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TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding
Judge Olga Herrera Carbuccion
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

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

Public

**Sang Defence Request for Leave to Appeal
the Decision on Prosecutor's Application for Witness Summonses
and resulting Request for State Party Cooperation**

Source: Defence for Mr. Joshua arap Sang

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

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I. INTRODUCTION

1. In its *Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation*, the majority of Trial Chamber V(A) ruled that it has the power to compel the testimony of eight witnesses, and that pursuant to Article 93(1)(d) and (l) of the Statute, the Government of Kenya is obligated to serve the summons and assist in compelling their attendance before the Chamber.¹ The Majority looked primarily to international jurisprudence in determining that the Court must necessarily have such "implied powers", including the force of a subpoena, without which it could not effectively function.²
2. Justice Carbuccia filed a Dissenting Opinion, in which she agreed that Article 64(6)(b) of the Statute allows the Trial Chamber to issue summonses vis-à-vis witnesses who are not willing to testify voluntarily, but she argued that the Government of Kenya does not have a legal obligation pursuant to Article 93(1)(d) and (l) of the Statute to enforce such a summons.³
3. The Sang Defence hereby seeks leave to appeal several aspects of the Decision, pursuant to Article 82(1)(d), being issues which arise from the decision:
 - i. **whether the ICC is competent to issue a subpoena to compel a witness to appear and testify before it**, including:
 - a. whether implied powers can be relied upon to create a compulsory subpoena power for the Court where a holistic, plain reading of the Statute, Rules and *travaux préparatoires* are sufficiently clear that the States Parties did not intend for the Court to have such a power;⁴
 - b. whether the Chamber can circumvent the express provision of Article 93(1)(e), referring to the voluntary appearance of

¹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1274-Corr2, Decision on Prosecutor's Application for Witness

² For example, Decision, para. 74.

³ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1274-Anx, Dissenting Opinion of Judge Herrera Carbuccia on the 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation', 29 April 2014 ("Dissent"), paras. 8-9.

⁴ Cf, Dissenting Opinion, paras. 19-22.

- witnesses, by relying on the 'catch-all' provision of Article 93(1)(l);⁵
- c. whether the ICC can set up a compulsory summons regime which operates differently for those who are detained (see Article 93(7)) and those who are not;⁶ and
 - d. whether the Chamber's "good faith" argument combined with the object and purpose of the Rome Statute justifies a reading of the Rome Statute which allows for witnesses to be compelled to testify;⁷
- ii. **whether the ICC is competent to obligate a State Party to compel a witness to appear before it against his/her will, and whether the ICC can subsequently require the State party to sanction a non-compliant witness, should he/she fail to appear:**
- a. where the Rome Statute's own contempt provision, Article 70, does not specifically list failure to comply with a subpoena as one of the contemptuous behaviours meriting punishment; and
 - b. where the majority did not consider arguments made by the parties as to the human rights implications of the imposition of retroactive penalties;⁸
- iii. **whether a request to the Government of Kenya to compel the appearance of a witness is prohibited by Kenyan law and the Rome Statute operating as part of Kenyan law, including:**
- a. whether the Chamber is allowed under the Rome Statute to treat different States differently, depending on whether their domestic law explicitly prohibits a subpoena or does not explicitly allow it;
- iv. **whether the concept of "complementarity" in the Rome Statute:⁹**
- a. allows judges to confer upon themselves the role of interpreting the Kenyan Constitution and domestic implementing legislation

⁵ Decision, paras. 116-119; cf. Dissenting Opinion, paras. 13, 16.

⁶ See Dissenting Opinion, para. 14.

⁷ Decision, paras. 120-133.

⁸ Cf. Dissenting Opinion, paras. 23-24.

⁹ Decision, paras. 134 et seq.

such as the International Crimes Act (as well as those of other member states), notwithstanding the fact that such constitutions have expressly reserved the powers of interpretation of such constitutions and laws to domestic courts; and

- b. in conjunction with the majority's notion of the ICC's "legal personality" as defined by Article 4(1) of the Rome Statute can be combined such that they vest the Court with the same powers as ordinarily held by domestic courts;¹⁰
- v. **whether the Prosecution has justified issuing the subpoena as requested, in this case, on the basis of their relevance, specificity and necessity;**¹¹ and
- vi. **whether the majority has adequately upheld its obligation pursuant to Article 68(1) to protect the physical and psychological health and well-being of witnesses,** especially Witness 15, by compelling them to testify against their will and abdicating responsibility to the Government of Kenya to ensure their safety.¹²

II. APPLICABLE LAW

- 4. As determined by Appeals Chamber of the ICC, an issue "is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one".¹³ The issue must be more than a mere disagreement over the correctness of a Chamber's reasoning.¹⁴
- 5. Article 82(1)(d) stipulates that either party may appeal: "A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-

¹⁰ Decision, paras. 134-140.

