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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

**Dissenting Opinion of Judge Herrera Carbuccion on the 'Decision on
Prosecutor's Application for Witness Summonses and resulting Request for
State Party Cooperation'**

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

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Mr Karim Khan

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Unrepresented Victims

**Unrepresented Applicants for
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The Office of Public Counsel for Victims

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States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Deputy Registrar

Detention Section

Victims and Witnesses Unit

Others

**Victims Participation and Reparations
Section**

I. INTRODUCTION

1. I respectfully disagree with the decision of my colleagues insofar it finds that, 'pursuant to Article 93(1)(d) and (l) of the Statute, it [the Chamber] can, by way of requests for cooperation, obligate Kenya both to serve summonses and to assist in compelling the attendance (before the Chamber) of the witnesses thus summonsed'.¹
2. I succinctly explain the main reasons of my dissent.

II. BACKGROUND

3. The Prosecution requests the Chamber to order the Registrar, in consultation and cooperation with the Prosecution, to request assistance pursuant to Article 93(1)(d), Article 93(1)(l) and Article 99(1) of the Statute, for the a) service of summonses by the Government of Kenya on eight witnesses; b) for the Government of Kenya's assistance in compelling and ensuring the appearance of the summoned witnesses for testimony before the Court in the territory of Kenya; and c) for the Government of Kenya to make appropriate arrangements for the security of the witnesses until they appear before the Court.²

¹ Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation ('Majority Decision'), 17 April 2014, ICC-01/09-01/11-1274, para. 193.

² Corrigendum of Prosecution's request under article 64(6)(b) and article 93 to summon witnesses, 2 December 2013, ICC-01/09-01/11-1120-Red2-Corr, para. 160. See also: Prosecution reply to the Ruto Defence's 8 January 2014 and the Sang Defence's 8 January 2014 responses to the Prosecution's request under article 64(6)(b) and article 93 to summon witnesses and variation of time limits under Rule 35(2), 10 February 2014, ICC-01/09-01/11-1183-Red; Prosecution's supplementary request under article 64(6)(b) and article 93 to summon a further witness, 19 February 2014, ICC-01/09-01/11-1188-Conf-Red; Prosecution's submission of one additional document in support of the "Prosecution's supplementary request under article 64(6)(b) and article 93 to summon a further witness" [ICC-01/09-01/11-1188-Conf-Exp/Red], 26 February 2014, ICC-01/09-01/11-1192-Conf; and Prosecution's further submissions pursuant to the Prosecution's request under article 64(6)(b) and article 93 to summon witnesses, 5 March 2014, ICC-01/09-01/11-1202.

4. The Sang Defence originally submitted that the relief sought in the Prosecution's request should be rejected in full.³ The Ruto Defence agreed that the Government of Kenya may serve summonses on the witnesses and make appropriate arrangements for their security until they appear before the Court. However, the Ruto Defence submitted that the Government of Kenya is under no statutory duty to enforce the summons served, nor can it seek to compel witnesses to appear before the Court.⁴
5. Nonetheless, in a more recent joint submission from both Defence teams, they request that the Trial Chamber rejects the relief sought. Alternatively, they request the Chamber to issue non-enforceable summonses inviting the relevant witnesses to appear before the Court and to order the Prosecution to disclose the evidence in its possession which shows that intimidation, bribery or other improper influence has been the proximate cause of witness non-cooperation.⁵
6. The Legal Representative of Victims ('LRV') submits that the Chamber has the authority to grant the relief sought by the Prosecution.⁶ However, the LRV leaves it to the Chamber to consider whether compulsion would advance or detract from the interests of participating victims if they are to become hostile.⁷

³ Sang Defence Response to the Prosecution's Request under Article 64(6)(b) and Article 93 to Summon Witnesses, 8 January 2014, ICC-01/09-01/11-1138-Red, para. 100.

⁴ 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'", 8 January 2014, ICC-01/09-01/11-1136-Red2, paras 29, 38.

⁵ Additional Defence submissions on the corrected and amended version of "Prosecution's request under article 64(6)(b) and article 93 to summon witnesses", 4 March 2014, ICC-01/09-01/11-1200-Red (public redacted version notified 5 March 2014), para. 68.

⁶ Transcript of Hearing, 18 February 2014, ICC-01/09-01/11-T-87-Red-ENG, page 7, line 21 to page 8 line 2; page 9 line 16 to page 10 line 2 and Common Legal Representative for Victims' Response to the Prosecution's Request and Supplementary Request under Article 64(6)(b) and Article 93 to Summons Witnesses, 4 March 2014, ICC-01/09-01/11-1201.

