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TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding Judge
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

**The Government of the Republic of Kenya's Submissions on the 'Prosecution's Request
under Article 64 (6) (b) and Article 93 to Summon Witnesses'**

Source:

Government of the Republic of Kenya, represented by the Attorney General of Kenya

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

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I. INTRODUCTION

1. The Government of the Republic of Kenya hereby respectfully files with Trial Chamber V(A) of the International Criminal Court (ICC) ('the Court'), pursuant to **Rule 103(1)** of the ICC Rules of Procedure and Evidence, observations on the relief sought in the Prosecutor's *Corrected and amended version of "Prosecution's request under article 64(6)(b) and article 93 to summon witnesses"*¹ ('Summons Request'). The Government of the Republic of Kenya was invited to submit these written observations by Trial Chamber V(A) ('the Trial Chamber') in its '*Decision on status conference and additional submissions related to "Prosecution's request under article 64(6)(b) and article 93 to summon witnesses"*' ('Status Conference Decision').²

II. BACKGROUND

2. On 28 November 2013, the Office of the Prosecutor ('Prosecution') filed the Summons Request.
3. On 29 January 2014, Trial Chamber V(A) in its Status Conference Decision invited the Government of the Republic of Kenya to 'submit written observations on the relief sought in the Summons Request'.³ Specifically, paragraph 8 of the Decision invited the Government of Kenya to file written submissions which address the issue of whether the relief sought by the Prosecution is prohibited by national law. In particular, the Court stated that:

'... By relying upon Article 93(1)(1) of the Statute, the Prosecution has made Kenyan national law an important component of the present litigation. The Chamber considers that it would be of assistance prior to ruling to hear from the Government of Kenya on whether or not the relief sought by the Prosecution is prohibited by national law. Pursuant to Rule 103(1) of the Rules, the Chamber invites the Government of Kenya to submit written observations on the relief sought in the Summons Request.'

¹ ICC-01/09-01/11-1120, 5 December 2013.

² ICC-01/09-01/11-1165, 29 January 2014.

³ ICC-01/09-01/11-1165, 29 January 2014, para. 8.

4. The relief sought in the Summons Request is clearly stated at paragraph 100(B) and reads thus:

‘...for the Government of Kenya’s assistance in compelling and ensuring the appearance of the summoned witnesses for testimony before the Court on the territory of Kenya;...’

III. SUBMISSIONS

5. The Government of the Republic of Kenya submits that while it is feasible under the laws of Kenya for witnesses to voluntarily appear before the Court sitting at an appropriate location of its choice in Kenya (*in situ* or by means of video-link technology) for purposes of testifying before the Court, the Government of the Republic of Kenya submits that under its national law, in particular **The International Crimes Act, No. 16 of 2008**, a witness cannot be compelled to appear and testify before the Court regardless of where the Court is sitting.
6. The Government of the Republic of Kenya’s submissions in response to the Prosecution’s request for the relief set out in paragraph 100(B), will focus on three main points as follows:
 - a) That the Rome Statute employs the principle of voluntary appearance of witnesses to testify before the Court whether at the seat of the Court or within the territory of Kenya. Thus, the Court has no power to request the Government of the Republic of Kenya to compel unwilling witnesses to appear and testify before the Court;
 - b) That the Prosecutor cannot legally and legitimately impose obligations on Kenya as a State Party to the Rome Statute (‘the Statute’), beyond those obligations that the Statute itself imposes on States Parties. Requiring the Government of the Republic of Kenya to exercise judicial

authority in compelling witnesses would be an attempt at imposing obligations on a State Party that exceed the treaty obligations; and

- c) That the Prosecution's reading of Kenya's national law regarding the appearance of witnesses to testify before the ICC is flawed.

(a) Principle of Voluntary Appearance of a Witness to Testify before the ICC

7. The Government of the Republic of Kenya submits that, contrary to what the Prosecution asserts at paragraph 65 of the Summons Request, the giving of oral (*viva voce*) testimony before the Court is based on the principle of voluntary appearance.⁴In particular, paragraph 65 of the Summons Request reads thus:

'If the Court's ability to hear oral evidence were to depend entirely on the inclination of witnesses to appear voluntarily, it would be hostage to the continuing good will of its witnesses and at the mercy of external forces. As a result, its truth-finding function and public confidence in the accuracy of its final judgment could be significantly compromised. The Court, therefore, should take all available steps within its authority to secure the attendance of witnesses.'

