



Original: **English**

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

Date: **13 June 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 Annexes 1 and 4 confidential *ex parte* OPCV only
and Annexes 2 and 3 public**

**Observations of Victim Applicants on the Place of the Proceedings for the Purposes
of the Confirmation of charges Hearing**

Source: Office of Public Counsel for Victims

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

The Office of the Prosecutor

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

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Unrepresented Victims

**Unrepresented Applicants for
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REGISTRY

Registrar & Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

INTRODUCTION

1. The victim applicants oppose holding the confirmation of charges hearing in Kenya. The security situation and governmental apparatus presently in place are not conducive to a proper hearing. Holding the confirmation of charges hearing in Kenya could increase the risk of violence, including against those who might be suspected of being actual or potential victim applicants in the proceedings.

PROCEDURAL HISTORY

2. The confirmation of charges hearing in this case has been scheduled to commence on 1 September 2011.¹ The Pre-Trial Chamber announced, on 3 June 2011, that it was “*in the process of assessing the desirability and feasibility of conducting the confirmation of charges hearing on the territory of the Republic of Kenya*” and requested observations from, *inter alia*, “*victims who have applied for participation*”. The Chamber appointed the Office of Public Counsel for Victims (the “OPCV” or the “Office”) to submit observations on behalf of victim applicants.²

3. The OPCV would like to note preliminarily that the security situation in the country, as well as logistical difficulties to reach the majority of the places where victims reside, has impeded the Office’s efforts to enter into contact with a meaningful number of victims within the short time period permitted by the Chamber. Indeed, some hundreds of victims have applied to participate in the case of *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*.

4. The applications for participation in the proceedings received by the Office in compliance with Pre-Trial Chamber II’s Decision requesting observations on the place of the proceedings for the purposes of the confirmation of the charges hearing

¹ Transcript of the hearing held on 7 April 2011, No. ICC-01/09-01/11-T-1-ENG ET p. 17.

² “Decision Requesting Observations on the Place of the Proceedings for the Purposes of the Confirmation of Charges Hearing”, ICC-01/09-01/11-106, 3 June 2011, para. 7.

relate to individuals already represented by counsels and therefore the Office has deemed it appropriate to contact said persons via their legal representative in order to avoid security concerns and to facilitate the flow of information while also preserving the trust relationship between the applicants and their counsel. Counsel have expressed the same concerns as those indicated by the Office in paragraph 3 above. Additionally, they were able to contact some of their clients and to provide the Office with their observations which are annexed to the present submissions as Annexes 3 and 4.

5. The Office has also received unsolicited reports from local organizations which are annexed to the present submission as Annexes 1 and 2.

6. In accordance with Regulations 23 *bis* of the Regulations of the Court, Annexes 1 and 4 are submitted in their confidential *ex parte* only available to the OPCV version, as well as in their public redacted version. Redactions have been applied after consultation with the authors to preserve the privacy and safety of the persons concerned, as well as of victims who reside in Kenya.

SUBMISSIONS

7. The victim applicants in the present case are of the unanimous opinion that the confirmation of charges hearings should not be held in Kenya. They strongly oppose hearings being held on the territory of Kenya since they believe that witnesses would not be able to testify freely and with confidence if obliged to testify in Kenya, and that the truth, under these circumstances, would be more likely to be spoken in The Hague. This view is particularly salient considering that the Prosecution has announced its intention to rely on the oral testimony of ten witnesses, and considering that the Prosecution has indicated that witnesses face

serious risks.³ Requiring them to testify in Kenya in person at the confirmation of the charges hearing would pose a serious risk of disclosure of their identities – if only because of immigration formalities – and would increase the risk that they or their families might be intimidated. Resort to video-link testimony, even assuming that could be an effective means of protecting the identity of those witnesses, would largely defeat the purpose of having hearings closer to the communities most affected by the crimes.

8. The risk of witness intimidation in this case is real. These concerns are consistent with reports by sources that cannot legitimately be accused of bias or partiality. Former United States Ambassador to Kenya Michael E. Ranneberger wrote in a confidential cable on 5 January 2010 that *“we have noted a steady rise in the number of individuals threatened or killed for political reasons. A number of witnesses who testified before the Commission to Investigate Post-Election Violence, also known as the Waki Commission, have already been threatened.”*⁴ He went on to say that *“multiple sources indicate that implicated political leaders, notably cabinet ministers William Ruto and Uhuru Kenyatta, are directing a campaign of intimidation against potential witnesses.”*⁵ State witness protection mechanisms were assessed to be insufficiently independent to ensure the security of those under its protection.⁶

9. Amnesty International, though acknowledging recent amendments to the witness protection regime, has expressed concern that:

“the law is not yet fully operational and that it is too soon to determine whether it will offer effective protection for victims and witnesses of the post-election violence. As of last year, up to 22 witnesses who testified before a 2008 official inquiry into the post-election violence, who might be called to testify in future ICC or other court trials, were reported to be living in fear as a result of threats to their lives or security. An unknown number of other

³ Transcripts of the hearing held on 18 April 2011, No. ICC-01/09-01/11-T-2-ENG ET WT, pp. 8, 16.

