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No.: ICC-01/09-01/11  
Date: 10 October 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 Document

With Public Annexes A, B, C, D, E, F and G  
and Confidential and *Ex Parte* Annex H

Response by the Victims' Representative to the "Defence Request Regarding  
Prejudicial Comments Made by Victims' Legal Representative Sureta Chana during  
Closing Statement"

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**  
Ms Sureta Chana

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented  
Applicants(Participation/Reparation)**

**The Office of Public Counsel for Victims**  
Ms Paolina Massidda

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

**States' Representatives**

**Amicus Curiae**

## **REGISTRY**

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**Registrar**  
Silvana Arbia  
**Deputy Registrar**  
Didier Preira

**Counsel Support Section**

**Victims and Witnesses Unit**  
Fiona McKay

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## Introduction

1. The victims' representative hereby responds to the "Defence Request Regarding Prejudicial Comments Made by Victims' Legal Representative Sureta Chana during Closing Statement" filed on 30 September 2011 (the "Defence Request").<sup>1</sup>
2. The Defence Request objects to a particular part of the closing statement of the victims' representative at the confirmation of charges hearing on 8 September 2011,<sup>2</sup> in which the victims' representative read out an e-mail that she had received that day from a field worker in Kenya (the "E-mail"). The E-mail stated that the field worker had received information that Mr Charles Keter had made inciteful statements in a broadcast on Kass FM radio station<sup>3</sup> on 6 September 2011, concerning witnesses in these proceedings.
3. Further details of the information that the victims' representatives had at the time of the closing statement, and of further information subsequently received, are provided in the annexed affidavits of the field officer who was the author of the E-mail (Annex A), of two of his sources referred to as "X" and "Y" (Annexes B and C), and of two colleagues of "Y" (Annexes D and E, referred to in paragraphs 31-32 of the field officer's affidavit). These affidavits are filed in redacted form because the people who gave them are concerned for their security and have requested that their identities not be disclosed to the Defence. These affidavits are contained in unredacted form in Annex H, which is filed confidentially and *ex parte*, and which gives further details of the security concerns of those giving affidavits.
4. Mr Charles Keter is the Kenyan Member of Parliament for Belgut. It appears that he was present in The Hague during the confirmation of charges hearing. The *Daily Nation* website for instance contains a photograph with the caption "Eldoret North

<sup>1</sup> ICC-01/09-01/11-343. This response is filed pursuant to the Single Judge's "Decision on the 'Request by the Victims' Representative for authorisation to respond to the "Defence Request Regarding Prejudicial Comments Made by Victims' Legal Representative Sureta Chana during Closing Statements'" of 3 October 2011 (ICC-01/09-01/11-347).

<sup>2</sup> Transcript, 8 September 2011, page 26 line 25 to page 29 line 6.

<sup>3</sup> It is noted that the Kass FM radio station is referred to in 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, ICC-01/09-01/11-261-AnxA (the "document containing the charges" for purposes of Article 61(3)(a) of the Statute), at paragraphs 17, 18, 19, 23, 25, 26, 29, 49, 50, 53, 67, 90, 98, 102, 103, 105, 114, 122, 129, and 132.

MP William Ruto (left) followed by his wife Rachel, Belgut MP Charles Keter and radio presenter Joshua Sang (right) arrive at the ICC on 1 September 2011. Photo/WILLIAM OERI".<sup>4</sup>

5. For the reasons given below, it is submitted that the Defence Request should be rejected in its entirety.

#### **Response to the contentions in the Defence Request**

##### *(a) The contention that the observations were untrue*

6. The Defence Request states that the E-mail was "untrue, fabricated and sensational" (Defence Request, paragraphs 1(ii), 11, 29).
7. This is not accepted, for the reasons given in below and in the annexed affidavits. However, in any event, it is submitted as a preliminary matter that the victims' representative cannot be precluded from raising with the Chamber information of direct concern to the victims, merely because there is a possibility that upon further investigation it might be determined that the information is not correct, or that the concern is unwarranted.
8. As a further preliminary matter, the victims' representative objects to paragraph 11 of the Defence Request. This paragraph contains an express reference to a newspaper article from the *Daily Nation* reproduced at Annex D of the Defence Request. This paragraph of the Defence Request observes that the newspaper article states "that Hon. Keter is pursuing this issue against Ms. Chana through the Kenyan judicial process". The newspaper article itself at Annex D of the Defence Request states that Mr Keter "will sue" the victims' representative over what she said in her closing statement.
9. It cannot be the case that a victims' representative who has information suggesting that there may be a risk to victims, or suggesting that attempts may be underway to create a climate of intimidation, will face a potential risk of being sued personally in a national court if he or she raises that information with the International Criminal

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<sup>4</sup> <http://www.nation.co.ke/hague> (Annex F).

