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TRIAL CHAMBER V(A)

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG

Confidential
Prosecution's further submissions pursuant to the Prosecution's request under article 64(6)(b) and article 93 to summon witnesses

Source: **Office of the Prosecutor**

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

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Introduction

1. Pursuant to the Chamber's oral invitation of 17 February 2014,[1] the Prosecution provides the following further submissions on issues arising from the status conference held on 14 and 17 February 2014 regarding the Prosecution's request under article 64(6)(b) and article 93 to summon witnesses.[2]

Submissions

2. Article 64, in Part 6 of the Rome Statute, governs the functions and powers of the Trial Chamber. The general rule respecting the power of the Trial Chamber to require the attendance and testimony of witnesses is found in article 64(6)(b). Part 9, which deals with international cooperation and judicial assistance, does not and cannot detract from those powers expressly conferred upon the Trial Chamber in Part 6. Rather, the two parts must be read together to give effect to the Statute as a whole.[3]

3. The power to require witness attendance under article 64 is given effect through the provisions of Part 9 - which regulates *the process* by which the Trial Chamber's determination that a witness's attendance is necessary becomes translated into a request to the relevant national authorities to secure that person's appearance at a specific time and location.

4. The general obligation of States Parties to comply with requests for assistance from the ICC is found in article 86, which specifies that "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). Reference to "provisions of this Statute" ensures that the Court

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[1] ICC-01/09-01/11-T-88-CONF-ENG, p.5.
[2] ICC-01/09-01/11-1120-Conf-Red-Corr2, hereafter "Prosecution Application".
[3] To hold otherwise would be mean that a provision relating to one particular form of State Party cooperation for facilitating voluntary witness appearance would be read to limit the functions and powers of the Chamber to require witness attendance.

can rely on State Party assistance for all the forms of assistance provided for throughout the Statute which are necessary to fulfil its mandate and not just those measures listed in Part 9.[4] Indeed, since article 64(6)(b) foresees that implementation of this particular measure may be accomplished through State Party cooperation, it would be nonsensical if a power so specified could not be given effect because it was not expressly listed in Part 9. The same is true of provisions in article 69(2) and rule 67 contemplating the use of videoconferencing to hear live oral testimony which would undoubtedly be given effect through State cooperation, as well as the provisions related to the institution of *in situ* proceedings under rule 100.[5]

5. The power to ensure witness attendance is so basic a feature of criminal courts that no court could successfully operate and fulfil its mandate to establish the truth without it. Indeed, it would be wholly unreasonable to hold that the International Criminal Court, established to adjudicate the most serious crimes of international concern, and to fill the gap left by unwilling or unable States, would have less power to hear evidence than any national court dealing with ordinary crimes. It would wholly undermine the concept of complementarity,[6] since if the Court were unable to dispose of the most basic tools to administer justice, it might be questioned whether it can indeed complement national criminal jurisdictions or overcome the limitations of national courts found to be "unable to obtain … the necessary evidence and testimony" if it cannot do the same.[7]

6. All of the equally authentic texts of the Rome Statute, in article 64(6)(b), use a term which denotes the giving of a judicial order requiring fulfilment: "require" in English; "ordonner" (to order) in French; "ordenar" (to order) in Spanish; "الأمر" (to

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[4] Kress, C. and Prost, K., 'Article 86', in Triffterer, O. (ed), Commentary on the Rome Statute of the International Criminal Court (2008), pp.1514-1515.
[5] See e.g. regulation 48(1) of the Regulations of the Registry.
[6] Article 1, ICC Statute, whereby the Court is "complementary to national criminal jurisdictions".
[7] Article 17(3), ICC Statute.

order) in Arabic; "требовать" (to require) in Russian; "传唤" (to summon/subpoena) in Chinese.[8]

7. Certain exceptions have been carved out of the general power to require attendance and testimony of witnesses. These exceptions respond to the concerns of certain States over constitutional impediments they faced in compelling their citizens to go outside the country in response to a summons.