⁴ <http://wikileaks.ch/cable/2010/01/10NAIROBI11.html> (accessed on 11 June 2011), para. 4.

⁵ *Idem*, para. 6.

⁶ *Ibid.*, paras. 7-14.

potential witnesses have had to flee Kenya in the last three years because of similar threats against them.”⁷

10. Organizations with extensive experience working with victims in Kenya have reported overt acts of violence, as well as threats and intimidation.⁸ Witnesses forced to return to Kenya to give their testimony at the confirmation hearing risk disclosure of their identities, which would mean that *“they and their closest relatives will be in danger of inducement, intimidation or persecution.”⁹*

11. Victims, under these unfortunate circumstances, will be no more involved in, and feel no greater ownership of, confirmation of the charges hearing held in Kenya. As one organization working with victims observed:

“It is noteworthy that there is no credible infrastructure for the protection of witnesses or victims in Kenya and any exposure will significantly endanger the lives of victims, witnesses and or their close relatives. This fact is well-known to the parties before the ICC as well as the victims, the latter of whom have expressed to us that a hearing locally would make them feel endangered and thereby shun the process. Having confirmation of charges hearings will therefore be a self-defeating process.”¹⁰

⁷ <https://www.amnesty.org/en/library/info/AFR32/003/2011/en> (accessed on 11 June 2011). A similarly skeptical view has been expressed by the Kenyan Section of the International Commission of Jurists, Proposed Amicus Curiae Observations, “Transmission by the Registry of both the “Request for leave to submit Amicus Curiae Observations on behalf of The Kenyan Section of the International Commission of Jurists Pursuant to Rule 103 of the Rules of Procedure and Evidence” and the “Proposed Amicus Curiae Observations by the Kenyan Section of the International Commission of Jurists Pursuant to Rule 101 of the Rules of Procedure and Evidence”, No. ICC-01/09-01/11-71-Anx2, 2 May 2011.

⁸ The Office received unsolicited reports from these organizations in relation to the current proceedings that address these threats, and the perception of these threats by victims themselves. Being said reports relevant for the issue of the feasibility of the confirmation of charges hearing in Kenya, the Office attaches them to the present submission. Memorandum received by Kituo Cha Sheria, p. 2 (“The security situation for victims of the Post election violence 2007 and other victims of violence is still alarming. While there are only isolated acts of reprisal/attacks/acts of violence/incidents, in certain regions such as Eldoret IDPs stopped rebuilding their houses, as every attempt to do so is followed by threats/intimidation from the neighborhood. One of our clients received a letter threatening murder”). The Memorandum is attached to the present submission as Annex 1; Observations received by the International Centre for Policy and Conflict, para. 11. The Observations are attached to the present submission as Annex 2.

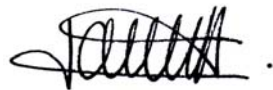
⁹ Observations by The International Centre for Policy and Conflict, para. 11.

¹⁰ *Ibidem*. See also Memorandum of Kituo Cha Sheria, p. 3.

12. Finally, holding the confirmation of charges hearing in Kenya could increase the danger of an outbreak of violence. Victim applicants expressed concern that the hearings might be exploited for domestic political consumption, a potential that would only be exacerbated by holding proceedings in Kenya. Organizations working closely with victims also echoed that concern, noting for example that “[t]here is a great danger that the hearings will be used to generate a negative public mood and to divide the nation.”¹¹ The least that can be said is that the hearings could have unforeseen consequences on the security situation in Kenya.

13. The Pre-Trial Chamber’s initiative in considering holding the confirmation hearings as close as possible to the affected communities is greatly appreciated by the victim applicants. The unfortunate reality, however, is that such hearings would not be in the interests of justice given current circumstances.

FOR THE ABOVE MENTIONED REASONS, the Office of Public Counsel for Victims, acting on behalf of victim applicants, respectfully submits the present observations.



Sarah Pellet
Counsel

Dated this 13th day of June 2011

At The Hague, The Netherlands

¹¹ Memorandum of Kituo Cha Sheria, p. 2