¹¹ Decision, paras. 46 et seq.

¹² Decision, pg. 78; cf, Dissenting Opinion, paras. 25.

¹³ *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para. 9.

¹⁴ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-817, Decision on Prosecution's Application for Leave to Appeal the 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', 18 July 2013 ("Excusal LTA Decision"), para. 12.

Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.¹⁵ The Appeals Chamber has stated that the object of the remedy provided by Article 82(1)(d) is to “pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”.¹⁶

6. The “fairness” prong has been described as the balance between the parties during the proceedings.¹⁷ In the *Situation in the DRC*, the Pre-Trial Chamber stated, “equity of the proceedings entails equilibrium between the two parties, which assumes both respect for the principle of equality and the principle of adversarial proceedings”, and includes respect for the procedural rights of all parties and participants.¹⁸ The requirement of fairness has thus operated to the benefit of both the Defence and the Prosecution; the Defence further submits that the overall fairness of the proceedings must also take into account the rights of participants such as representatives of States Parties and the witnesses themselves.

7. The “expeditious conduct” of the trial means the timely and efficient conduct of proceedings. The principle requires that decisions at all stages do not unnecessarily delay the ultimate determination of responsibility.¹⁹ Therefore, a decision taken by the Trial Chamber, which delays the determination of responsibility for the alleged crimes or compromises the efficiency of the process, affects the expeditious conduct of the trial.

¹⁵ See also, Excusal Decision, para. 14; ICC-01/09-01/11-596, Decision on the joint defence request for leave to appeal the decision on witness preparation, 11 February 2013 (“Witness Preparation LTA Decision”), para. 4.

¹⁶ *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber’s 31 March 2006 Decision Denying Leave to Appeal (“Extraordinary Review Decision”), para. 19.

¹⁷ Excusal LTA Decision, para. 15.

¹⁸ Extraordinary Review Decision, para. 38; see also, ICC-01/09-01/11-1018-Red, Decision on Prosecution’s Application for Leave to Appeal the ‘Decision on Disclosure of Information related to Prosecution Intermediaries’, 8 October 2013 (“Intermediaries LTA Decision”), para. 11 (The Prosecution has previously agreed that the concept of fairness encompasses the procedural and substantive rights of all participants and parties).

¹⁹ The prompt determination of responsibility is not just an interest of the defence, but also of the prosecution, victims, and the international community as a whole. See e.g. *Prosecutor v Norman et al*, SCSL-2004-07-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003, para.8; and Terrier, “Powers of the Trial Chamber” in Cassese, Gaeta and Jones (ed) (2002) 1259 at 1264-65.

8. The “outcome of the trial” has been defined as the Judgement at the end of the trial proceedings (rendered pursuant to Article 74 of the Statute), meaning either an acquittal or a conviction.

III. SUBMISSIONS

9. The Sang Defence acknowledges that trial chambers have found that it is not “sufficient for the purposes of granting leave to appeal” that the issue for which leave is sought is either of general interest or may arise again in the future.²⁰ However, in a situation such as this, where judges of the ICC have claimed to have powers that are not explicitly granted to them by the States Parties, the wide-ranging significance vis-à-vis State Party cooperation and the novelty of the issue must tilt the scales toward the granting of leave, even if not a sufficient factor on its own accord. In any event, the Sang Defence submits that the issues meet the criteria for leave to appeal under Article 82(1)(d).

Each of the Issues Arises from the Decision

10. Each of the six issues arises directly from the Decision and is a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.
11. The first issue, as to whether the ICC is competent to compel a witness to testify before it, is one of the core questions addressed by the Decision. The majority determined that Article 4(1) and a broad interpretation of the Court’s implied powers coalesced to create a power for the Trial Chamber to summon witnesses who have ceased their cooperation with the Court. The majority relied heavily on ICJ jurisprudence and what it considered to be “customary international criminal procedural law” in order to conclude at paragraph 74 of the Decision that:

“[...] The resulting principle of—or legal formula for—implied power thus becomes this. If the power (capacity or competence) under consideration is such that the functions (that the States Parties entrusted to an international body or institution)

²⁰ Excusal LTA Decision, para. 16 (citing *Prosecutor v. Lubanga*, ICC-01/04-01/06-1191, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008, 26 February 2008, para. 11) and ICC-01/09-01/11-817-AnxA, Dissenting Opinion of Judge Eboe-Osuji, para. 2.

