

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Response of the Common Legal Representative for Victims to the “Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court or, in the alternative, Application for Leave to file Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence”

Source: **Wilfred Nderitu, Common Legal Representative for Victims**

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

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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

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**The Office of Public Counsel for the
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States' Representatives

The Government of the Republic of Kenya

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Fiona McKay

I. LEGAL BASIS FOR THE FILING

1. The Common Legal Representative for Victims (“the CLR”) files these Observations pursuant to Trial Chamber V’s Decision made on 24th April 2013¹, in accordance with Rule 103(2) of the Rules.

II. CORE OF THE SUBMISSIONS

2. The CLR takes note of the assertion of the Government of Kenya “the Government” regarding unfettered access into Kenya and within Kenya. In this regard, the CLR brings back to mind the **“Observations of the Common Legal Representative for Victims on Issues Related to the Commencement of Trial”** filed on 7th February 2013, in which he stated, *inter alia*, as follows:

In the course of conducting a mission on victims’ participation and representation, the Common Legal Representative for Victims encountered and incident on 6th February 2013 involving the unsolicited presence of an officer of the National Intelligence Service at a venue where the mission was taking place. The officer in question was inquisitive, and wanted to attend the meeting with victims which was underway. After discussions with the Common Legal Representative and his Team it was made clear that the officer would not be allowed to attend the meeting, as it did not involve him and would likely attract adverse reactions from the victims. The officer eventually agreed to leave the venue of the meeting but asked that he be updated on the meeting upon its conclusion...

3. In addition to the foregoing, the CLR notes that despite there being in force warrants of arrest against President Omar Hassan Ahmad al Bashir of the Republic of Sudan issued by the International Criminal Court (“the ICC”), the Government invited him to the ceremony marking the inauguration of President Uhuru Kenyatta as the 4th President of Kenya. Although President al Bashir eventually did not attend the ceremony, the invitation was significant in view of the Government’s treaty obligations as a State Party to the Rome Statute establishing the ICC and as one of

¹ ICC-01/09-01/11-700, “Decision on the Government of Kenya’s application for leave to file observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence”

the States which received a request for cooperation in the enforcement of the warrants in question. It is to be noted President al Bashir had visited Kenya during the promulgation of the country's current Constitution on 27th August 2010. More importantly, the invitation was coming at a time when there is in force a provisional warrant of arrest issued by the High Court of Kenya on 28th November 2011 requiring authorities of the Government to arrest and surrender President al Bashir to the ICC if he entered Kenyan territory. The fact that both the Deputy President and the President are facing charges before the ICC also cannot be overlooked in attempting to understand the full implications of the invitation on the Government's cooperation with the ICC.

4. The CLR further notes the assertion by the Government to the effect that it "has enacted several pieces of legislations that complement its cooperation with the Court", including the Witness Protection Act². Earlier in its submissions, the Government makes specific reference to the Witness Protection Agency³. However, it is the CLR's submission that these initiatives which have been cited by the Government as proof of its co-operation with the ICC are only remotely related, if not totally unrelated, to the issue of co-operation between the Court and the Government. With respect to the established Kenyan Witness Protection Agency, the Government's stated position is that all parties are free to refer their witnesses to the Agency for consideration for inclusion into the Witness Protection Scheme. However, at the time of establishment of the Witness Protection Agency (WPA), it is within the CLR's knowledge that members of the public and various stakeholders were informed that the Agency would not deal with witnesses relating to the Post-Election Violence of 2007/2008. As a result, it is unclear how the establishment of the WPA forms part of the Government's co-operation as a State Party to the Rome Statute.
5. Concerning the request by the Office of the Prosecutor to interview police officials, it is in the public domain that the level of cooperation given to the Prosecutor when he came to Kenya in December 2010 to interview various state officials in relation to the post-election violence was wanting, and the exercise was frustrated by State officials.

² Paragraph 38 of the "Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court or, in the alternative, Application for Leave to file Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence"

³ Paragraph 30

In particular, the Government declined to issue a directive to the concerned State officials to meet with the Prosecutor, which led to the eventual failure of the collection of evidence. Subsequent to that, the suit to which the Government has made reference in its submissions⁴ was filed, with the Attorney General as a Respondent. The Attorney General explains in his submissions that the Government is unable to cooperate with the Prosecutor on this matter due to a court Order in place, but there has been no disclosure of the efforts, if any, that has made on behalf of the Government in order to bring the petition to conclusion and thereby facilitate the work of the ICC. It is noteworthy that the prohibitory Order of the High Court was made over 2 years ago and is still in force although the prohibition was meant to have been in force “pending the hearing and determination of the application”⁵.

6. The Government’s filing on co-operation⁶ appears to suggest that the International Crimes Division (“the ICD”) has already been established within the High Court and is functional. The reality is different. The ICD is in its embryonic stages of establishment. The jurisdiction of the ICD has only recently been adopted and the Rules of Evidence and Procedure which it will adopt, as well as its overall organizational structure are matters that are yet to be worked out.

III. PRAYER SOUGHT

7. Accordingly, the Common Legal Representative respectfully requests the Trial Chamber considers these observations alongside the submissions of other parties and participants.

Respectfully submitted,



⁴ High Court Constitutional Petition No. 2 of 2011- *Jackson Mwangi – v- The Hon. Attorney General & Hon. Kalpana Rawal*

⁵ vide., paragraph 42 of the Government’s submissions

⁶ vide., paragraph 40 of the Government’s filing

WILFRED NDERITU
Common Legal Representative for Victims

Dated this 8th day of May 2013

At Nairobi, Kenya