

**Cour
Pénale
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**International
Criminal
Court**

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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

Public redacted version of "Defence response to the corrected and amended version of 'Prosecution's request under article 64(6)(b) and article 93 to summon witnesses'"

Sources: 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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I. Introduction

1. The defence for Mr. William Samoei Ruto (“Defence”) has repeatedly stated that all witnesses in this case, whether for the Prosecution or the Defence, “*should be free to come and speak the truth*”.¹ The Defence wants witnesses to attend and does not want any witness to withdraw.² In fact, the Defence specifically requested that three out of the seven witnesses for whom the Prosecution is now seeking summons to appear be called to testify immediately after the opening statements in this case.³ The Prosecution opposed this request.⁴

2. However, in respect of compelling witnesses to appear, the Defence has acknowledged that the “*Rome Statute...[has] its own weaknesses and limitations regarding enforcing appearances*”.⁵ Accordingly, the Defence submits that the *Corrected and amended version of “Prosecution’s request under article 64(6)(b) and article 93 to summon witnesses” (ICC-01/09-01/11-1120-Conf-Exp)* (“Request”)⁶ should only be granted in part.

3. The Request is a creative but legally improper attempt to place a duty on *some* States Parties,⁷ in this case the Republic of Kenya, to compel witnesses to appear and testify before the Court. The Prosecution’s assertion that the combination of Articles 64(6)(b), 93(1)(d) and 93(1)(l) of the Rome Statute (“Statute”) provides a Trial Chamber with the requisite legal authority to do so is not supported by an analysis of the statutory regime governing the appearance of witnesses and State cooperation. The plain fact is, that on the issue of witness compellability, States Parties deliberately chose to implement a cooperation regime of a horizontal

¹ See, e.g., ICC-01/09-01/11-T-26-CONF-ENG ET 09-09-2013, p. 39, lines 2-3.

² ICC-01/09-01/11-T-26-CONF-ENG ET 09-09-2013, p. 39, line 5.

³ ICC-01/09-01/11-818. Note the Prosecution erroneously refer to four witnesses at para. 6 and fn. 3 of the Request. However, P-0524 was not included in defence filing ICC-01/09-01/11-818.

⁴ ICC-01/09-01/11-849-Conf-Red.

⁵ ICC-01/09-01/11-T-26-CONF-ENG ET 09-09-2013, p. 39, lines 13-15. See also the Prosecution’s reference at ICC-01/09-01/11-1120-Conf-Red-Corr2, para. 6.

⁶ ICC-01/09-01/11-1120-Conf-Red-Corr2.

⁷ See *infra.*, paras. 26 to 27. While the Request is limited to the Republic of Kenya, the Prosecution’s argument clearly has broader application.

nature complemented by the other broad provisions governing legal assistance set out in Article 93 which include the power to take witness testimony by rogatory commission.⁸ This regime cannot be circumvented in the manner proposed in the Request. Instead, the Defence submits that the Government of Kenya (“GoK”) can be requested to assist with the service of summonses on each of the witnesses who are the subject of the Request. However, no obligation exists on the GoK to enforce these summonses. Further, any such attempted enforcement is not authorised by Kenyan law.

4. This response is classified as “confidential and *ex parte* available to the Ruto and Sang Defence only” because it includes information obtained during on-going defence investigations which the Defence has no obligation to reveal to the Prosecution at this stage of proceedings. **Annexes C and D** are similarly classified for the same reason. **Annexes A and B** are classified as “confidential” because they contain information disclosed to the Defence by the Prosecution on a confidential basis. A public redacted version of this response will be filed in the record.

