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Date: **10 January 2014**

TRIAL CHAMBER V(A)

Before: **Judge Chile Eboe-Osuji, Presiding**
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

Public Redacted Version of

Sang Defence Response to the Prosecution's Request under Article 64(6) and Article 93 to Summon Witnesses

Source: **Defence for Mr. Joshua arap Sang**

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. Joshua arap Sang ("the Defence") hereby responds to the *Prosecution's Request under Article 64(6)(b) and Article 93 to Summon Witnesses* ("Prosecution's Request").[1] The Defence opposes the Prosecution's Request on the following five grounds:

(1) The International Criminal Court's ("the Court") legal framework does not provide Trial Chamber V(A) ("the Chamber") with the power to summon witnesses against their will;
(2) The Court's legal framework does not provide the Chamber with the power to request, let alone require, states to issue subpoenas ordering witnesses to appear against their will;
(3) The Republic of Kenya's ("Kenya") domestic law does not provide for a power to issue subpoenas, ordering witnesses to appear against their will;
(4) Orders to summon and, or issue subpoenas ordering witnesses to appear cannot be issued on a speculative basis. In this instance, the whereabouts of the witnesses are unknown and uncertain; and
(5) Even if both the Rome Statute and Kenyan law allow for the issuance of subpoenas, this mechanism should not be resorted to in this case because the Prosecution has not shown that the anticipated testimony would materially assist its case (given that many have recanted their evidence) nor that the evidence is not otherwise obtainable.

II. CONFIDENTIALITY

2. Pursuant to regulation 23bis(1) of the Regulations of the Court, the Defence requests that this Response be classified as "confidential" since it contains confidential information related to the security of witnesses and their whereabouts. This is information that was discussed in the Prosecution's Request that was filed confidentially. The Defence will submit a Public Redacted version of this Confidential Response in due course.

III. PRELIMINARY OBSERVATIONS

[1] ICC-01/09-01/11-1120-Conf-Red-Corr2 ("Prosecution's Request").

3. As a first preliminary observation, the Defence notes that, to a large extent, the Prosecution's Request is based on the Prosecution's interpretation of Kenya's International Crimes Act 2008, which is Kenya's implementing legislation for the Rome Statute. The Defence submits that the Prosecution's interpretation of this Act is erroneous in part.[2] The Defence, however, acknowledges that neither the Prosecution, nor the Defence are best equipped to analyse and interpret Kenya's domestic law. The best equipped in this regard is without doubt the Government of Kenya ("GoK"). The Defence therefore suggests that the Chamber would be assisted by observations from GoK on the issue of interpretation of its own domestic law with regard to the issue at hand.

4. In addition, the Prosecution's Request not only concerns the Defence and the Court, but it also concerns the GoK. In the event that the Prosecution's Request is granted, the GoK will be requested to assist the Court "to take steps to secure the witnesses' appearance at an appropriate location … for purposes of testifying before the Court … in the on-going trial".[3] A request for assistance from a State should not be granted without first hearing from the government of that State, here the GoK.

5. Therefore, in light of the significance of this request to the GoK and the importance of an accurate interpretation of Kenyan domestic law to the issue for the Chamber to consider, the Defence requests that the Chamber invite the GoK to provide it with observations on the Prosecution's Request.

6. As a second preliminary observation, the Defence notes the Prosecution's assertion that the Defence "indicated an interest in calling four of the seven witnesses" who are subject to the Prosecution's Request.[4] The Defence denies this assertion. All the Defence has done is request the Chamber to order the Prosecution to alter its proposed witness order and call these four witnesses, as well as several others, toward the beginning of the trial rather than the end.[5] This request was made with the

[2] This is discussed in detail in Section V(3) of this Response.
[3] Prosecution's Request, [3]. The Defence has omitted from the citation from the Prosecution's Request the references to "in Kenya" and "(*in situ* or by means of video-link technology)". The Defence omitted these references because, in the event that the Prosecution's Request is granted, the Defence will strongly object to the testimonies of these witnesses to be heard by means of video-link technology. This is, however, not yet the issue of debate. The Defence will make its observations if and when it gets to that stage.
[4] Prosecution's Request, para. 6. The four witnesses in question are P-0015, P-0016, P-0336 and P-0524.
[5] *See* ICC-01/09-01/11-818, Public Defence request regarding the first eight witnesses to be called by the

understanding that the witnesses would be testifying voluntarily; the Defence never suggested that unwilling witnesses be compelled to testify. The reason for this request was that these were witnesses who the Defence alleged were "engaged in a concerted process to contaminate Prosecution investigations to a significant extent through the deliberate and organised fabrication of evidence".[6]

7. Though the Defence never indicated an interest in calling these witnesses, the Defence has no objection to them testifying before the Chamber on a voluntary basis (though as elaborated herein, the credibility of such testimony is questionable). The Defence submits that the court does not have the power to summon witnesses against their will, nor does it have the power to impose on States an obligation to summon witnesses to appear against their will. Accordingly, the Defence requests the Chamber to dismiss the Prosecution's Request and submits the following arguments in support of this request.

IV. RELEVANT LEGAL PROVISIONS

8. Article 64(6)(b) of the Rome Statute provides:

> In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary: (b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute.

9. Articles 93(1)(d), (e), (l) and 93(7)(a)(i) and (ii) provide (emphasis added):

> 1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:
>
> (d) The service of documents, including judicial documents;
>
> (e) Facilitating the <u>voluntary appearance</u> of persons as witnesses or experts before the Court;
>
> (l) Any other type of assistance which is <u>not prohibited by the law of the requested State</u>, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.
>
> […]
>
> 7. (a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:

Prosecution, 13 July 2013; ICC-01/09-01/11-850-Conf, Sang Defence Response to Ruto Defence Request regarding the First Eight Witnesses to be Called by the Prosecution, 13 August 2013.

[6] ICC-01/09-01/11-818, para. 9 (*see also* [1, 2]); *see also* ICC-01/09-01/11-850-Conf, [1].

(i) The person freely gives his or her informed consent to the transfer; and
(ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

V. APPLICATION OF LEGAL PROVISIONS

(1.) GENERAL POWER OF THE COURT TO COMPEL WITNESSES TO TESTIFY

10. The Defence submits that the law of the ICC on the issue of summons is clear. In contrast to the *ad-hoc* Tribunals, the ICC does not have the power to compel witnesses to appear before it. This follows from article 64(6)(b), read in conjunction with article 93(1)(e). In addition, article 93(7)(a), as well as the absence of any enforcement mechanism, supports this reading of the law.

11. Article 64(6)(b) provides the only potential legal basis in the Rome Statute and Rules for an argument that the Court has the power to compel witnesses to testify, as it refers to the authority of a Chamber to "[r]equire the attendance and testimony of witnesses and production of documents". Pursuant to this provision, the Prosecution expresses the view that the Court has the power to compel witnesses to appear before it.[7] In expressing this view, the Prosecution relies on a number of scolarly opinions. For instance, Gilbert Bitti shares the prosecution's view that the Chamber can summon witnesses on the basis of article 64(6)(b).[8]

12. Similarly, Kress and Prost hold that "the Trial Chamber may well, pursuant to article 64 para. 6(b) create an international obligation of persons to appear and testify before the Court",[9] which they connect with " the pivotal procedural principle contained in article 69 para 2 that testimony of a witness at trial shall, where possible, be given in person".[10] However, article 69(2) deals with live testimony as opposed to written testimonial evidence. This principle may have an impact on admissibility of witness statements, but has no bearing on the issue at hand, that is, whether the court has the power to compel witnesses to appear.

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[7] Prosecution's Request, [66-67]. The Prosecution nonetheless concedes that the Chamber "has no power to directly enforce an order compelling personal appearance against individuals who are not physically present on the Court's premises or in its custody" [67].
[8] Bitti, G., 'Article 64', in Triffterer, O. (ed.) *Commentary on the Rome Statute of the International Criminal Court* (2008), 1213.
[9] Kress, C. and Prost, K., 'Article 93', ibid, 1577.
[10] Ibid, 1576.