Court. For obvious reasons, the Statute contains express provision to prevent this,<sup>5</sup> which is given the force of law in Kenya's national law.<sup>6</sup> If counsel considers that another counsel has said something inappropriate in proceedings before this Court, that is a matter that can only be raised before this Court.

10. It is submitted that this statement in paragraph 11 of the Defence Request is an apparent attempt to intimidate the victims' representative, and thereby indirectly to intimidate the victims themselves, and to deter anyone else from cooperating with the victims' representative or the ICC process more generally, which is wholly inappropriate, and abusive.

11. Paragraph 11 of the Defence Request goes on to state that Annexes A-C of the Defence Request "do not verify the allegations read into the record by Ms. Chana" and that "the contents of the broadcast prove that Mr. Keter did not make such remarks as alleged".

12. In this respect, it is submitted, first, that the victims' representative did not state that Mr Keter *had* made such remarks. She stated that she had received an e-mail from a field worker "suggesting that attempts may be underway to create a climate of intimidation in Kenya towards those involved in proceedings before this court" (emphasis added). The E-mail that was read out stated that a person had provided certain information to the field worker. What was said in the closing statement and E-mail was a *factually correct* statement that certain information had been received by the field worker, and an expression of concern. The victims' representative did not

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<sup>5</sup> Article 48(4) of the Statute provides that "Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court". Article 18(1)(b) of the Agreement on the Privileges and Immunities of the International Criminal Court provides that the immunity of "counsel" includes "Immunity from legal process of every kind in respect of words spoken or written and all acts performed by him or her in official capacity, which immunity shall continue to be accorded even after he or she has ceased to exercise his or her functions". Article 1(l) of that Agreement specifies that "Counsel" in this context includes "the legal representatives of victims".

<sup>6</sup> Section 9A of the Privileges and Immunities Act (Kenya) (Annex G) provides that "The judges, officials and staff of the International Criminal Court, and any counsel, experts, witnesses and other persons required to be present at the seat of that Court, shall have the privileges and immunities set out in article 48 of the Rome Statute and the agreement on privileges and immunities contemplated in that article".

go further than to state what information she had,<sup>7</sup> and to say that it could be the subject of further verification.<sup>8</sup>

13. Secondly, the annexed affidavits of the field officer who was the author of the E-mail, and of "X" and "Y", demonstrate that the field officer diligently took all measures reasonably open to him to confirm the correctness of the information before the closing statement was given. The annexed affidavits demonstrate that since then, all diligent efforts have been made to verify the correctness of that information. It is submitted that the victims' representative's team had an evidential basis which justified reading out the E-mail in the closing statement.
14. Thirdly, even the evidence contained in the Defence Request itself is seriously troubling. The Defence admits that Mr Keter did give a Kass FM interview on 6 September 2011. According to the Defence, what Mr Keter said is contained in the transcript in Annex B of the Defence Request. According to this transcript, Mr Keter *did* say with reference to the confirmation of charges hearing that "*I know everybody heard the lies for themselves*", that "*Kalenjin should know that lies were said*" and that "*they are all lying*". Here, Mr Keter is expressing very strong views on the merits of matters that are pending before the Chamber for determination. It is further suggested by Mr Keter at the end of the transcript that in these "*lies*", "*all Kalenjin were mentioned*", and he refers to the need for Kalenjin unity. It is submitted that the clear inference is that the present proceedings before the Court are a lie against the entire Kalenjin people. Furthermore, the transcript contains statements which can be understood as inciting hostility against those people who were said to be telling "*lies*", who were said to be Kalenjin, the implication being that they were disloyal to the Kalenjin people:

Kalenjin should know that lies were said. And *we know our people said lies*. We want everybody wherever they are to know that *they are living well with their children yet they put others in problems*. We

<sup>7</sup> Transcript, 8 September 2011, page 26 line 25 to page 26 line 2: "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" (emphasis added).

<sup>8</sup> Transcript, 8 September 2011, page 27 lines 3-5, page 29 lines 5-6, stating that she would not do more than "read out this e-mail ... [which] I received from a field worker in Kenya this morning", and that "these matters can of course be verified".

are informed also that others are targeted to write lies at home.  
[Emphasis added.]