II. Submissions

A. The Statutory regime only provides for the “voluntary” appearance of witnesses before this Court

5. Article 93(1)(e) of the Statute is the key provision in the Court’s legal framework governing a State Party’s obligation to secure the appearance of witnesses before the Court. This article provides that a State Party shall comply with a request by the Court to facilitate “*the voluntary appearance of persons as witnesses or experts*”.⁹ Accordingly, and with one exception,¹⁰ a person can only appear before this

⁸ See Article 93(1)(b) of the Statute which provides that a State Party can be asked for assistance in relation to “[t]he taking of evidence, including testimony under oath [...]”.

⁹ Emphasis added.

¹⁰ As discussed further below, Rule 193 of the Rules of Procedure and Evidence (“Rules”) provides that, with respect to a person convicted by the Court serving his or her sentence in the State of enforcement, the provisions of Article 93(7) – requiring a person in custody’s consent for temporary transfer to the Court – shall not apply.

Court as a witness if s/he consents.¹¹ The Court has no authority to seek State assistance to compel appearance. The Defence submits that Article 93(1)(e) applies regardless of where the appearance before the Court is to take place (i.e. at the seat of the Court in The Hague or at another location pursuant to Article 3(3) of the Statute) or the medium used to secure the appearance (i.e. in person or via video-link).¹²

6. The Prosecution's arguments which seek to circumvent the plain terms of Article 93(1)(e) by relying on Articles 64(6)(b), 93(1)(d) and 93(1)(l) are not compelling. While the Defence agrees that a Trial Chamber can request a State Party to serve judicial documents, including an ICC summons requiring a person to appear as a witness before the Court, pursuant to Article 93(1)(d),¹³ the Defence submits that the Court has no authority to request that a State take measures to secure the enforcement of such summonses pursuant to Article 93(1)(l).¹⁴ This conclusion is supported by an analysis of Article 93, its drafting history and a consideration of the Statute as a whole.

7. In their commentary on Article 93, the commentators, Kress and Prost, observe that this article "*provides a detailed and broad list of the forms of legal assistance, outside of surrender, available to the ICC. In addition, it recognizes the availability of other forms of assistance not specified in the list, subject only to the limitation of a prohibition under the law of the requested State.*"¹⁵ The appearance of witnesses is one "form" of legal assistance which is explicitly provided for in the article and, as noted above, is dealt with in Article 93(1)(e). As regards "*other forms...not*

¹¹ As also discussed below, the requirement for consent is emphasised by Article 97(7)(a); even a person in custody can only be transferred to the Court as a witness or for purposes of identification if s/he freely consents to the transfer.

¹² See Request, para. 3 where the Prosecution states that it wishes the witnesses' appearances to be secured "at an appropriate location in Kenya for purposes of testifying before the Court (*in situ* or by means of video-link technology) in the on-going trial." See also Request, paras. 85 and 86.

¹³ Request, paras. 71 and 72. In the Kenyan context, see the International Crimes Act 2008, section 86 (Assistance in arranging service of documents).

¹⁴ Request, paras. 73 and 81-84.

¹⁵ Kress, C. and Prost, K., "Article 93", in Triffterer, O. (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2008), p. 1572.

specified in the list", Article 93(1)(l) is the relevant catch-all provision and requires a State Party to provide "[a]ny other type of assistance which is not prohibited by the law of the requested State".

8. The key phrase in Article 93(1)(l) is "[a]ny other type of assistance".¹⁶ The Defence submits that this sub-article makes clear that it only applies to types of assistance which are not otherwise specifically dealt with in Article 93(1) and provides a second limitation on the scope of Article 93(1)(l) in addition to the requirement that the assistance not be prohibited under national law.¹⁷ Clearly, the appearance of witnesses is a "type" of assistance which is expressly addressed in Article 93(1)(e). This is unsurprising since it is an obvious form of assistance that will be required when addressing the functioning of an international criminal court. Further, Article 93(1)(e) clarifies that witness appearance must be "voluntary". Contrary to the Prosecution's position, it is implausible to argue that the non-voluntary appearance of witnesses is a type of assistance different to the voluntary appearance of witnesses which would be left unaddressed and, thus, can be dealt with under another more general provision.¹⁸ Indeed, it is notable that the two commentators (one of whom is an OTP staff member) who argue that Article 93(1)(l) can be used by the Court to ask national authorities to compel the appearance of witnesses fail to analyse in any detail the wording of Article 93(1)(e) and the relationship between Articles 93(1)(e) and 93(1)(l).¹⁹ As demonstrated above, such an analysis is vital to a proper understanding of the

¹⁶ Emphasis added.