8. Indeed, all of the references to the issue of summoning witnesses during the entire four years of negotiations leading up to and including Rome refer solely to the problem of witnesses *traveling* or being *forcibly transferred* to *the seat of the Court*.

9. The 1995 Ad Hoc Committee Report notes: "The delegations that commented on the issue of witnesses noted that, in relation to an international criminal court, the problem arose whether attendance of witnesses could be compelled directly or through State authorities. *It was noted that, in many countries, it was not constitutionally possible to force a citizen to leave the country to attend judicial proceedings in another country*" (emphasis added).[9]

10. The 1996 Preparatory Committee Report notes: "Witnesses or experts may not be compelled to testify *at the seat of the Court*. If they do not wish to *travel to the seat of the Court*, their testimony *shall* be taken in the country in which they reside or in some other place which they may determine by common accord with the Court" (emphasis added).[10] The 1996 report again refers to: "The problem of the arrest and

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[8] Article 128, ICC Statute.

[9] *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, A/50/22 (1995), para.233, cited at fn.49 of Prosecution Application. The paragraph goes on to refer to possible solutions such as compelled appearance in the requested State, testimony by video-link, or the *in situ* hearing of evidence.

[10] *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II*, A/51/22 (1996), p.284; cited at fn.51 of the Prosecution's Request (a typographical error lists the reference incorrectly as p.282 in the Prosecution Application).

forcible transfer of recalcitrant witnesses to the Court creates problems for many States" (emphasis added).[11]

11. The 1998 Report of the Preparatory Committee recalls the previous observation, this time in bracketed text: "[7. (a) Witnesses or experts may not be compelled to testify *at the seat of the Court*. [(b) If they do not wish *to travel* to the seat of the Court, their evidence *shall* be taken in the country in which they reside or in such other place as they may agree upon with the Court [in accordance with national requirements [and in compliance with international law standards]]…]" (emphasis added).[12] The Report of the Working Group on International Cooperation and Judicial Assistance, contained in the same 1998 report, observes in a footnote to the text on the facilitating of voluntary witness appearance: "This includes the notion that witnesses or experts may not be compelled *to travel* to appear before the Court" (emphasis added).[13]

12. Nowhere in the entire legislative history is there anything to support the proposition that States sought to *ensure* that the Court lacked the power to compel the attendance of witnesses under any circumstances. The issue was limited solely to forcing witnesses to travel to appear at the seat of the Court, which negotiating States sought to address through alternative means made available to the Court.[14]

13. The concern over attendance abroad derives from traditional mutual legal assistance regimes between States, which typically provide that a summons served on a witness on behalf of a foreign jurisdiction carries no mandatory obligation in the requested State for the witness so served, and that no sanctions may be taken by

[11] *Ibid.*, p.253, fn.95.
[12] *Official Records, Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, A/CONF.183/13 (Vol. III), p.75. Consideration of the exact formulation of this draft provision was linked, according to the accompanying footnote (fn.266), to the formulation adopted for article 69.
[13] *Ibid.*, p.329, fn.221.
[14] See e.g. ICC-01/09-01/11-1183-Conf, hereinafter "Prosecution Reply", para.20; *supra* fn.9

the requested State against the witness if s/he fails to attend.[15] The same inter-State regimes also contain the standard proviso that witnesses in a requested State's custody cannot be transferred to a foreign jurisdiction for the purpose of providing testimony abroad without that person's consent.[16] Nonetheless, the existence of such exceptions does not create a general right for witnesses not to be compelled to appear, under any circumstances, in respect of a foreign judicial process. Instead, recognising that States may only subpoena witnesses within their own territory, traditional mutual legal assistance foresees other means to obtain the result sought. For example, a State may execute a rogatory letter or receive a rogatory commission for the taking of a person's statement within its territory using the normal mechanisms of domestic law enforcement.[17] States may also agree that witnesses may be compelled to appear for testimony by means of video-link on their territory for a foreign process, even though the same witness would be free to decline to travel abroad to attend the same hearing in the foreign jurisdiction.[18]

