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No.: ICC-01/09-01/11

Date: 25 June 2014

THE APPEALS CHAMBER

Before: Judge Akua Kuenyehia, Presiding Judge
 Judge Sang-Hyun Song
 Judge Sanji Mmasenono Monageng
 Judge Erkki Kourula
 Judge Anita Ušacka

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 Observations under Rule 103 in relation to the Defence Appeal against the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation

Source: The 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. On 10 June 2014, the Appeals Chamber granted leave pursuant to Rule 103(1) of the Rules of Procedure and Evidence to the Government of the Republic of Kenya (“Government” or “GOK”),¹ to submit observations on the Second Issue emanating from Trial Chamber V(A)’s 17 April 2014 *Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation*.² The Second Issue is framed as follows:

‘Whether the Government of Kenya, a State party to the Rome Statute, is under an obligation to cooperate with the court to serve summonses and assist in compelling the appearance of witnesses subject to a subpoena.’

2. In short, as a State Party to the Rome Statute, the Government of Kenya accepts that it has an obligation to cooperate with the Court to serve summons on witnesses whose testimony has been requested. However, the Government submits that the Majority erred in determining that the Government is further obliged to compel the appearance of witnesses subject to a subpoena. The Majority’s determination is incorrect in that: (i) it contradicts the plain language of Kenya’s domestic implementing legislation, the International Crimes Act (2008) and its drafting history, (ii) it is contrary to the Constitution of Kenya, it would unfairly and retroactively impose a criminal sanction on witnesses who thought they were participating in a voluntary process, and (iii) it is contrary to the Rome Statute and controverts the understanding of other States Parties who have ratified the Rome Statute.
3. The Government has been granted only ten pages to file its observations, as the Appeals Chamber has noted that the Government’s previous oral and written submissions are already before it.³ The Government therefore relies on these court records and also on the additional arguments contained herein.

¹ ICC-01/09-01/11-1350, granting the Government of Kenya’s request as contained in ICC-01/09-01/11-1333, 3 June 2014.

² ICC-01/09-01/11-1274-Corr2 (“Decision” or “Majority”) and ICC-01/09-01/11-1274-Anx (“Dissent” or “Minority”).

³ ICC-01/09-01/11-1350, para. 8, citing ICC-01/09-01/11-1304, 12 May 2014; ICC-01/09-01/11-1184, 10 February 2014; ICC-01/09-01/11-T-86-Red, Transcript of 14 February 2014.

II. SUBMISSIONS

4. The Majority's Decision relies on **Article 64(6)(b)** – the power of the Trial Chamber to order witnesses to appear; **Article 93(1)(d)** – the power of the Court to request a State Party to serve court processes; and **Article 93(1)(l)** – the power of the Court to make any other request upon a State Party that is not prohibited by the law of the forum,⁴ and the related provisions of Kenya's International Crimes Act (2008) ("ICA"), to conclude that the Government of Kenya is obliged to cooperate in the service and enforcement of witness summonses in order to ensure their appearance before the Court in Kenya or via video-link. The Government has indicated that it is prepared to serve the witness summonses. However, the Government contests that given the relevant legal framework, the Government of Kenya is under an obligation to enforce the summons. In other words, the Government is not obliged to assist in compelling the appearance of witnesses subject to a subpoena, where they are unwilling to testify.

Provisions of the International Crimes Act (2008)

5. As stated during oral submissions, there is not a complex question of law at issue here.⁵ The ICA spells out in great detail how the Government of Kenya may, *inter alia*, provide requested assistance to the Court. Yet in its Decision, the Majority gives short shrift to the intricacies of the ICA, focusing instead on the fact that the Rome Statute has the direct force of law in Kenya.
6. While **Article 2(6)** of the Constitution and **Section 4(1)** of the ICA does give the Rome Statute the direct force of law in Kenya,⁶ where the ICA is more specific or more detailed in its provisions, then resort to the Rome Statute is not necessary and the ICA provisions take precedence.⁷ In any event, the Majority's reliance on dicta in a decision by a Kenyan High Court justice, to the effect that "The ICC is a Court duly recognized and incorporated by the Constitution as a court which, in terms of the preamble and objects of the ICA,

⁴ Decision, para. 173.

⁵ ICC-01/09-01/11-T-86-Red, 14 February 2014, pg. 48.

⁶ Section 4(1) of the ICA provides that portions of the Rome Statute specified in subsection (2) shall have the force of law in Kenya in relation to the following matters, including (a) the making of requests by the ICC to Kenya for assistance and the method of dealing with those requests. The provisions of the Rome Statute which are specified in subsection (2) of Section 4 include those relating to the conduct of trials (encompassing Article 64(6)(b) and those relating to international cooperation and judicial assistance (encompassing Article 93).

