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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
with a Public Annex**

**Prosecution response to the Government of the Republic of Kenya's observations
on the Appeals against the "Decision on Prosecutor's Application for Witness
Summonses and resulting Request for State Party Cooperation"**

Source: Office of the Prosecutor

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Introduction

1. The observations of the Government of Kenya (“GoK”)¹ are of limited assistance to the Appeals Chamber in determining the second issue certified for appeal.² They misapprehend the nature of the Decision, add little to the submissions of the Parties, and do not demonstrate any error by the Trial Chamber.³ The Appeals Chamber should dismiss the appeals accordingly, and uphold the Decision.

Preliminary observation

2. As the GoK expressly recognises, it was “granted only ten pages to file its observations”.⁴ The Appeals Chamber set this limit deliberately.⁵ According to Regulation 36(3) of the Regulations of the Court, “[a]n average page shall not exceed 300 words”. Yet the GoK’s observations exceed these restrictions, being 11 pages in length⁶ and averaging approximately 328 words per page.⁷

Submissions

3. Although the GoK properly accepts its obligation to cooperate with the Court by the *service* of the Court’s summonses, it maintains incorrectly that Kenya’s International Crimes Act (“ICA”), the Constitution of Kenya, and even the Rome Statute forbid it to enforce such summonses.⁸ On the contrary, these instruments permit, enable and indeed oblige Kenya to cooperate in the manner requested.

The GoK’s obligation to cooperate by enforcing the Court’s summonses is consistent with the ICA

¹ ICC-01/09-01/11-1406 (“GoK Observations”).

² See ICC-01/09-01/11-1350 OA7 OA8, paras.7-8 (granting the GoK leave to file observations on the second issue only); ICC-01/09-01/11-1313, paras.40, 54 (defining the second issue).

³ ICC-01/09-01/11-1274-Corr2 (“Decision”).

⁴ GoK Observations, para.3.

⁵ See ICC-01/09-01/11-1350 OA7 OA8, para.8.

⁶ See ICC-01/04-01/06-3002 A5 A6, para.7 (confirming that the page limit under Regulation 37(1) “has to be read as including both the cover and notification pages”).

⁷ An approximate word count of the GoK Observations amounts to at least 3,280 words, divided by ten pages in accordance with the Appeals Chamber’s direction on the page limit.

⁸ *Contra* GoK Observations, paras.2, 4.

4. At the heart of the GoK's criticism of the Trial Chamber's alleged interpretation of the ICA—and especially the proper relationship between different ICA provisions—is the view that “domestic legislation is best analysed by those mandated to uphold it”.⁹ As the Prosecution has already observed, this premise is incorrect—the Trial Chamber did not make a dispositive interpretation of Kenyan law.¹⁰ Moreover, although the GoK's view of its pre-eminence in interpreting domestic law is not uncommon when State authorities participate in a legal dispute, whether international or domestic, it should be approached with care. When required for the proper exercise of its competence, it is *the Court's* duty and prerogative to reach its own view of the law, with the assistance of submissions from the Parties and participants—but not with undue deference to them. In this instance, it is this Court's independent assessment (as to whether a prohibition exists in Kenyan law) which is dispositive. The GoK's observations merit weight, but only to the extent that they are cogent and well-reasoned. In this case, they are not. Indeed, the Court cannot be asked to accept blindly a State's position on what its legislation says when that State has not shown that its interpretation is firmly rooted in the applicable domestic provisions, or when its arguments are manifestly weak or plainly unpersuasive.

5. The Prosecution has previously articulated why the Decision correctly ruled that the GoK is obliged to cooperate with the Court by enforcing witness summonses, and that this action is directly contemplated by the ICA and other relevant domestic law.¹¹ The Decision gave effect to the terms of the ICA on its plain reading. The GoK's alternative interpretation of the law is artificially narrow, and does not

⁹ See GoK Observations, para.14.

¹⁰ See ICC-01/09-01/11-1380 OA7 OA8 (“Prosecution Consolidated Response”), para.67. Rather, the Trial Chamber only verified whether Kenyan law existed which prohibited the requested assistance, for the limited purpose of carrying out its own duty under the Statute, especially Article 93(1)(l).