We need to know that people said lies and they are our people. So I  
am telling Kalenjin to continue praying and be united.  
[Emphasis added.]

15. Fourthly, the annexed affidavits indicate that the information in the E-mail was correct. There is no dispute that Mr Keter made statements on Kass FM in an interview on 6 September 2011, and that the statements were made in Kalenjin. There are now three English versions of that interview, in Annexes B and C of the Defence Request, and Annex D of the field officer's affidavit<sup>9</sup> (under the heading "Third Footage"). Understandably, there are differences in translations produced by different translators, and translations may not identify all of the nuances of what was conveyed in the original language.<sup>10</sup>
16. From each of the three translations, it is apparent that the interview was given by Mr Keter by telephone from The Hague, that he repeatedly referred to the evidence against the suspects as "lies", that those who were telling the "lies" were Kalenjin and implied that the ICC proceedings were an attack against the entire Kalenjin community (suggesting that witnesses were disloyal to their own people). It is furthermore submitted that the tone of the language in each of these transcripts is such that the conclusion can be drawn that the statements were made in a way that would incite hostility amongst listeners against the witnesses who were being called liars. From the affidavits annexed to this response, it is additionally evident that at the time, the human rights community was aware of Mr Keter's broadcast and very concerned about it, and that Mr Keter's statements were understood by them to be inflammatory and to contain implied threats against witnesses giving evidence against the Suspects. It is evident that those giving the affidavits who heard the broadcast perceived it to have the effect of raising hostility amongst the Kalenjin community against such witnesses, and more generally against persons cooperating in the ICC process (as evidenced by the transcript of comments subsequently made

<sup>9</sup> Annex A to the present response.

<sup>10</sup> Paragraph 31 of the affidavit of "Y" (Annex C to the present response) states that the Kalenjin language is "rich in hidden nuances, allegory and metaphors".

by phone-in listeners), causing them to have additional reason to fear for their security.

17. Fifthly, the annexed affidavits provide evidence that the information contained in the E-mail was correct. "X" and "Y" who heard the broadcast continue to maintain that what was said in the E-mail read out in the closing statement was accurate (in particular, affidavit of "X", para 13; affidavit of "Y", para 30). When it was put to "Y" that there are three specific statements that Mr Keter was said in the E-mail to have made that are not found in the transcript prepared by "Y"'s translator, "Y" continued to maintain that these statements had been clearly heard by his colleagues (field officer's affidavit, para 26), and his two colleagues have given affidavits to confirm this (especially Annex D, paras 8-9; and Annex E, paras 5-7).
18. "Y" has suggested, as an explanation for why these three statements are not in the transcript prepared by "Y"'s translator, that the audio recording was incomplete (field officer's affidavit, para 26). Another possible explanation might be that Mr Keter made more than one broadcast from The Hague, and that these particular comments were made in one of the other broadcasts. The transcript of the audio recording prepared by "Y"'s translator indicates that the audio recording in question has three segments, which the translator has labelled "First Footage", "Second Footage", and "Third Footage". The "Third Footage" can be seen to be the broadcast to which Annexes B and C of the Defence Request relate. "First Footage" and "Second Footage" contain material apparently from another broadcast, or possibly two other broadcasts. From the references in "First Footage" to "Saturday" in the past tense, and the references in both "First Footage" and "Second Footage" to "Wednesday" in the future tense, it appears that the other broadcast(s) date from either Monday 5 September 2011, or Tuesday 6 September 2011. Both appear to be incomplete segments, and statements may therefore have been broadcast that are not contained in any of these translated segments.
19. Sixthly, irrespective of this, "X" in his affidavit is clear in his view that what was said in the broadcast was "carefully constructed threats to punish people deemed traitors of the Kalenjin community considered to be giving evidence at the ICC" (affidavit of

"X", para 17). "Y" is clear in his view that the statements made by Mr Keter "were uttered in a way as to incite anger from members of the larger Kalenjin community against individuals considered to be witnesses or persons related to witnesses for the Prosecutor" (affidavit of "Y", para 29).

