



Original: **English**

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

Date: **28 April 2011**

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul, Judge
Judge Cuno Tarfusser, Judge

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 on behalf of Henry Kiprono Kosgey to the 'Application on Behalf of the
Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute'**

Source: Defence

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

The Office of the Prosecutor

Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

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and Allan Kosgey
Counsel for Joshua Arap Sang:
Joseph Kipchumba Kigen-Katwa, Joel
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Legal Representatives of the Victims

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

Sir Geoffrey Nice QC
Rodney Dixon

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia, Registrar

Counsel Support Section

Deputy Registrar

Mr. Didier Daniel Pereira, Deputy
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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. On 31 March 2011, the Government of the Republic of Kenya [the 'Government'] sought to challenge the Admissibility of proceedings before the International Criminal Court and filed '*Application on behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute*' ['Government's Application'].
2. On 4 April 2011, Pre-Trial Chamber II rendered a Decision on the Conduct of Proceedings following the Application of the Government pursuant to Article 19 of the Rome Statute in which it was requested that the Prosecutor and Defence submit written observations on the Government's Application no later than Thursday 28 April 2011, at 16.00 hours.
3. This Response is submitted pursuant to that Decision and Regulations 24 and 34 of the ICC's Regulations of Court.

Government's Application

4. The Government submits, in their Application, that the two cases currently before the ICC arising from the Kenya Situation should, pursuant to Article 19(2)(b) and Article 17(1)(a), be held inadmissible.¹ The Application is the first such Application to be made by any State under Article 19 before the ICC.²
5. It is apparent from the Government's Application that the request is based on the ground that fundamental and far reaching constitutional and judicial reforms have recently been enacted in Kenya, which will enhance the capacity and ability of the government to exercise national jurisdiction over international criminal offences and on the information 'that will be submitted

¹ Government's Application para. 1 and para 80.

² Government's Application para. 19.

to the Court'.³ The Government state that the 'process of reform and improvement is not complete' and that further transformation of both the judicial and police systems is anticipated.⁴

6. The Government states that the 'processes of reform and the investigations of crimes will continue over the coming months'. The Government states that 'it envisages that these steps will be completed within the next six months by September 2011.'⁵ The Government seek a final determination on the admissibility of the two cases after the Pre-Trial Chamber has had an opportunity to consider all of the steps already undertaken, and to be undertaken, by the Government progressively over the next six months.⁶

7. The Government Application sets out a detailed timetable over which it will present further supplementary evidence and reports to the Pre-Trial Chamber:
 - (i) End of July 2011 - report on investigations under the new DPP and how they extend up to the highest levels, and on the cooperation with the ICC Prosecutor in these investigations;
 - (ii) End of August 2011 - report on progress made with investigations to the highest levels, and on adoption of the three Police Bills and reorganisation of the police services, including the appointment of the new Inspector-General; and
 - (iii) End of September 2011 - report on progress made with investigations and readiness for trials in light of judicial reforms.⁷

8. Noting the 'vital importance' of the Application to the national interest of Kenya, the future of Kenya, and the Kenyan people, the Government sought an oral hearing to permit the Government to address the Pre-Trial Chamber in respect of its Application.

³ Government's Application para. 1.

⁴ Government's Application para. 9.

⁵ Government's Application para. 13.

⁶ Government's Application para. 16.

⁷ Government's Application para. 79.

Complementarity at the heart of the ICC regime

9. The Principle of Complementarity is at the heart of the ICC regime, and has been invoked in the preamble as well as in Article 1 of the ICC Statute. It is central to the philosophy of court.⁸

10. The Preamble to the ICC Statute provides, *inter alia*:

Emphasizing that the International Criminal Court established under this Statute shall be *complementary* to national criminal jurisdictions
[Emphasis added]

11. Article 1 of the ICC Statute provides:

An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be *complementary* to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.
[Emphasis added]

12. The importance of Complementarity to the functioning of the ICC was stressed by former President of the ICC, Philippe Kirsch QC, who previously served as Chair of the Committee of the Whole of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. On Complementarity, and its importance during negotiations on the ICC Statute, he stated:

⁸ The International Criminal court commentary on Rome Statute William A Schalpas P 336

[A]n early concern was that the ICC would interfere with or undermine the operation of national judicial systems. States supportive of the ICC addressed these concerns by emphasizing that the Court is intended to 'complement', not replace, national judicial systems. The ICC is intended to take jurisdiction when States are unwilling or unable to bring transgressors to justice. This was the one politically sensitive issue which delegations were able largely to resolve during the preparatory negotiations.⁹

13. The statute has set high threshold for exclusion of national jurisdiction except where the State is unwilling or unable genuinely to carry out the investigation or prosecution. The Application therefore merits careful and detailed consideration being the first of its kind by a State.

Defence Position

14. The Application raises fundamental issues on the principle of complementarity. The Defence as an interested party is not able to contribute definitively on the information submitted or to be submitted by the Government. Accordingly the Defence of Mr. Henry Kiprono Kosgey reserves their right pursuant to the provisions of Article 19(4) of the ICC Statute.



George Odinga Oraro
On behalf of Henry Kiprono Kosgey

Dated this 28th day of April, 2011

At Nairobi, Kenya.

⁹ Commentary on the Rome Statute of the International Criminal Court, Observer Notes, Article by Article, Otto Triffterer (ed.) p. XXXIII para. 4.