witnesses has had previous conduct, has made other statements previously, and indeed they are just doing this as a formality when they're being interviewed by the Office of the Prosecutor. So armed with this, he came to the Court.¹⁹

The only thing you can credit the office the public prosecutor is creativity, but investigations never carried out whatsoever.²⁰

When the investigations are so sloppy, it also shocks the suspects, and it could not have been the intention of the Rome Statute that suspects would be shocked by sloppiness of investigations.²¹

... in conclusion, we are asking you to find that there were no genuine, independent, and open-minded investigations in Kenya. We can't even start to talk about integrity and honesty.²²

... the Prosecution did not do any investigation, and the victims' counsel has demonstrated how they would probably have done a better work ...²³

18. It is acknowledged that the Prosecution did seek for refute these allegations.

For example, on 8 September 2011, Ms Tai said on behalf of the Prosecution that:

Finally, the Prosecution addresses the Defence -- a variety of attacks on its investigation. We've heard attacks on the wholesale integrity of the investigation, failure to claim potentially exculpatory evidence or claims that the mandate, Prosecution's mandate, was not adhered to. The Prosecution investigated possible exonerating material, including the possibility that the activities of the suspects were the consequence of political interest or other reasons.²⁴

19. The victims' representative is naturally extremely concerned at the suggestion, which has been vigorously repeated by the Defence, that the Prosecution has not diligently and adequately investigated this case.

¹⁹ Transcript, 8 September 2011, p 42 lines 4-14.

²⁰ Transcript, 8 September 2011, p 43 lines 20-21.

²¹ Transcript, 8 September 2011, p 44 lines 13-16.

²² Transcript, 8 September 2011, p 49 lines 11-13.

²³ Transcript, 8 September 2011, p 64 lines 16-18.

²⁴ Transcript, 8 September 2011, p 13 line 19 to p 14 line 1.

20. As has been noted above, if a case goes to trial without diligent and adequate investigation, it risks the possibility of a person being acquitted simply on the basis of the lack of adequate investigation. By virtue of the principle of *ne bis in idem*, it will then become impossible for the case ever to be dealt with adequately.
21. For this reason, it is the submission of the victims' representative that if it appears to the Pre-Trial Chamber at the confirmation of charges stage that a case has not been diligently and adequately investigated, the appropriate course would be for the Pre-Trial Chamber to exercise its power under Article 61(7)(c)(i) to adjourn the hearing and to request the Prosecutor to consider providing further evidence or conducting further investigation. In a more extreme case, the appropriate course might be for the Pre-Trial Chamber to exercise its power under Article 61(7)(b) to decline to confirm the charges on the ground of insufficient evidence. In either case, the Chamber's course of action in not confirming the charges will be without prejudice to the ability of the Prosecutor to request confirmation of the charge again at a later date once the request can be supported by additional evidence (Article 61(8)).
22. The difficulty for the victims' representative at this stage is that without access to the evidence that the Prosecution has produced to date, the victims' representative is in no position at all to form any view on whether, as contended by the Defence, the Prosecution investigation has been wholly inadequate, or whether, as apparently contended by the Prosecution, there has been a proper investigation. At this stage, the victims' representative is entirely marginal to this debate, and is unable to participate in the proceedings in relation to this issue at all. If the investigation has not been diligent and appropriate, that will affect the interests of the victims in the most direct way. However, without access to the Prosecution evidence, the victims' representative cannot even begin to guess at the details of the potential issues

that have arisen in this respect. On this most fundamental issues, the victims have in effect been wholly excluded.

23. Without prejudice to the generality of what is said above, it is noted that one issue that arose in the course of the confirmation of charges hearing concerned possible contradictions in the evidence concerning the involvement of, or connection with, the crimes committed by the present Prime Minister of Kenya, Mr Raila Odinga. Relevant transcript references include the following:

For the Defence:

2 September 2011 (Mr Hooper)

... this document is, and this is by another witness. And this is EVD-PT-OTP-00399, and we have at the top -- well, at the bottom. You have to go from the bottom on this one. It has Raila. That's Raila Odinga, the Prime Minister, the current serving Prime Minister of Kenya. This is this structure. And you go down. You have Ruto and Kosgey, Honourable Kosgey, Honourable Ruto. And then we go down to Cheruiyot, Cheramboss, Koech. South Rift, Central Rift and North Rift. And then we come down to divisional commanders. Two things: The actual structuring is clearly different, the nominations are different, and we have here Raila Odinga as the named chief man, commander. Witnesses elsewhere have mentioned Mr. Odinga, one claiming that he said the waves of calm, they will be swept away. Meaning perhaps the Kikuyu? Who knows. Others claiming that -- one other witness claiming that the finance or finance had come from Raila Odinga. And the point I make here is not to implicate Raila Odinga, but to indicate that it would seem the Prosecution does not accept that account. As far as we know, there's been no effort to bring Mr. Odinga before this court, but more than that, between these two witnesses, there is a significant change in structure, and this against an inner context where the Defence have very little indications of structure and precious little from this document containing the charges.²⁵