*(b) The contention that the role of victims' representative was exceeded*

20. Paragraphs 7, 13 and 16 of the Defence Request suggest that the victims' representative lacked any authorisation by the Chamber or Single Judge to read out the E-mail. It is submitted that all necessary authorisation had been granted. The Single Judge's 5 August 2011 Decision<sup>11</sup> granted authorisation to the victims' representative to make an opening and closing statement.
21. The role of the victims' representative is to express the views and concerns of victims. The reading out of the E-mail in the closing statement did not go beyond the subject matter of views and concerns that had already been expressed in these proceedings by the victims' representative, and to which no objection has been taken by the Defence.
22. Even before the confirmation of charges hearing, the 5 August 2011 Decision ordered the victims' representative to communicate to the Chamber the victims' preference on the disclosure of their identity to the Defence. In partial compliance with that order, the victims' representative filed a document on 25 August 2011<sup>12</sup> which stated amongst other matters:
  6. The victims expressed grave personal safety concerns regarding the security situation in their home areas, especially sensitive due to the impending 2012 general elections and the Chamber's imminent decision on whether or not to confirm the charges in the present Case. Nearly all victims expressed concerns that the persons against whom proceedings are brought are powerful people with vast financial resources and that the victims themselves are disempowered, lacking in resources and of lowly status, leaving them vulnerable to reprisals or intimidation from perceived agents and communities loyal to Mr. Ruto, Mr. Kosgey and Mr. Sang.

<sup>11</sup> ICC-01/09-01/11-249, "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings", 5 August 2011 (the "5 August 2011 Decision").

<sup>12</sup> ICC-01/09-01/11-292, "Communication to the Chamber pursuant to the Chamber's Decision of 5 August 2011", filed 25 August 2011 (the "25 August 2011 filing").

7. Out of the 98 victims consulted on the question of anonymity, 55 responded that they are still "living amongst the enemy" or more generally that they were still living "in the communities of the perpetrators" and hence live in fear of being targeted for cooperating with the ICC.

8. A further 58 victims mentioned that people in the relevant communities did not understand the difference between witnesses and victims in relation to proceedings before the Court. This misunderstanding has led to the perception by those communities that victims have been materially aiding the Prosecutor in his case against Ruto, Kosgey and Sang. Consequently, a number of victims mentioned that they have either received threats or have heard threatening remarks coming from within their communities.<sup>13</sup>

23. At no stage has the Defence suggested that the 25 August 2011 filing went beyond the range of views and concerns of victims that may appropriately be presented pursuant to Article 68 of the Statute. Indeed, even now, the Defence Request does not suggest that there was anything inappropriate in the 25 August 2011 filing. It is submitted that if it is not within the role of a victims' representative under Article 68 to raise concerns such as these, then it is difficult to envisage what meaningful views or concerns of victims could be raised under Article 68 at all.

24. This same concern was expressed by the victims' representative in her *opening* statement on 1 September 2011, in which she said that victims live in fear, and in trepidation that they may be recognised as participants in proceedings before this Court, and that they will continue to feel vulnerable and threatened for the indefinite future if those who were responsible know that it is possible to act with impunity.<sup>14</sup> Related concerns were expressed in the opening statement that the Government of Kenya has shown no resolve to pursue the perpetrators, and in fact has devoted substantial resources to seeking to prevent the International Criminal Court from exercising jurisdiction,<sup>15</sup> that there is a deep culture of impunity in Kenya,<sup>16</sup> and that victims fear that a cycle of election violence will continue to be repeated should this kind of violence go unpunished yet again.<sup>17</sup>

<sup>13</sup> 25 August 2011 filing, paras 6-8.

<sup>14</sup> Transcript, 1 September 2011, page 73 lines 13-19; page 79 line 24 to page 80 line 1.

<sup>15</sup> Transcript, 1 September 2011, page 77 line 4 to page 78 line 15.

<sup>16</sup> Transcript, 1 September 2011, page 82 lines 12-23.

<sup>17</sup> Transcript, 1 September 2011, page 80 line 3 to page 82 line 19.

25. Again, it is submitted that the above matters are all clearly within the range of views and concerns of victims that may appropriately be presented pursuant to Article 68 of the Statute. At no stage during the confirmation of charges hearing, or indeed in the Defence Request, has the Defence suggested that anything inappropriate was said in the victims' representative's opening statement.
26. In effect, the reading out of the E-mail was an update of the concerns previously expressed in the 25 August 2011 filing and the opening statement concerning the climate of fear, trepidation and vulnerability in which victims presently live. It is submitted that, as in the case of the 25 August 2011 filing and the opening statement, there was nothing objectionable in this.
27. Furthermore, it is noted that the Defence did not object at the oral hearing to the reading of the E-mail. It is noteworthy that Defence counsel for Mr Ruto, Mr David Hooper QC, did in fact rise to object in relation to two *other* parts of the victims' representative's closing statement,<sup>18</sup> yet took no objection at the time to the reading out of the E-mail. Indeed, no objection was taken by the Defence at all until the Defence Request was filed, some *three weeks* after the close of the confirmation of charges oral hearing.
28. Paragraph 27 of the Defence Request seeks to explain the delay by stating that after Mr Hooper had raised two objections, the Presiding Judge stated that "[further] [i]nterruption [by Defence counsel] will not be granted".<sup>19</sup> This was said by the Presiding Judge in response to a comment by the victims' representative that "I'd be grateful if I could continue my speech without further interruption".<sup>20</sup> Clearly, a ruling by the Presiding Judge that the victims' representative should be permitted to give her closing speech without interruption is not a ruling that the Defence is precluded from raising any objection or issue immediately after the victims' representative's closing speech had concluded. The Defence had the opportunity to do so, since the closing statements of the Defence were given immediately after the