⁷ ICC-01/09-01/11-1201, para. 49.

7. The Government of Kenya contends that it has no obligation to enforce compulsory summonses and that its domestic implementing legislation, the International Crimes Act of 2008, does not allow for compulsory appearance of witness before the Court.⁸

III. ANALYSIS

8. I agree with the majority 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 in court voluntarily.⁹
9. However, I respectfully disagree with the findings of the majority that the Government of Kenya has the legal obligation, pursuant to Article 93(1)(d) and (l) of the Statute, to enforce such a summons.¹⁰
10. Article 64(6)(b) of the Statute is a clear provision whose first iteration appeared in the drafting history as early as the 1994 International Law Commission Draft Statute. Moreover, although the term 'require' in the English version of the Statute may seem ambiguous, the terms '*ordonner*' and '*ordenar*' in the French and Spanish versions of the Statute are unequivocal.¹¹ Consequently, this provision should be interpreted in a manner that the Trial Chamber may order a witness to appear and testify before the Court.
11. However, the Court has no mechanism to make an individual liable for refusing to testify in contravention of a Court order under Article 64(6)(b) of

⁸ Transcript of Hearing, 14 February 2014, ICC-01/09-01/11-T-86-Red-ENG, page 49, lines 3-21. See also: The Government of the Republic of Kenya's submission on the 'Prosecution's request under article 64(6) (b) and article 93 to summon witnesses', 11 February 2014, ICC-01/09-01/11-1184.

⁹ Majority Decision, para. 193. I agree with the finding of the Majority of the Chamber that: '(i) it has the power to compel the testimony of witnesses'.

¹⁰ Majority Decision, para. 193. I disagree with the findings of the Majority of the Chamber that '(ii) pursuant to article 93(1)(d) and (l) of the Statute, it can, by way of requests for cooperation, obligate Kenya both to serve summonses and to assist in compelling the attendance (before the Chamber) of the witnesses thus summonsed'.

¹¹ It is to be noted that Article 128 of the Statute provides that the Arabic, Chinese, English, French, Russian and Spanish versions of the Statute are equally authentic.

the Statute. The Statute's provision on offences against the administration of justice does not contemplate this kind of contempt power.¹² Consequently, a fundamental element of subpoena powers is absent.¹³

12. Furthermore, statutory provisions should not be read in isolation. Consequently, when cooperation from State Parties is required, Article 64(6)(b) should be interpreted in light of Article 93(1)(e) of the Statute, which provides that States Parties shall comply with requests by the Court to provide the following assistance: 'Facilitating the voluntary appearance of persons as witnesses or experts before the Court' [emphasis added].¹⁴ This holistic reading is confirmed by the text of Article 64(6)(b) itself, as witness attendance is to be required 'by obtaining, if necessary, the assistance of States as provided in this Statute' [emphasis added].

13. The history of Article 93(1)(e) confirms that the intention of the drafters was to explicitly and solely include the voluntary appearance of the witnesses,¹⁵ as

¹² Article 70 of the Statute, dealing with offences against the administration of justice provides: 1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally: (a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth; (b) Presenting evidence that the party knows is false or forged; (c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence; (d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties; (e) Retaliating against an official of the Court on account of duties performed by that or another official; (f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.

¹³ The author observes states that subpoena powers encompass two vital elements. Firstly, the exercise of subpoena powers should establish a direct obligation for the addressed individual toward the Court making use of these powers. Second, failure to fulfill the subpoena obligation makes one liable to either criminal sanctions or direct enforcement action. See: Goran Sluiter, "I beg you, please come to testify" – The Problematic Absence of Subpoena Powers at the ICC, *New Criminal Law Review*, Fall 2009, page 592.

¹⁴ Gilbert Bitti has stated that while the ICC could still summon witnesses pursuant to Article 64(6)(b) of the statute, pursuant to Part IX of the Statute, the State Party is not under an obligation to compel the witness's appearance before the ICC. Gilbert Bitti, Article 64: Functions and Powers of the 'Trial Chamber', in Trifflerer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Second Edition (2008), page 1213. Kres and Prost note the "serious weakness" within the ICC system caused by Article 93(1)(e) of the Statute, which in their view "connotes voluntariness". Kres and Prost conclude that although under Article 64(6)(b) the Trial Chamber may well 'create an international obligation of persons to appear and testify before the Court, but States are under no duty to enforce that obligation'. Claus Kres and Kimberly Prost, Article 93: Other forms of cooperation, in Trifflerer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Second Edition (2008), pages 1576-1577.