¹⁷ The Defence submits that the words "[a]ny other type of assistance" cannot be ignored. Indeed, when interpreting general provisions it is to be expected that Courts will construe them narrowly. Of note is the following guidance on the interpretation of general provisions: "the use of a purely general expression without any *expressio unius* at all will not necessarily result in the general expression being given its fullest literal meaning. Indeed, the wider an expression used the less safe it may be to expect the Courts not to imply some limitations in it." See Greenberg, D., *Crises on Legislation*, Sweet & Maxwell (10th ed.), p. 789.

¹⁸ Request, para. 70 and fn. 42.

¹⁹ Of the commentators relied upon by the Prosecution (see Request, para. 87 and fns. 64 and 65), only two argue that recourse can be made to Article 93(1)(l) to compel witnesses to appear before the Court. See Rastan, R., "Testing Co-operation: The International Criminal Court and National Authorities", 21 *Leiden Journal of International Law* (2008), 431 at 436; and Friman, H., "Sweden", in Kress et al (eds.), *The Rome Statute and Domestic Legal Orders, Vol II*, (2004), 409.

Article as a whole and cannot simply be skipped over. Accordingly, the Defence submits that the appearance of witnesses does not fall to be addressed in any manner under Article 93(1)(l).²⁰

9. Clear support for this interpretation of Articles 93(1)(e) and 93(1)(l) is provided by the *travaux préparatoires*.²¹ The “Report of the Working Group on International Cooperation and Judicial Assistance” establishes that the provision which became present Article 93(1)(e) should be interpreted at face value. A footnote to the relevant draft provision states that it “*includes the notion that witnesses or experts may not be compelled to travel to appear before the Court.*”²² When considered against the plain wording of the draft provision which makes no mention of “travel” or “transport”,²³ it is evident that this explanation relates to the broad power to compel regardless of the Court’s location or the manner in which a witness appears before the Court. Contrary to the Prosecution’s apparent suggestion, Article 93(1)(e) is not intended to prevent simply the forcible transport of witnesses across international borders.²⁴ Notably this inconvenient but important piece of information which is crucial to the proper interpretation of Article 93(1)(e) is ignored by the Prosecution in the Request.²⁵

²⁰ The Defence approach to the interpretation of Article 93 is supported by the rule of statutory interpretation - *expressio unius est exclusio alterius*. This maxim applies in this case such that the express inclusion of a provision dealing with the appearance of witnesses before the Court (Article 93(1)(e)) means that it can be assumed that it was not intended that the appearance of witnesses be dealt with again, albeit in respect of a narrower situation, under another more general provision (i.e. Article 93(1)(l)). The Defence submits that the concerns expressed by this Trial Chamber recently about the application of the *exclusio unius* maxim in the context of the interpretation of Article 63 do not apply here (see ICC-01/09-01/11-777, paras. 58, 61). First, there is no alternative purpose to Article 93(1)(e); its purpose is clear on its face. Second, the context of Article 93(1)(e) also indicates that it serves a limited purpose and simply governs the discrete issue of the assistance to be provided by a State Party in respect of securing the attendance of witnesses before the Court. Third, and as argued elsewhere in this response, the application of the maxim to Article 93(1)(e) will not lead to inconsistency and injustice when applying other provisions of the Statute.

²¹ As recently reconfirmed by the Appeals Chamber, the Statute’s *travaux préparatoires* are a useful “secondary means of interpretation”. See ICC-01/09-01/11-1066 OA5, para. 52.