<sup>18</sup> Transcript, 8 September 2011, page 18 line 2 to page 19 line 17; page 22 line 16 to page 24 line 15.

<sup>19</sup> Transcript, 8 September 2011, page 25 line 4.

<sup>20</sup> Transcript, 8 September 2011, page 25 lines 1-2.

closing statement of the victims' representative. The Presiding Judge's ruling is not an explanation for waiting *three weeks* before making an objection.

29. It is also noted that the Chamber did not, *proprio motu*, raise any issue as to the propriety of the reading of the E-mail.

30. Paragraph 2 of the Defence Request suggests that the reading of the E-mail was "wholly unnecessary for the victims' cause". Paragraph 25 goes on to say that the E-mail only "related in some vague way to the security of Prosecution witnesses". It is submitted that this cannot be accepted. The implications of the E-mail not only for the security of witnesses, but also for victims and anyone else cooperating with the ICC process against these three Suspects is self-evident. As was stated in paragraph 8 of the 25 August 2011 filing, "people in the relevant communities [do] not understand the difference between witnesses and victims in relation to proceedings before the Court".

31. It is therefore submitted that the victims' representative has not gone beyond the limits of permissible participation by a victims' representative under Article 68.

*(c) The contention that the victims' representative was acting as Prosecutor*

32. The Defence Request suggests at paragraphs 2, 18 and 25 that the victims' representative in reading the E-mail was seeking to assume the role of second Prosecutor. It is submitted that this is incorrect.

33. At no point so far has the victims' representative made any submission on the issue of whether or not any of the charges should be confirmed against any of these three particular Suspects. Indeed, in her closing statement, the victims' representative said expressly that she would not do so, in order not to "stray into territory that is the function of the Prosecution or Defence".<sup>21</sup> Nor was any such observation made by

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<sup>21</sup> Transcript, 8 September 2011, page 15 lines 10-13: "It is my function pursuant to paragraph (3) of Article 68 of the Statute to present the views and concerns of the victims. I do not seek to stray into territory that is the function of the Prosecution or Defence". Also Transcript, 8 September 2011, page 16 lines 1-3: "At this stage I will confine myself to making observations on how certain matters that transpired at this confirmation hearing which affect the concerns that I addressed in my opening statement". Similarly, in the opening statement, the victims' representative said, Transcript, 1 September 2011, page 83 lines 7-12: "The victims I represent are very mature. They understand that justice being done means a fair trial before an independent and impartial tribunal in accordance with the law. They all knew the concept of a person is innocent until proven guilty. What is important to

the victims' representative in her final written observations filed on 30 September 2011. Quite simply, the victims' representative has been unable to take any position on whether or not the Prosecution evidence is sufficient to justify confirmation of the charges against these three Suspects, because she has not been given access to all of the Prosecution evidence. At this stage, submissions on that issue were necessarily required to be left to the Prosecutor.

34. Somewhat curiously, paragraph 22 of the Defence Request appears to suggest that the victims' representative, despite her lack of access to Prosecution evidence, *should* in her closing statement have restricted herself to addressing the issue of "whether the evidence adduced by the Prosecution was sufficient to confirm the charges" against the three Suspects, and the victims' views on "the substance of the charges".