13. In addition, the Defence submits that article 64(6)(b) cannot be read as standing alone, but has to be read in light of Part 9 of the Rome Statute dealing with State cooperation. Indeed, while in accordance with article 64(6)(b), the Chamber may require the attendance and testimony of witnesses, the means to do so is "by obtaining, if necessary, the assistance of States as provided in this Statute". This is where article 93(1)(e), which is part of Part 9 of the Rome Statute, comes into play. Pursuant to article 93(1)(e), States may be requested to facilitate "the voluntary appearance of persons as witnesses or experts before the Court". This provision cannot be circumvented by looking at article 64(6)(b) in isolation.

14. According to Sluiter, "the reference to voluntary appearance in Article 93(1)(e) entails a general prohibition of compulsion, whether by the ICC or by states".[11] Therefore, "witnesses have a right not to be compelled to testify before the ICC, as regrettable as this may be", and irrespective of "…whether this is done by the Court or by national authorities".[12]

15. It is noteworthy that Sluiter took part in the Working Group on Part 9 and observed the debates on this provision first-hand. Accordingly, he has important insight knowledge, which makes his views particularly weighty. This is especially the case because Sluiter has no ulterior motive to interpret the relevant provisions as he does. To the contrary, he sees the lack of *subpoena* powers as a weakness of the Court and argues that this may undermine the fairness of the proceedings and an accused person's right to a fair trial.[13] The International Bar Association ("IBA") International Criminal Court Programme has also indicated that the Court's lack of any subpoena power may be a factor relevant to determining the overall fairness of proceedings before the Court.[14]

16. Sluiter notes that, during the drafting process, the imposition of an obligation upon citizens to testify at the seat of the Court was met with strong opposition.[15] He also points at a footnote to article 93(1)(e) contained in the Report of the Working Group on Part 9 to the Plenary of the Conference. This footnote reads as follows: "This

[11] Sluiter, G., '"I beg you, please come testify" – The problematic absence of subpoena powers at the ICC' 12 *New Criminal Law Review* (2009), 600.
[12] Ibid, 599.
[13] Ibid, 601-605..
[14] International Bar Association International Criminal Court Programme, *Witnesses before the International Criminal Court* (July 2013), 17.
[15] Sluiter (2009), 597.

includes the notion that witnesses or experts may not be compelled to travel to appear before the Court".[16] Sluiter's comment on this is that " [n]either the footnote nor the text of the provision conditions or qualifies in any way this principle of voluntary appearance".[17]

17. Multiple academic authors agree with this reading of the relevant legal provisions. With reference to article 93(1)(e), Mochochoko and Harhoff, for instance, confirm that, "according to the Statute, witnesses cannot be compelled by the Court to come to The Hague and testify. Their attendance at the Court is always voluntary …"[18]

18. Similarly, and relying on article 93(1)(e), Schabas states that "[t]here can be no real doubt that the *Rome Statute* does not contemplate the compulsory appearance of witnesses, through a mechanism such as a *subpoena*".[19]

19. Also, the IBA reports that "[a]ll witnesses who appear to testify before the ICC do so voluntarily, even if they are key witnesses and their evidence is central to the case". The IBA also states that "the inclusion of voluntariness appears to undermine the requirement to appear".[20]

20. Persuasively, Chambers of the Court have repeatedly reaffirmed this position. For instance, when in the case of *Lubanga* a witness was unwilling to testify, the Presiding Judge stated that: "The Chamber has no power to compel the attendance of witnesses".[21] The Prosecution did not challenge this position. Rather, it stated:

> "In our submission, the Registry had expended all appropriate methods to secure the witness′s testimony and it now seems highly unlikely that the witness –– as stated, the witness would indeed come to testify in a manner that would be appropriate for the running of this case. And accordingly, our submission would be that it seems that we are at the end of the road, to put it in that way, Mr. President. Thank you"[22]

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[16] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (1998), <http://legal.un.org/diplomaticconferences/icc-1998/vol/english/vol_III_e.pdf>, 329, fn. 221.
[17] Sluiter (2009), 598.
[18] Mochochoko, P., and Harhoff, F., 'International Cooperation and Judicial Assistance', in Lee, R. (ed.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (2001), 660.
[19] Schabas, W., *The International Criminal Court: A Commentary on the Rome Statute* (2010), 768 (emphasis added by the author). See also: commentary on article 93(1)(e), ibid, 1020 ; and Maogoto, J., 'A Giant without Limbs: The International Criminal Court's State-Centric Cooperation Regime' 23 *The University of Queensland Law Journal* (2004), 102, 114.
[20] International Bar Association International Criminal Court Programme (July 2013), 15, with reference to Sluiter, G., *International Criminal Adjudication and the Collection of Evidence : Obligation of States* (2002), 254-255, 311.
[21] *Prosecutor v. Lubanga*, Transcript, ICC-01/04-01/06-T-355-ENG ET, 5, line 19.
[22] *Prosecutor v. Lubanga*, Transcript, ICC-01/04-01/06-T-355-ENG ET, 2, line 5.

21. On a similar note, in *Situation in the Republic of Kenya*, the Pre-Trial Chamber held that:

> 20. […] According to the Statute, the Court may request a State Party to facilitate the voluntary appearance of a witness before the Court, but not to compel a witness to testify before the national authorities of that State. The only remedy to be found in the Court's statutory documents lies in rule 65 of the Rules. It empowers the Court to compel a witness, who appears before it to provide testimony, which is not the case under consideration. Moreover, based on the submissions provided to the Chamber, the Prosecutor has made it clear that any testimony given is based on the willingness of the persons concerned. […][23]

22. The principle of voluntary appearance is strengthened by article 93(7)(a)(i), pursuant to which the Court may only request the temporary transfer of a person in custody, if the person freely gives his or her informed consent to the transfer. In Sluiter's view, "Article 93(7) is a procedural arrangement-which one may dislike very much or think was hastily adopted, but this does not reduce its legal effect-that gives an already detained witness a right not to be brought before the Court".[24] This provision then "…accords with the apparent wish of the drafters not to compel witnesses in any way to appear before the Court as witnesses… witnesses who are not detained have at least the same rights as detained witnesses toward the Court and cannot be compelled in any way to testify".[25]

23. However, the Prosecutor, as well as a number of scholars disagree with such reasoning on the basis of article 93(7). Kress and Prost assert that "this argument gives by far too much prominence to a provision that deals with a very specific procedural scenario…".[26] The Prosecution further points out that there are "particular penal policy considerations that render the situation of prisoners distinguishable from that of ordinary citizens", which is why "it is commonly provided in modern-day treaty relationships that the consent of the person as well as the State be required in this context".[27] However, in the event that an individual is subpoenaed to appear before the Court against his will, unless he consents to his transfer, the only way to transport him or her to the seat of the Court is by imprisoning the unwilling individual. Should such an individual be treated differently from other detained persons? The Defence submits that he or she should not be treated differently, and should therefore consent to his or her transfer to the Court.

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[23] ICC-01/09-39, [20] (emphasis added).
[24] Sluiter, (2009), 600.
[25] Ibid, 600-601.
[26] Kress and Prost, inTriffterer, (2008), 1576. See also, Prosecutor's Request, [93].
[27] Prosecution's Request, ibid (footnotes omitted).

24. The Prosecutor also states that article 93(7) does not create an absolute principle, as is evidenced by rule 193.[28] Rule 193(1) provides that a Chamber "may order the temporary transfer from the State of enforcement to the seat of the Court of any person sentenced by the Court whose testimony or other assistance is necessary to the Court", in which case "[t]he provisions of article 93, paragraph 7, shall not apply".

25. However, as Schabas noted, it is not clear whether this exception to article 93(7) as described under rule 193 removes only the requirement of consent by the State of enforcement, or whether it also removes the requirement of consent by the prisoner.[29] In any case, "the relevant Rule is problematic in that it derogates explicitly from the *Statute*. Article 51(5) of the *Rome Statute* declares that in the event of a conflict with the Rules of Procedure and Evidence, the *Statute* prevails."[30]

26. Even if article 64(6)(b) is read in isolation, without making a direct link to Part 9 of the Rome Statute which embodies both article 93(1)(e) and article 93(7), this provision is ambiguous. It does not make an explicit reference to a power of the Court to issue *subpoenas* or to compel witnesses to testify. Nor does this provision specify that witnesses whose attendance may be required must appear. Accordingly, a clear obligation for witnesses to appear cannot be drawn.