¹¹ See Prosecution Consolidated Response, paras.62-64, 68-75. The filing of an appeal in *Barasa*—not yet decided—is irrelevant, since the Trial Chamber relied on *Barasa* only as “further and independent support to the findings of the Chamber”, upon which it did not depend: see Decision, paras.178-179. *Contra* GoK Observations, para.6.

represent either the necessary or proper understanding of the relevant provisions.¹² Moreover, the GoK frequently assumes a faulty view of the Court's powers under the Statute.

6. The GoK confuses the Decision's reference to ICA provisions that refer to the Statute having direct force of law in Kenya.¹³ The Decision did not refer to these in isolation from, or preference to, more specific provisions of the ICA. To the contrary, it considered the ICA itself—including those sections incorporating the Court's powers under Articles 64(6)(b), 93(1)(d) and 93(1)(l).¹⁴ Nor did the Trial Chamber err in its understanding of section 23(1) of the ICA, which refers to requests of the Court being addressed "in accordance with the relevant procedure under the law of Kenya, *as provided in this Act*."¹⁵ The GoK's view that this limits its cooperation strictly to those actions enumerated in the ICA—without reference to other domestic legislation—is too narrow,¹⁶ considering the express references throughout the ICA which link implementation of the Court's requests through the ICA with other aspects of domestic procedure.¹⁷ Such a view would also defeat the purpose of Article 99(1) of the Statute, which ICA section 23(1) implements—and indeed the very concept of 'implementing legislation' in the first place.

7. Many of the GoK's observations incorrectly assume that the Court's power to summons a witness under Article 64(6)(b) must be translated into a request for the voluntary appearance of a witness under Article 93(1)(e) of the Statute.¹⁸ Yet this is

¹² The Decision reflects a similar view of the GoK's arguments at trial: *see e.g.* Decision, paras.158-164.

¹³ *Contra* GoK Observations, para.6 (referring, *e.g.* to ICA, s.4(1)).

¹⁴ *See e.g.* Decision, para.165.

¹⁵ ICA, s.23(1) (emphasis added).

¹⁶ *Contra* GoK Observations, para.9.

¹⁷ *See* Prosecution Consolidated Response, paras.74-75 (referring, *inter alia*, to ICA, ss.4, 20, 80, 108).

¹⁸ *See* GoK Observations, paras.8, 11-12 (arguing that ICA sections 87-89, implementing Article 93(1)(e) of the Statute, limit any other form of assistance that the Court can request under Article 93(1)(l), implemented by ICA section 108). Since this understanding of the Statute is erroneous--*see below* fn.19—the GoK's view that ICA sections 87-89 limit section 108 is also erroneous.

not the basis for the Decision, nor a correct legal analysis of the Statute.¹⁹ The GoK has not been granted leave to address this question, which forms part of the First Issue under appeal.²⁰

8. The GoK's analysis of section 108 of the ICA, implementing Article 93(1)(l)—on which the Decision turns—is unpersuasive.²¹ The fact that the Attorney-General of Kenya must satisfy himself that an Article 93(1)(l) request “is in accordance with Kenyan law” does not mean that he must be satisfied that the “ICA [...] provide[s] a mechanism by which the Government can compel a witness to testify against his will”.²² This interpretation of the term “Kenyan law” for the purpose of section 108(1)(b) is inconsistent with the GoK's reading of section 23(1).²³ Moreover, it would entirely defeat the expressly open-ended purpose of Article 93(1)(l)—reiterated in section 20(1)(a)(xiii) of the ICA—if the sub-provision could only be implemented by the domestic law (the ICA) which gives effect to Article 93(1)(a) to (k).²⁴ Finally, the GoK fails to address the ICA's provisions which form a bridge to domestic law governing the taking of evidence in criminal proceedings.²⁵

9. The GoK's analysis of section 80 of the ICA, implementing Article 93(1)(b) of the Statute, is equally unconvincing.²⁶ The GoK does not explain why, for the purpose of implementing its obligations under Article 93(1)(b) of the Statute, such assistance “is different from a situation wherein ICC judges hear testimony while sitting in Kenya”. Nor does it explain why “[i]t makes sense” that the ICA and other relevant domestic law would enable the GoK to compel the Court's witnesses to appear in Kenyan courts for the taking of evidence, but would not enable the GoK to compel

¹⁹ See Decision, paras.113-119, 146-155; Prosecution Consolidated Response, paras.2-4, 14, 27-31, 44-48, 62-64.