⁷ Cf, Decision, para. 165-177.

Kenya *must* cooperate in the *in the performance of its functions*”,⁸ may be in jeopardy. Recently, the High Court’s decision in this regard has been subjected to a three-judge Court of Appeal Chamber to determine various constitutional questions that were raised in the High Court, including, on the question of direct implementation of the Rome Statute.⁹ Therefore, the Court cannot safely rely on this dicta.

7. At all times, the Constitution of Kenya (2010) remains supreme. **Article 2(1)** of the Constitution states: “This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government”. **Article 2(3)** of the Constitution stresses that the validity or legality of this Constitution is not subject to challenge by or before any court or other State organ. **Article 2(4)** goes on to state: “Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.” And finally, **Article 2(6)** reads “Any treaty or convention ratified by Kenya shall form part of the law of Kenya *under* this Constitution”.
8. Generally speaking, the ICA sets out the process by which Kenya cooperates with the Court, including the manner, the procedures and the modalities of cooperation that Kenya is to provide under the Rome Statute Article 93(1). **Section 20** sets out a several different ways in which the Government of Kenya may provide assistance to the ICC, in relation to Articles 86, 87(1)(a) and 93(1) of the Rome Statute.¹⁰ In this instance, **Sections 87 to 89** of the ICA are the *lex specialis* for the implementation of **Article 93(1)(e)** – facilitating the voluntary appearance of persons as witnesses before the Court, and will be elaborated upon in due course.
9. Furthermore, **Section 23(1)** states that where there is a request for assistance, the request shall be dealt with in accordance with the relevant procedure under the law of Kenya, *as provided in this Act*. Therefore, the Government is

⁸ Decision, para. 178, citing Justice Mwongo, Principal Judge of the High Court of Kenya in *Barasa v Cabinet Secretary of the Ministry of Interior & National Co-ordination & 6 others*, Constitutional Petition 288 of 2013, 31 January 2014; See also, ICC-01/09-01/11-1202, para. 14.

⁹ <http://www.capitalfm.co.ke/news/2014/05/appeals-court-blocks-barasas-arrest-extradition-to-icc/>

¹⁰ This includes the service of documents, including judicial documents (Section 20(1)(a)(v)), facilitating the voluntary appearance of persons as witnesses or experts before the ICC (Section 20(1)(a)(vi)) and any other type of assistance that is not prohibited by the law of Kenya, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the ICC (Section 20(1)(a)(xiii); also Article 64 (which relates to various measures that can be taken by the Trial Chamber) (Section 20(b)(iii)).

limited to what is permitted by the ICA, and cannot resort to other domestic legislation for comparison, unless directed to do so by the ICA itself. This limitation is fatal to the Prosecution's arguments that the Government can look outside the terms of the ICA to see how summons are served in domestic proceedings and what penalties may apply if there is non-compliance. The following provision in **Section 23(b)** does not undercut this limitation. Rather, **Section 23(b)** refers to the execution of a request in a particular manner, or by using a particular procedure that is not prohibited by Kenyan law. Our submission is that a 'procedure' does not include the substantive punishment of witnesses who fail to honour a subpoena from the Court.

10. Part V of the ICA, **Sections 86 to 89**, deals with the *Service of Documents and Appearance of Witnesses*. **Section 86** is most applicable here because the Majority has ordered the service of a document¹¹ in Kenya pursuant to **Article 93(1)(d)**; the Section simply states that the Attorney-General shall give authority for the request to proceed if he is satisfied that the request relates to any proceedings before the ICC (which is not in dispute) and the person to be served is or may be in Kenya (which remains to be seen). **Section 86** goes on to explain that Kenyan agencies should use their best endeavours to have the process served, in accordance with procedures specified in the request or in accordance with the law of Kenya. Yet this provision of the ICA is silent as to how a document or summons served pursuant to this provision could be enforced. The Government submits this is because the ICA does not empower the Government to take any action against a summoned witness who then does not comply with the Court's request.
11. Instead, as a logical next step following the issuance of a summons, the ICA in **Section 87** implements **Article 93(1)(e)** of the Rome Statute, which refers to facilitating the voluntary (ie, non-compulsory) attendance of witnesses before the ICC (note that there is no distinction drawn between witnesses who appear before the ICC at the seat of the Court, and witnesses who appear before the ICC via video-link or before the Court sitting in Kenya). Again, the procedure whereby the Attorney-General can authorize the facilitation of the voluntary appearance of a witness to proceed is specified (in **Section 88**), yet there is no correlated specified procedure or substantive power to sanction witnesses who refuse to attend voluntarily. The absence of such a provision is not an accidental omission, but an indication that the obligations of the

¹¹ **Section 86(2)(3)(a)** clarifies that a "document" includes a summons requiring a person to appear as a witness.

