

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: 8 May 2013

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
THE PROSECUTOR v.
*WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG***

Public

**Public Redacted Version of "Defence Response to the Government of Kenya's
Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence on
the Status of Cooperation with the International Criminal Court"**

Source: Defence for Mr. William Samoei Ruto

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

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Victims and Witnesses Unit

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**Victims Participation and Reparations
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Other

I. Introduction

1. Significant investigative deficiencies and disclosure failures underlying the two cases that the Prosecutor has brought arising out of the Situation in Kenya have, in recent months, slowly been brought to light.¹ The response of the Prosecutor has been, in large part, to find scapegoats outside her office for these failures. Mr. Ruto and his defence (“Defence”) have been repeatedly accused of witness intimidation and interference.² [REDACTED].³ The Government of Kenya (“GoK”) has been accused of non-cooperation.⁴ Generic problems with the security situation in Kenya have also been blamed.⁵ The hallmark of all these allegations is that they are made in such a manner that the party being accused is severely constrained in its ability to refute them. The allegations are made in the media or they are made without proper substantiation, or at least, the evidence allegedly underpinning them is never provided to the party being accused. The result is that these serious allegations remain unchallenged and the parties accused remain unable to properly and effectively clear their names.

2. Accordingly, the Defence understands why the Government of Kenya must have felt compelled to file observations on the status of cooperation with the International Criminal Court (“Court”).⁶ Pursuant to the Trial Chamber’s decision of 24 April 2013, the Defence files its response to the Observations submitted by the Government of Kenya.⁷

¹ In the proceedings of the *Prosecutor v. Kenyatta*, see, e.g., ICC-01/09-02/11-728, paras. 121 and 123; ICC-01/09-02/11-728-Anx2, paras. 1 and 2. In the present proceedings, see, e.g., ICC-01/09-01/11-642, para. 13.

² See, e.g., ICC-01/09-01/11-647-Conf-Red, para. 7; ICC-01/09-01/11-665-Conf-Red.

³ ICC-01/09-01/11-680-Conf-Red, paras. 16-17.

⁴ See examples referred to by the GoK in ICC-01/09-01/11-670 (“GoK Observations”) at paragraphs 2 and 3.

⁵ See, e.g., ICC-01/09-01/11-695-Conf-Red, para. 35. See also the comments of Judge Christine Van den Wyngaert in ICC-01/09-02/11-728-Anx2, at paragraph 2.

⁶ GoK Observations (see footnote 4 above).

⁷ ICC-01/09-01/11-700.

3. These Observations are submitted as confidential as they refer to specific submissions within certain filings that remain confidential. A public redacted version shall also be filed.

II. Submissions

4. In short, the Defence supports the submissions made by the Attorney-General of Kenya in his filing. In particular, that the proper determination of the case before the Chamber would be facilitated by requiring parties making allegations against another party to support those assertions with specific references and evidence. Further, the Defence submits that given that Kenya is a State Party to the Rome Statute, the Defence supports the right of Kenya to answer such allegations and that the Prosecutor be required to cease making such allegations if unfounded, or else to make such allegations in an *inter partes* hearing where the allegations of cooperation or non-cooperation can be properly determined by the Trial Chamber. As stated in the GoK Observations:

The Government of Kenya further notes that the Prosecutor has not requested any Chamber of the Court to refer the Republic of Kenya to the Assembly of States Parties. Instead, the Prosecution's approach is that of a halfway house - alleging non-cooperation and delaying tactics by the Kenyan Government in support of its legal submissions and requested relief, without affording the Government of Kenya the opportunity to comment on and respond to these claims so as to expose or explain such assertions as false, incomplete, inaccurate or otherwise misleading. In addition, there are circumstances when a State Party and sovereign government may not be able to provide a party to the proceedings before the ICC or the Court itself with everything requested. An obvious example is in circumstances envisaged by Article 72 of the Statute.⁸

5. The Attorney- General of the Republic of Kenya pithily concluded:

That not everything requested by a party to proceedings is provided by a State, is not to say that a State has not cooperated with the Court or that its co-operation is deficient so as to justify one sided adverse comment from a party to proceedings, which is what the Prosecutor of the ICC has unfortunately been doing.⁹

⁸ GoK Observations, para. 24.

