

**Cour
Pénale
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**International
Criminal
Court**

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No.: ICC-01/09-01/11
Date: 29 November 2013

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
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

Prosecution's request under article 64(6)(b) and article 93 to summon witnesses

Source: Office of the Prosecutor

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

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Introduction

1. The Prosecution requests Trial Chamber V(A) to exercise its powers under article 64(6)(b) to “require the attendance and testimony of witnesses” P-0015, P-0016, P-0336, P-0397, P-0516, P-0524 and P-0495. These seven persons, all of whom were under the protection of the Court, gave statements to the Prosecution variously describing (a) pre-election meetings they attended – some at Mr. RUTO’s home -- wherein post-election violence (“PEV”) was planned and participants, including Mr. RUTO, distributed money and weapons; (b) broadcasts on Mr. SANG’s radio station in which Mr. SANG incited violence; and (c) acts of violence during the PEV itself. Their identities were disclosed to the Defence in February, March and April 2013. Now, following months -- in some cases, years -- of cooperation, the witnesses either refuse to continue to communicate with the Prosecution or have affirmatively informed the Prosecution that they are no longer willing to testify.

2. The seven witnesses currently live in Kenya. The Prosecution cannot issue its own subpoenas to require them to leave Kenya and testify in The Hague. Nor can the Chamber order them to travel to the seat of the Court. The Chamber, however, has the statutory authority to require the assistance of States in securing the attendance and testimony of witnesses (article 64(6)(b)), and States Parties have a corresponding obligation to provide such assistance pursuant to Part 9 of the Rome Statute. The Chamber also has an indisputable interest in hearing the witnesses’ evidence to fulfil its mandate to discover the truth.

3. Given the commencement of the trial and the difficulties already experienced securing the attendance of witnesses, it is necessary to take urgent steps to obtain the assistance of the Kenyan authorities to summon these individuals

and, if required, to secure their appearance under articles 93(1)(d) and 93(1)(l). Accordingly, the Prosecution requests that the Court seek the assistance of the Government of Kenya (GoK), pursuant to article 64(6)(b) and article 93, to take steps to secure the witnesses' appearance at an appropriate location in Kenya for purposes of testifying before the Court (*in situ* or by means of video-link technology) in the on-going trial. If this application is granted, the parties and participants, and the Registry, can make submissions on the modalities for the taking of their testimony and the protection of the witnesses' safety before, during, and after their appearances.

Confidentiality

4. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, the Prosecution requests that this application be classified as "confidential, *ex parte*, Prosecution and VWU only", since it contains confidential information related to the security of witnesses and to ongoing article 70 investigations. A confidential redacted version will be filed shortly.

Statement of Facts

5. The Prosecution is seeking the Court's assistance in requiring the attendance of seven formerly cooperative witnesses who, in numerous statements, have provided highly relevant evidence about the crimes charged. Each was provided protective measures of varying sorts, [REDACTED] and it appears that each opted to leave their protection locations and return to their original homes. After their identities were disclosed to the Defence, each either directly refused to continue to cooperate or discontinued communication with the Prosecution. To the best of the Prosecution's knowledge, all seven witnesses are currently in Kenya, thus within the jurisdiction of the Kenyan national authorities.

6. The Chamber should hear the evidence of these witnesses in order to determine the truth, not simply about the charged crimes, but also concerning the allegations by both Defence teams of a concerted and elaborate conspiracy at play in this case to fabricate evidence and implicate the Accused.¹ In this regard, the Defence for Mr. RUTO has explicitly stated that it would support attempts to enforce the appearance of reluctant witnesses before the Court,² and the Defence teams for both Accused persons indicated an interest in calling four³ of the seven witnesses. Certain of these witnesses have subsequently recanted the evidence given to the Prosecution and accused the Prosecution of irregularities in its interactions with them.⁴ It is thus particularly important to secure the attendance of these witnesses to explore properly the veracity of their conflicting statements.
7. The Prosecution has no statutory or practical power to summon the witnesses, and its past efforts to obtain assistance of the Kenyan authorities to take evidence under oath from witnesses domestically before national courts have been blocked.⁵ It is now, therefore, necessary for these witnesses to be summoned. This is the only means by which their attendance can be achieved for the Court to hear their testimony and for the veracity of their evidence to be assessed through questioning. Only then will the Chamber be able to establish the truth regarding the Prosecution's allegations and to reliably determine the individual criminal responsibility of the Accused.

P-0015

¹ See ICC-01/09-01/11-818 and ICC-01/09-01/11-850-Conf. The Defence for both Accused repeated these allegations in ICC-01/09-01/11-878-Conf and ICC-01/09-01/11-895-Conf.

² See ICC-01/09-01/11-T-26-CONF-ENG ET 09-09-2013 1-60 WN T, at page 38 line 25 to page 39 line 17. The Defence for RUTO's assertion at page 39, line 13 was a direct response to the Prosecution's statement at page 34, lines 10-13.

³ P-0015, P-0016, P-0336, P-0524.

⁴ P-0015 and P-0016.

⁵ ICC-01/09-01/11-730-Red, paras 20-24.