September 2011 (Mr Kilukumi)

The reason for saying this, Madam President and your Honours, is that Witness number 0006, in his own handwriting, draws a chart showing the flow of communication, and on top of that chart -- Madam President, this is EVD-PT-OTP-00399. At the top of the chart he puts four divisional commanders, and the four divisional

²⁵ Transcript, 2 September 2011, p 146 line 8 to p 147 line 3.

commanders are General Cheruiyot, Cheramboss, and General Koech, and these two are reporting, according to this witness, to Honourable Kosgey and Honourable Ruto, and those two are ultimately reported to Raila Odinga, according to the testimony, according to the chart that has been placed before the Court. And what does the Prosecutor tell you in her closing speech? She tells you they do not believe Raila Odinga is involved in this. In other words, they do not believe this witness. If the Prosecutor himself does not believe this witness, why should this Chamber have reason to believe anything that has been said by this witness?²⁶

September 2011 (Mr Ryder)

The second inconsistency raised by the Prosecution before you was Witness 0006's mention of Mr. Raila Odinga. As we understand it, the Prosecution have now conceded that they have no evidence that Mr. Raila Odinga was involved. Our point is a simple one. Witness 0006 reports that on the basis of what he was told in a meeting, Raila Odinga was at the head of the alleged network. In this regard, Witness 0006's evidence is clearly inconsistent with the other witnesses. No one else claims to have been told that. No one else claims that was the case. And the Prosecution do not suggest it now.²⁷

For the Prosecution:

8 September 2011 (Ms Tai)

... Mr. Kosgey's Defence claims that a particular exhibit produced by Witness 0006 identifies Odinga as the top, the top of the network's hierarchy and that this is in contravention with the rest of the Prosecution's evidence. We assert that that is, in fact, untrue and that the Prosecution has no evidence at this time indicating that Raila Odinga was involved in the planning or implementation of the crimes that are the subject of this case. In any event, even looking at this information at the light most favourable to the Defence, does it exonerate Mr. Kosgey? We submit it doesn't.²⁸

24. It now appears that evidence of the involvement of Mr Raila Odinga may be of particular pertinence, given that the Defence has in its purported challenges to jurisdiction indicated that it will be arguing that an "organizational policy" within the meaning of Article 7(2)(a) of the Statute must be a policy of an

²⁶ Transcript, 8 September 2011, p 41 lines 10-23.

²⁷ Transcript, 8 September 2011, p 58 lines 7-16.

²⁸ Transcript, 8 September 2011, p 7 lines 11-19.

organisation that partakes of some characteristics of the State, as opposed for instance to mafia-type groups, mobs, groups of (armed) civilians or criminal gangs.

25. The contents of the purported jurisdictional challenges of the Defence, and of the responses thereto by the victims' representative and the Prosecution, are not unnecessarily repeated here. Nor does the victims' representative enter here into any debate as to the correctness of the interpretation of Article 7(2)(a) that has been advanced by the Defence. That issue would be for argument at trial in the event that the charges in this case are confirmed. It is merely noted that one of the arguments of the victims' representative in response to the purported Defence challenges to jurisdiction is that the expression "a State or organizational policy" in Article 7(2)(a) of the Statute must at the very least extend to a political organisation which has the objective of becoming the government, or part of the government, especially where the acts in question were related to the furtherance of that objective. In that context, the possible involvement of Mr Raila Odinga is of relevance, given that Mr Odinga was a candidate for President at the 2007 election challenging the incumbent President Mwai Kibaki, and given that following the post-election violence Mr Odinga became the Prime Minister as a result of a power-sharing agreement.
26. While it is apparent that this issue of fact is of potential relevance, without access to the Prosecution evidence in this case, the victims' representative is unable to make any assessment of whether this matter has been diligently and appropriately investigated by the Prosecutor. The victims' representative is unable to take any position on the question, for instance, whether it should be urging the Pre-Trial Chamber to exercise its power under Article 61(7)(c)(i) to adjourn the hearing and to request the Prosecutor to consider providing further evidence or conducting further investigation on this matter. Again, on this issue the victims' representative is wholly marginalised and excluded from the proceedings.