27. The Defence further submits that the silence of the Rome Statute on the obligations of witnesses outside of article 64(6)(b) also counts against the Court having any powers to summon witnesses. There is no other provision in the Statute or Rules which places any such obligations on witnesses which would support the inference of a power to summons. This is remarkable, particularly when compared with the Rules of Procedure and Evidence ("RPE") of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"), which include such an explicit power.

28. Indeed, Rule 54 of the ICTY and ICTR RPE state: "At the request of either party or *proprio motu,* a Judge or Trial Chamber may issue such orders, summonses,

[28] Prosecution's Request, [94].
[29] Schabas, 2010, 1023.
[30] Ibid, (emphasis added by the author).

subpoenas, warrants and transfer orders as may be necessary for the purpose of an investigation or for the preparation or conduct of the trial."[31]

29. Article 64(6)(b) of the Rome Statute is not at all as explicit as Rule 54 of the ICTY and ICTR's RPE. Article 64(6)(b) does not refer to any term such as 'orders', 'summonses', or 'subpoenas'. The Defence submits that close attention was paid to the RPEs when drafting the Rome Statute and that the drafters of the Rome Statute deliberately opted for the weaker term 'require' instead. It is noteworthy that the French version refers to 'ordonner', as in other places in the Statute. However, the English version of the Rome Statute only uses the term 'require' in article 64(6)(b) and uses the term 'order' in other provisions where the French version uses 'ordonner'.[32] This suggests a deliberate softening of the wording.[33]

30. The Prosecution does not agree and suggests that 'order' and 'require' have the same meaning. However, the definitions of these terms are not quite the same. Citing Black's Law Dictionary, the Appeals Chamber in *The Prosecutor v. Casimir Bizimungu et al.* defined an order as 'a command, direction or instruction'.[34] The term 'require' on the other hand is more ambiguous and should be interpreted with reference to its context which is less a matter of a mandatory obligation and has more to do with practical considerations. For instance, in certain circumstances, for practical reasons, assistance may be required. The term 'order' is therefore significantly stronger and explicit than the term 'require'.

31. As a further argument in support of interpreting article 64(6)(b) as granting power to the Court to compel witnesses to appear, the Prosecution points out that "article 64(6)(b) also tracks, albeit not word-for-word, the authority granted to the Trial Chamber in common ICTY/R Rule 98".[35]

32. The Defence cannot support this argument. First, article 64(6)(b) does not resemble common ICTY/ICTR Rule 98, which provides:

[31] Rule 54 of the Rules and Procedure of the Special Court of Sierra Leone contains an almost-identical provision.
[32] See, for example, articles 64(6)(d), 65(4)(b), 72(7)(b)(i) and 79(2) of the Rome Statute.
[33] Sluiter, (2009), 600.
[34] Case No. ICTR-99-50-AR73.7, 22 May 2008, citing Black's Law Dictionary, 8th ed., 1129-1130, referring to Henry Campbell Black, *A Treatise on the Law of Judgments* S1 at 5 (2d ed. 1902).
[35] Prosecution's Request, [74].

> A Trial Chamber may order either party to produce additional evidence. It may *proprio motu* summon witnesses and order their attendance.[36]

33. Unlike article 64(6)(b), common ICTY/ICTR Rule 98 includes the terms 'summon' and 'order'. As stated above, these are much stronger terms than 'require' as embodied in article 64(6)(b). Accordingly, these provisions cannot be compared at all.

34. Second, Rule 98 does not provide the basis for issuing *subpoenas* but rather grants the Chamber the power to order the parties to call additional witnesses, over and above those already called by the parties. If a witness is reluctant, the Chamber may grant a *subpoena* pursuant to Rule 54.[37] The Chamber would not use Rule 98 to *subpoena* unwilling witnesses. In other words, this provision does not provide for a *subpoena* mechanism but rather grants the Chamber a power to request additional evidence from the parties even though the parties are essentially in charge of calling their own evidence.[38]

35. Thus, if anything, the Prosecutor's argument supports Sluiter's reading of article 64(6)(b) that the Court's authority described therein merely reflects the Chamber's function to assure itself of the sufficiency of evidence and the adoption of expeditious and fair procedures.[39] Indeed, the Defence submits that this is the proper reading of article 64(6)(b). The Chamber can rely on this article to require the re-calling of witnesses who previously testified, or the calling of additional Chamber's witnesses, in addition to those called by the parties. However, the Chamber can only require that witnesses be called or re-called if these witnesses are willing to testify. The Defence is

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[36]Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), Rule 98.. Rule 98 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda ("ICTR") is almost identical and states: "A Trial Chamber may *proprio motu* order either party to produce additional evidence. It may itself summon witnesses and order their attendance".

[37] See, for instance, the *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on Request for a Subpoena Compelling Witness DAN to Attend for Defence Cross-Examination, 31 August 2006, [2]. See also, *Karemera et al.,* Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2 and NZ3 (TC), 12 July 2006, [9]; *Prosecutor v. Krstic*, Case No. IT-98-33-A, Decision on Application for Subpoenas (AC), 1 July 2003, [10]; *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder (TC), 9 December 2005, [36]; *Prosecutor v. Halilovic*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas (AC), 21 June 2004, [7].

[38] Rule 98 has also been relied upon to order the Prosecutor to obtain and disclose material which had proven difficult, if not impossible, for the defence to obtain : see *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Decision on the Request of the Defence Pursuant to Rule 73 of the Rules of Procedure and Evidence for Summons on Witnesses, 8 June 2000, [18]-[19]; *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on the Request for Documents Arising From Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses, 16 December 2003; *Prosecutor v. Karemera*, ICTR-98-44-PT, Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to Bring Judicial and Immigration Records, 14 September 2005, [11].

[39] Prosecution's Request, [89], fn 70 which cites Sluiter, (2009), 599.

also of the view that the parties can invite the Chamber to invoke its authority under article 64(6)(b) in respect to identified individuals who would rather be called by the Chamber than by either party. However, such witnesses cannot be compelled to testify if they are unwilling to appear before the Court. Article 64(6)(b) does not grant the Court with a *subpoena* power compelling any witness to be called or re-called against his or her will.

36. The correctness of this proposed interpretation is even more evident in light of Rule 65 of the Rules. This rule empowers the Court to compel a witness 'who appears before the court' to provide testimony. Furthermore, those who refuse to testify may be sanctioned under Rule 171. It is noteworthy that a recent IBA report has noted that if the witness 'disappears' and the Court requires State cooperation for their return "in such cases, the witnesses' 'voluntariness' would apply, meaning the witnesses would need to agree to appear even though they are technically compellable".[40] More importantly, Rule 65 evinces a clear effort to grant the Court with the power to compel a witness to testify, but only those 'appearing before the court'. Thus it would appear that a conscious decision was made not to extend this power to the testimony of witnesses more generally.

37. The power under Rule 171 to sanction witnesses who appear before the court but then refuse to testify stands in stark contrast to the silence both in the Statute and in the Rules on sanctioning a witness who refuses to appear before the court. Article 70 is sillent on the failure to respect a Court's order to appear. Article 71 allows for Court imposed sanctions in case of "deliberate refusal to comply with its directions". However, article 71 states that only persons "present before it" can be subject to sanctions. Accordingly, a witness who has not yet appeared in The Hague will not be subject to sanctions under article 71.[41]

38. By contrast, ICTY and ICTR Judges are vested both with an inherent power and a power under their respective rules to prosecute witnesses who refuse to comply with a *subpoena*. In *Blaskic*, the Appeals Chamber held that "The remedies available to the International Tribunal range from a general power to hold individuals in contempt of

[40] International Bar Association International Criminal Court Programme, (July 2013), 17.
[41] *See also*, Schabas, 2010, 859- 860.

the International Tribunal (utilising the inherent contempt power rightly mentioned by the Trial Chamber) to the specific contempt power provided for in Rule 77".[42]

39. The drafters of the Rome Statute and Rules were well aware of the position of the ad hoc tribunals but nonetheless failed to follow their example and include any power to sanction witnesses for refusing to appear before the Court. This absence is particularly striking because an inclusion of such a power had been proposed in Rome but was not accepted.[43] Thus, it was a deliberate omission, which is a further indicator that there was no intention to impose an obligation on individuals to appear as witnesses.[44]

40. In this regards, Sluiter sensibly suggests that Article 64(6)(b), particularly the reference to 'require', should be interpreted in light of this absence:

> "It seems to have essentially – or only – internal effect, namely among parties, when no sanction can be imposed on the witness for failure to appear. It should thus be understood as requiring the parties to undertake their best efforts to ensure the appearance of witnesses"[45]

41. Therefore, in light of the wording of article 64(6)(b) and the Rome Statute as a whole, including the absence of enforcement or sanctioning regimes, article 64(6)(b) cannot be read to grant the Chamber a power to compel the attendance of witness testimony.

