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Date: 20 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
PROSECUTOR v. WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY, and
JOSHUA ARAP SANG*

Public Document

**Application on behalf of the Government of Kenya for leave to file observations
in response to submissions made by Legal Representative for the Victims**

Source: The Government of the Republic of Kenya, represented by Sir
Geoffrey Nice QC and Rodney Dixon

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

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A. Introduction

1. The Government of Kenya files this application to request leave to file observations on the allegations made against the Government of Kenya by the Common Legal Representative for the Victims, Ms. Sureta Chana, in the confirmation of charges proceedings in the present case.
2. Ms. Chana claimed that (i) the Government of Kenya has failed to investigate and prosecute persons responsible for Post-Election Violence and (ii) the Government of Kenya was not interested in protecting and assisting victims and witnesses. The specific allegations are summarised below. They were made by Ms. Chana during both her opening and closing statements on 1 September 2011 and 8 September 2011, respectively, of the confirmation hearing in case ICC-01/09-01/11,¹ as well as, in the Victims' Observations on Jurisdictional challenges of 16 September 2011² and Ms. Chana's Response of 10 October 2011 to the Defence Request in respect of the comments she made in her closing submissions.³
3. It is most significant that Ms. Chana has submitted no concrete evidence to the Pre-Trial Chamber to support her allegations. On the contrary, she has ignored and failed to bring to the Chamber's attention the efforts, programs and initiatives that have been undertaken by the Government of Kenya. It is not proper that an officer of the Court can make highly prejudicial comments publicly in Court which directly attack a State Party of the ICC (or any party) without concrete evidence to substantiate these allegations, while failing to acknowledge the clear evidence that is contrary to her submissions. Such conduct undermines the integrity and fairness of the proceedings. The Court is deprived of a balanced and complete view of all of the relevant evidence which could be misleading to the Court.
4. The Government of Kenya bases this application on it having been and continuing to be involved in the present proceedings on account of its Admissibility Application and

¹ ICC-01/09-01/11-T-5-ENG, pg. 72, ln. 13 – pg. 85, ln. 11, ICC-01/09-01/11-T-12-ENG, pg. 15, ln. 6 – pg. 34, ln. 11.

² Observations of the Victims' Representative on the Defence challenges to jurisdiction, ICC-01/09-01/11-332, 16 September 2011 (hereinafter "Victims' Observations of 16 September 2011").

³ Response by the Victims' Representative to the 'Defence Request Regarding Prejudicial Comments Made by Victims' Legal Representative Sureta Chana during Closing Statement', ICC-01/09-01/11-348, 10 October 2011 (hereinafter "Response by the Victims of 10 October 2011").

its Requests for Assistance to obtain access to the evidence relied on by the Prosecution in the present case. Even though the Requests for Assistance have been filed in the Kenya Situation, they have been specifically directed at obtaining evidence presented in the present case. The Prosecution has objected to the Government of Kenya's requests on the grounds of witness safety and protection, and the lack of any meaningful investigations and prosecutions. The allegations made by Ms. Chana that the Government of Kenya seeks leave to respond to, are precisely that the Government is not committed to genuine investigations and prosecutions and to protecting and assisting victims and witnesses. It is thus most important that the Government of Kenya is given the opportunity to refute Ms. Chana's allegations. It is hoped that Ms. Chana will support the Government of Kenya's application to guarantee a fair consideration of the issues. Her submissions should not be relied on in determining any of the Government's Requests for Assistance, and indeed any future challenges to admissibility in the present case, without the Government of Kenya being provided with the chance to answer these allegations.

5. The comments made by Ms. Chana are obviously of great concern to the Government of Kenya. They amount to very serious allegations which cannot be taken lightly by a State Party to the ICC. They certainly should not be made in a court of law without cogent evidence to back them up. It is thus important for the record that the unsubstantiated allegations against the Government of Kenya are not left without any response from those who are wrongly accused.
6. The Government of Kenya respectfully requests the Pre-Trial Chamber in these circumstances to allow it to submit observations limited to these allegations against the Government by Monday 31 October 2011, or such date as ordered by the Chamber.
7. Ms. Chana filed her final written observations on 30 September 2011.⁴ She filed her submissions in response to the Defence request concerning her comments on 10 October 2011. The Government of Kenya reviewed these observations and submissions before filing this application to determine whether her earlier allegations were substantiated or verified in any way in these filings. Ms. Chana did not provide

⁴ Final written observations of the Victims' Representative in relation to the confirmation of charges hearing, ICC-01/09-01/11-334, 30 September 2011 (hereinafter "Victims' Final Observations of 30 September 2011").

any concrete evidence in support of her allegations in her final observations or her response. Her prior submissions should therefore be answered, the more so because she has not sought to support them with any concrete evidence in her final observations or her response.