It follows that the Prosecution, at paragraph 65 of its application, misconstrued the judicial powers of the Court in regard to summoning witnesses to testify in trials. The Court has no powers to compel witnesses to testify against their will.⁵

⁴ G. Sluiter, "I Beg You, Please Come Testify" – The Problematic Absence of Subpoena Powers at the ICC, *New Criminal Law Review*, (12) No. 4, Fall 2009, pp. 590 - 608 <http://dare.uva.nl/document/199910> last accessed 6 February 2014.

⁵ International Bar Association, *Witnesses before the International Criminal Court*, July 2013 <http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCoQFjAA&url=http%3A%2F%2Fwww.ibanet.org%2FDocument%2FDefault.aspx%3FDocumentUId%3D9c4f533d-1927-421b-8c12-d41768ffc11f&ei=KdX0UqSXLqHq4wSk3YCYDQ&usg=AFQjCNE6FY2qydmBp3p4iVesgwFRXbevaQ> 7 February 2014.

8. The Government of the Republic of Kenya submits that the Prosecution's analysis of **Article 64(6)(b)** of the Rome Statute is flawed. **Article 64(6)(b)** states:

'6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary: ...

(b) Require 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 Prosecution, at paragraphs 66 and 67 of the Summons Request, alleges that the authority of the Court to require the attendance and testimony of witnesses reflects the power and capacity of the Court to issue 'an order compelling personal appearance' of witnesses to testify before the Court.

It appears that in its analysis, the Prosecution equates 'require' with 'order'. The two words are not synonymous and the Prosecution purports to ascribe a meaning to the term 'require' as used in the Statute, that is different from its ordinary meaning. This is contrary to the rules of treaty interpretation as provided in **Article 31(1)** of the **Vienna Convention on the Law of Treaties, 1969 (VCLT)** which provides that:

'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

In this regard, Sluiter observes, that 'the language of **Article 64 (6)(b)** is not clear. It does not follow from it that a direct obligation toward witnesses is envisaged. "Requiring the attendance" is not identical to "ordering" or similar language.'⁶ As such, 'one must therefore construe this wording in light of other relevant provisions' in this case provisions of **Article 93** of the Rome Statute as they relate to summoning of witnesses, in particular, **Article 93(1)(e)**

⁶ Supra note 4, p. 600.

and (l) as well as **Article 93(7)** of the Rome Statute. None of these provisions compel or order States to provide the set out form of cooperation, but instead, they are forms of assistance on witness attendance and testimony which States are requested to provide under procedures of national law.

9. Moreover, the Government of the Republic Kenya's submission that giving witness testimony before the ICC is regulated by the principle of voluntary appearance is further grounded by the fact that, Part 6 of the Statute which sets out **Article 64(6)(b)** which requires the attendance of witnesses, does not likewise provide any sanctions for non-attendance by witnesses.

If, indeed, **Article 64(6)(b)** of the Statute granted the Court the power to compel witness attendance and testimony, it would follow that the Statute would have set out the sanctions for non-compliance with the authorisation of the Court. However, **Article 64** of the Statute does nothing more than set out a requirement for witness attendance while remaining silent on the enforcement mechanism or attendant sanctions for non-compliance.⁷

10. Moreover, none of the provisions of **Part 6** of the Statute, which deals with the trial process, sets out sanctions that may be meted out against States or witnesses personally for non-compliance with a requirement of the Court for witness attendance and testimony.

Sluiter notes that, during the Rome Conference, negotiations were conducted relating to offences against the administration of justice and misconduct but States did not discuss sanctions or enforcement measures in case of failure by a witness or a requested State to comply with a requirement for witness attendance and testimony.⁸ As such, it is doubtful whether the founders of the Statute really intended **Article 64(6)(b)** of the Statute to be a mandatory

⁷ Supra note 5, p. 7.

⁸ Supra note 4, p. 598.

provision setting out authoritative orders. In this regard, Sluiter observes:

'The absence of any mechanism to directly enforce an "order to appear as a witness" raises the question as to what should then be understood by the power to require the appearance of witnesses, as contained in Article 64 (6)(b) of the Statute. It seems to have essentially-or only-internal effect, namely among parties, when no sanction can be imposed on the witness for failure to appear. It should thus be understood as requiring parties to undertake their best efforts to ensure the appearance of witnesses...