²² United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Vol. III, A/CONF.183/13, Document Conf.183/C.1/WGIC/L.11, p. 329, fn. 221 (emphasis added).

²³ The draft provision closely resembles the current wording of Article 93(1)(e) and read as follows: “[f]acilitating the appearance of persons as witnesses or experts before the Court, which shall be voluntary”.

²⁴ Request, para. 76.

²⁵ Instead, the Prosecution erroneously focuses on the drafting history of Article 64(6)(b) of the Statute. See Request, paras. 75-76. Given that Article 93(1)(e) is the specific rule, it should be the primary focus of the discussion.

10. The deliberate decision of States Parties not to include a power to compel witnesses to testify before the Court is in keeping with a horizontal approach to cooperation and reflects the fact that the Court is an organisation created by treaty with complementarity as one of its foundational principles. This is in contrast to the *ad hoc* tribunals which were created by the Security Council and have supremacy over national courts.²⁶ Again, Kress and Prost's commentary on Article 93 is of assistance, noting that:

*[t]he debates surrounding the negotiation of article 93 reflected...the division of principle as to whether the Statute should reflect a horizontal or vertical cooperation regime. In the end, no single approach prevailed in totality, but the scheme reflects a creative and unique scheme for cooperation, primarily of a vertical nature.*²⁷

11. While the scheme for cooperation implemented was "primarily" of a vertical nature, it is evident that the scheme governing the appearance of witnesses followed the horizontal approach generally found in treaties dealing with inter-State assistance in criminal matters.²⁸ Such treaties generally²⁹ do not compel a witness to comply with a summons issued by a State in which the individual does not reside.³⁰ Nevertheless, horizontal regimes usually permit evidence to be

²⁶ Given this fundamental difference between this Court and the *ad hoc* tribunals, it is submitted that the experience and jurisprudence of the ICTY and ICTR are of limited assistance on the issue of subpoena powers.

²⁷ Kress and Prost, *supra*, p. 1572 (emphasis not added).

²⁸ Sluiter, G., "I beg you, please come testify" – The Problematic Absence of Subpoena Powers at the ICC, 12 *New Crim. L. Rev.*, 590 at 592 ("In traditional inter-state co-operation law, it has been a long standing rule that witnesses residing abroad cannot be the object of subpoena powers, in the sense that the subpoena cannot have legal effect outside the state's territory. This tradition finds its basis in protection of a state's nationals and its sovereignty") (footnotes omitted). See also at 595 ("It is therefore interesting that the vertical model was not fully embraced at the Rome diplomatic conference, as one finds a less effective cooperation model in a number of areas").

²⁹ The Defence acknowledges that "[e]xceptions to the territorial limits to subpoena powers exist in a few legal assistance regimes [but these are] between countries that closely cooperate in other areas as well" (see Sluiter, *supra*, at 592-593 (footnotes omitted)).

³⁰ See, e.g.: (i) the European Convention on Mutual Assistance in Criminal Matters, 1959, Article 8 ("A witness or expert who has failed to answer a summons to appear, service of which has been requested, shall not, even if the summons contains a notice of penalty, be subjected to any punishment or measure of restraint, unless subsequently he voluntarily enters the territory of the requesting Party and is there again duly summoned."); and (ii) the United Nations Model Treaty on Mutual Assistance in Criminal Matters 1990, A/RES/45/117, Article 14(2) ("The Requested State shall invite the person to appear as a witness or expert in proceedings or to assist in investigations.") and Article 15(3) ("A person who does not...accept an invitation pursuant to article 14 shall not, by reason thereof, be liable to any penalty or subjected to any coercive measure.")

taken in the requested State.³¹ A similar mechanism is included in the Statute, specifically in Article 93(1)(b).