B. Specific allegations made by Ms. Chana

8. Ms. Chana has made several factually incorrect and unsupported allegations about the Government of Kenya's approach to investigating and prosecuting crimes committed during the Post-Election Violence and to victim and witness protection. These can be summarised as follows:

- On 1 September 2011, during her opening statement to the Pre-Trial Chamber, Ms. Chana submitted that the Government has displayed no willingness "to devote resources to bring even the lowest level perpetrator to account"⁵ as well as no "resolve on the part of the authorities in Kenya to do anything to pursue the perpetrators."⁶ Ms. Chana also alleged that "[t]he government has no interest in protecting ... the little person. Instead, they use all their might to protect the big people in government."⁷
- During her closing statement to the Pre-Trial Chamber on 8 September 2011, Ms. Chana alleged "that the government is not there to assist" the victims⁸ and emphasised a "manifest lack of concern for the plight of those affected".⁹ She claimed that the Government of Kenya had done little to assist the victims or to investigate and prosecute crimes committed during the Post-Election Violence.¹⁰ Ms. Chana stated that the Government of Kenya "continue[s] to devote great resources to prevent these proceedings [before the ICC] from taking place"¹¹ and that a "culture of impunity ... has become well-established in Kenya."¹² Lastly, Ms. Chana referred to "a climate of menace"¹³ for victims

⁵ ICC-01/09-01/11-T-5-ENG ET WT, pg. 78, ln. 10-15.

⁶ ICC-01/09-01/11-T-5-ENG ET WT, pg. 77, ln. 8-10.

⁷ ICC-01/09-01/11-T-5-ENG ET WT, pg. 77, ln. 11-13.

⁸ ICC-01/09-01/11-T-12-ENG ET WT, pg. 19, ln. 23-25. See also, Id., pg. 16, ln. 14-16.

⁹ ICC-01/09-01/11-T-12-ENG ET WT, pg. 31, ln. 19-20.

¹⁰ ICC-01/09-01/11-T-12-ENG ET WT, pg. 16, ln. 5-18, pg. 17, 9-11, pg. 19, ln. 20-25.

¹¹ ICC-01/09-01/11-T-12-ENG ET WT, pg. 16, ln. 14-16.

¹² ICC-01/09-01/11-T-12-ENG ET WT, pg. 16, ln. 5-6.

¹³ ICC-01/09-01/11-T-12-ENG ET WT, pg. 16, ln. 6-7.

and witnesses in Kenya who were not being protected by the Government of Kenya.¹⁴

- In the Victims' Observations of 16 September 2011, Ms. Chana re-iterated her allegation that "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."¹⁵ Ms. Chana asserted that "the Government of Kenya has not shown interest in prosecuting the perpetrators of these crimes."¹⁶ She expressly questioned the Government of Kenya's credibility by claiming that "the political party supported by the alleged perpetrators of the crimes in this case is now part of the government of Kenya."¹⁷
- After the Defence for Ruto and Sang filed an objection on 30 September 2011 to prejudicial comments made in Ms. Chana's closing statement,¹⁸ she submitted a response in which she stated 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."¹⁹ Ms. Chana's response addressed the security situation in Kenya by alleging that "there is a deep culture of impunity in Kenya."²⁰ Further, Ms. Chana asserted that the legal representative for victims may express the concerns of victims by making allegations against any party, State or individual whether or not "there is *proof* that the specific risk *does* exist"²¹. Ms. Chana argued that her submissions are permissible because they are "not evidence pertaining to the substantive merits" of the case.²²

9. Ms. Chana has continued to make erroneous and unsupported statements against the Government of Kenya outside of the court proceedings. In an interview with the "Kenya Monitor", published on 11 October 2011, Ms. Chana again alleged that

¹⁴ ICC-01/09-01/11-T-12-ENG ET WT, pg. 16, ln. 6-8.

¹⁵ Victims' Observations of 16 September 2011, para. 5.

¹⁶ Victims' Observations of 16 September 2011, para. 56.

¹⁷ Victims' Observations of 16 September 2011, para. 56.

¹⁸ Defence Request Regarding Prejudicial comments Made by Victims' Legal Representative Sureta Chana during Closing Statement, ICC-01/09-01/11-343, 30 September 2011.

¹⁹ Response by the Victims of 10 October 2011, para. 24.

²⁰ Response by the Victims of 10 October 2011, para. 24.

²¹ Response by the Victims of 10 October 2011, para. 47.