²⁰ See above fn.2.

²¹ *Contra* GoK Observations, paras.13-15.

²² *Contra* GoK Observations, para.14 (emphasis added).

²³ See above para.6 (emphasising the qualification “as provided in this Act”); GoK Observations, para.9

²⁴ See also Prosecution Consolidated Response, paras.72-73.

²⁵ See Prosecution Consolidated Response, paras.74-75.

²⁶ *Contra* GoK Observations, para.16.

the Court's witnesses to appear before the Court itself when sitting *in situ*. To the contrary, such a distinction is illogical, and would frustrate the object and purpose of the ICA. This interpretation of section 80 is thus strained and unpersuasive.

The GoK's obligation to cooperate by enforcing the Court's summonses is consistent with the Constitution of Kenya

10. Although the Constitution of Kenya is the supreme domestic law of Kenya,²⁷ the observations of the GoK conflate the distinct questions of the existence of an obligation upon Kenya under international law, and the enforceability of that obligation within domestic law. The GoK has not shown how anything in the Constitution either supersedes or interferes with Kenya's obligation to cooperate with the Court by enforcing its summonses.

11. Although the GoK asserts that the "Kenyan Constitution is superior at all times to [...] international treaties ratified by Kenya" for the purpose of international law,²⁸ it is well established in the international law of treaties (and State responsibility) that a State may not rely on domestic law to relieve it of an obligation assumed under international law;²⁹ this is complemented in the Statute by the requirement under Article 86 that State Parties "shall [...] cooperate fully with the Court".³⁰ While the Constitution of Kenya may control the means by which Kenya's international obligation under the Statute is implemented within Kenya, this is without prejudice to the existence of the obligation itself. Article 93(3) of the Statute makes clear that even the existence of "an existing fundamental legal principle of general application"

²⁷ GoK Observations, paras.7, 17.

²⁸ *Contra* GoK Observations, para.17. *See also* para.7.

²⁹ *See e.g.* Vienna Convention on the Law of Treaties, 1969, Art.27; Responsibility of States for Internationally Wrongful Acts, ILC, 2001, Art.32. *See also* Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, 2002), pp.207-208. Kenya has signed, but not ratified, the Vienna Convention.

³⁰ *See also* Statute, Art.88 (procedures must be available under national law for cooperation "specified" in Part 9). In the specific context of Article 93(1)(l) only, read with Article 93(3), domestic law is expressly recognized as relieving a State Party of compliance with a request for any type of assistance not specified in the Statute which is "prohibited" by domestic law. This prohibition must be express: *see* Prosecution Consolidated Response, paras.72-73.

does not invalidate a request for assistance as such, but only triggers good faith negotiations between the Court and the State to resolve the request by another means. For these reasons, the Constitution of Kenya is simply irrelevant to an analysis of Kenya's international obligations as a State Party to the Statute.

12. Moreover, the GoK has not shown how Kenya's enforcement of the Court's summonses would violate any of the constitutional rights identified.³¹ In particular, the GoK fails to explain how Articles 29, 32(1), 40, or 47 of the Constitution of Kenya are engaged, since these rights, in relevant part, are not absolute but subject to the proper operation of the criminal law.³² Neither the Decision, nor the Prosecution, has suggested that the GoK may or should act extra-legally; rather, the Decision correctly determined that the established law of Kenya permits the GoK to enforce the Court's summonses.³³ In particular, the protection against retroactive criminal law in Article 50(2)(n) of the Constitution of Kenya would not bar the enforcement of the Court's summonses since the ICA and other provisions of Kenyan law clearly provide the necessary notice.³⁴ Nor does the GoK clearly explain how the risk of retroactivity could arise when the relevant summonses, which will provide the necessary notice, have not yet been served.

The GoK's obligation to cooperate by enforcing the Court's summonses is consistent with the Rome Statute

13. The GoK's categorical statement that its obligation to enforce summonses issued by the Court "is contrary to the Rome Statute"³⁵ lacks merit. Although a State confronted with a request may dispute the legality of a cooperation request under

³¹ *Contra* GoK Observations, para.17.