... It is symptomatic that within Part 6 the provision on offenses against the administration of justice (Article 70) does not include the failure of a witness to respond to a request or summons from a Trial Chamber to appear; nor has there ever since been adopted any enforcement provision in the Rules of Procedure and Evidence. It means nothing else than that the ICC itself has no direct enforcement powers, and 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 [emphasis added]. This makes perfect sense in light of the language of Part 9.⁹

11. The Government of the Republic of Kenya submits that Pre-Trial Chamber II's '*Second Decision on Application by Nine Persons to be Questioned by the Office of the Prosecutor*'¹⁰ in the *Situation in the Republic of Kenya* confirms that the process of giving testimony or evidence before the Court is voluntary.

b) Obligations of a State Party under the Rome Statute Regarding the Attendance and Testimony of a Witness

12. At paragraphs 67, 68 and 73 of the Summons Request, the Prosecution asserts that the Government of the Republic of Kenya is obligated to provide the Court with assistance in respect of **Articles 64(6)(b)** and **93(1)** of the Statute by facilitating and ensuring the attendance of witnesses to testify before the Court.

⁹ Ibid (emphasis added).

¹⁰ ICC-01/09, 31 January 2011.

Paragraph 67 of the Summons Request, in part, reads:

'...article 64(6)(b) adds that the Court can require the attendance and testimony of witnesses "by obtaining, if necessary, the assistance of States as provided in the Statute. The authority of the Court to make binding requests for judicial assistance, in turn, is set out in article 93(1), which provides that "States Parties *shall ... comply with requests by the Court*"

Paragraph 68 of the Summons Request, in part, reads:

'As a State Party, the GoK is both empowered and obliged to assist the Court in accordance with articles 64(6)(b) and 93(1)...'

While paragraph 73 of the Summons Request reads:

'Since the ICC has no enforcement mechanism beyond the premises of the Court, except through the authority of States, the obligation under article 93 (1)(d) to serve a summons on its behalf necessarily includes an obligation to enforce – to give effect to – the requirement that the person appear. Indeed, without enforceability, a summons would not "require" the person's attendance – it would be no more than an invitation to appear – and the Court would have no need for the assistance of the State to issue such an invitation.'

From the foregoing, it appears that the Prosecution attributes to the Court the power to compel witnesses to attend and testify before the Court, while imputing on Kenya, as State Party to the Statute, an obligation to assist the Court in facilitating the compelled attendance of witnesses at the Court pursuant to **Articles 64(6)(b)** and **93(1)(d)** of the Statute.

13. The Government of the Republic of Kenya submits that **Articles 64(6)(b)** and **93(1)(d)** of the Statute do not empower the Court to compel witness attendance and testimony or impose on Kenya an obligation to assist in this regard. The legislative history of the drafting of the Statute does not give an indication that it was the intention of the founders of the treaty to give the Court powers similar to those of the *ad hoc* tribunals, which had primacy over

national courts, to compel or order the attendance and testimony of witnesses from States Parties and request the States Parties' assistance in this regard.¹¹ The founders of the Rome Statute intended that the Court be complementary to national criminal jurisdictions, and thus at the same level with national courts of States Parties.

14. As discussed earlier, the Rome Statute envisages a situation where witnesses voluntarily appear and testify before the Court. Thus, the obligation of Kenya as a State Party is to facilitate the voluntary appearance of witnesses to testify before the Court. Attributing other power or effect on the Court other than the power to request voluntary appearance of witnesses would be an attempt to expand the powers of the Court and obligations of States Parties beyond that which the treaty sets out, and thus constitute a breach of treaty.

c) *Prosecution's Misapplication of Kenyan Law*

15. The Government of the Republic of Kenya submits that the Prosecution's request, that is 'the Government of Kenya's assistance in compelling and ensuring the appearance of the summoned witnesses for testimony before the Court on the territory of Kenya' is procedural and thus its implementation is regulated by the procedural provisions set out under the **International Crimes Act, No. 16 of 2008**. The International Crimes Act ('ICA') is the implementing legislation of the Rome Statute in Kenya. Other than providing for the application of the Rome Statute in Kenya, subject to the national or domestic circumstances, it sets out the procedure for cooperation with the ICC.

16. Contrary to what the Prosecution alleges in paragraph 80 of its Summons Request, **the Criminal Procedure Code, Chapter 75 of the Laws of Kenya** sets out the procedure for proceedings in criminal matters and processes in

¹¹ Supra note 4, pp. 600, 607.

relation to criminal cases under the jurisdiction of the Kenyan courts. The Criminal Procedure Code cannot be applied in respect of a procedural request that the ICC, an international court, has jurisdiction over. Therefore, the Prosecution cannot legally adopt the definition of the term 'summons' as used in the Criminal Procedure Code and apply it to the definition of 'summons' under the International Crimes Act.