²² Response by the Victims of 10 October 2011, para. 37.

“[t]here’s been no will of the Government of Kenya to do anything about these people [the victims]. I think by and large the victims have been ignored, completely and nobody has been highlighting their plight.”²³

C. Reasons to grant leave to submit observations

10. There are three reasons relied on by the Government of Kenya for requesting leave to submit observations: (i) the allegations made by Ms. Chana have a direct bearing on the Government of Kenya’s Requests for Assistance, and any future applications on behalf of the Government, (ii) Kenya as a State Party of the ICC should be permitted to place on the record its response to very serious allegations which question its good faith and commitment to the ICC, and (iii) the Legal Representative should not be permitted to make highly prejudicial allegations without the necessary forensic evidence to support such allegations and without bringing to the Court’s attention the evidence against her submissions.

11. First, the Government of Kenya has filed Requests for Assistance to obtain access to the evidence relied on by the Prosecutor in the present case.²⁴ The Prosecution has refused to make this evidence available on the grounds that the Government of Kenya cannot be trusted to ensure the safety and security of witnesses and because the Government has not established that genuine investigations and prosecutions are taking place.²⁵ In shadowing the Prosecution’s allegations, but without any evidence or additional evidence in support, Ms. Chana could, intentionally or otherwise, influence the Chamber in its deliberations about the Government’s Requests for Assistance. Her filings and contributions in Court amount to a form of “false collateral” evidence – i.e. assertions that give the impression of supporting other allegations whereas they are in fact founded on those allegations.

²³ “Q&A with Victims’ Lawyer Sureta Chana: We can’t even talk about the long term because victims are in the same place as just after the violence”, Kenya Monitor, A project of the Open Society Justice Initiative, 11 October 2011.

²⁴ Although the Government of Kenya’s first Request for Assistance of 21 April 2011 was rejected by the Pre-Trial Chamber on 29 June 2011, the “Government of Kenya’s Application for Leave to Appeal the ‘Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence’” of 4 July 2011 is still pending. The Government of Kenya filed its second Request for Assistance on 16 September 2011, without prejudice to its Application for Leave to Appeal of 4 July 2011. This second Request for Assistance has yet to be decided (Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10), Article 96 and Rule 194, ICC-01/09-79, 16 September 2011).

²⁵ Prosecution’s Response to ‘Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10), Article 96 and Rule 194’, ICC-01/09-80, 6 October 2011, paras. 3, 9-17.

12. Even though the Requests for Assistance are being considered in separate proceedings, Ms. Chana's allegations have been made before the same Chamber that is seised of the Requests for Assistance. The Requests are for access to the evidence in the very case in which Ms. Chana represents victims. In order to render its decision on the basis of all relevant evidence and a balanced view of the circumstances, the Pre-Trial Chamber should hear the Government of Kenya's observations. The Government of Kenya can in its observations submit to the Chamber all relevant information and evidence about the steps that it has and continues to undertake to assist and protect victims and witnesses. In the Government of Kenya's submission it would not be fair to decide on its Requests for Assistance without hearing the Government's submissions.

13. The Chamber may of course decide not to take any of Ms. Chana's observations into account, nor give them any weight, especially given that they have no proper evidentiary foundation. The Government of Kenya notes a previous finding by the Pre-Trial Chamber in this regard²⁶ in which the Chamber determined that the Government of Kenya's reply to the Prosecutor's allegations was unnecessary:

“in making a judicial ruling, it does not rely on a single factor. Rather, the Chamber reaches its finding after having examined and weighed the different facts available in the case *sub judice*. Thus, even if the Prosecutor invoked security concerns, the Chamber does not have to give weight to such claim, unless it is convinced of its merit.”²⁷

14. As set out below, the Government of Kenya should nevertheless be permitted to respond as a State Party for the record of the ICC. Furthermore, the Government of Kenya may make further applications in respect of the admissibility of the case before the ICC. It would be unfair if unanswered allegations remained on the record that could be invoked to oppose the Government's applications. The Government's observations may also assist the Chamber in its evaluation of witnesses in the confirmation proceedings itself who have made allegations in connection with their

²⁶ Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence, 29 June 2011.

²⁷ Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence, 29 June 2011, paras. 20-22.

safety and security, which are potentially critical of the Government and its witness protection programs.