*(d) The contention that the victims' representative was putting evidence on the record*

35. The Defence Request repeatedly states that the victims' representative, in reading the E-mail, was seeking to "put evidence on the record" (Defence Request, paragraphs 1, 7-8, 10, 15-17, 22-24, 27). It is submitted that this is incorrect.
36. The reading of the E-mail was not intended to be, and is not, evidence in the case against the Suspects. Indeed, paragraph 25 of the Defence Request expressly acknowledges that "The contents of the allegations do not concern the charges or the evidence on the record". The E-mail was read by way of raising a concern on behalf of the victims relating to their security, and to the climate of fear and menace in which they presently live. As observed above, this same concern had already been previously raised without objection in the 25 August 2011 filing and the victims' representative's opening statement.
37. Where victims or witnesses raise concerns that they feel threatened, and even where victims or witnesses present evidence of actual threats against them, they are not thereby seeking to present evidence that a suspect or accused is guilty of the crime with which they are charged.

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them, however, now, is that the criminal justice process has now engaged seriously, professionally and rigorously with what has occurred."

38. By way of analogy, in cases where protective measures are requested by a victim or witness, this is almost always due to concerns that the person to be protected is at risk either from a suspect or accused, or from a person or persons supportive of a suspect or accused, or from a person or persons supportive of the party, group, etc, with which an accused or suspect was associated. Yet this does not mean that a request for protective measures, or evidence in support of a request for protective measures, is evidence that the suspect or accused is guilty of the crime charged.
39. The Court, when rendering its final judgment under Article 74(2) of the Statute, is required to base its decision "only on evidence submitted and discussed before it at the trial", that is to say, only on evidence relating to the *substantive merits* of the case. Other information or material that is not evidence pertaining to the substantive merits, such as information raised during the proceedings concerning threats to victims or witnesses, is excluded from the Article 74(2) consideration. Professional judges are capable of making this distinction when evaluating evidence.
40. If the Prosecutor or Chamber did form the view that evidence of threats to victims was of relevance to the substantive merits of the case against a suspect or accused, then of course at that stage provisions relating to the rights of the Defence would apply if the material was to be treated as evidence in the case.

*(e) The contention that the observations were prejudicial to the Defence, and contrary to the rights of the Suspects*

41. The Defence Request repeatedly states that the challenged observations were prejudicial to the Defence (Defence Request, paragraphs 1(ii), 10, 12, 15-17, 22, 26-29). However, given that the challenged observations did not concern the merits of the case against the Suspects (paragraphs 35-40 above), no explanation is provided as to how the Defence was thereby prejudiced.
42. Paragraph 26 of the Defence Request suggests that the challenged observations imply "that there was a breach of confidentiality". The Defence Request does not explain the basis for this suggestion. No suggestion was made in the closing statement that broadcasts on Kass FM included ICC confidential or closed session material.

43. Paragraph 27 of the Defence Request suggests that the Defence was prejudiced because it was not given notice of what the victims' representative said, and was therefore "ambushed" and unable to comment on the observations during the Defence closing statements.
44. Again, it is difficult to see how the Defence was "prejudiced" by lack of notice, given that the challenged observations did not relate to the substantive merits of the case, and were not evidence in the case against the Suspects (paragraphs 35-40 above). The Statute and Rules do not require any particular notice to be given to the Defence of expressions of concern by victims relating to their security. Failure to give notice to the Defence of evidence of threats to victims can hardly be equated with a failure to give the Defence adequate notice of the case against a suspect or accused.
45. In any event, the Defence has not been prevented from responding to the victims' representative's observations. The Defence Request is such a response.

*(f) The contention that the observations were insufficiently substantiated*

46. The Defence request suggests that the victims' representative was not entitled to read the E-mail, because the information was "third-hand anonymous hearsay" that was "untested, unreliable" (Defence Request, paragraphs 1(i) and (ii)), and that such concerns should "not have been raised unless they were supported by concrete evidence" (Defence Request, paragraph 3; also paragraph 19-20, 24, 26, 28).
47. In response, it is submitted, first, that where there is information suggesting that there *may* be a risk to victims, there is no reason why that concern should not be raised. The Defence Request appears to suggest that concerns about threats to victims cannot be raised at all, unless there is *proof* that the specific risk *does* exist. It is submitted that this cannot be correct. Where the victims' representatives have information that raises a genuine concern, the victims' representative must be entitled to express that concern (see paragraph 7 above).
48. Secondly, it is submitted that there was clearly a sufficient evidential basis for reading out the E-mail in the closing statement (see paragraphs 11-19 above).

49. The Defence Request seeks to rely on certain case law which, it is submitted, is not pertinent to the circumstances of this case.<sup>22</sup>

(g) *The contention that the observations could only be made in the context of a request for a concrete form of relief*

50. The Defence Request suggests that the victims' representative was not entitled to bring the information in the E-mail to the attention of the Chamber, otherwise than in the context of "seeking a concrete form of relief to the benefit of the Victims, such as a request for protective measures" (Defence Request, paragraph 3). It is submitted that this must be incorrect.