17. The Prosecution at paragraph 83 of the Summons Request alleges thus:

'Put another way, article 93(1)(l) does not rely on the positive inclusion of an enabling provision in national law for the measures sought, but is drafted in the negative – the absence of a prohibition. If the national law of a requested State is silent, and thus does not prohibit the requested measure, the ICC can request it. It is thus open for the Court to seek State assistance in not merely "serving" a summons, but more specifically in securing compliance with it. To the Prosecution's best information, nothing in Kenya's law prohibits a request that the GoK require the presence of the summoned witness through compulsory measures. On the contrary, as noted above, its national law elsewhere provides for the enforcement of a 'summons' through coercive measures.'

18. In seeking the Court's assistance in requesting the Government of Kenya to effect service of summonses and to compel the attendance of the witnesses identified in the Summons Request, the Prosecution alleges that Kenya's national law provides for a mechanism of enforceability of summonses on unwilling witnesses.

It is the Government of the Republic of Kenya's submission that the Prosecution misinterpreted and misapplied Kenya's law in developing its flawed arguments in paragraphs 79, 80 and 81 in support of its claim that Kenyan law allows the application of coercive measures to enforce a summons ordering a witness to appear and testify before the Court. The paragraphs state as follows:

'79. With respect to Kenya, the International Crimes Act appears to distinguish between (i) "a summons *requiring* a person to appear as a

witness” (emphasis added) pursuant to article 93(1)(d) (regulated under Section 86 of the Act) and which contains no reference to voluntariness, from (ii) the facilitation of “voluntary appearance” pursuant to article 93(1)(e) of the Statute (regulated under Sections 87-89 of the Act) where voluntariness serves as a prerequisite.

80. Since the mechanism for providing the assistance depends on the procedure under national law, the meaning of the term “summons”, as interpreted and applied under national law, may establish enforceability of a summons issued pursuant to article 93(1)(d). Under Sections 144 – 149 of the Kenyan Criminal Procedure Code, witnesses who are summoned to appear following service by the competent national authorities are compellable, and their non-appearance is punishable. It thus appears that a “summons” – an existing legal term under Kenyan law and the same term used in the International Crimes Act – means a judicial order that can be enforced through coercive means when required. As the ICC’s requests are given effect through domestic procedures, the Court can request the GoK to enforce a summons duly served on its behalf in accordance with relevant procedures under national law and in the manner specified by the Court in its request.
81. As prefaced above, apart from article 93(1)(d) the Court can also rely on article 93(1)(l) to request the enforcement of a summons duly served, if required. This provision enables the Court to seek “[a]ny other type of assistance which is not prohibited by the law of the requested State.” This sub-article has been described as a “catch-all” provision that the drafters intentionally left open for States to provide any assistance not specified in the Statute, so long as the requested measure does not violate national law.’

19. The Government of the Republic of Kenya submits that the Prosecution misinterprets the provisions of **Sections 86, 87, 88 and 89** of the ICA in claiming that **Section 86**, on the one hand relates to the ‘required’ appearance of a witness; while **Sections 87, 88 and 89** of the Act, on the other hand, relate to the ‘voluntary’ appearance of a witness. Instead, the Government of the Republic of Kenya submits that **Sections 86, 87, 88 and 89** relate to the voluntary appearance of witnesses.

20. **Section 86(1)** of the ICA makes provision for cooperation between the Court and Kenya in the service of documents, in Kenya, emanating from the Court.

Section 86(3)(a) of the ICA defines ‘documents’ to include a summons requiring a person to appear as a witness. In particular, the provision reads:

‘3) In this section, “document” includes—

(a) a summons requiring a person to appear as a witness;...’

The Government of the Republic of Kenya submits that **Section 86 of the ICA** provides for the service of summons from the Court to persons who may not have been engaged as witnesses by the Court in the past. These persons reserve the right to voluntarily comply with the summons or refuse to do so. As such, the Prosecution’s interpretation of **Section 86** is wrong as the Prosecution alleges that this provision relates to ‘require’ as opposed to the ‘voluntary’ appearance of a witness to testify before the Court.

21. **Section 87** of the ICA provides:

(1) Where the ICC requests assistance under paragraph 8 of article 19, article 56, paragraph 7 of article 58, article 64 or paragraph 1(e) of article 93 of the Rome Statute in facilitating the voluntary appearance of a witness before the ICC, the Attorney-General may give authority for the request to proceed if he is satisfied that—

- (a) the request relates to an investigation being conducted by the Prosecutor or any proceedings before the ICC; and
- (b) the witness’s attendance is sought so that the witness can give evidence or information relating to the investigation or proceedings; and
- (c) the witness is or may be in Kenya.

(2) In this section and sections 88 and 89, “witness” includes a person who may give expert evidence, but does not include a person who has been accused of an international crime in the proceedings to which the request relates.’