(2.) POWER OF THE COURT TO COMPEL AND/OR REQUEST STATES TO ISSUE SUBPOENAS

42. The Defence submits that the Court does not have the power to order States to arrange for the appearance of involuntary witnesses, irrespective of whether the law of the State in question allows it. States are only required to assist in voluntary participation under article 93(1)(e). Consequently, the Prosecution may request Kenya to cooperate, but it has no grounds on which to invite the Court to order Kenya to cooperate in the manner sought.

(a) The Horizontal Nature of the Court's Legal Structure and Cooperation

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[42] *Prosecutor v Tihomir Blaskic,* Case number IT-95-14-AR108*bis*, Judgement on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997, 29 October 1997, [59] (hereinafter "*Blaskic* Subpoena Appeal Decision").
[43] Sluiter, (2009), 598.
[44] Ibid, 600.
[45] Ibid, 599.

43. The Defence's submission on the inability of the Court to compel states is first based on the legal structure created by the Rome Statute, which stands in marked contrast with the legal regimes of other international criminal tribunals. In particular, the system created by the Rome Statute is much more horizontal in nature than the system in which the *ad hoc* tribunals are embedded. The latter operates in a far more vertical manner, owing to the fact that the *ad hoc* tribunals derive from Security Council authority. Accordingly, States are under no duty to compel the presence of an individual before the Court, even though they may be required to facilitate voluntary appearance of a witness, or voluntarily provide for domestic law giving effect to ICC requests.

44. In *Blaskic*, the ICTY Appeals Chamber clarified the "vertical" nature of the *ad hoc* Tribunal's power to compel States to cooperate:

> In 1993 the Security Council for the first time established an international criminal court endowed with jurisdiction over individuals living within sovereign States, be they States of the former Yugoslavia or third States, and, in addition, conferred on the International Tribunal primacy over national courts. By the same token, the Statute granted the International Tribunal the power to address to States binding orders concerning a broad variety of judicial matters (including the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest or detention of persons, and the surrender or transfer of indictees to the International Tribunal). Clearly, a "vertical" relationship was thus established, at least as far as the judicial and injunctory powers of the International Tribunal are concerned.[46]

45. The *Blaskic* Appeals Chamber's reasoning cannot be applied to the Rome Statute regime. Clearly, those negotiators at the Rome Conference initially in favour of giving *subpoena* powers to the Court sacrificed this demand early to reach a compromise with State representatives.[47] Instead, the provisions on State cooperation with regard to the appearance of witnesses established in Part 9 of the Statute are based on an essentially voluntary legal regime, as laid down in articles 93(1)(e) and (l). The terminology used is more one of requesting than imposing or ordering cooperation. Moreover, Article 64(6)(b) clearly does not confer any power upon the Chamber vis-à-vis member States which goes beyond the provisions of Part 9, as evidenced by the wording "by obtaining, if necessary, the assistance of States as provided in this Statute".

[46] *Blaskic* Subpoena Appeal Decision, [47].
[47] Sluiter, (2009), 597.

46. Also, the general cooperation regime of the Court does not grant the Court primacy in the way that the provisions applicable to the *ad hoc* tribunals do, particularly as regards jurisdictional matters. The Court has concurrent, not primary jurisdiction and is based on a treaty. It has therefore fewer powers to impose cooperation on States than the *ad hoc* tribunals. Similarly, Pre-Trial Chamber II has found that "[t]he Court is not in a position to dictate on the national authorities the manner in which they should perform their cooperation with the Court."[48] Accordingly, the Court cannot compel States to ensure the presence of an individual before the Court as the ICTY and ICTR can.

47. Furthermore, the *ad hoc* tribunals could rely on Security Council resolutions 827 and 1031 binding States to comply with orders of the tribunals, including *subpoenas*.[49] By contrast, the Court cannot rely on any exception to the rule of customary international law that a State cannot be ordered by another State or international organization.[50] Accordingly, as Rastan concludes, "the ICC cannot issue binding orders to States: it can only request their co-operation."[51]

48. In addition, the *ad hoc* tribunals can circumvent State cooperation by issuing *subpoenas* directly to the individuals concerned and entering into contact with them personally, rather than through the State.[52] Once again, this highlights the vertical nature of the *ad hoc* tribunals. In contrast, the Court does not have the power to issue a *subpoena* to any individual directly, but must revert to the cooperation of States to facilitate the voluntary transfer of such individuals. This further difference between the legal systems in which the Court and *ad hoc* tribunals operate vis-a-vis *subpoena* powers re-emphasises the fact that the Court cannot circumvent State cooperation.[53]

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[48] ICC-01/09-39, [21].
[49] *Blaskic* Subpoena Appeal Decision, [26].
[50] Rastan, R., 'Testing Co-operation: The International Criminal Court and National Authorities' 21 *Leiden Journal of International Law* (2008), 431, 436.
[51] Ibid.
[52] Ibid, 436. Relying on the *Blaskic* Subpoena Appeal Decision, Rastan, however, states that the *ad hoc* tribunals can only issue *subpoenas* directly to individuals acting in a private capacity, not to the state or state officials (as a consequence of their functional immunity). However, the jurisprudence of the *ad hoc* tribunals has since clarified that state officials do not enjoy immunity "against being compelled to give evidence of what the official saw or heard in the course of exercising his official functions". Accordingly, whilst state officials cannot be subpoenaed to produce "documents in their custody in their official capacity", they can be subpoenaed to appear as witnesses. See e.g. *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-A, Decision on Application for Subpoenas (AC), 1 July 2003, [27]; *Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-A, Appeals Chamber's Judgment, 14 December 2011, [532].
[53] Rastan seems to suggest that the Court should have the power to issue subpoenas directly to individuals, rather than necessarily through States. Rastan, however, also takes a different position in respect of the correct interpretation of article 64(6)(b) as the one proposed under section 1: Rastan, (2008), 436.

49. Even the commentators who are of the view that the Court has the power to compel witnesses to testify under article 64(6)(b), agree that in implementing this power, the Court must rely on State cooperation. These commentators further concede that, while the Court may have the power to compel witnesses to testify before the Court, there is no duty for States to compel witnesses to appear and testify before the Court.[54] In their view, States can provide for a procedure to compel witnesses to appear before the Court, but have no such obligation.[55] It would simply involve the voluntary imposition of a duty which goes above and beyond what the Rome Statute itself requires. This follows from article 93(1)(e). As Kress and Prost put it, "[t]he term "to facilitate" connotes voluntariness and excludes an obligation on the part of the State Party to provide sanctions according to its national law, if a witness or an expert refuses to appear before the Court".[56]

50. The Prosecution cites the above commentators with approval. In its submission, the Court has the power to compel witnesses to provide testimony to the Court under article 64(6)(b) (a submission contested by the Defence, as discussed above). Accordingly, the Prosecution submits that the Court can then order States to issue *subpoenas* for witnesses to testify, provided such States either provide explicitly for a similar power, or do not explicitly prohibit exercising such a power to compel a witness's testimony.[57] In making this submission, the Prosecution circumvents article 93(1)(e) by relying on articles 93(1)(d) and 93(1)(l) respectively.

51. The Prosecution is of the view that article 93(1)(e) does not represent "the limit of the assistance that States may provide in securing the appearance of a witness before the Court".[58] It thereby makes a distinction between a request for a witness's transfer to the Court and the issuing of a *subpoena* compelling a witness's testimony. In this regard, the Prosecution argues that it is not necessary for the witnesses subject to a *subpoena* request to travel to the Court. It is proposed that they give their testimony in Kenya via video-conference.[59]

[54] Kress and Prost, inTriffterer, (2008), 1574-1577; Bitti, in Triffterer (2008), 1213; Schabas, 2010, 1020.
[55] Bitti, in Triffterer, 2008, 1213.
[56] Kress and Prost, inTriffterer, (2008),1576.
[57] Prosecution'sRequest, [77]-[78].
[58] Ibid, [92].
[59] Ibid, [6].