12. Indeed, the link between Articles 93(1)(b) and 93(1)(e) is noted by Kress and Prost who observe:

*[t]estimony under oath and expert opinions and reports necessary to the Court are mentioned explicitly to alert States Parties to this special form of evidence that may be requested by the Court under the Statute. In the absence of a State duty to compel witnesses to appear and testify before the Court, rogatory commissions are likely to be of particular importance. The duty of States under littera b extends to the use of coercive powers, where necessary.*³²

13. When the horizontal nature of the witness appearance provisions are appreciated, any purported issue regarding the reconciliation of Article 93(7) (which prohibits the involuntary transfer of a person from a prior custodial setting) with Article 93(1)(e) dissolves.³³ The horizontal nature of Article 93(7) is expressly identified in the Request. The Prosecution acknowledges that the sub-article has its origins “*in modern-day treaty relationships*” and its “*drafting history...was copied from traditional inter-State vocabulary without detailed consideration.*”³⁴ Accordingly, the Defence view of the whole witness appearance regime is to be preferred because it conforms to a consistent, horizontal approach.³⁵ A State’s nationals – whether detained or not – are in the same position as regards their obligations towards the Court and cannot be compelled to appear before the Court under the Rome Statute regime. Instead, recourse can be made to the powers set out in Article 93(1)(b) of the Statute.³⁶

³¹ See, e.g.: (i) European Convention on Mutual Assistance in Criminal Matters, 1959, Chapter II – Letters rogatory; and (ii) United Nations Model Treaty on Mutual Assistance in Criminal Matters 1990, A/RES/45/117, Articles 1(2)(a) and 11.

³² Kress and Prost, *supra*, pp. 1574-1575 (footnotes omitted).

³³ Request, paras. 93-94.

³⁴ Request, para. 93 (footnotes omitted).

³⁵ See Request, para. 92 and fn. 76 citing to ICC-01/04-01/06-803-tEN, paras. 283-284; ICC-01/05-01/08-388, paras. 34-36.

³⁶ *Supra*, paras. 11 and 12.

14. The Defence also notes in passing that the Prosecution’s invocation of “*particular penal policy considerations that render the situation of prisoners distinguishable from that of ordinary citizens*” is misplaced and exemplifies the fact that the Prosecution’s attempts to import a subpoena power into the Statute are legally unsound.³⁷ The convention relied upon – the Convention on the Transfer of Sentenced Persons – is completely inapposite because its stated purpose is to address “*the problems posed by prisoners of foreign nationality, including the question of providing procedures for their transfer so that they may serve their sentence in their home country.*”³⁸ This is very evidently not the subject of Article 93(7).
15. Further, and contrary to the Prosecution’s assertion, there is no inconsistency between Article 93(7) and Rule 193.³⁹ As the Prosecution observes, Rule 193 “*provides for the temporary transfer of a prisoner sentenced by this Court from the State of enforcement [but] has no requirement of consent before transfer.*”⁴⁰ Clearly, therefore, the subject of Rule 193 is a detained individual who is under this Court’s jurisdiction rather than a detained individual who is under the jurisdiction of a State Party, as is the case in Article 93(7). The State sovereignty considerations which underpin Article 93(7), thus, do not arise.⁴¹
16. Looking at the Statute more broadly, as this Court’s jurisprudence on statutory interpretation requires,⁴² provides further support for the position that States Parties are under no obligation to compel witnesses to appear before the Court. In this regard, Part 6 of the Statute, specifically Articles 64(6)(b) and 70, is of relevance.

³⁷ Request, para. 93 and fn. 77.

³⁸ See Explanatory Report, *Convention on the Transfer of Sentenced Persons* (Council of Europe ETS No. 112), Introduction, para. 1. Available at: <http://conventions.coe.int/Treaty/EN/reports/html/112.htm>.

³⁹ Request, para. 94.

⁴⁰ Request, para. 94 (emphasis added).

⁴¹ *Supra*, fn. 28.