14. The goal of such processes is to effectively secure the evidence required by the foreign State and to promote, rather than obstruct, the administration of justice.[19] The ICC is not in an inferior position to horizontal inter-State mechanisms in this regard. Indeed, the relationship created by the Rome Statute whereby the ICC, as an international court, is both complementary to national criminal jurisdictions and relies on State cooperation, creates a far more profound set of bonds. For example, as Justice Mwongo, Principal Judge of the High Court of Kenya, held in the recent

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[15] See e.g. *United Nations Model Treaty on Mutual Assistance in Criminal Matters*, (A/RES/53/112), articles 14-15; 2001 *Mutual Legal Assistance Act* [Kenya], article 15.
[16] Article 93(7)(a)-(b) also deals with attendance outside of the State, i.e. transfer from the State to the Court.
[17] See e.g. Mutual Assistance in Criminal Matters Act 1987 [Australia], s.13; Canada Evidence Act, (R.S.C., 1985, c.C-5), ss.46-47; Crime (International Co-operation) Act 2003 (c.32) [UK], s.15, schedule 1; 18 US Code s.3512.
[18] Compare articles 7-8 of the *European Convention on Mutual Assistance in Criminal Matters* (ETS No. 30, 1959), and article 10 of the *European Union Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union* (OJ C 197/00, 29 May 2000), which per preamble paras.6-7 and article 1 supplements the types of assistance provided in the 1959 Convention. See also article 9 of the 2001 *Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters* (ETS No. 182).
[19] Preamble paras.3-4 and article 10(1), EU Convention on Mutual Assistance; article 9(1), Second Additional Protocol on Mutual Assistance.

judgment in the *Barasa* case, the 2008 International Crimes Act ("ICA" or "Act") gives the Rome Statute "legal 'teeth' within the jurisdiction of Kenya", and the statute "constitutionally forms part of the law of Kenya".[20]

15. Proper effect can be given to article 64(6)(b) if it is linked to the catch-all clause in article 93(1)(l). The inclusion of such a provision that is subject only to a prohibition in national law, or to a fundamental legal principle of general application,[21] should come as no surprise to States Parties. Indeed, its inclusion was debated as early as 1996, and ultimately secured through recognition that the ICC should be able to call on State assistance for any other measures that national law enforcement could put at its disposal.[22] Article 93(1)(l) is not an afterthought: it was seen early on as a guarantor of flexibility. And Kenya has incorporated the same provision, as required as part of its implementing legislation, in ICA section 108.

16. The ICA, as with all ICC implementing legislation, is intended to provide national procedures to enable a State Party to cooperate fully with the Court with its obligations in accordance with the provisions of the Statute.[23] In this regard, national implementing legislation regulates the *process* by which States Parties cooperate (the manner, the procedures, the modalities): national legislation is not intended to, and cannot, override or defeat the substantive forms of cooperation that a State is obliged to provide. Indeed, the Prosecution considers Kenya's ICA as a model of effective implementing legislation in that it mirrors all the forms of cooperation listed in article 93(1)(a)-(l), while also making reference to other relevant parts of the Statute including *inter alia* article 64 as well as article 3 dealing with *in situ* proceedings, without in any way limiting the forms of cooperation required by the Statute.

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[20] *Walter Osapiri Barasa v Cabinet Secretary Ministry of Interior & National Co-ordination & 6 others, Constitutional Petition 488 of 2013*, 31 January 2014, paras.56 and 84.
[21] Article 93(3), ICC Statute.
[22] Prosecution Reply, at fn.9.
[23] Article 86, ICC Statute.

17. At the hearing it was suggested that sections 87-89 of the ICA limit the range of assistance that Kenya can provide to the facilitating of voluntary witness appearance, and that *ipso facto*, any request for assistance with respect to compelled witness attendance would be prohibited under the Act.[24] However, the Prosecution understands that sections 87-89 *only* relate to a request from the Court pursuant to article 93(1)(e). Both section 87 and the marginal notes make this clear. This is confirmed by the architecture of the ICA, which sets out in section 20 the various forms of requests for assistance contemplated by the Act. Sections 87-89 correspond to section 20(a)(vi). But this is not the form of assistance that the Prosecution is proposing.