52. The Prosecution submits that, pursuant to article 93(1)(d) it can order any State that has explicitly incorporated the option of summoning witnesses to appear before the Court in domestic legislation, to issue *subpoenas*.[60] Article 93(1)(d) imposes on States Parties an obligation, "in accordance with the provisions of this Part and under procedures of national law, [to] comply with requests by the Court to … [serve] documents, including judicial documents".

53. The Prosecution states that, depending on the implementing legislation of the State concerned, "the judicial documents that States Parties are obligated to serve upon the Court's request may include a summons for a witness' appearance before the ICC."[61] This applies to States which have included "a summons issued by the Court's for a witness' appearance before the ICC within the definition of "documents" capable of service domestically under article 93(1)(d)".[62] According to the Prosecution, Kenya is one of those States (See e.g. Section 86(3) of Kenya's International Crimes Act, citing article 64 of the Statute). The Defence, however, submits that this is based on an erroneous reading of Kenya's implementing legislation, which will be discussed in detail in Section 3. The issue here is the correct interpretation of the Rome Statute in respect to the issue of State cooperation.

54. Alternatively, as long as a State has not explicitly prohibited the compellability of witnesses whose appearance before the Court is being sought, the Prosecution is of the view that a State can be compelled to issue *subpoenas* under article 93(1)(l), expecting States to provide "[a]ny other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court".[63] The Prosecution refers to this provision as a "catch-all" provision that the drafters intentionally left open for States to provide any assistance not specified in the Statute, so long as the requested measure does not violate national law".[64]

55. Accordingly, "[t]he authority of the Court to issue compulsory orders against a person not physically before it therefore appears to rest on whether the domestic legislation of the state concerned enables the ICC to do so or otherwise prohibits the Court from

[60] Prosecution's Request, [71]-[72], [73], [80].
[61] Ibid, [71].
[62] Ibid, [72].
[63] Ibid, [81].
[64] Ibid, with reference to Kress and Prost, inTriffterer, (2008), 1579.

asking".[65] The Prosecution submits that Kenyan law enables the Court to do so, or at least does not prohibit the Court from asking.[66]

56. The Defence submits that these arguments – though creative – cannot hold ground. If testimony can be provided solely on a voluntary basis, as was argued under Section 1, then surely the Court cannot impose on a State an obligation to arrange the involuntary appearance of a witness, irrespective of whether the domestic legislation allows it. Thus, neither the Prosecution nor the Court can impose on Kenya or any other State Party an obligation to issue a *subpoena* ordering unwilling witnesses to appear before the Court.

57. It is also not for the Court or Prosecution to interpret Kenyan law (see Section 3). But, in any event, it is irrelevant what the Kenyan law states on this issue. It cannot be the case that the Court itself has different powers vis-à-vis different States Parties depending on how they have decided to implement the Rome Statute in domestic legislation. Such an interpretation could have an impact on the manner in which States give effect to the law of the Court. This may have the effect that States would amend their domestic legislation to keep their cooperation obligations to a minimum. It would be unfair to treat individuals in different States differently, not just on States (as they have a choice in the matter) but also on the individuals who did not have any say over the manner in which their State decided to implement the Rome Statute. Their status as a witness before the Court cannot depend on the implementing legislation of States.

58. Sluiter agrees with the view that it would be unfair on witnesses if their obligation to testify before the Court would depend on the State legislation rather than a uniform regime under the Court's legislation.[67] It is Sluiter's conviction that it corresponds better with the intention of the drafters "to codify a general regime of voluntary cooperation, going beyond the mere question of state cooperation".[68]

(b) Erroneous Reliance on Alternative Forms of Cooperation in article 93(1)

59. The Prosecution's proposition is also in violation of the Rome Statute. Rule 93(1)(e) is very clear and cannot be set aside by relying on other provisions, which are far less

[65] Rastan, (2008), 436.
[66] Prosecution's Request, [77], [79] – [80].
[67] Sluiter, (2009), 601.
[68] Ibid.

clear and explicit. Contrary to the Prosecution's suggestion, article 93(1)(e) should be the exclusive provision when dealing with the very specific issue of witness appearance because it is the only provision in Part 9 of the Rome Statute which explicitly deals with this issue. One cannot circumvent a very explicit provision by way of using other provisions that were not intended to be used in the manner proposed. In this regard, it is noteworthy that none of the legal scholars who have looked at this issue have suggested that article 93(1)(d) can serve as a basis to issue *subpoenas* to witnesses to appear before the Court, thereby substituting the mechanism described under article 93(1)(e).

60. Article 93(1)(l) has been mentioned as a provision allowing the Court to request States which do not explicitly prohibit the procedure of issuing *subpoenas*, to issue such *subpoenas*.[69] This reading of article 93(1)(l) is possible only if it is accepted that the Court has the power to compel witnesses to appear before the Court under article 64(6)(b), which the Defence has argued under Section 1 is not the case. Even if the Chamber disagrees with the interpretation of article 64(6)(b) as submitted by the Defence, article 93(1)(l) can likewise not be used to bypass article 93(1)(e). Indeed, article 93(1)(l) refers to "other" types of assistance and can therefore not be used to trump provisions specifically dealing with particular issues. Article 93(1)(l) was certainly not meant to include assistance otherwise prohibited by the Statute.

61. In this regard, the Defence fully endorses Sluiter's observation that "[w]hile it is understandable that supporters of a strong ICC use all creativity to repair in some way aspects of the Statute that are now widely considered as defective, this cannot be done without properly observing the rules and principles of (treaty) interpretation".[70] In terms of the rules of treaty interpretation, the Defence submits that the methodology of treaty interpretation contained in articles 31 and 32 of the Vienna Convention on the Law of Treaties[71] is well accepted as declarative of customary international law.[72] Accordingly, the provisions of the Rome Statute must be interpreted « in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of their object and purpose ».[73]

[69] See, for example, Rastan, (2008), 436.
[70] Sluiter, (2009), 601.
[71] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *U.N.T.S* 331.
[72] See, for example, the commentary contained in Damrosch, L. et al (eds.), *International Law: Cases and Materials* (5th ed, 2009), 165.
[73] Vienna Convention on the Law of Treaties, Article 31(1).

62. In this case, rules and principles of proper treaty interpretation require that article 93(1)(e) dictates the conversation on witness appearance. This is a clear and unambiguous provision. Given the explicit reference to 'voluntary transfer' in this provision, no measure allowing involuntary transfer can be imposed on individuals irrespective of the domestic legislation of the State where they are residing. According to Sluiter, based on personal experience in participating in the negotiations on State cooperation in Rome:

> …a hard battle was fought over the permissible degree of interference with national sovereignty. The imposition of an obligation upon citizens to testify at the seat of the Court met with strong opposition. It seems to me-and follows from the official record-that the absence of subpoena powers was easily sacrificed, possibly as a bargaining chip in respect to matters deemed at that time more important by the delegates.[74]

63. It is respectfully submitted that this compromise cannot simply be ignored by creative interpretation of other less specific provisions. States are free to set limits to the reach of ICC legislation. These limits cannot then be modified by actors who are of the view that the Court should have a wider reach. Accordingly, it is clear that the Court's legal framework does not permit the Chamber to request, let alone require, States to issue *subpoenas* ordering unwilling witnesses to appear before the Court.

(c) Testimony by Video Technology

64. Finally, the Defence submits that the same principles apply when, as the Prosecution proposes, witnesses testify in their national jurisdiction by video technology. Article 69(2) of the Rome Statute describes testimony by video technology as *viva voce* (oral) testimony. Accordingly, even if a witness does not physically travel to the seat of the Court, when he or she gives testimony by video technology directly connected to the courtroom in The Hague, he or she appears before the Court similar to those who appear physically before the Court. Accordingly, the issuance of a *subpoena* to a witness to give testimony by video technology is likewise not permitted under the Rome Statute.

65. In addition, the Defence would strongly object to the hearing of the testimony of these witnesses by video technology, as proposed by the Prosecution. If the witnesses are to testify, the defence submits that fairness dictates that they give their testimony *viva*

[74] Sluiter, (2009), 597.

voce before the Court. Given their questionable credibility, this would be the only fair manner of taking their testimony. However, this is not the subject of the Prosecution's Request and the Defence will elaborate this point if and when this becomes an issue.

