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

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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

Defence response to “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: Defence for Mr. William Samoei Ruto

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

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I. INTRODUCTION

1. The Defence for Mr. William Samoei Ruto (“Defence”) hereby submits its response to *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* (“GoK Observations”).¹

II. SUBMISSIONS

2. The Defence respectfully agrees with the reasoning set out in the GoK Observations. In particular, the Defence agrees that:
 - (a) States Parties such as Kenya are only obligated under Article 93(1)(e) of the Rome Statute (“Statute”) to facilitate the voluntary appearance of witnesses before the Court;²
 - (b) Kenya has given effect to this obligation in sections 87 to 89 of the International Crimes Act 2008 (“ICA”), which provisions are the *lex specialis* for the appearance of witnesses before the Court;³ and
 - (c) the Majority’s reliance on Article 93(1)(l) of the Statute, implemented in the ICA via section 108, is misplaced; Kenya is prohibited under its Constitution from enforcing any ICC summons to appear before the Court.⁴
3. In light of its general agreement with the GoK Observations, the Defence limits its response to the following four points.
4. *First*, the Defence agrees with the GoK⁵ that one of the fundamental errors in the Majority’s approach to Kenyan law is the insistence that Kenya identify an express provision of its domestic law “that *prohibits* Kenya as a State Party from complying with an ICC request for the facilitation of the compelled appearance

¹ ICC-01/09-01/11-1406.

² GoK Observations, paras. 19-20.

³ GoK Observations, paras. 8-12, 14.

⁴ GoK Observations, paras. 14, 15, 17.

⁵ GoK Observations, para. 13.

of a witness before the Trial Chamber.”⁶ There is nothing in Article 93(1)(l) (or elsewhere in the Statute) which requires that the domestic prohibition(s) be drawn in such narrow and express terms.⁷ To take such an approach would mean that more general legal prohibitions stemming from internationally recognised human rights norms and/or constitutional principles could not be taken into account. The Defence submits that such a conclusion is clearly incorrect. The GoK identifies various protections and rights enshrined in the Constitution which would be controverted if it were to enforce a summons issued by the ICC.⁸ The Defence submits these constitutionally enshrined protections and rights are properly cited as the reason why the GoK is prohibited from assisting in compelling the attendance before the Trial Chamber of the witnesses to be summonsed.

5. Indeed, as correctly identified by the GoK,⁹ where clear and express terms are required is in the notification to individuals within Kenya’s jurisdiction that they will have committed an offence to which specific penalties attach should they fail to testify before the ICC. As stated above, such notice is required under the Kenyan Constitution which enshrines basic human rights norms. However, nowhere in the ICA or other domestic legislation is this notification given.¹⁰ This is fatal to the Decision.
6. It is pertinent to highlight that, in erroneously concluding there is no domestic impediment to granting the Prosecution’s requested relief,¹¹ the Majority ignored the submissions of the GoK (and the Defence) which directly drew the Chamber’s attention to the prohibitions which would render the compelling of

⁶ Decision, para. 158 (emphasis in original). *See also* Decision, para. 160 (“no one has brought to the attention of the Chamber any *bona fide* law of Kenya that specially precludes an obligation on Kenya to assist the ICC in the facilitation of compelled appearance of a witness under an ICC subpoena for purposes of appearance before a Trial Chamber” (emphasis added)).

⁷ Article 93(1)(l) of the Statute simply states that States Parties shall provide “[a]ny other type of assistance which is not prohibited by the law of the requested State [...]”.

⁸ GoK Observations, para. 17.

⁹ GoK Observations, para. 17.

¹⁰ GoK Observations, para. 17.

¹¹ Decision, paras. 157-179, 193(ii) and 193(iii).

witnesses to appear before the Court by the GoK unlawful under Kenyan law.¹² The Majority also complained that the GoK failed to respond to the Chamber's "repeated specific invitation"¹³ on this point and, in fact, "avoided giving an answer".¹⁴ These complaints are, the Defence respectfully submits, an unfair and inaccurate representation of the GoK's position on this critical issue.

7. *Second*, the Defence agrees with the GoK that Article 93(1)(b) of the Statute, which relates to the "taking of evidence, including testimony under oath", is not applicable as an alternative legal basis on which to give effect to the Decision.¹⁵ The plain wording of sections 77 to 80 of the ICA establish that Kenya has implemented Article 93(1)(b) in order to give effect to its obligations under this provision via proceedings before the Kenyan High Court. Of additional note is the fact that section 80 expressly states that "the applicable law with respect to compelling a person to appear before a Judge under section 78 or 79 and to give evidence or answer questions" is the law of Kenya.¹⁶ The ICA, therefore, makes the necessary link between domestic proceedings and domestic compulsion powers in order to give the notice required to give effect to an individual's rights under the Constitution. Glaringly, this link is not made in section 108 of the ICA which implements Article 93(1)(l) of the Statute, the article relied upon by the Majority in the Decision. The Defence submits that the approach taken by Kenya when implementing Article 93(1)(b) and the express reference to domestic compulsion powers as being available to enforce the relevant proceedings demonstrates that Kenya was aware of this mechanism but only chose to incorporate it for the taking of evidence before domestic courts and not for the

¹² ICC-01/09-01/11-T-86-CONF-ENG ET, p. 84, lines 1-7; ICC-01/09-01/11-1200-Red, paras. 46-52.

¹³ Decision, para. 164.

¹⁴ Decision, para. 158.