18. Nothing in the Act suggests that procedures specified for one form of assistance limit or prevent the provision of different forms of assistance. Nothing in the Act leads the Prosecution to believe that the consent requirements of sections 87-89 apply to all witnesses, including those summoned under article 93(1)(d); those called for taking evidence under article 93(1)(b); those required to appear under article 64(6)(b) or article 93(1)(l); nor those heard by the Court *in situ* under article 3 and rule 100. Similarly, no such linkage to sections 87-89 is found in relevant sections 78-80, 86, 108, and 161 *et seq*. of the Act.

19. Moreover, any domestic legislation that would subject the operation of self-standing provisions of the Statute to the conditions of article 93(1)(e), contrary to the terms of the Statute, would not reflect the cooperation duties of States Parties. Article 93(1)(e) is not the chapeau provision to which all other sections of the Statute must submit: it is one sub-paragraph of a more general provision (article 93), which itself must be read in the light of the more general functions and powers of the Trial Chamber.

[24] See e.g. ICC-01/09-01/11-T-86-Red-ENG, p.44 at lines 14-21; p.66. at line 25 *et seq*., p70 at lines 2-6.

20. As for article 93(1)(l), a prohibition in national law cannot be presumed from silence, but must be express, as is evident from the wording of the provision. Notably, the same principle has been recognised in domestic cases in Kenya. For example, in *Livingstone Maina Ngare v. Republic*, High Court Justice Ochieng held that despite the absence of a specific provision in the Kenyan law of evidence or procedure, the taking the evidence of witnesses in a criminal trial in Kenya by video-link was not prohibited. Thus he concurred that what is not expressly prohibited is permitted – provided it serves the ends of justice.[25] Such a proposition is also in keeping with both the letter and the spirit of the Rome Statute.[26]

21. The Prosecution's oral submissions briefly summarised how the power in article 64(6)(b) is translated through other provisions of the Rome Statute and the ICA into effective implementation.[27] In particular, the relevant domestic laws that enable the law enforcement authorities to secure compelled attendance become integrated into the Act by the means of, *inter alia*, sections 4, 20(1)(a)(xiii), 20(1)(b)(iii) and 20(2), and 108.

22. With regard to the ability of the Court to sit in Kenya, ICA section 162 provides when sitting in Kenya the ICC may perform any of its functions under the Statute and Rules, including "taking evidence".[28] Since the Court has the power to request State Party assistance under article 93(1)(b), there appears to be no reason why the Court could not request Kenya to assist it in the "taking of evidence" by the Trial Chamber in Kenya, rather than before a domestic judge.[29]

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[25] *Livingstone Maina Ngare v Republic*, [2011] eKLR, 28 July 2011. See also decision of the High Court in *Equity Bank Limited v Capital Construction Limited*, [2012] eKLR, where Justice Musinga, interpreting the provisions of the new Kenyan constitution, favoured granting Kenyans access to justice over undue observance of procedural technicalities.
[26] To this end, it unnecessary for the Chamber to have recourse to the implied powers doctrine, since the functions and powers of the Trial Chamber in this instance have been made express within the Statute.
[27] ICC-01/09-01/11-T-88-CONF-ENG, pp.7-11.
[28] See also ICA section 163.
[29] ICA section 78 specifies that the taking of evidence shall be done before a Judge of the High Court, but there appears to be no reason why the Court could not interpret article 93(1)(b) as including the taking of evidence by the Trial Chamber when *in situ*; see in particular ICA sections 162-163.