(3.) KENYAN LEGISLATION

66. The relevant sections of Kenya's International Crimes Act, 2008, are: section 86, dealing with the service of documents; sections 87, 88 and 89 which deal with a request to facilitate the voluntary appearance of witnesses; and, sections 90, 91 and 92 which deal with the temporary transfer of Kenyan prisoners.

67. These sections provide (emphasis added):

> 86. (1) Where the ICC requests assistance under paragraph 8 of article 19, article 56, paragraph 7 of article 58, article 64 or paragraph 1 (d) of article 93 of the Rome Statute in arranging for the service of a document in Kenya, the Attorney-General may shall give authority for the request to proceed if he is satisfied that
> (a) the request relates to an investigation being conducted by the Prosecutor or any proceedings before the ICC; and
> (b) the person or body to be served is or may be in Kenya.
> (2) If the Attorney-General gives authority for the request to proceed, he shall forward the request for service to the appropriate Kenyan agency, and that agency shall, without delay:
> (a) use its best endeavours to have the process served:
> (i) in accordance with any procedure specified in the request; or
> (ii) if that procedure would be unlawful or inappropriate in Kenya, or if no procedure is specified, in accordance with the law of Kenya; and
> (b) transmit to the Attorney-General:
> (i) a certificate as to service, if the document is served; or
> (ii) a statement of the reasons that prevented service, if the document is not served.
> (3) In this section, 'document' includes:
> (a) a summons requiring a person to appear as a witness; and
> (b) a summons to an accused that has been issued under paragraph 7 of article 58 of the Rome Statute.
>
> 87. (1) Where the ICC requests assistance under paragraph 8 of article 19, article 56, paragraph 7 of article 58, article 64 or paragraph 1 (e) of article 93 of the Rome Statute in facilitating the voluntary appearance of a witness before the ICC, the Attorney-General may give authority for the request to proceed if he is satisfied that:
> (a) the request relates to an investigation being conducted by the Prosecutor or any proceedings before the ICC; and
> (b) the witnessís attendance is sought so that the witness can give evidence or information relating to the investigation or proceedings; and
> (c) the witness is or may be in Kenya.
> (2) In this section and sections 88 and 89, 'witness' includes a person who may give expert evidence, but does not include a person who has been accused of an international crime in the proceedings to which the request relates

88. (1) If the Attorney-General gives authority for the request to facilitate the voluntary appearance of a witness to proceed, he shall forward the request to the appropriate Kenyan agency.
(2) The Kenyan agency to which a request is forwarded under subsection (1) shall make such inquiries as may be necessary to ascertain if the prospective witness consents to giving evidence or assisting the ICC.
(3) The Attorney-General may, at any time, ask the ICC to give one or more of the following assurances:
(a) that the witness will not be prosecuted, detained, or subjected to any restriction of personal freedom by the ICC in respect of all or any specified acts or omissions that occurred before the person's departure from Kenya;
(b) that the witness will be returned to Kenya as soon as practicable in accordance with arrangements agreed to by the Attorney-General;
(c) an assurance relating to such other matters as the Attorney-General thinks appropriate.

89. (1) The Attorney-General shall assist in the making of arrangements to facilitate a witness's attendance before the ICC if he is satisfied that:
(a) the prospective witness has consented to giving the evidence or assistance requested; and
(b) the ICC has given adequate assurances where appropriate.
(2) The Attorney-General shall:
(a) approve and arrange the travel of the witness to the ICC;
(b) obtain such approvals, authorities, and permissions as are required for that purpose, including, in the case of a person who although not liable to be detained in a prison is subject to a sentence:
(i) the variation, discharge, or suspension of the conditions of the personís release from prison; or
(ii) the variation or suspension of the personís sentence, or of the conditions of the person's sentence; and
(c) take such other action for the purposes of subsection (1) as he thinks appropriate.

90. Where the ICC requests assistance under paragraph 1 (f) of article 93 of the Rome Statute in facilitating the temporary transfer to the ICC of a Kenyan prisoner, the Attorney-General shall give authority for the request to proceed if he is satisfied that:
(a) the request relates to an investigation being conducted by the Prosecutor or any proceedings before the ICC; and
(b) the prisonerís attendance is sought for the purposes of identification or for obtaining evidence or other assistance.

91. (1) If the Attorney-General gives authority for the request to facilitate the temporary transfer of a Kenyan prisoner to proceed, he shall forward the request to the
(2) The Kenyan agency to which a request is forwarded under subsection (1) shall make such inquiries as may be necessary to ascertain if the prisoner will consent to the transfer.
(3) The Attorney-General may ask the ICC to give one or more of the following assurances:
(a) that the prisoner will not be released from custody without the prior approval of the Attorney-General;
(b) that the prisoner will be returned to Kenya without delay in accordance with arrangements agreed to by the Attorney-General;
(c) assurances relating to such other matters as he thinks appropriate.

92. (1) The Attorney-General may authorise the temporary transfer of a Kenyan prisoner to the ICC if he is satisfied that:
(a) the prisoner has consented to giving the evidence or assistance requested; and
(b) the ICC has given adequate assurances where appropriate.

> (2) If the Attorney-General authorises the temporary transfer of the prisoner to the ICC, he may:
> (a) direct that the prisoner be released from the prison in which that person is detained, for the purpose of the transfer to the ICC; and
> (b) make arrangements for the prisoner to travel to the ICC in the custody of:
> (i) a member of the police force;
> (ii) a prison officer; or
> (iii) a person authorised for the purpose by the ICC.
> (3) A direction given by the Attorney-General under (b) request the ICC to provide a certificate recording the total period during which the prisoner was detained outside Kenya in connection with the request until sentence was imposed for the Kenyan offence.
> (2) A certificate obtained under subsection (1) shall be presumed to be accurate in the absence of any evidence to the contrary.
> (3) The Attorney-General may issue a certificate setting out the date and period specified in subsection (1) if:
> (a) the ICC does not provide a certificate within a reasonable time after the Attorney-General makes a request under subsection (1); and
> (b) the Attorney-General is satisfied on such information that he has that an accurate calculation can be made of the period referred to in paragraph (b) of subsection (1).

68. As stated in the Preliminary Observations, nobody is in a better place to explain Kenyan legislation than the Kenyan Government, Parliament or Judiciary. The Defence and Prosecution can only make an attempt at understanding and interpreting the law of a foreign jurisdiction. Accordingly, as aformentioned, the Defence requests that the Kenyan authorities be given an opportunity to respond.

69. The Prosecution submits that the International Crimes Act includes the option of issuing a "summons" – that is, "a judicial order that can be enforced through coercive means when required" - requiring a person to appear as a witness.[75] In support of this submission, the Prosecution relies only on section 86(3) of the International Crimes Act dealing with a request for the serving of documents. Pursuant to section 86(3), documents in this context include "a summons requiring a person to appear as a witness". The Prosecution has ignored the other sections dealing with a request to facilitate the voluntary appearance of a witness and the temporary transfer of Kenyan prisoners. These latter sections emphasise the requirement of consent of the witness or the prisoner. In solely relying on section 86(3) of the International Crimes Act, the Prosecution seeks to circumvent the requirement of consent.

70. However, the requirement of consent under sections 87-92 of the International Crimes Act should also apply if the witness's testimony be given in Kenya by video

[75] Prosecution's Request, [80].

technology. Whilst testimony by video technology does not require a witness to travel to the seat of the Court, it nonetheless requires a witness to appear before the Court.

71. In this regard, sections 88(1) and (2) combined provide that "[i]f the Attorney-General gives authority for the request to facilitate the voluntary appearance of a witness to proceed" … "[t]he Kenyan agency to which a request is forwarded under subsection (1) shall make such inquiries as may be necessary to ascertain if the prospective witness consents to giving evidence or assisting the ICC". Section 89(1)(a) provides that "[t]he Attorney-General shall assist in the making of arrangements to facilitate a witness's attendance before the ICC if he is satisfied that: (a) the prospective witness has consented to giving the evidence or assistance requested" (emphasis added).