22. The Government of the Republic of Kenya submits that **Section 87** of the ICA sets out the nature of assistance that Kenya can provide to the Court in facilitating the voluntary appearance of a witness who consents to testify. In

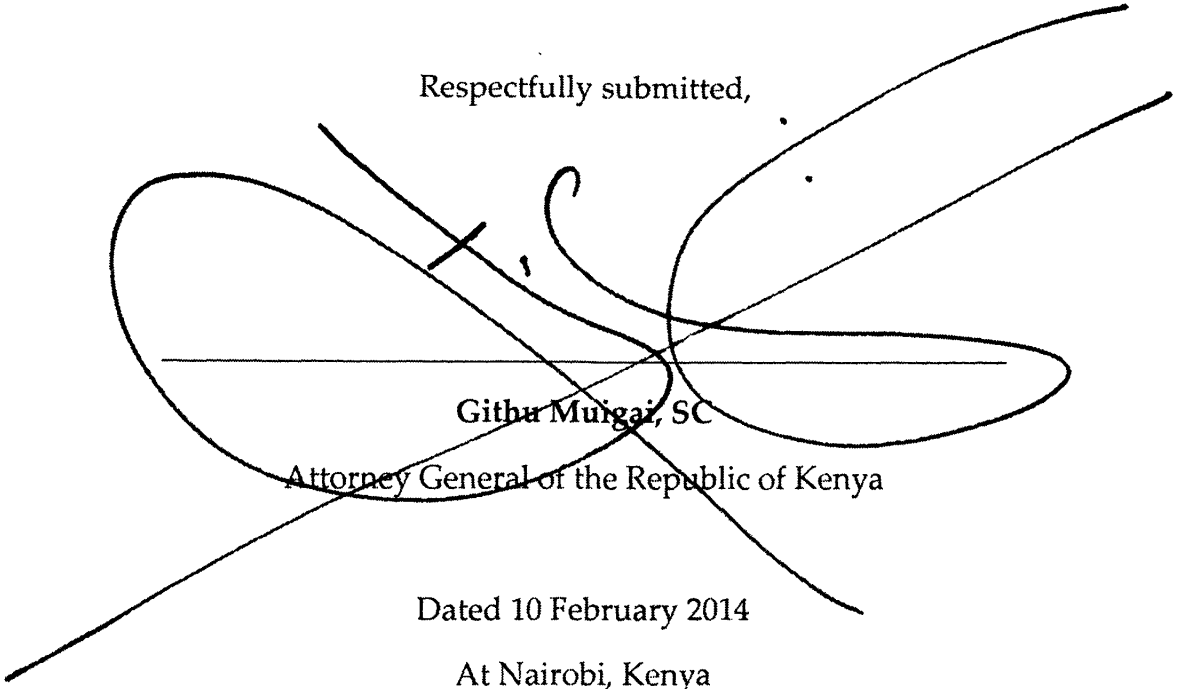
this case, the person who is a voluntary or consenting witness has already responded to Court summons to appear and testify and the cooperation the Attorney General of Kenya provides the Court with is facilitating the appearance of such a witness before the Court.

23. The Government of the Republic of Kenya submits that the Prosecution improperly arrogated to itself the power to interpret Kenya's national law, which according to **Kenya's Constitution, 2010** is a preserve of Kenya's courts, as it relates to the appearance of witnesses to testify before the Court and powers of the Kenyan Courts in that regard. The Prosecution can only offer what its understanding of the Kenyan national law on summoning witnesses is and cannot assert what the interpretation and application of Kenyan legislation actually is, as the Prosecution purports to do at paragraph 80.

The forms of assistance in witness appearance before the Court as set out in **Article 93** of the Statute are envisaged to be provided by States Parties acting under their national laws and mechanisms as they relate to the Rome Statute and interpreted by Kenyan courts. It is thus not the Prosecution's place to set out the national laws that apply and the procedures thereunder as they relate to the appearance of witnesses before the ICC as the Prosecution has done in paragraphs 79 and 80 of the Summons Request.

Respect for Kenya's sovereignty and independence of her judiciary requires that the Prosecution request an interpretation by Kenyan courts of her national laws as they relate to the appearance by witnesses to testify before the ICC as provided for in **Articles 64** and **93** of the Rome Statute. The Prosecution has not demonstrated that Kenyan courts are incapable of dispensing this constitutional duty of interpreting her laws and obligations under treaties for the Prosecution to purport to do this for Kenya.

Respectfully submitted,

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke, is written over the text below.

Githu Muigai, SC

Attorney General of the Republic of Kenya

Dated 10 February 2014

At Nairobi, Kenya