23. The assistance required would be limited to Kenya's cooperation to summon and, if necessary, bring the witness before the Chamber, just as it would have done before a Kenyan judge. ICA section 80 foresees that witnesses whose testimony is to be taken by a Kenyan magistrate under article 93(1)(b) are compellable to appear.[30] Sections 80(1)-(2) also specify that for the purpose of taking of evidence under Sections 78-79 (i.e. pursuant to article 93(1)(b)), "*the applicable law is the law of Kenya that applies to the giving of evidence or the answering of questions or the production of documents or other articles on the hearing of a charge against a person for an offence against the law of Kenya*". This is set out in sections 144-149 of the Kenyan Criminal Procedure Code.

24. The International Crimes (Procedures for Obtaining Evidence) Rules, which "apply where the Attorney-General has authorized the taking of evidence and production of evidence under sections 78 and 79 of the Act",[31] further provides that a summons served on a witness for this purpose shall specify "the date any intended witness is *required* to appear"[32] (emphasis added); and that "A witness who has been summoned to give evidence or to produce a document *shall appear* ..."[33] (emphasis added).

25. Thus while the Prosecution's Application has relied upon articles 93(1)(d) and 93(1)(l) for the relief requested, as indicated in its oral submissions,[34] the Chamber may equally rely upon article 93(1)(b)[35] where it sits in Kenya.

26. The absence of a sanctioning mechanism under article 70, compared to ICTY/R rule 77, is not determinative of whether the Court has the power to require

[30] While ICA section 80 goes on to deal with the protection of witnesses (including rights related to the *compellability of testimony*), the premise is that witnesses are *compellable to appear* (ss 80(1)). The same distinction is borne out by section 80(3). ICC rule 65 also deals with compellability to give testimony, not compellability of appearance.
[31] International Crimes (Procedures for Obtaining Evidence) Rules, 2010 [L.N. 177/2010.], rule 3.
[32] *Ibid.*, rule 8.
[33] *Ibid.*, rule 10.
[34] ICC-01/09-01/11-T-86-Red-ENG, lines 1-3 (referring properly to *article* 93(1)(b)).
[35] Read with article 3 and rule 100 and articles 64(6)(b) and 99(1).

witness attendance. Indeed, in the seminal *Blaskic* subpoena decision, the ICTY Appeals Chamber examined the legal remedies available for non-compliance by an individual with a subpoena or order issued by the International Tribunal by distinguishing between: (i) the sanctions and penalties that can be imposed by the authorities of the State where the individual is located; and (ii) those that can be imposed by the International Tribunal.[36]

27. As the Appeals Chamber noted, normally the Tribunal will turn to the relevant national authorities to seek remedies or sanctions for non-compliance by an individual in this regard. Only where it decides not to notify the national authorities and to enter into direct contact with an individual, does the person become subject to the Tribunal's own contempt powers.[37] A request for Kenya's assistance in the service and enforcement of a summons on a witness to appear before the Court in Kenya and reliance on the sanctions mechanisms available to the Kenyan national authorities in the event of non-compliance would be wholly consistent with this approach.

28. Finally, contrary to the Defence's oral submissions, neither the Statute, the Rules, nor the jurisprudence of this Court or the *ad hoc* tribunals prohibits a party from calling or cross-examining a witness that it knows is hostile.[38] Rather, in circumstances where the Prosecution sought to call witnesses it knew were hostile, the ICTY Appeals Chamber in *Popović* held that "the interests of justice dictate a certain measure of flexibility."[39] In particular, the Appeals Chamber endorsed the flexible approach adopted by the Trial Chamber in the *Krajišnik* case, which included

[36] See *Blaskic Subpoena Interlocutory Appeal*, IT-94–14, 29 October 1997, para.57.
[37] *Ibid.*, para.60. See Prosecution Request, at fn.81.
[38] The Prosecution is also unable to find any jurisprudence of the *ad hoc* tribunals that distinguish between witnesses who become hostile after giving evidence from witnesses known to be hostile in advance.
[39] *Popović et al.*, IT-05-88-AR73.3, Decision on Appeals Against Decision on Impeachment of a Party's Own Witness, 1February 2008, para.28.