72. These sections cannot be stepped over by relying merely on section 86(3). Indeed, these sections are not limited to prospective witnesses who are requested to give evidence at the seat of the Court. These sections do not specify where the evidence is to be given or other assistance is to be provided to the Court. Therefore, in accordance with these sections, any prospective witness must consent to giving evidence or assisting the Court, irrespective of the location where the evidence is to be given or other assistance is to be provided to the Court.

73. A legitimate reading of section 86(3) of the International Crimes Act could be that it was intended to allow a prospective witness, whose appearance is required by the Court under article 64(6)(b) of the Rome Statute, to be summoned with the sole purpose of ascertaining if the person concerned "consents to giving evidence or assisting the ICC" as required by section 88(2) of the International Crimes Act. The GoK will be better placed to clarify whether this is the case.

74. In any event, as the Prosecution concedes,[76] whilst section 86(3) allows for the issuing of summons, the International Crimes Act is silent on the consequences of a failure to respond to a summons. The Act does not refer to any sanctions in a case of non-compliance. In the Defence submission, this silence must be read to mean that no such sanctions can be imposed. Thus, persons are not compellable to appear as witnesses under section 86(3). The Prosecution seeks to introduce the component of compellability of witnesses to respond to a summons into the International Crimes Act

[76] Prosecution's Request, [77](2).

by relying on an entirely different law – that is the Kenyan Criminal Procedure Code. Pursuant to sections 144-149 of this Code, witnesses who are summoned to appear are compellable, and a failure to respond to a summons is punishable.[77] However, these sections, nor any section with similar language, do not appear in the International Crimes Act. It is submitted that they cannot simply be transplanted from one piece of legislation to another without legislation providing for such dual applicability. Indeed, it cannot be assumed, merely on the basis that the same legal term "summons" is used, that a failure to respond to a summons under section 86(3) of the International Crimes Act is punishable in a similar fashion as described in the Criminal Procedure Code. This proposition is particularly problematic in light of sections 87-92 directly following section 86(3) and dealing with the same issue of witness appearance of witnesses, which stress the voluntariness of witnesses to appear. This would rather suggest that a failure to respond to summons to appear is not subject to sanctions as a witness is not compellable under the International Crimes Act.

75. Accordingly, to the Defence it seems apparent that the Kenyan legislation does not provide for involuntary appearance.

(4.) SPECULATIVE BASIS OF THE REQUEST

76. The Defence also notes that, even if Kenya has an obligation to comply with a request to issue summons to which the identified witnesses are compelled to respond, it may not be able to carry out such a request. Until recently, the witnesses were under the Prosecution's charge. They have not been returned to the Kenyan authorities, who are not even aware of their identities. The Prosecution states that "[a]ll witnesses referred to in this application are located within Kenya, and none (to the best of the Prosecution's knowledge) are in custody".[78] The Defence is unaware of the basis of the Prosecution's information concerning the witnesses' whereabouts, particularly as it says that it has lost contact with a number of them. The Kenyan government may not be able to trace the witnesses down. These witnesses may not even be in Kenya. If the Attorney-General is not satisfied that the person to be served with a summons "is or may be in Kenya", he may not give authority for the request to proceed pursuant to section 86(1)(b).

[77] Criminal Procedure Code (Rev. 2009) [Kenya], Sections 144-149, cited in the Prosecution's Request at [80].
[78] Prosecution's Request, [93].

77. Accordingly, given the speculative basis of the Prosecution's Request, the Defence submits that the GoK is under no obligation to comply with the request to issue *subpoenas* to the witnesses concerned.

(5.) REASONS WHY THESE PARTICULAR PROSECUTION WITNESSES SHOULD NOT BE SUMMONED

78. The Defence submits that even if the Chamber determines that it has the power to issue the requested summons, the Chamber should still decline to issue them. This is because hearing the testimony of these seven witnesses would not assist the Trial Chamber in determining the truth in relation to the alleged guilt of Mr. Sang; nor does the Request satisfy the requirements established by the ad hoc tribunals and special court in this regard.

79. It is well established in the *ad hoc* tribunals and special courts that the determination of whether a subpoena should be issued is in the discretion of the Trial Chamber; it is not a mandatory duty.[79] However, the Prosecution has provided no test for the Chamber to apply in exercising its discretion in this instance, and it is not sufficient to summon a witness simply because doing so may arguably help establish the truth. The Defence submits that because the Court has no judicial precedent on the criteria to be used when determining whether to summon a witness, resort to the tests employed by these other tribunals is appropriate for guidance.

80. At the ICTR, the requesting party must demonstrate that: (i) it has made reasonable attempts to obtain the voluntary cooperation of the witness; (ii) the witness's testimony can materially assist its case; and (iii) the witness's testimony must be necessary and appropriate for the conduct and the fairness of the trial.[80]

81. At the Special Court for Sierra Leone ("SCSL"), the judges considered: (i) whether the information in the possession of the prospective witness is "necessary" for the resolution of specific issues in the trial and (ii) whether the information in the

[79] Rules of Procedure and Evidence of the SCSL, Rule 54 provides: "At the request of either party or of its own motion, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purpose of an investigation or for the preparation and conduct of the trial".
[80] *Prosecutor v. Karemera*, ICTR-98-44-T, Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2, and NZ3 (TC), 12 July 2006, [9] ("Karemera Subpoena Decision").

possession of the prospective witness is obtainable by other means,[81] with the Trial Chamber stating that "[t]he availability of the evidence from other sources is a relevant inquiry in the exercise of the Trial Chamber's discretion, where other sources may be available without resort to the coercive powers of the Court".[82]

82. The Defence submits that should the Trial Chamber find that it does have the power to summon witnesses through the assistance of State Parties, it should weigh the following factors in the exercise of its discretion:

> (a) Whether the issuance of a summons is necessary to ensure the attendance of the prospective witness;
> (b) Whether the prospective witness's testimony can materially assist the Prosecution's case, or is necessary for the resolution of specific issues in the trial;[83] and
> (c) Whether the information in the possession of the prospective witness is obtainable through other (non-coercive) means.

83. In cumulatively considering these criteria, it is clear that summons should not be issued in this case.

(a) Whether the Summons are Necessary to Ensure Attendance

84. The Defence does not dispute that all seven witnesses have either recanted their testimony and/or refused, directly or indirectly, to continue cooperating with the prosecution. It is clear that the witnesses will not voluntarily appear before the Court. To this extent, a summons would be necessary to ensure attendance at trial. However,

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[81] *Prosecutor* v. *Krstic*, IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, [10-11],. See also, *Prosecutor v. Milosevic*, IT-02-54-T, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroeder, 9 December 2005, [36].

[82] *Prosecutor v. Taylor,* SCSL-03-01-T-996, Decision on Prosecution Motion for the Issuance of a Subpoena to Naomi Campbell, 30 June 2010, 5 (citing *Prosecutor v. Norman, Fofana and Kondewa,* SCSL-04-14-T-688, Decision on Interlocutory Appeals against Trial Chamber Decision refusing to Subpoena the President of Sierra Leone, 11 September 2006, [8]).

[83] See, for example, *Karemera* Subpoena Decision, [4]: Furthermore, an applicant seeking a subpoena must make a certain evidentiary showing of the need for the subpoena. In particular, the applicant must demonstrate a reasonable basis for his belief that the prospective witness is likely to give information that will materially assist the applicant with respect to clearly identified issues in the forthcoming trial. A subpoena becomes "necessary" for the purposes of Rule 54 where a legitimate forensic purpose has been shown.10 In deciding whether an applicant has met the evidentiary threshold, the Trial Chamber may properly consider whether the information sought through the use of subpoena is necessary for the preparation of an applicant's case, to ensure a fair and informed trial, and whether it is obtainable through other means.

the Defence highlights the following information in order to stress that compelling these witnesses under these circumstances would definitely result in testimony being given on a non-voluntary basis.

85. Witness P-15 removed himself from the ICCPP in October 2012 (prior to his identity being disclosed to the defence).[84] Thereafter, he has explicitly recanted his previous statements and withdrawn his cooperation.[85] The Prosecution has not been able to reach him since June 2013.[86] His own recent public proclamations[87] show that he has irrevocably distanced himself from cooperating with the Prosecution and that he does not wish to testify.