15. Second, the Government of Kenya should be permitted as a State Party of the ICC to place on record its response to the allegations that have been made. These are very serious allegations which question Kenya's commitment to the ICC and the dispensation of justice. It is only right that the Government is able to have its response recorded in the court proceedings of the ICC.
16. The Government of Kenya participates as a State Party in the Assembly of States Parties. In this and similar forums the Government of Kenya should be able to refer to its filings before the Court in respect of any misconceived allegations that it is not committed to the ICC and ending impunity, and does not take witness and victim protection and security seriously.
17. Third, Ms. Chana should not be permitted to make allegations of a highly prejudicial nature without evidence in support of these allegations. The problem is compounded by Ms. Chana simply ignoring the evidence that stands against her allegations and failing to bring this evidence to the Chamber's attention.²⁸
18. For example, Ms. Chana did not acknowledge the fact that thousands of persons have been investigated, prosecuted and convicted for serious crimes committed during the Post-Election Violence in the Rift Valley Province, Western Province, Nyanza Province, Coast Province, Nairobi Province and Central Province.²⁹ Her allegations also disregard all judicial, police and public prosecution reforms undertaken since the Post-Election Violence.³⁰ In addition, she has not once noted the witness protection programs that have been established in Kenya under the reformed witness protection legislation³¹. She does not even mention the independent Witness Protection Agency with officers recruited and vetted by an international agency and with independent

²⁸ As Ms. Chana will be aware from her experience in courts around the world, counsel are required as part of their duty of candour to the court to ensure that the court is aware of the legal authorities and, in certain circumstances, evidence which may undermine the case being advanced by counsel. Counsel is in no circumstances ever allowed to misrepresent the state of the evidence before the court.

²⁹ Filing of Annexes of Material to the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, 21 April 2011, Annex 3.

³⁰ Application on behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute, 31 March 2011, paras. 45-79.

³¹ The Witness Protection (Amendment) Bill, 2010.

funding.³² There has been no reference at all to the recent steps that the Kenyan authorities have taken to protect ICC and other witnesses.³³

19. As a professional officer of the Court Ms. Chana should have at least noted the programs and initiatives of the Government of Kenya. It is misleading to the Court to do otherwise. It hampers the Court in its primary function of discovering the truth on the basis of all relevant evidence. Ms. Chana has a responsibility as the Legal Representative appointed by the Court to represent victims in accordance with Article 68(3) which requires that the views of victims must be presented in a manner that is not prejudicial or inconsistent with “*a fair and impartial trial*”. Her suggestion that in effect it does not matter whether there is concrete evidence in support of allegations made by victims is most disconcerting.³⁴ As an officer of the court she obviously should not be advancing submissions that she knows may be or are unsupported by concrete evidence. She should at least inform the Court that the views expressed are not founded on any verifiable facts. And she should inform the Court of the facts that may refute the views expressed. The Legal Representative is not appointed to be an “empty vessel” who merely relays what she is told by victims. Such an approach does not assist the Court, it does not do a service to the victims and their interests, and it can result in highly prejudicial statements being made in open court which have no foundation or substance.

20. The Government of Kenya wishes to request in its observations, if granted, that the Chamber should direct that Ms. Chana refrain from making allegations in a court of law without submitting the evidence in support of such allegations and that she should always bring to the Chamber’s attention the evidence that may not support her submissions and the views expressed by the victims. The Government requests that such a direction is given even if this application is refused by the Chamber. It will ensure in future court proceedings that it is not open to the Legal Representative to make whatever comments may be passed on by those she represents without any regard to the underlying facts.

³² Reply on behalf of the Government of Kenya to the Responses of the Prosecutor, Defence, and OPCV to the Government’s Application pursuant to Article 19 of the Rome Statute, 13 May 2011, paras. 71-75 and Annex 9.

³³ Kenya: ICC Witness Family Flee to Eldoret, allAfrica, 27 September 2011, Tobiko Orders Investigations into ICC Witnesses Claims, The Nairobi Star, 27 September 2011, Tobiko orders probe into threats on witness family, The Standard, 28 September 2011, Kenya: High Security at Nandi Home of ICC Witness, allAfrica, 29 September 2011, Kenya: Ocampo Suspect Linked to Witness Home Attack, allAfrica, 4 October 2011, Kenya: Police Guard Home of Ali ICC Witness, allAfrica, 5 October 2011.

³⁴ Response by the Victims of 10 October 2011, para. 47.

D. Conclusion

21. For all of these reasons the Government of Kenya respectfully respects the Pre-Trial Chamber to grant the Government of Kenya an opportunity to submit observations in response to the unfounded allegations of the Legal Representative of Victims by Monday 31 October 2011, or such date as ordered by the Chamber.



Sir Geoffrey Nice QC
Rodney Dixon
Counsel on behalf of the Government of the Republic of Kenya

Dated 20th October 2011
London, United Kingdom