the possibility of granting a "calling party leave to cross-examine its own witness on an inconsistent statement without a prior showing of adversity."[40]

29. This flexible approach is warranted to allow a party to discharge its duty in presenting its case and is reflected in the approach taken more recently by a number of common law national jurisdictions. In the UK, for example, the position may be summed up as follows: "The prosecution may call a person as a witness even if he has shown signs that he is likely to be hostile, for example by retracting a statement or by making a second statement prior to the trial".[41] The US Federal Rules of Evidence similar provide: "Any party, including the party that called the witness, may attack the witness's credibility.[42]

30. In this regard, the Prosecution notes that only four of the witnesses it now seeks to summon have recanted and may properly be described as being "hostile"; the remaining witnesses are recalcitrant as far as it is aware. The Prosecution is entitled to call all of these witnesses with a view to allowing them to adopt as true their original statement within the solemn environment of the court under the peril of prosecution for perjury.

31. The flexible approach is further consonant with the Chamber's discretionary and broad powers to hear witnesses under article 69(3) and rule 140 of the Rules of this Court. Indeed, in its Decision on the Conduct of Trial Proceedings this Chamber endorsed such an approach in ruling that "modes of questioning . . . will be dealt with on a case by case basis during trial, as and when a clear need arises to do so."[43]

32. Furthermore, jurisprudence from the *ad hoc* tribunals also does not lend support for placing limits on the Prosecution's entitlement to call witnesses that are

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[40] *Ibid.*, para 25.
[41] *Blackstone's Criminal Practice*, (2010), F6, p.2378.
[42] Federal Rules of Evidence, 1 December 2013, Rule 607.
[43] ICC-01/09-01/11-847-Corr, para.18.

known in advance to be hostile. Taken at its highest, the relevant cases[44] only establish that a party may not call a witness it knows to be hostile where doing so serves an improper motive, such as only using it as an opportunity to "ask leading questions"[45] or as "a device to seek to tender the earlier inconsistent interview of that witness"[46].

33. No such improper motive can be alleged here. On the contrary, the forensic utility, practical reasons and legitimate good faith basis upon which the Prosecution intends to call these witnesses are set out in detail in its written and oral submissions.[47] The purpose of calling these witnesses is not solely to impeach them, nor as subterfuge to admit evidence not otherwise admissible. Rather, the evidence sought from each witness goes to the substance of the matter in controversy and key issues in this case.

34. Moreover, the Prosecution has informed the Court and the Defence in advance of the probability that some of the witnesses are likely to testify to the contrary of a prior statement, therefore enabling the Court to satisfy itself of the absence of any improper motive and to intervene if necessary. Moreover, rule 68(2) of the ICC Rules, as with ICTY rule 92 *quinquies* adopted after the *Popovic* Appeals Decision, specifically permits the admission of the prior recorded testimony of a witness who has been subjected to interference.

35. In sum, the legislative structure of the Statute and Kenya's ICA supports the issuance and service of a summons requiring a witness to attend. Furthermore, Kenyan domestic law, which is incorporated by the ICA, permits the enforcement of

[44] *Popović et al.*, Appeals Decision on Impeachment; *Limaj et al.*, IT-03-66-T, Decision on the Prosecution's Motion to Admit Prior Statements as Substantive Evidence, 25 April 2005.
[45] *Popović et al.*, Appeals Decision on Impeachment, para.20.
[46] *Limaj et al.*, Decision on Prior Statements, paras.30-32, whereby the Trial Chamber admitted evidence of prior recorded video testimony not only as a means of assessing the credibility of a hostile witness but also as a means of assessing whether the witness "was being truthful in the earlier account and whether what was then said remains reliable despite the contrary oral evidence."
[47] Prosecution Application, paras.5-61; ICC-01/09-01/11-T-87-ENG, pp.33-36.

such a summons requiring a witness to attend at a location in Kenya to testify via video-link or before the Trial Chamber sitting in Kenya.

Fatou Bensouda, Prosecutor

Dated this 4th day of March 2014

At The Hague, the Netherlands