⁹ *Ibid.*

6. The Defence also notes the reference at footnote 14 of the Observations filed by the Government of Kenya, citing the Prosecutor's public assertions that her discussions and requests addressed to the Attorney-General were to "no avail" and that her attempts of cooperation with the Government of the Republic Kenya represented "the most difficult" of circumstances out of all the situations she has dealt with. Lead counsel in this case also acts as Lead Counsel in the case of the *Prosecutor v. Abdallah Banda and Saleh Jerbo* in the Darfur situation and submits that this comment by the Prosecutor is, on any view, absolutely devoid of merit. As the Government of Kenya noted, Prosecution, Registry and Defence staff are allowed into Kenya and conduct investigations unimpeded.¹⁰ Whereas, as stated in public filings in the *Banda and Jerbo* case, it is clear that no such access is permitted and that cooperation with the Court constitutes a criminal offence punishable under the laws of the Republic of Sudan.¹¹ All suspects in the Darfur Situation from the Government-side have refused to recognise the jurisdiction of the Court and all have refused to surrender. Juxtapose this with the Kenya situation wherein all six named suspects cooperated with the Court and **did** voluntarily surrender. That cooperation continues to this day. Additionally, it appears from the filing submitted by the Government of Kenya that requests from the Prosecution have, it seems, been answered. The Prosecutor's comments cannot be simply dismissed as hyperbole; they must be considered deliberate and unfortunate utterances that are simply not true.
7. The Defence submits that such serious allegations should not be allowed to cloud the present proceedings and distract from the central issues falling for determination: namely, whether the Prosecution has over these last three years conducted investigations effectively and with full fidelity to their statutory

¹⁰ GoK Observations, para. 25.

¹¹ See, e.g., Defence Request for a Temporary Stay of Proceedings, 6 January 2012, ICC-02/05-03/09-274, paras. 2, 4 (noting, *inter alia*, that the Prosecution's own submissions to the Court indicate that the Government of Sudan, in addition to not cooperating with the Court, criminalises any such cooperation and persecutes those who are suspected of cooperating with the Court).

obligations and whether the allegations made against the Accused in this case are true – or whether, in the most important particulars, they are absolutely false and that the Office of the Prosecutor has been duped to a staggering extent by key witnesses that it purports to put forward as reliable witnesses of truth.

8. The Defence position on this issue is principled, not expedient. In previous filings, the Defence has noted that the Prosecution is making repeated utterances in public filings and in the press¹² that the Defence has somehow been involved in witness intimidation, witness interference or bribery. Innuendos and insinuations have, in fact, been bandied about in a most prejudicial and thoroughly unfair manner. These allegations are spurious and vigorously denied. The Prosecution has averred an intent to lead such evidence as “consciousness of guilt”. The Defence welcomes the opportunity to expose this slur of witness interference on the part of the Defence, [REDACTED].¹³ [REDACTED] the Prosecution should be compelled to focus on the sufficiency of evidence and the truth or otherwise of the allegations raised against Mr. William Ruto for involvement in the post-election violence that occurred in 2007 and 2008. Allegations, which the Defence repudiates and rejects in emphatic terms.
9. The Victims have the right to the truth. The people of Kenya must be allowed to make honest appraisals based upon evidence, not rhetoric or one-sided narratives. The Defence respectfully submits that the Prosecutor should cease the constant barrage of stories blaming the Government of Kenya or the Defence for Prosecution failures. There has been a stubborn refusal by the Prosecution to accept that it erred in any respect in this case, and in fact, the Defence submits, the Prosecution got this case fundamentally wrong.

¹² See, e.g., Public Redacted Version of “Defence Request for Status Conference”, submitted on 16 April 2013, 25 April 2013, ICC-01/09-01/11-683-Red, paras. 4-5.

¹³ Defence Request for Status Conference, 16 April 2013, ICC-01/09-01/11-683-Conf, para. 4.

Alternatively, the interests of justice – including the rights of the Defence and the rights of victims – militate in favour of requiring the Prosecution to adduce evidence of these collateral matters so that they may be judicially determined, in advance of trial, once and for all.

Respectfully submitted,



Karim A.A. Khan QC
Lead Counsel for H.E. William Samoei Ruto
Deputy President of the Republic of Kenya

Dated this 8th Day of May 2013
At Nairobi, Kenya