51. First, in this specific case, the concern raised was relevant to the reasons why victims do not want their identities disclosed to the Defence or the public, already addressed

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<sup>22</sup> Paragraph 19 of the Defence Request quotes from the transcript of 9 February 2009 of the trial in the *Lubanga* case (ICC-01/04-01/06-T-122-ENG, pp 51-53, 55-56). It appears that in that case the Prosecution had earlier made a request for the adjournment of the evidence of a particular witness on the basis that "something may have transpired with respect to Rule 74" and that "there were other issues regarding protection that we had been potentially aware of from the past". However, investigations turned up nothing so that the Prosecution did not pursue its request for an adjournment (*ibid.*, p 51 line 17 to p 52 line 24). The Presiding Judge at the trial then said that "If in future it is going to be suggested that a witness's evidence should be adjourned, ..., there will have to be a firm basis for the application". That is far from the circumstances of the present case. Paragraph 19 of the Defence Request then refers to a decision in the *Lubanga* case, which was concerned with comments made by the Prosecution to the media (ICC-01/04-01/06-2433, "Decision on the press interview with Ms Le Fraper du Hellen", Trial Chamber I, 12 May 2010). The Trial Chamber there criticised what it considered to be the Prosecution's use of a *public interview* to misrepresent evidence, much of which had been heard in closed session, and to comment on matters that were still awaiting resolution by the Court (*ibid.*, para 52). That is far from the circumstances of the present case. There is no suggestion in that decision that where a victims' representative has information suggesting that attempts may be underway to intimidate victims, the victims' representative should refrain from raising that concern *with the Court* (as opposed to the media), for fear that the information may ultimately prove to be incorrect. Paragraph 20 of the Defence Request refers to ICTY decisions dealing with the cross-examination of witnesses testifying in the substantive proceedings, which again is removed from the circumstances of the present case. In *Prosecutor v Krajisnik*, "Decision on Cross-Examination of Milorad Davidovic", IT-00-39-T, Trial Chamber, 15 December 2005, the Trial Chamber said that "witnesses should not be subjected to improper or unfair questions" and that "when a party wishes to confront a witness with what effectively constitutes allegations that the witness has engaged in serious criminal conduct, that party must have reasonable grounds to do so at the time the allegations are made". The Chamber went on to state that "'Reasonable grounds' does not require that the party have in its possession incontrovertible evidence of wrongdoing; it does, however, require something more than mere hunch, innuendo or unsubstantiated hearsay". That decision is not pertinent, as the challenged observations were not made in the context of cross-examination of a witness in the proceedings. In any event, for the reasons given in paragraphs 11-19 above, in the present case the victims' representative *had* material that would have satisfied the *Krajisnik* test.

in the 25 August 2011 filing (see paragraph 22 above). In effect, the concerns raised were a partial update of the 25 August 2011 filing (see paragraph 26 above).

52. Secondly, it cannot be the case that victims are not entitled to express a concern unless that concern is raised in connection with a request for some concrete form of relief. Nothing in the Statute, Rules or Regulations suggests that this is the case.

53. Apart from anything else, under the Rules of Procedure and Evidence, protective measures can be ordered by a Chamber of its own motion.<sup>23</sup> A Chamber can only take measures of its own motion to deal with a situation if it is aware of the situation. In cases where information does not relate to a specific threat to a specific person, but rather to a general climate of fear and vulnerability of victims, it may be difficult for a victims' representative to formulate a specific proposal as to what action the Chamber might take in the light of that information. It must be legitimate for a victims' representative to raise a general concern with the Chamber without proposing any specific order or remedy. If the Chamber is aware of the concern, it can take that concern into account when making decisions relating to the conduct of the proceedings generally (for instance, when deciding whether the identities of victims should be disclosed to the Defence), and can, if it deems it appropriate, take any action of its own motion.

54. Thirdly, in some cases, the mere fact that a victims' representative expresses a concern publicly may itself be of some positive benefit for the victims. It is particularly noteworthy that according to the evidence in the annexed affidavits, after the victims' representative gave her closing statement on 8 September 2011, "there has been [a] cessation to the airing of inciting statements and programmes on Kass FM with callers being warned to be careful in the statements they make" (affidavit of "Y", para 36; affidavit of "Y"'s colleague (Annex E), para 8).