¹⁵ These complementary means of interpretation, in accordance with Article 32 of the Vienna Convention, have previously been used by judges in the ad-hoc tribunals and the ICC. See for example: ICTY, *Tadić case*, IT-94-

originally the draft Statute provided for a more general notion: '(e) Facilitating the appearance of persons before the Court'.¹⁶ The first recorded insertion of the word 'voluntary' into the provision appears on 6 July 1998. A footnote appears next to the provision as it then read (emphasis added):

(e) Facilitating the appearance of persons as witnesses and experts before the Court, which shall be voluntary;[FN1]

[FN1] This includes the notion that witnesses or experts may not be compelled to travel to appear before the Court.¹⁷

14. Thus, the State Parties purposely included the word 'voluntary' and thus excluded facilitating the appearance and testimony of compelled witnesses from the types of cooperation provided for in Article 93 of the Statute.¹⁸ In this regard, I also note the existence of Article 93(7) of the Statute, which provides that a detained person must give their consent prior to being transferred to testify before the Court. It does not make sense why a non-detained person could be compelled to testify under Article 93(1)(l) but a detained person could not be so compelled under Article 93(7). It makes more sense for voluntary testimony to be the rule in both cooperation contexts, and the Majority makes no effort to explain why they adopt an interpretation of the Statute which allows for this kind of disparate treatment between detained and non-detained persons.

I-A, Judgment of the Appeals Chamber of 15 July 1999, paragraphs 295-296; *Delalic et al case*, IT-96-21, Trial Chamber II, Judgment of 16 November 1998, paragraph 357. ICC, Lubanga case, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change, 14 December 2009, ICC-01/04-01/06-2205, paragraph 91. See also: Muriel Ubéda-Saillard 'Techniques interprétatives de la norme internationale' in *Revue Générale de Droit International Public*, Tome 115 (2011), pages 427-428.

¹⁶ Article 90, Draft of the 1998 Preparatory Committee in: Cherif Bassiouni, *The Legislative History of the International Criminal Court: An Article-by Article Evolution of the Statute* (Transnational Publishers, 2005, Volume 2) page 685.

¹⁷ Committee of the Whole, Working Group on International Cooperation and Judicial Assistance, Rolling Text of Articles 87, 90, 90 ter and 90 Quater, 6 July 1998, A/CONF.183/C.1/WGIC/L.15, page 2.

¹⁸ Goran Sluiter, "I beg you, please come to testify" – The Problematic Absence of Subpoena Powers at the ICC, *New Criminal Law Review*, Fall 2009, page 591. See also: William Schabas, *An Introduction to the International Criminal Court* (3 ed. 2007) page 298. The author states that '[n]othing in the Statute provides for compellability of witnesses, for example by issuance of a subpoena or similar orders to appear before the Court. Witnesses are to appear voluntarily'.

15. This interpretation has been suggested by Trial Chamber V previously in this case, when it determined that demonstrating an intent to call a witness can be satisfied by 'including the individual on its filed witness list, or by the witness informing the non-calling party that he or she has agreed to be called as another party's witness, or by any other means that establish a clear intention on behalf of the calling party to call the individual as a witness and that this individual has consented thereto'.¹⁹ The principle of voluntary appearance has also been confirmed by other ICC Chambers in previous occasions.²⁰ Moreover, the Office of the Prosecutor in its interviews with its witnesses has routinely included this principle when it informs them of their rights and duties as witnesses.²¹

16. The majority of the Chamber has referred to Article 93(1)(l) of the Statute in its determination,²² as this provision includes 'any other assistance' that can be provided by State Parties. I disagree with the Majority that this residual provision could include facilitating the appearance and testimony of non-voluntary witnesses, as this possibility was expressly eliminated from paragraph (1)(e), as noted above. The legal framework as to the voluntariness of witnesses is unequivocal when one reads Article 93(1)(e). It is dangerous to extend the scope of a residual provision such as Article 93(1)(l) to include

¹⁹ Emphasis added. *Ruto and Sang case*, Annex to Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call, 24 August 2012, ICC-01/09-01/11-449-Anx, page 1.