'could not be effectively discharged' without the power (capacity or competence) in question, the international body or institution 'must be deemed to have [that power]'."

And at paragraph 83 of the Decision:

It is not surprising then that the Rome Statute has codified this doctrine of implied powers—no doubt out of an abundance of caution. To that effect, article 4(1) provides as follows: 'The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes,' [Emphasis added]. There is no doubt at all in the Chamber's mind that 'legal capacity' in the sense of article 4(1) includes competence, power, ability and capability.

12. The second issue, as to whether the ICC can obligate a State Party to compel an unwilling witness to testify, and to sanction him/her if he/she does not comply, also arises from the Decision, specifically Section B. At paragraph 103, the majority concluded:

It is noted from the outset that article 86 imposes upon States Parties a general obligation to 'cooperate fully' with the Court in its 'prosecution' of crimes within the jurisdiction of the Court. According to the provision: 'States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.' [Emphasis added.] The wording saying that full cooperation shall be rendered 'in accordance with the provisions of this Statute' affords no refuge to non-cooperation, such as may result purportedly from any claim that the subject-matter of the request was not spelt out explicitly in the Statute.

And at paragraph 151:

Compelled appearance, on the other hand, involves, by definition, essential legal antagonism between the unwilling witness and any person (including the police) or entity (including a State) that seeks to compel the witness into something that s(h)e does not wish to do. The essence of the rule of law in the average law-abiding State is that each State Party would have organised its internal affairs in such a manner that adversarial relationships between the State (or its agents) and the subject are to be governed by the law.

13. The third issue, as to whether a request by the Court to the Government of Kenya to compel the appearance of witnesses is prohibited by Kenyan law and the Rome Statute, was addressed at length by the majority in paragraphs 165-179, concluding that there was no such prohibition.
14. The fourth issue, as to whether the concept of "complementarity" allows judges of the ICC to interpret Kenyan law and also vest the ICC with the same powers of ordinary domestic courts, arose most directly in paragraph 138:

That is to say, a genuine international crimes trial in a domestic court must comprise the power of the domestic court to compel witnesses to appear. That being the case, the doctrine of complementarity should, in good faith, put the ICC in no weaker stead to conduct such trials in cases before it. In other words, the ICC will have an equal ability—as does a domestic criminal court genuinely trying an international crime case—to subpoena witnesses to appear, as an incidence of the doctrine of complementarity—and given especial anchor by the operation of article 21(1)(c) of the Rome Statute that notably allows national legal systems (especially of situation countries) to supply powers and remedies not clearly or expressly provided for in the Rome Statute and related instruments.

And in Section C, titled “Kenya’s Obligation to Honour the Request to Compel Witness Attendance, wherein the majority favoured the interpretation of Kenyan law put forward by the Legal Representative for Victims over that of the Attorney General of the Republic of Kenya.²¹

15. The fifth issue, as to whether the Prosecution justified issuing the requested subpoenas, was addressed by the Chamber when it determined that the request with respect to the eight witnesses must satisfy the tripartite principles of relevance, specificity and necessity (both in terms of determining the truth and in order to obtain the testimony of the witness).²² The majority made only a cursory determination as to relevance, at paragraph 182, and specificity at paragraph 184. Following that, the majority claimed that the potential hostility of some of the eight witnesses did not detract from the fact that their testimony was necessary to the determination of the truth (see, for instance, paragraphs 187 and 188).

16. The sixth issue and final issue is whether the majority adequately considered its obligations under Article 68(1) to protect the physical and psychological well-being of witnesses. In fact, there is no reference to Article 68(1) in the Decision, which actually underscores the Defence’s point. The majority did, however, order the Government of Kenya to provide for the security of the eight witnesses from now until their testimonies are heard. Additionally, Justice Carbuccia noted in her Dissent at paragraph 25 that the security concerns of witnesses must be taken into consideration if one were to agree that the ICC has subpoena powers.

²¹ See, Decision, paras 159-160.

²² Decision, para. 181.

17. These are not abstract issues of academic significance, but real issues arising from the Decision, and which are more than mere disagreements with the outcome of the Decision itself.