86. Witness P-16 withdrew his participation in the ICCPP during a temporary return to Kenya in July 2013, when he [REDACTED] and disappeared.[88] During his last contact with the prosecution in August 2013, he refused to confirm his cooperation.[89] Like P-15, his recent public proclamations make it clear that he has recanted and will not voluntarily testify as a prosecution witness.[90]

87. Witness P-336 was part of the ICCPP but [REDACTED] in August 2013; he has broken off all contact with the Prosecution since then, except for when his wife [REDACTED]. As he stated that he was [REDACTED] and has otherwise gone incommunicado, it is clear that he no longer intends to testify at trial.[91]

88. Witness P-397 was [REDACTED].[92] Though the Prosecution says this witness has only reconsidered his position, and not explicitly recanted, the witness did [REDACTED]."[93] He also unequivocally stated that [REDACTED].[94]

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[84] Prosecution's Request, [7]-[8].
[85] Ibid, [10].
[86] Ibid, [15].
[87] Ibid, [16]-[17].
[88] Ibid, [21]-[22].
[89] Ibid, [24]-[25].
[90] Ibid, [27]-[29].
[91] Prosecution's Request, paras. 32-34.
[92] [REDACTED].
[93] [REDACTED].

His non-cooperation and the non-voluntary nature of any future testimony is therefore obvious, especially as he has avoided any face-to-face meeting with the Prosecution since his withdrawal.[95]

89. Witness P-516 has failed to attend any meetings with [REDACTED] since July 2013 and the Prosecution has been unable to communicate with him since.[96] The defence submits that this is a valid indication over the last seven months of his unwillingness to testify.

90. Witness P-524, [REDACTED].[97] He also has admitted that at the time he was approached severally to participate as a prosecution witness, [REDACTED].[98] The Defence submits that these admissions are sufficient to show that P-524 had an ulterior motive for cooperating with the Prosecution in the case [REDACTED] and that he has withdrawn (indeed P-524 has returned to Kenya and the Prosecution has been unable to contact him since August 2013) and that he has effectively recanted his previous statements due to "soul searching" and pressure from his family.[99]

91. Witness P-495 was relocated and seemed to be cooperating with the Prosecution until September 2013, when he secretly checked out of his hotel and disappeared instead of meeting with the Prosecution. The Prosecution has not been able to contact him since then.[100] The Defence submits that his purposeful unavailabilty is evidence of his withdrawal and non-cooperation.

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[94] [REDACTED].
[95] Prosecution's Request, para. 42.
[96] Prosecution's Request, para. 46-48.
[97] [REDACTED].
[98] [REDACTED].
[99] Prosecution's Request, paras. 53-55.
[100] Prosecution's Request, para. 57, 61.

92. Pursuant to the foregoing, it is clear that these seven prospective witnesses will not voluntarily testify as Prosecution witnesses, and that a summons would be necessary to compel them to appear before the Court in this capacity.

93. The Defence is surprised at the different approaches taken by the Prosecution in respect of recanting and/or withdrawing witnesses in the Kenya 1 and Kenya 2 cases. In the Kenya 2 case, the Prosecution recently notified the Chamber that one witness (P-12) had recanted a critical component of his evidence and therefore would be withdrawn from the witness list.[101] The Prosecution notified the Chamber that a second witness (P-11) had stated that he was no longer willing to appear as a witness and was thus removed from the list of witnesses.[102] The Prosecution duly withdrew these witnesses despite the fact that their removal from the witness list has undermined the Prosecution's case to such an extent that it currently cannot present a case that could satisfy the evidentiary standard applicable at trial, "beyond a reasonable doubt".[103] This approach, the Defence submits, is the appropriate one, and seems to be an admission on the part of the Prosecution that testimony which has been recanted, has limited probative value. Indeed, in the *Lubanga* case, where a witness was unwilling to testify and therefore in the Prosecution's submission was "unlikely to testify in a manner that would be appropriate for the running of this case", the Prosecution admitted that it had no remaining options and withdrew the witness.[104]

94. In striking contrast, the Prosecution in the Kenya 1 case has chosen to summon seven witnesses who have either recanted their statements and/or withdrawn their cooperation with the Prosecution, claiming that the Chamber has an "indisputable interest in hearing the witnesses' evidence to fulfill its mandate to discover the truth".[105]

(b) Whether the prospective witnesses' testimony can materially assist the Prosecution's case, or is necessary for the resolution of specific issues in the trial

[101] *Prosecutor v. Kenyatta,* ICC-01/09-02/11-875, Notification of the removal of a witness from the Prosecution's witness list and application for an adjournment of the provisional trial date, 19 December 2013, [6]-[10], [14]-[15].
[102] Ibid, [11]-[13], [16].
[103] Ibid, [15].
[104] *Prosecutor v. Lubanga*, Transcript, ICC-01/04-01/06-T-355-ENG, 2, line 5.
[105] Prosecution's Request, [2].

95. Given that arguably four of the prospective witnesses have recanted the incriminating statements they originally made to the prosecution, and/or that the witnesses have other significant issues which affect their credibility,[106] should the witnesses be compelled to testify, their anticipated evidence would likely have a low probative value. Evidence which has been disowned or changed multiple times and/or which is not procured voluntarily is hardly believable beyond a reasonable doubt, and therefore does not materially assist the Prosecution's case, nor does it resolve any specific issues in the trial. Certainly, if P-15 and P-16 have completely recanted all substantive aspects of the statements they have given to the Prosecution and may ultimately be the subject of an adverse witness application, then the Defence fails to see how either of their anticipated testimony could materially assist the Prosecution's case.

96. The Defence submits that in reality, this Request for summons is a back-door attempt by the prosecution to bring Article 70 allegations against the accused or others into the main trial. This is unacceptable. As the Defence has often argued,[107] these vague aspersions create an additional cloud of suspicion surrounding the accused and should form no part of the core case. Furthermore, the Prosecution has previously undertaken [REDACTED].[108] Thus, the Prosecution's request to summon witnesses whose testimony has been largely recanted, while highlighting claims of witness interference, is incorrect.

97. Indeed, this Trial Chamber has made it clear that any charges brought pursuant to Article 70 would be part of a separate case, before different judges. Additionally, the Chamber ruled:

> "Consequently, these allegations will not affect the preparation time in the current case; unless the Prosecution at trial intends to rely on additional evidence that forms part of Article 70 allegations, in which case it must disclose this material, and apply to the Chamber to add it to the LoE".[109]

[106] For instance: [REDACTED].
[107] For example, ICC-01/09-01/11-818, para 12; ICC-01/09-01/11-T-23-CONF, 15 May 2013, p. 36-7.
[108] ICC-01/09-01/11-T-23-CONF, 15 May 2013, p. 39-42. [REDACTED].
[109] *Prosecutor v. Ruto and Sang,* ICC-01/09-01/11-762, Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date, 3 June 2013, para. 89.

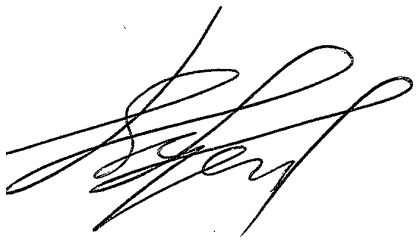
98. As far as the Defence is aware, the Prosecution has not disclosed such material,[110] nor has it applied to the Chamber to add it to the List of Evidence. Yet, the Prosecution makes reference to it throughout its Request for Summons as information which the Trial Chamber should hear from these witnesses in fulfillment of its mandate to discover the truth. The Request should be rejected on this basis.

(c) Whether the information in the possession of the prospective witness is obtainable through other (non-coercive) means

99. In its Request, the Prosecution has not given adequate consideration to whether the information, which it intends to elicit from these seven witnesses, is obtainable through other (non-coercive) means. If the meetings and events contained in the statements of these prospective witnesses were actually true, the Prosecution would have a plethora of witnesses from which to choose. It may therefore be possible for the prosecution to replace the testimony of these non-cooperative witnesses with voluntary witnesses, as it has successfully petitioned the court to do on previous occasions.[111]

VI. RELIEF SOUGHT

100. On the basis of the above submissions, the relief sought by the Defence is that the Prosecution's Request be rejected.



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua arap Sang
Dated this 10th Day of January 2014
In Nairobi, Kenya

[110] To the contrary, [REDACTED].
[111] For example, *Prosecutor v. Ruto and Sang,* ICC-01/09-01/11-899-CONF, Decision on the Prosecution's Requests to Add New Witnesses to its List of Witnesses, 3 September 2013.