⁴² See, e.g., ICC-01/04-01/07-776 OA 7, 26 November 2008, para. 73 (individual provisions must be “read in light of the statutory scheme as a whole”).

17. Dealing first with Article 70, it is evident that this provision which concerns offences against the administration of justice does not extend to the failure of a witness to respond to a request or summons from a Trial Chamber to appear. The absence of sanctions to enforce appearance is consistent with the Defence's position that there is no power of compulsion. This additionally provides, what the Defence submits is, compelling and persuasive evidence that such an obligation was never intended at the Rome Conference.⁴³
18. Instead, the real issue lies in the apparent inconsistency between Article 64(6)(b) and Article 93(1)(e). Article 64(6)(b) provides that a Trial Chamber may "[r]equire the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute". The tension between Article 64(6)(b)'s broad power to "require the attendance...of witnesses" and Article 93(1)(e)'s qualifier that the appearance of witnesses before the Court be "voluntary" is clear.
19. However, commentators, including some of those relied up by the Prosecution in the Request,⁴⁴ have resolved this tension as follows:
- The better view...is that the Trial Chamber may well, pursuant to article 64 para. 6(b) create an international obligation of persons to appear before the Court, but that States are under no duty to enforce that obligation. Under this view, States are not prevented from providing the Court with enhanced cooperation regarding the testimony of witnesses before it, in particular, by inducing the witness to appear and testify through the imposition of a conditional fine.*⁴⁵
20. The Defence submits that the above approach is correct because it fits with the view that Article 64(6)(b) is the general rule (rather than a stand-alone rule) and,

⁴³ Request, para. 95. See also Sluiter, *supra*, at 600 ("the ICC itself has no direct enforcement powers...while this is not determinative regarding the existence of a direct obligation toward the Court it is nevertheless very strong evidence that simply no obligation was intended at the Rome Conference").

⁴⁴ Request, fn. 64 which refers, *inter alia*, to Kress and Prost, *supra*, pp. 1576-1577, 1579; Bitti, G., "Article 64", in Triffterer, O. (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2008), p. 1213.

⁴⁵ Kress and Prost, *supra*, pp. 1576-1577 (emphasis added) (footnotes omitted). See also Bitti, *supra*, p. 1213; and Schabas, W., *The International Criminal Court – A Commentary on the Rome Statute*, Oxford University Press (2010), p. 768.

when the “assistance of States” is required to effect its implementation, directs that recourse should be had to other provisions in the Statute – a clear direction to Part 9. In the situation envisaged in the Request, and for the reasons specified above, this direction is to the particular rule governing witness appearance, namely Article 93(1)(e).

21. As indicated in paragraph 19 above, notwithstanding the terms of Article 93(1)(e), State Parties can choose to independently legislate for enhanced cooperation. However, where this additional step is taken, it appears that most States⁴⁶ do not take the view that a recalcitrant witness could be taken into custody to ensure appearance but that sanctions are limited to fines.⁴⁷

B. The Kenyan legislation only provides for the “voluntary” appearance of witnesses before this Court

22. Given the foregoing, it is necessary to analyse the approach taken by Kenya in its domestic legislation, the International Crimes Act 2008 (“2008 Act”), which implements its cooperation obligations with the Court. A review of the 2008 Act, makes it clear that the provisions implementing Article 93 follow the statutory wording carefully and no other provisions enhancing cooperation such that a duty is placed on the GoK to compel witnesses to appear before the Court, have been included in the Act.
23. The first relevant provision is section 86 of the 2008 Act which implements the obligations contained in Article 93(1)(d) of the Statute. The margin of the Act expressly states that section 86 concerns the provision of “[a]ssistance in arranging *service of documents*”.⁴⁸ While section 86(3)(a) provides that “document” includes “*a summons requiring a person to appear as a witness*”. The plain wording of the

⁴⁶ Germany appears to take a more robust approach and permits a witness to be compelled to appear. See Broomhall, B. and Kress, C., “Implementing Cooperation Duties under the Rome Statute: A Comparative Synthesis”, Kress et al (ed.), *The Rome Statute and Domestic Legal Orders*, Vol. 2, Nomos (2005), p. 529.