*(h) The contention that the victims' representative has breached the Code of Conduct*

55. The Defence Request contends that the victims' representative in reading the E-mail was in breach of Articles 24(1) and (2) of the Code of Professional Conduct for

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<sup>23</sup> Rules of Procedure and Evidence, Rule 87(1).

Counsel. These provisions (and for completeness, Articles 24(3) and (4) and Article 25(1)) state as follows:

#### **Article 24**

##### **Duties towards the Court**

1. Counsel shall take all necessary steps to ensure that his or her actions or those of counsel's assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute.
2. Counsel is personally responsible for the conduct and presentation of the client's case and shall exercise personal judgement on the substance and purpose of statements made and questions asked.
3. Counsel shall not deceive or knowingly mislead the Court. He or she shall take all steps necessary to correct an erroneous statement made by him or her or by assistants or staff as soon as possible after becoming aware that the statement was erroneous.
4. Counsel shall not submit any request or document with the sole aim of harming one or more of the participants in the proceedings. ...

#### **Article 25**

##### **Evidence**

1. Counsel shall at all times maintain the integrity of evidence, whether in written, oral or any other form, which is submitted to the Court. He or she shall not introduce evidence which he or she knows to be incorrect.

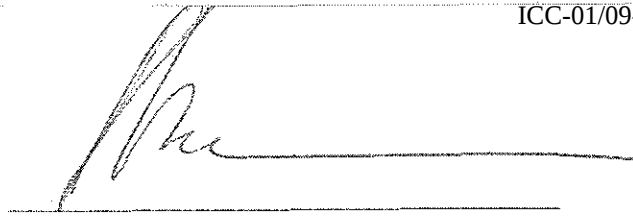
56. For the reasons given above, the reading of the E-mail was not in breach of any of these provisions. The victims' representative acknowledges that it was her personal judgment that the E-mail should be read during the closing statement (Article 24(2)). She did not knowingly say anything that was incorrect or misleading, and did not deceive the Court (Article 24(3) and 25(5)). After the Defence Request was filed, contending that the E-mail was untrue, the victims' representative took further steps to verify the information in the E-mail, and has presented the results to the Chamber in the form of the annexed four affidavits (Article 24(3) above). These affidavits, it is submitted, do not suggest that the information in the E-mail was erroneous in any material way. The E-mail was not read by the victims' representative "with the sole aim of harming one or more of the participants in the proceedings" (Article 24(4); rather, it was read in order to raise a very legitimate concern for the victims she represents, being a concern that had already been expressed previously without objection in her 25 August 2011 filing and in the opening statement. The reading of the E-mail was not prejudicial to the Defence (paragraphs 41-45 above) or the proceedings (Article 24(1)), and accordingly it is submitted that the reading of the E-mail could not bring the Court into disrepute (Article 24(1)).

## Response to the specific requests of the Defence

57. The Defence Request asks that the observations of the victims' representative be excluded from the Chamber's consideration of the confirmation of charges (paragraph 4(i) and 30(iii)). It is submitted that it is unnecessary to grant this request, since the observations in question did not relate to the merits of the confirmation of charges proceedings (see paragraphs 35-45 above).
58. The Defence Request asks that the victims' representative be precluded from raising or relying on the E-mail in her final confirmation of charges brief (paragraph 30(iv)), or in any post-confirmation briefs (paragraph 4(iv)). The former request is now otiose, since the victims' representatives has now filed her final observations on the confirmation of charges hearing, which did not refer further to the information in the E-mail. As to the latter request, if the victims' representative considers in future that it is necessary to refer to the matter again, it is submitted that she should not be precluded from doing so. It will be for the Single Judge or Chamber to decide, at the relevant time, whether it is appropriate for her to do so.
59. The Defence Request asks that the Chamber remind the victims' representative of the limitations and obligations of her role (paragraphs 4(iii) and 30(i)). For the reasons given above, it is submitted that the victims' representative has not exceeded her role or breached her obligations.
60. Finally, the Defence Request asks that the Chamber "obtain from the victims' representative the full identity and particulars of the alleged 'field officer'" from whom the "allegations" were sourced. As this information is contained in the confidential *ex parte* Annex H to this response, it is unnecessary for this request to be granted.

## Conclusion

61. For the reasons above, it is submitted that the Defence Request should be refused in its entirety.

A handwritten signature in dark ink, appearing to be 'Sureta Chana', is written over a horizontal line.

Sureta Chana

Dated this 10<sup>th</sup> day of October 2011

At Nairobi, Kenya