Government stop after service of the document or the facilitation of voluntary testimony.

12. Notably, in facilitating the voluntary appearance of a witness, Kenyan agencies “shall make inquiries as may be necessary to ascertain if the prospective witness consents to giving evidence or assisting the ICC” (**Section 88(2)**). The Government submits that after service of a summons pursuant to **Section 86**, the next step is to inquire as to the witness’s willingness. Therefore, this inquiry into consent is not limited to requests for assistance under **Article 93(1)(e)** alone, but often follows from a request pursuant to **Article 93(1)(d)**. Indeed, **Section 89(1)(a)** makes this even clearer by stating “The Attorney-General shall assist in the making of arrangements to facilitate a witness’s attendance before the ICC *if he is satisfied that the prospective witness has consented to giving the evidence or assistance requested*”. It makes no difference whether the consent was obtained following the issuance of a summons (pursuant to **Article 93(1)(d)**) or in the ordinary course of ensuring that any willing witness can participate in ongoing proceedings before the ICC.¹²
13. Despite the fact that the modalities of facilitating witness testimony (such as through **Articles 93(d)** and **(e)**) are fully covered in **Sections 86-89** of the ICA, the Majority and the Prosecution¹³ make much of the fact that the Attorney-General could not demonstrate, as required by **Article 93(1)(l)**, the existence of a Kenyan law prohibiting the requested assistance; ie, the enforcement of summons. They take the absence of an express prohibition to mean that Kenyan law could not prohibit the assistance simply by failing to expressly permit or require such assistance.¹⁴
14. Yet **Section 108** of the ICA, which corresponds with the residual provision of **Article 93(1)(l)**, states that where the ICC requests any *other* type of assistance (ie, not of the type already dealt with elsewhere in sub-section (1)), for the purpose of facilitating the prosecution of crimes within the jurisdiction of the ICC, the Attorney-General shall give authority for the request to proceed if he is satisfied that the request relates to proceedings before the ICC *and the assistance sought is in accordance with Kenyan law*. It is for Kenya to determine

¹² Cf, ICC-01/09-01/11-1202, paras. 17-19.

¹³ Prosecution Appeal, paras 68 et seq.

¹⁴ ICC-01/09-01/11-1202, para. 20.

what is permitted and prohibited by its laws, either expressly or by omission.¹⁵ The ICA is the promulgated Kenyan law with respect to cooperation with the ICC; if the ICA does not provide a mechanism by which the Government can compel a witness to testify against his will, then it cannot happen. The determination of national law in relation to the ICC by the Attorney-General on behalf of the Government of Kenya is not an scary or threatening assertion of sovereignty,¹⁶ but an expression of the reality that domestic legislation is best analysed by those mandated to uphold it.

15. The Prosecution attempts to rely on a domestic case, *Livingstone Maina Ngare v. Republic*, to suggest that what is not expressly prohibited is permitted – provided it serves the ends of justice.¹⁷ However, the *Ngare* case is completely distinguishable from the current question, which addresses whether witnesses who presumed that their cooperation with the ICC was voluntary, can now be criminally sanctioned by the Kenyan Government if they fail to appear and testify before the ICC. What was at stake in *Ngare* was simply whether the Court could resort to using video-link as an alternative modality for judicial proceedings, where there was no specific provision in relation to video-link in Kenyan law of evidence and procedure. Obviously, much more than modalities are at stake here, where the ICC is asking the Government to intrude on a witness's liberty or pecuniary interests if there is a failure to cooperate.
16. In attempting to find other ways around the summons issue, the Prosecution errantly argues¹⁸ that **Article 93(1)(b)** – whereby a Kenyan Court can assist in the taking of evidence – applies to the instant Appeal, through **Section 80** of the ICA. But this type of assistance provided by Kenyan Courts is different from a situation wherein ICC judges hear testimony while sitting in Kenya. Therefore, **Section 80** (which is tied through the marginal note to the “protection of witnesses”), is inapplicable to the present situation. It makes sense that the Kenyan Government can compel ICC witnesses (via existing domestic legislation) to come before its own Kenyan Court for the taking of evidence, but it cannot compel ICC witnesses pursuant to the same domestic

¹⁵ ICC-01/09-01/11-T-86-Red, 14 February 2014, pg. 82.