²⁰ See: *Lubanga case*, Transcript of 20 May 2011, ICC-01/04-01/06-T-355-ENG ET, page 5, line 19; Kenya Situation, Second Decision on Application by Nine Persons to be Questioned by the Office of the Prosecutor, 31 January 2011, ICC-01/09-39, paragraph 20.

²¹ For Witness 15, see document KEN-OTP-0052-0003, at KEN-OTP-0052-0011, 0012, 0051, and 0052. For Witness 16, see document KEN-OTP-0029-0131 at KEN-OTP-0029-0133 and 0153. For Witness 0336, see document KEN-OTP-0082-0187 at KEN-OTP-0082-0189 and 0217. For witness 397, see document KEN-OTP-0074-0264 at KEN-OTP-0074-0266 and 0293. For Witness 0516, see document KEN-OTP-0087-0031 at KEN-OTP-0087-0032 and 0052. For Witness 524, see document KEN-OTP-0087-0277 at KEN-OTP-0087-0279 and 0312. For witness 495, see document KEN-OTP-0084-0236 at KEN-OTP-0084-0237 and 0252. For Witness 323, see document KEN-OTP-0072-0397 at KEN-OTP-0072-0398, 0399 and 0419.

²² Majority Decision, paras 115-118 and 147-156.

something that was foreseen and in fact was excluded from the primary provision.²³

17. Pursuant to Article 93 of the Statute, read in its integrity, the Government of Kenya is under no legal obligation to compel a witness to appear before the ICC, either in The Hague or *in situ*. The International Crimes Act is the applicable domestic law, and, in accordance with the Rome Statute, its Section 20(1)(a)(vi) also explicitly provides for '[f]acilitating the voluntary appearance of persons as witnesses or experts before the ICC' (emphasis added).²⁴
18. Thus, even if one would read Article 64(6)(b) of the Statute as allowing the Court to issue a subpoena vis-à-vis an individual, the ICC cannot demand a State to deliver a non-voluntary witness pursuant to Article 93(1)(e) of the Statute.²⁵
19. Moreover, the majority considers that the principle of implied powers, as a general principle of international law, is codified in Article 4(1) of the Statute.

²³ In their commentary to Article 93, Kress and Prost give examples of assistance which would fall under the residual paragraph (1)(l), such as intercept of communications, the provision of forensic or DNA expertise, as well as the freezing of assets for specific purposes, such as securing the arrest of a person sought, and also provision of logistical support, such as the transportation of a suspect. See: Trifflerer (ed), Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, Second Edition (2008), page 1579.

²⁴ The LRV in his filing submits that while State Parties are under no obligation to compel witnesses to appear before the Court, State Parties may compel witnesses to appear before the Court. The LRV refers to examples of State Parties that in their implementation laws, have gone a step further in order to give the Court the best possible assistance and ultimately, to introduce the compellability of witnesses through their domestic law. In essence, even those countries (such as Finland and Germany) which have included compellability of witnesses, have done so under the understanding that the Statute in itself, does not include this possibility. See: Common Legal Representative for Victims' Response to the Prosecution's Request and Supplementary Request under Article 64(6)(b) and Article 93 to Summons Witnesses, 4 March 2014, ICC-01/09-01/11-1201, paragraphs 32-42.

²⁵ Robert Cryer and others, An Introduction to International Criminal Law and Procedure, Second Edition (2010), page 514. See also: Vladimir Tochilovsky, Jurisprudence of the International Criminal Courts and the European Court of Human Rights, Procedure and Evidence (2008), page 204. The author, referring to the ad-hoc tribunals, states that 'issuing a subpoena would only occur if the Chamber considers that it is reasonably likely that there will be cooperation if such an order were made'.

In their view, Article 4(1) of the Statute recognises the power to subpoena witnesses in Kenya to appear before this Court.²⁵

20. According to Articles 1 and 4 of the Statute, the power of the Court is limited by the provisions of the Statute. The scope of this power is clarified by the provisions of Article 21 of the Statute, which establishes the hierarchy of applicable law. Pursuant to this provision, the Court shall apply in the first place the Statute, the Elements of Crimes and the Rules of Procedure and Evidence.