⁴⁷ Kress and Prost, *supra*, fn. 19; Broomhall and Kress, *supra*, p. 529 (citing to Finland and Sweden).

⁴⁸ Emphasis added.

section establishes that it is concerned solely with service of documents and not with the enforcement of the documents served. In this regard, and notwithstanding the terms of Article 99(1) of the Statute,⁴⁹ the Defence submits that the Prosecution's analysis in paragraph 80 of the Request (whereby it is suggested that the domestic Kenyan procedure for enforcing a domestic summons can somehow be automatically used to enforce a summons issued by this Court) is incorrect. This is highlighted by section 86(2)(a)(ii) of the 2008 Act. This sub-section provides that, when having the process "served", "*if no procedure is specified, [service shall be effected] in accordance with the law of Kenya*". Recourse to Kenyan law is, thus, specifically directed in this instance. However, no equivalent provision is included in section 86 which could cover the enforcement of summons issued by this Court.⁵⁰

24. Further, nothing in section 108 of the 2008 Act which implements Article 93(1)(l) of the Statute and concerns "*[r]equest[s] for other types of assistance*" indicates that it may be used to enforce documents served under section 86.
25. In addition, sections 87 to 89 of the 2008 Act implement Article 93(1)(e) of the Statute. The repeated emphasis in these sections on ensuring that a witness has consented to giving evidence clearly demonstrates that the Kenyan regime is predicated on voluntary appearance and has made no provision for "enhanced cooperation" under which the Kenyan authorities could independently act to

⁴⁹ Article 99(1) provides that "[r]equests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process."

⁵⁰ The Defence notes the terms of section 172 of the 2008 Act which provides "The Minister may make regulations, not inconsistent with this Act, for any of the following purposes – (a) prescribing the procedure to be followed in dealing with requests made by the ICC, and providing for notification of the results of action taken in accordance with any such request". It is the Defence's understanding that these regulations have not yet been made.

fine or otherwise compel a witness who is otherwise unwilling to appear before the Court.⁵¹

26. Despite the foregoing, the Prosecution argues that the Kenyan legislation's silence on the consequences of the non-appearance of witnesses means that it is permissible to import powers to enforce summonses into this domestic context via Article 93(1)(l).⁵² The unsatisfactory and, it is submitted, legally untenable nature of the Prosecution's argument is underlined by the fact that it would apply to a limited number of States Parties, that is those States Parties which have not included express provisions on the consequences of a witness' non-appearance in their implementing legislation.
27. Given the potentially serious consequences of failing to comply with a summons backed by enforcement powers on a State's nationals, it is submitted that legislative silence should not be construed in favour of imposing a duty on States Parties to compel witnesses to appear before the Court.
28. In addition, even if it is accepted that subpoena powers can be read into the Kenyan legislation via Articles 64(6)(b), 93(1)(d) and 93(1)(l), a series of complex questions are begged, none of which are answered by the Prosecution in the Request. For example, how is the GoK to enforce the summons? Can witnesses summoned by this Court be deprived of their liberty or only fined? As discussed above, States such as Finland and Sweden, which have included enhanced cooperation provisions in their domestic implementing legislation only provide for the imposition of financial penalties. These questions provide further

⁵¹ Section 88(2) of the 2008 Act states that "[t]he Kenyan agency to which a request is forwarded under subsection (1) shall make such inquiries as may be necessary to ascertain if the prospective witness consents to giving evidence or assisting the ICC." In addition, section 89(1) provides that "[t]he Attorney-General shall assist in the making of arrangements to facilitate a witness's attendance before the ICC if he is satisfied that – (a) the prospective witness has consented to giving the evidence or assistance requested". See also section 20(1)(a)(vi) of the 2008 Act.