¹⁵ GoK Observations, para. 16.

¹⁶ ICA, Section 80 (Protection of Witnesses) provides, in relevant part, as follows:

(1) The applicable law with respect to compelling a person to appear before a Judge under section 78 or 79 and to give evidence or answer questions, or to produce documents or other articles, is the law specified in subsection (2), which law shall apply with any necessary modifications.

(2) For the purposes of subsection (1), 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.

taking of evidence before the Court. Section 162 of the ICA, which provides for “ICC sittings in Kenya”, does not change this conclusion since proceedings would still be before the Court and not a Kenyan court.

8. *Third*, the Defence submits that the GoK’s observation that its position “with respect to the enforcement of summons is in line with the understanding of other States Parties”¹⁷ is correct. The position advanced in the GoK’s observations is consistent with the approach taken in many treaties dealing with mutual assistance in criminal matters in which States agree to serve summonses relating to foreign criminal proceedings but not to enforce them.¹⁸
9. It is, of course, acknowledged that certain States, including Kenya,¹⁹ have agreed to provide enhanced cooperation within such mutual assistance regimes (generally with respect to neighbouring States subject to reciprocal arrangements) by enforcing the relevant summonses. Crucially, however, such enhanced cooperation is contingent upon an express agreement in a statute or agreement on mutual assistance. Such powers cannot be implied domestically but are subject always to express provisions. This reality has been overlooked in the Decision under the guise of implied powers.
10. In this regard it is pertinent to recall that a similar position pertains vis-à-vis the Court where certain States Parties have expressly legislated to provide cooperation which exceed the obligations of such States pursuant to Part 9 of the Statute.²⁰ Kenya has not so legislated. The Defence submit that, in these circumstances, it constitutes a legal error to imply such powers, under the Rome statutory regime and require a State to do that which it maintains it is not authorised to do. To require a State Party to coercively compel one of its citizen

¹⁷ GoK Observations, para. 18.

¹⁸ See, e.g., the European Convention on Mutual Assistance in Criminal Matters, 1959, Article 8 (“A witness or expert who has failed to answer a summons to appear, service of which has been requested, shall not, even if the summons contains a notice of penalty, be subjected to any punishment or measure of restraint, unless subsequently he voluntarily enters the territory of the requesting Party and is there again duly summoned.”).

¹⁹ See ICC-01/09-01/11-T-86-CONF-ENG, p. 11, lines 2-7 referring to the Kenyan Witness Summonses Reciprocal Enforcement Act.

²⁰ See ICC-01/09-01/11-1345, fn. 94 referring to the German legislation.

in the absence of a domestic legal basis to do so, constitutes an unlawful arrogation of power from the State to the Court.

11. *Fourth*, when considering the GoK Observations, the Defence submits that the fact that they are made by the Attorney General, the representative of the GoK in these proceedings, is significant. Indeed, ordinarily, in domestic proceedings the content of foreign law is normally proved by expert evidence, with courts often giving deference to interpretations provided by the foreign state's law officers. In the Court's statutory regime, when a cooperation request has been issued, Article 93 likewise recognises the central role that States play in determining whether or not the assistance requested is prohibited by their domestic laws.²¹ At the stage prior to issuance of a request, it stands to reason that the same principle of deference should apply when a Trial Chamber is assessing whether or not assistance can be requested under Article 93(1)(l) from a particular State. In the present case, the Defence respectfully submits that the views of the Attorney General should be determinative of the issue of the scope and content of Kenyan law when he appears, not as a party but as the chief law officer of Kenya, before this international court.²² At the very least, a significant margin of deference should be given to them.

12. In this respect, the Defence submits that the central and determinative role the Attorney General plays in handling requests for assistance submitted to Kenya by the Court is evident in various provisions of the ICA. Section 87, which concerns requests for assistance submitted pursuant to, *inter alia*, Articles 64 and 93(1)(e), provides that such requests may only proceed if the Attorney General is satisfied of certain specified matters. Further, section 88, which deals with facilitating the voluntary appearance of a witness, requires the authority of the Attorney General. Finally, and crucially, section 108 of the ICA, which corresponds to Article 93(1)(l), provides that "requests [for] any other type of

²¹ Statute. Articles 93(3) and 93(5).

²² *Contra* ICC-01/09-01/11-1313-Anx-Corr, para. 42.

assistance” can only proceed if the Attorney General is satisfied that: “(a) the request relates to an investigation being conducted by the Prosecutor or any proceedings before the ICC; and (b) the assistance sought is in accordance with Kenyan law.” Thus, under Kenyan law it is for the Attorney General to decide whether Kenyan domestic law prohibits the requested assistance. According to section 108(3) “[i]f the Attorney General considers that the assistance sought cannot lawfully be provided” (emphasis added), then he shall enter into consultations with a view to resolving the issue in accordance with Article 93(5) of the Statute.

III. RELIEF REQUESTED

13. For the reasons set out in the GoK Observations and above, the Defence respectfully submits that the Appeals Chamber should accept the GoK’s conclusion that the government is not obligated to assist in compelling the appearance of witnesses subject to ICC subpoenas and that it is prohibited by Kenyan law from doing so.
14. Accordingly, the Defence submits that the Appeals Chamber should reverse the Decision.

Respectfully submitted,



Karim A.A. Khan QC
Lead Counsel for Mr. William Samoei Ruto

Dated this 30th Day of June 2014
At The Hague, Netherlands