³² See Constitution of Kenya, Arts.24 (limitation of constitutional rights by law), 29(a) (qualification for "just cause"), 40(2)(a) (restriction on arbitrary deprivation). Articles 32(1) and 47 appear to be inapplicable, since it is not explained how the issue of a summons is an "administrative action" nor how the requirement to answer infringes upon a person's freedom of conscience.

³³ Decision, paras.157-179.

³⁴ See *above* para.8; Prosecution Consolidated Response, paras.74-75.

³⁵ See GoK Observations, para.2.

Article 93,³⁶ the GoK incorrectly assumes for itself the prerogative of interpreting the Rome Statute with regard to both the exercise of the Court's powers and its expression through State cooperation. As the Decision correctly found, nothing in the Statute forbids the Court from requesting, and thereby obliging, State Parties to enforce witness summonses within their domestic jurisdictions.³⁷ Consistent with the unique competence of the Court to determine its own judicial functions under the Statute,³⁸ the apparent "understanding" of a particular State Party concerning specific statutory provisions is not dispositive of their meaning.³⁹

14. In any event, the "Model Law" and explanatory report of the Commonwealth Expert Group ("CEG") do not support the claim that "nothing in the Model Law [...] suggests a state is obliged to enforce subpoenas for a witness to testify before the ICC."⁴⁰ To the contrary, consistent with the Prosecution's position,⁴¹ the Model Law and explanatory report contemplate the necessity of the witness' consent only for travel abroad to testify at the seat of the ICC.⁴² As an alternative, as the GoK itself quotes, the Report explains that the Court "can instead" request evidence to be compelled by a national court "with the usual sanctions applying if the person does not appear."⁴³

15. Although the Model Law and explanatory report do not exhaustively analyse the variety of ways in which the Court may be able to take evidence from a witness without requiring them to travel abroad, the CEG plainly recognised that the Court could request the relevant State Party to compel a witness's appearance on that

³⁶ See Regulations of the Court, Regulation 108.

³⁷ See *e.g.* Decision, para.193.

³⁸ See *e.g.* Statute, Art.119(1). See also Art.4(1).

³⁹ *Contra* GoK Observations, paras.18-20. Membership of the Commonwealth Expert Group comprised representatives of six State Parties: see Commonwealth Secretariat, International Criminal Court (ICC) Statute and Implementation of the Geneva Conventions (cited at GoK Observations, fn.19) ("Model Law"; "Report"), Annex A, para.1.

⁴⁰ *Contra* GoK Observations, para.19.

⁴¹ See *e.g.* Prosecution Consolidated Response, paras.4, 24, 30, 32-43.

⁴² See *e.g.* Model Law, ss.57(1)(b) (referring to the "witness' departure from (name of country)"), 57(2)(a) (referring to "the travel of the witness to the ICC").

⁴³ GoK Observations, para.19 (quoting Report, para.115).

State's territory in order to give evidence. Indeed, notwithstanding the reference to appearance before a "national court" in paragraph 115 of the Report, section 93 of the Model Law expressly provides (as one option for implementing States) that the Court, when sitting on the territory of a State Party, may "issue a summons or make other orders requiring the attendance of any person before the ICC", which "shall be enforced by the domestic authorities of (name of country) as if the summons or order had been issued or made by a domestic court in (name of country)."⁴⁴

Conclusion

16. The GoK's observations misapprehend the Decision, and offer limited assistance to the Appeals Chamber in its determination of the Second Issue. Nothing in the GoK's observations shows that the Trial Chamber erred in law in determining that the Court may require the attendance of a witness for testimony in the manner contemplated in the Decision, and thereby request the GoK, a State Party, to serve and enforce witness summonses on its territory. The Appeals Chamber should dismiss the appeals and uphold the Decision.



Fatou Bensouda, Prosecutor

Dated this 30th day of June 2014

At The Hague, The Netherlands

⁴⁴ Model Law, ss.93(2), (3). *See further* Report, paras.147-148 ("to effectively carry out its functions [when sitting in a domestic jurisdiction] the ICC will need to have enforceable powers in particular to require the attendance of witnesses").