¹⁶ Cf, ICC-01/09-01/11-1313-Anx-Corr, para. 46-47, where the Presiding Judge suggested that the Government is using an outdated notion of state sovereignty in order to frighten judges of the ICC.

¹⁷ ICC-01/09-01/11-1202, para. 20, citing *Livingstone Maina Ngare v Republic*, [2011] eKLR, 28 July 2011.

¹⁸ ICC-01/09-01/11-1202, paras. 22-23 and footnote 29. The Government argues that the clear provisions of ICA Section 78 regarding the taking of evidence before the High Court cannot be expanded to interpret Article 93(1)(b) so as to include the taking of evidence by the Trial Chamber when in situ.

legislation to go unwillingly before the ICC sitting in Kenya for the purpose of giving testimony.

17. As noted above, the Kenyan Constitution is superior at all times to both international treaties ratified by Kenya and domestic implementing legislation. Consequently, the Government cannot enforce a summons issued by the ICC, pursuant to either the Rome Statute through direct force, or pursuant to the ICA as implementing legislation, where to do so would controvert any of the protections and rights enshrined in the Constitution, such as: **Article 29** – the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause; **Article 32(1)** – the right to freedom of conscience; **Article 40** – the right not to be arbitrarily deprived of property; **Article 47** – the right to administrative actions which are expeditious, efficient, lawful, reasonable and procedurally fair. Significantly, it is **Article 50(2)(n)** which is most pertinent for the current debate – that is the right of Kenyan citizens not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya or a crime under international law. Offences require certainty, such that a perpetrator is on notice. Thus, the lack of a clearly definable offence in Kenyan or international law in relation to a witness's failure to testify before the ICC means that the Constitution prohibits the Government of Kenya from enforcing the requested summons.

Understanding of Other States Parties as to Compulsory Nature of Summons

18. The position taken by the Government with respect to the enforcement of summons is in line with the understanding of other State Parties. For instance, in July 2011, the Commonwealth Secretariat held a Meeting of Commonwealth Law Ministers and Senior Officials, during which the topic of discussion was the *International Criminal Court (ICC) Statute and Implementation of the Geneva Conventions*. At the meeting, the *Commonwealth Expert Group on Review of the Implementing Legislation for the Rome Statute of the International Criminal Court* ("Expert Group") presented a text of a *Model Law to Implement the Rome Statute of the International Criminal Court* ("Model Law").¹⁹

¹⁹ The Model Law and report of the Expert Group are available at: [http://secretariat.thecommonwealth.org/files/238381/FileName/LMM\(11\)17PICCStatuteandImplementationoftheGenevaConventions.pdf](http://secretariat.thecommonwealth.org/files/238381/FileName/LMM(11)17PICCStatuteandImplementationoftheGenevaConventions.pdf) . Note that the Expert Group was comprised of seven members (one of whom was Mrs Emily Achieng Chweya of Kenya), and five observer members (one of whom was Mr David Koller, who represented the ICC).

19. The purpose of the Model Law was to serve as a guide for the national legislators of Commonwealth countries who wanted to domesticate the Rome Statute. **Sections 51 and 55-57** are germane to the present argument, as they detail the proposed legislation relating to the service of documents and a State Party's obligations to facilitate the voluntary appearance of witnesses. There is nothing in the Model Law that suggests a state is obliged to enforce subpoenas for a witness to testify before the ICC. To the contrary, paragraph 115 of the Report explains:

‘The [consent-based] approach reflected in the model law is based on that used in legislation on mutual assistance in criminal matters and requires the consent of the witness with the state then facilitating his or her appearance at the ICC. If the witness does not consent, the ICC can instead request that evidence be taken in the requested state in which case that state would use its powers to require the witness to appear before a national court for evidence to be taken, with the usual sanctions applying if the person does not appear.’

20. Surely, had the technocrats involved in drafting the Model Law thought States were obliged to enforce a summons, they would have included it in the proposal. The fact that such legislation is not proposed indicates that there is no consensus as to such an obligation.

III. RELIEF REQUESTED

21. The Government requests that the Appeals Chamber carefully consider these observations from the State Party that will be required to implement the Decision of the majority of the Trial Chamber. The Government submits that the Majority has errantly determined that the Government of Kenya must enforce summons against unwilling witnesses, and that the Decision must be reversed.

Respectfully Submitted,



Githu Muigai, SC

Attorney General of the Republic of Kenya

Dated 25 June 2014

At Nairobi, Kenya