27. Finally, it is noted that the victims' representative has raised the concern that acts of destruction or burning of property, or looting, or of infliction of injuries, are at present not clearly and expressly included within the charges. Again, the victims' representative will not repeat unnecessarily all that has already been said on that subject. It is merely noted that it does appear that the charges presented by the Prosecution do not reflect the full extent of the evidence of crimes on which the charges are based. Without access to the evidence, the victims' representative is unable to assess whether or not there might be other areas where the charges presented by the Prosecution do not accurately or fully reflect the Prosecution evidence. On this issue also, the victims' representative is prevented from meaningful participation without access to the Prosecution evidence.

Conclusion

28. In the light of the matters set out at paragraphs 4-10 above, it is submitted that the request of the victims' representative for access the materials listed at paragraph 3 above is timely, measured and appropriate.
- a. The right of a victims' representative to have access to all filings, public and confidential, has been recognised in other cases.
 - b. The present request does not seek access to any *ex parte* filings.
 - c. The present request only seeks access to confidential materials emanating from the Prosecution, and does not seek access to any material that has not been provided to the Defence. Where material has been provided by the Prosecution to the Defence in redacted form, the present request seeks access in the same redacted form.
 - d. The present request is not a situation "in which the victims' legal representative aims at collecting, indiscriminately, all material on which the parties intend to rely for the purposes of the confirmation of

charges hearing, irrespective of its pertinence to any issue at stake and regardless of findings as to whether victims' interests are affected by that issue". The request has not been made prematurely. It has been made only after the oral confirmation of charges hearing, to address specific concerns that have arisen in the course of what was said at that hearing. It does not seek access to *all inter partes* confidential material filed in the record of the case, but is confined to material emanating from the Prosecution, and is confined to the evidence in the case. The material relates to concerns specific to the victims' interests where, it is submitted, the interests of the victims outweighs the need to retain the confidentiality of the information.

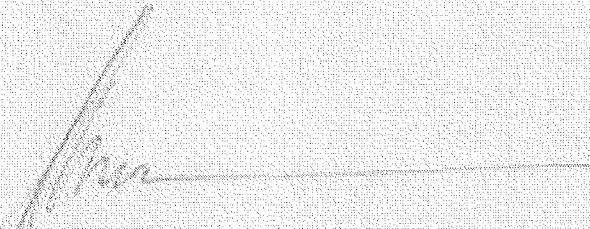
- e. It has been explained above how the personal interests of victims are affected by the specific matters at stake, and the impact thereof on the victims' personal interests. If the present request were denied, the victims would for the reasons given above "be prevented from effectively participating in the evidentiary debate".²⁹
- f. In granting the present request, it would be open to the Chamber to impose a condition that access shall be restricted to the victims' representative alone, and that such access shall not be extended to include the victims themselves.
- g. While some cases have drawn a distinction between anonymous victims and victims who were not anonymous,³⁰ that distinction is not based in the Statute or the Rules. Granting a victims' representative access to confidential materials where victims are anonymous would not of itself be inconsistent be "prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial", as stipulated by article 68(3) of the Statute. The reasons above for granting the present request are, it is submitted, compelling, and there are no countervailing

²⁹ *Katanga* 13 May 2008 Decision, para 151.

³⁰ See, for instance, *Katanga* 13 May 2008 Decision, paras 182-184.

considerations weighing against the granting of the present request. In the present case, in the 5 August 2011 Decision, the Single Judge has already rejected a Defence argument that permitting anonymous victims to question witnesses or present submissions concerning the evidential foundation of the parties' respective cases constitutes *per se* a prejudice to the rights of the suspects.²⁹ The reason why the victims in this case have so far remained anonymous has been due to concerns for their security.³⁰ It would be inconsistent with the object and purposes of the Statute of the Court if victims could be deprived of the right to participate meaningfully in proceedings before the Court unless they are prepared to put their own security at risk.

29. It is respectfully submitted that the present request is appropriate, and it is requested that it be granted.



Sureta Chana

Dated this 19th day of September 2011

At London, United Kingdom

²⁹ 5 August 2011 Decision, paras 124-126.

³⁰ 5 August 2011 Decision, paras 118-123; ICC-01/09-01/11-292, "Communication to the Chamber pursuant to the Chamber's Decision of 5 August 2011", filed by the victims' representative on 25 August 2011; ICC-01/09-01/11-282, "Communication to the Chamber pursuant to the Chamber's Decision of 5 August 2011", filed by the victims' representative on 25 August 2011.