The Issues Affect the Fair and Expeditious Conduct of the Proceedings

18. The trial against Mr. Ruto and Mr. Sang must be procedurally and substantively fair not only to them as the two accused, but to all parties and participants, including the Government of Kenya and the witnesses involved. The issues raised herein affect the fair conduct of the trial in several respects. One, the accused have long been plagued with a changing Prosecution witness list and yet they have a right to know with certainty the witnesses, and the related evidence, that will be part of the case against them. The fact that eight witnesses have withdrawn their cooperation and yet the majority has used a novel legal procedure to summon them to appear is unfair to the accused; it is not known how the subpoena will operate and whether it will actually result in the appearance of these witnesses. It is also unfair to the witnesses, who when giving statements to the Prosecution (in some cases several years ago), did not know that this would obligate them to testify at a later stage, and that if they failed to cooperate, they would be punished and subject to criminal sanctions. It is also unfair to the Government of Kenya, who as a State Party, signed up to the terms of the Rome Statute, and in good faith assumed that the terms of their obligations thereunder were clear and did not include a responsibility to forcibly compel witnesses to testify against their will. This novel and arguably expansionist reading of the Statute and the implied powers of the Court negatively impacts the fairness of those involved.
19. Furthermore, these issues, which result in the majority's decision to summon eight core witnesses, will have a great negative effect on the expeditiousness of the trial. The accused have a right to a speedy trial, yet the Decision is likely to inordinately delay the continued presentation of the Prosecution case. That is because the summons will have to be served on eight witnesses, many of whom have been out of contact with the Prosecution for a long period of time and therefore may be difficult for the Prosecution or the Government of Kenya to

locate and serve. As it stands, the Government of Kenya does not currently have any knowledge as to the identity and whereabouts of the witnesses. In fact, it is not even certain that all eight are residing in Kenya.

20. Assuming the eight witnesses are served, should the witnesses still refuse to testify voluntarily, one or more of them may challenge the effectiveness of the summons in a Kenyan court of law. The length of a domestic court challenge is not precisely known, but it is safe to say that it could take upwards of six months, as has been seen in the *Barasa* case. While these procedures are pending, the Defence will remain in a state of limbo, unsure to what extent it is necessary to continue investigations, case preparations, and any other activity necessary to prepare effectively for the cross-examination of these witnesses. This detracts from the fairness and the efficiency of the process, and as such is an additional reason why leave to appeal should be granted.

The Issues May Affect the Outcome of the Trial

21. If the summoned witnesses come, and if the witnesses provide incriminating linkage information similar to that in their statements to the Prosecution, then the content of their testimony could necessitate the presentation of a defence case. Conversely, if the summoned witnesses come, their testimony could exonerate the accused, should the witnesses choose to come clean about their participation in a domestic scheme to implicate Mr. Ruto and his associates in the post-election violence. Either way, the ultimate outcome of the proceedings is largely dependent on whether or not the witnesses in question appear in court and whether their testimony is believable. This weighs in favour of the leave to appeal being granted.

Immediate Resolution of the Issues may Materially Advance the Proceedings

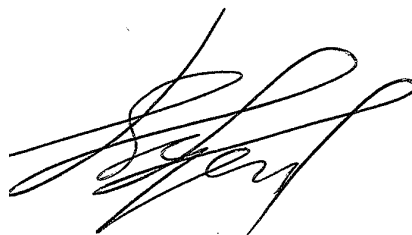
22. An immediate resolution of these issues would materially advance the proceedings, as it would bring clarity to the scope and anticipated length of the Prosecution case and whether or not a defence case may be needed. A decision by

the Appeals Chamber as to the compellability of these witnesses would allow the trial to move forward with certainty.

23. It is also noteworthy that there is a Dissenting Opinion resulting from a fundamental disagreement between the three judges in the Trial Chamber as to the viability of the Decision reached by the majority. This factor tends to lean in favour of granting leave to appeal, as resolution by the Appeals Chamber would advance the proceedings by correcting any possible mistake at the earliest opportunity.
24. Finally, it is important that this matter be dealt with now and not in an eventual appeal of the Chamber's final decision under Article 74 because if the Appeals Chamber finds at that moment that the Chamber's decision on the issuing of subpoena was in error, the Appeals Chamber would then most likely have to order a re-trial. This would unnecessarily increase the expenses for the Court and significantly increase the total length of the proceedings, which could be avoided by determining the matter now before judgment. Of course, there is also the knock-on effect of this Decision vis-à-vis the conduct of other trials.

IV. RELIEF REQUESTED

25. The Sang Defence respectfully requests that leave to appeal be granted on the six issues (and sub-issues) identified at paragraph 3 above, as they arise from the decision, affect the fair and expeditious conduct of the trial or the outcome of the proceedings, and their immediate resolution by the Appeals Chamber would materially advance the trial.



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua arap Sang
Dated this 5th day of May 2014
In Nairobi, Kenya