21. The concept of 'implied powers' cannot apply in this case. The Court shall exercise its functions and powers 'as provided for in the Statute' and this provision 'is directed against an expansion of the Court's powers beyond the Statute'.²⁷ In the case at hand, there is no lacuna in the Statute, as States Parties have clearly agreed that in matters of cooperation, only voluntary appearances of witnesses shall be facilitated. It also strikes me as particularly difficult to rely on the implied powers doctrine in a context where the drafters of the Statute have demonstrated a deliberate intent to limit the Court's authority.²⁸

22. Thus, using the doctrine of implied powers beyond what was provided for in the Statute is in my view contrary to the Statute, particularly the principle of legality (*nullum crimen sine lege*).²⁹

²⁵ Majority Decision, paras 83-87, 94, 104-110. See also footnote 160, which makes reference to *Djohakaba Lambi Longa v The Netherlands*, Application No 33917/12, Judgment of 8 November 2012, para. 72 [ECtHR].

²⁷ Wiebke Rückert, Article 4, Legal status and powers of the Court, in Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, Second Edition* (2008), page 126.

²⁸ I note, in this regard, that the Majority's primary response to the drafting history opposed to its position is to argue that *travaux préparatoires* is of limited value and that the present case is not the kind of situation where the Vienna Convention on the Law of Treaties permits resort to *travaux*. Majority Decision, paras 141-145.

²⁹ Article 11(2) of the Universal Declaration of Human Rights: No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed. Article 9(1) of the International Covenant on Civil and Political

23. In fact, Article 22 of the Statute clearly enshrines this principle, and states that the 'definition of a crime shall be strictly construed and shall not be extended by analogy, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted'. Consequently, the ICC could not possibly compel an individual and subject him or her to penalties or impose restrictions to his or her liberty based on an 'implicit' power not expressly defined in the Rome Statute or any other ICC provision.

24. Pursuant to Article 21(3) of the Statute, the ICC cannot deviate from these minimum human rights, particularly considering that the ICC's practice may be of significance and serve as reference in domestic proceedings, not only in the Republic of Kenya but in other State Parties, for other present and future cases.³⁰

25. Moreover, even if one would agree that the ICC has subpoena powers, given the security concerns of most witnesses who have appeared thus far in this trial, the Court firstly has to guarantee their protective measures, pursuant to Article 68(1) of the Statute, before compelling any witness to testify. The ICC cannot compel witnesses to testify because of fear of criminal prosecution, when the ICC, and particularly the Victims and Witnesses Unit (VWU), cannot guarantee the safety and well-being of the witness. In this regard, the VWU has previously stated that they 'will only be able to arrange the witness'

Rights (ICCPR): Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. Article 15(1) of the ICCPR: No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

³⁰ See: Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (2011), page 360. The author states that when an international criminal court deviates from minimum human rights standards, the court undermines existing human rights and minimum rights that are the baseline under which a court cannot go without compromising fairness and effectiveness.

availability for testimony as long as the individual consents to appear as a witness' [emphasis added].³¹

26. In the interests of justice and the rights of the accused a fair trial, I consider that the Trial Chamber must have the power to issue a subpoena to persons refusing to give their testimony before the ICC. This is in fact clearly provided for in Article 64(6)(b) of the Statute. However, trial proceedings must be done respecting the principle of legality, the guarantees of due process, and the rights of the accused to a fair trial.

IV. CONCLUSION

27. Consequently, in my opinion the Chamber has two options:

- i) It may require the assistance of the Government of Kenya in facilitating the voluntary attendance of the witnesses to appear before this Chamber in The Hague. If the witness is unwilling to travel to the seat of the Court, the Chamber may request the assistance of the Government of Kenya so that the witnesses' voluntary testimony is given in Kenya.
- ii) It could issue summonses to appear under Article 64(6)(b) of the Statute and could ask and encourage the Government of Kenya to make arrangements to secure their appearance. However, the Government of Kenya is under no obligation to assist in compelling and ensuring the appearance of the witnesses. The Court would have to take appropriate measures to protect the

³¹ *Ruto and Sang case*, Annex to Victims and Witnesses Unit's Amended Protocol on the practices used to familiarise witnesses for giving testimony, 25 April 2013, ICC-01/09-01/11-704-Anx, paragraph 10.

witnesses' safety and well-being pursuant to Article 68(1) of the Statute before any such order is enforced.

Done in both English and French, the English version being authoritative.

A handwritten signature in dark ink, appearing to read 'O. Herrera Carbuccion', is written over a horizontal line.

Judge Olga Herrera Carbuccion

Dated 29 April 2014

At The Hague, The Netherlands