⁵² Request, para. 73 ("the obligation under article 93(1)(d) to serve a summons on its behalf necessarily includes an obligation to enforce"). See also Request, paras. 77(2), 78, 81.

indications demonstrating that the Prosecution's position is superficial, does not withstand scrutiny and should be dismissed.

C. The assistance which the GoK can be asked to provide

29. Bearing in mind the terms of the 2008 Act discussed above, the Defence submits that the Trial Chamber may request the GoK for assistance to serve summonses on each of the witnesses who are the subject of the Request pursuant to Article 93(1)(d).⁵³ Such assistance could be provided in accordance with section 86 of the 2008 Act. Should any witness respond to the summons, the Trial Chamber may also request the GoK to make appropriate arrangements for the security of the witnesses until they appear before the Court.⁵⁴ However, the GoK is under no statutory duty to enforce the summons served nor can the GoK seek to compel a witness to appear before the Court given the terms of the 2008 Act.⁵⁵

D. Errors and misrepresentations in the Request

30. For completeness, the Defence takes the opportunity in this response to correct the following errors and misrepresentations included in the Request.
31. First, the Prosecution's statement that "*each [witness] opted to leave their protection locations and return to their original homes*" is simply not true.⁵⁶ [REDACTED].⁵⁷
32. Second, the Prosecution's request to depose the testimony of P-0015 was not made simply because it was feared that his return to Kenya would result in his subsequent unavailability to testify at trial,⁵⁸ [REDACTED].⁵⁹

⁵³ Request, para. 100(A).

⁵⁴ Request, para. 100(C).

⁵⁵ Request, para. 100(B).

⁵⁶ Request, para. 5. See also Request, para. 9.

⁵⁷ [REDACTED]

⁵⁸ Request, para. 9.

⁵⁹ [REDACTED]

33. Third, with reference to the Prosecution's submissions at paragraph 11 of the Request, [REDACTED] into the veracity of P-0015's account of being "*kidnapped and forced at gunpoint to sign the affidavit*" indicate that no such kidnap occurred.⁶⁰ The account given by P-0015 was completely false.

34. Fourth, in so far as any of the submissions in the Request imply that the Defence are linked to the witness withdrawals,⁶¹ the Defence strenuously denies any such suggestions. [REDACTED].⁶²

35. In respect of [REDACTED], in the confidential and *ex parte* annex to the *Defence Application for Disclosure of Information related to Prosecution Intermediaries including Payments and Benefits made by Intermediaries to Prosecution Trial Witnesses* filed on 15 August 2013⁶³ the Defence informed the Chamber of the following:

[REDACTED]

36. [REDACTED].⁶⁴

37. [REDACTED]⁶⁵. [REDACTED].

III. Relief requested

38. For the reasons set out above, the Defence respectfully prays that the Trial Chamber:

- a. request observations from the GoK on the legality and propriety of the Request in light of Kenya's domestic laws and obligations as a State Party; and

⁶⁰ [REDACTED]

⁶¹ See, e.g., Request, para. 5 ("[a]fter their identities were disclosed to the Defence, each either directly refused to continue to cooperate or discontinued communication with the Prosecution"); para. 10 ("[o]n 19 February 2013, the day after the witness's identity was disclosed to the Defence...").

⁶² See ICC-01/09-01/11-855-Conf-Exp-AnxH-Corr and confidential and *ex parte* **Annexes C and D**.

⁶³ ICC-01/09-01/11-855-Conf-Exp-AnxH-Corr.

⁶⁴ See confidential and *ex parte* **Annex C**.

⁶⁵ [REDACTED]

- b. only grant the Request in part and within the parameters set out in paragraph 29 above.

Respectfully submitted,



Karim A.A. Khan QC

Lead Counsel for Mr. William Samoei Ruto

Dated this 8th Day of January 2014
At The Hague, Netherlands