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

Date: **1 December 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

**Response to Victims' Representative's Request for Authorization to make a further
Written Submission on the Views and Concerns of the Victims**

Source: Defence for Mr. William Ruto and Mr. Joshua Sang

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

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Sureta Chana

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

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I. Introduction

1. The Defence objects to the Request by the Victims' Representative for authorization to make a further written submission on the views and concerns of the victims ("Request").¹
2. Essentially, the Victims' Representative submits that a handful of anonymous and unspecified victims of the post-election violence in Kenya feel that the Prosecution did not sufficiently investigate the situation. Consequently, that the Chamber should either adjourn the confirmation hearing and request the Prosecutor to conduct further investigations or confirm the charges and request the Prosecutor to continue investigating prior to the trial.
3. The Request should be dismissed because:
 - i. it is too late for parties or participants to submit materials for consideration by the Pre-Trial Chamber in determining whether or not to confirm the charges;
 - ii. it improperly contains substantive arguments in a request for authorization; and
 - iii. it does not comply with paragraphs 84 and 101 of the 5 August 2011 Decision,² which define the circumstances in which the Victims' Representative may request authorization to make written submissions on law and/or fact, ie when the victims' personal interests are 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.

II. Submissions

The Request Should be Dismissed in Limine as Untimely

4. Prior to the start of the confirmation of charges hearing, the Victims' Representative knew that she would be unable to meet, in advance of the hearing, with all of the victims whom she was assigned to represent.³ However, the Victims' Representative did not ask for the

¹ ICC-01/09-01/11-367, dated 9 November 2011 ("Request").

² ICC-01/09-01/11-249.

³ ICC-01/09-01/11-282, paras 7 and 8 (acknowledging on 23 August 2011, that during her mission to Kenya, she would only be able to meet with 150 of over 300 victims represented by her).

confirmation of charges hearing to be postponed so that she could gather the views and concerns of all of the victims, such that she would be in a position to express those views and concerns to the Chamber on their behalf during the hearing. The Defence submits that is now it is simply too late for the Victims' Representative to put these views and concerns before the Chamber.

5. The Victims' Representative had adequate opportunities to express the views and concerns of the victims during the confirmation of charges hearing. The Pre-Trial Chamber granted the Victims' Representative permission to make opening and closing statements,⁴ and to file any written observations which were relevant to the case and which were in relation to issues addressed at the confirmation of charges hearing. The Single Judge made it clear that any new issues which were raised would not be taken into account in the Chamber's final decision on the charges.⁵ The Victims' Representative filed written observations on 30 September 2011.⁶ Those observations should be the final say on the matter.

The Request Should be Dismissed in Limine for Improperly Containing Substantive Argument in a Request for Authorization

6. The Victims' Representative's Request is technically a request for authorization to submit the views and concerns of the victims. However, pages 4 through 8 of the Request primarily contain substantive submissions as to what the views and concerns of the victims are with respect to the historical nature of post-election violence in Kenya, the nature of the crimes committed during the post-election violence, and whether or not the post-election violence was spontaneous.
7. The Appeals Chamber of the ICC has consistently and emphatically instructed parties and participants not to put substantive arguments before the Chamber on issues which require prior authorization. In order to ensure that the Chamber is not improperly influenced by such a practice, the Appeals Chamber has underscored that the practice of filing such substantive arguments may in itself give rise to the rejection of requested authorisation to

⁴ ICC-01/09-01/11-249, para. 89.

⁵ ICC-01/09-01/11-T-12, 8 September 2011, p. 76.

⁶ ICC-01/09-01/11- 344.

submit such arguments.⁷ The Defence submits that such should be the case in the current instance.

The Request Should be Dismissed for Failing to Comply with the Requirements of the 5 August 2011 Decision

8. The Defence acknowledges that pursuant to article 68(3) of the Statute, the Single Judge has previously granted the Victims' Representative's request to make submissions on fact and law in respect of whether the charges should reflect acts of destruction of property, looting and infliction of physical injuries.⁸ This previous request is different than the request at hand in several ways.
9. First, the previous request was on the basis of factual evidence already before the Pre-Trial Chamber, whereas the current request is on the basis of speculation and anecdotal comments from anonymous victims, who may or may not even be authorized to participate in the current proceedings. Information contained in the victims' applications or information gleaned from interviews with victims is not evidence before the Chamber and cannot be relied upon to determine whether the Prosecution should investigate allegations of other charges. Additionally, due to a complete lack of references to any victims' pseudonyms in the Request, it is impossible to tell whether the alleged views and concerns are coming from victims authorized to participate in the proceedings or more generally from victims of the post-election violence in Kenya, who do not have any standing before this court.
10. Secondly, the previous request was made prior to the filing of the Victims' Representative's written observations on the confirmation of charges hearing, whereas the current request comes well after the conclusion of the confirmation proceedings. As such,

⁷ See, for example, *Prosecutor v. Lubanga*, ICC-01/04-01/06-824 OA7, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo", 13 February 2007, para. 68 ("The Appeals Chamber disapproves of a practice of the filing of a substantive reply prior to leave being granted by the Appeals Chamber, which in and of itself may also give rise to the rejection of an application for leave."); *Prosecutor v. Bemba*, ICC-01/05-01/08-602 OA2, Decision on the application of 14 September 2009 for participation as an amicus curiae, 9 November 2009, para. 9 ("In accordance with rule 103 [...], the submission of substantive observations is only permissible after a Chamber has decided to invite or grant leave to do so. In the present circumstances, Aprocdec submitted substantive observations on the appeal in paragraphs 35 through 74 of the application without leave. For that reason, the Appeals Chamber shall disregard the substantive submissions contained in the Amicus Application.").

⁸ ICC-01/09-01/11-338, paras 5 and 10.

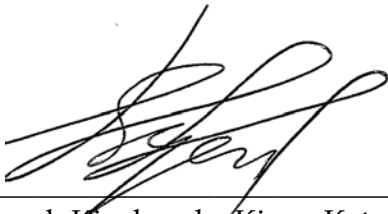
granting the Victims' Representative's Request at this stage of the proceedings would delay the decision on the confirmation of charges and would deny the Defence the right to have the last word, thus negatively impacting the fairness and expeditiousness of the proceedings.

11. Furthermore, the nature of this issue – the scope and sufficiency of Prosecutorial investigations – is not the sort of issue upon which the victims may express their views and concerns. The ICC jurisprudence is clear that the Victims' Representative should not act as a second Prosecutor.⁹ In any event, at the confirmation of charges hearing, the Single Judge stated that the Chamber “does not have the power to direct the Prosecutor's investigation. [It has] only to assess the quality of evidence”.¹⁰

III. Conclusion

12. Granting the Victims' Representative permission to express further views and concerns of the victims at this stage of the proceedings would be prejudicial to the rights of the suspects. The Request should be denied in its entirety.

Respectfully Submitted,



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

Dated this 1st day of December 2011

At Nairobi, Kenya

⁹ *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-T-43-ENG, 4 July 2008, p. 70.

¹⁰ ICC-01/09-01/11-T-12, 8 September 2011, p. 75-76.