8. P-0015 is an insider witness whose identity was disclosed to the Defence on 18 February 2013. In multiple statements given to Kenyan investigative bodies and media outlets, and subsequently also to the Prosecution, P-0015 implicated Mr. RUTO in the planning and organization of the PEV. According to the witness, Mr. RUTO was present and participated in 11 meetings to prepare for the attacks, during which the participants discussed the procurement of firearms, the selection of field commanders and the arrangement of finances and logistics. P-0015 also described the Network that Mr. RUTO utilized to commit the crimes. He described the attack on Yamumbi (in which he said he participated) and gave information about the attacks on Turbo and Kiambaa. Finally, he described how Mr. SANG's radio show on KASS FM, as well as other programs on that station, supported and incited the violence.
9. P-0015 was admitted into the ICC Protection Programme [REDACTED]. In November 2011 the witness left the ICCPP. In accordance with his wishes and despite strong opposing advice from the Prosecution and the VWU, he returned to Kenya on 26 October 2012 and was resettled outside of the Rift Valley. Fearing that P-0015's return to Kenya would result in his subsequent unavailability to testify at trial, the Prosecution made an application for the witness' testimony to be deposed in advance of trial, which was rejected by Trial Chamber V.⁶
10. On 19 February 2013, the day after the witness's identity was disclosed to the Defence, Eldoret lawyer Paul Gicheru sent the Prosecution an affidavit signed by P-0015 (and dated 7 February), in which the witness withdrew his cooperation from the ICC process. He also recanted his prior statements to

⁶ ICC-01/09-01/11-558-Conf-Exp.

the Prosecution and the Waki Commission, claiming they were fabrications, and accused members of the Prosecution of coaching and bribery.⁷

11. Three days after receiving this affidavit, the Prosecution interviewed P-0015 in Kenya. The witness stated that he had been kidnapped and forced at gunpoint to sign the affidavit. He also reaffirmed the veracity of his prior statements, withdrew his allegations of prosecutorial wrongdoing and repeated his willingness to testify.⁸
12. Slightly less than a month later, on 18 March 2013, the lawyer Gicheru sent a second affidavit signed by P-0015, along with two other affidavits signed by the witness's wife and father.⁹ P-0015's second affidavit reaffirmed his recantation, his refusal to testify and his allegations of prosecutorial wrongdoing, including the payment of bribes for his cooperation. Simultaneously, Kenyan media outlets received copies of P-0015's affidavits and reported widely on the recantation, naming him publicly.¹⁰
13. The Prosecution telephoned P-0015 on 20 March 2013. Over the phone, the witness stated he "was forced" to sign the second affidavit and that "they knew where he was". When asked whether he signed the affidavits under threat, P-0015 said he needed to discuss matters with the Prosecution at a face-to-face meeting. The Prosecution then attempted to meet with P-0015 in Kenya the next day, but the effort failed when P-0015 stated that he would not speak to the Prosecution without Gicheru, his lawyer, who was unavailable.¹¹

⁷ The Prosecution notified the Chamber and provided a copy of this affidavit, see ICC-01/09-01/11-624-Conf-Exp.

⁸ *Ibid.*, para. 10.

⁹ The Prosecution provided copies of these to the Chamber, see ICC-01/09-01/11-662-Conf-Exp.

¹⁰ *Ibid.*, paras. 6-14,

¹¹ *Ibid.*, paras. 17-23.

14. Thereafter, on 23 March the lawyer Gicheru issued a press release containing a statement by P-0015 that he had been threatened and intimidated by the Prosecution.¹²
15. The Prosecution last communicated with P-0015 on 27 June 2013. When asked whether he remained willing to testify before the Court, the witness stated, first, that this was a “matter for the Prosecution” and, second, that he would decide on the day of his scheduled testimony. The Prosecution has been unable to re-establish communication with P-0015 since this, despite repeated efforts.
16. On 11 September 2013 an article – entitled “Dropped ICC Witnesses were ‘coached’ to fix RUTO”¹³ – and a video report were published on the website of the Kenyan Capital FM News. They contain interviews with the two witnesses P-0015 and P-0016, both were named publicly. In the article, P-0015 accused the OTP, *inter alia*, of instructing him to lie, coaching him on what to say and how to lie convincingly in Court, providing already-drawn maps and sketches that he was instructed to say were prepared by him, and variously bribing and intimidating him to remain a witness.
17. Finally, on 28 October 2013 it was reported in the Kenyan media¹⁴ that P-0015 and P-0016 (both named) had submitted affidavits in the Kenyan High Court in support of the national proceedings regarding Walter BARASA, for whom a warrant of arrest was issued by Pre-Trial Chamber II.¹⁵

¹² *Ibid.*, paras. 25-28.

¹³ The article is appended to this application as Annex A. The video report can be viewed online at <http://www.capitalfm.co.ke/tv/video/9pgj5qx> (last accessed 20/11/2013). Neither of these witnesses had in fact been “dropped”, as the headline asserts.

¹⁴ See <http://www.nation.co.ke/news/politics/Walter-Barasa-ICC-Trial-Hague/-/1064/2050702/-/2p5mtj/-/index.html> (last accessed 20/11/2013).

¹⁵ ICC-01/09-01/13-1-Red2.

18. In his affidavit P-0015 repeats allegations of prosecutorial wrongdoing. P-0015 reaffirms his prior withdrawal and recantation, appending all such materials to the affidavit.¹⁶

P-0016

19. P-0016 is an insider witness whose identity was disclosed to the Defence on 11 February 2013. According to his statements, he was present at two meetings attended by Mr. RUTO, at which PEV crimes were planned and organized. These include a public meeting on 15 October 2007 in Kaptabee, where Mr. RUTO stated that the Kikuyu needed to be killed and evicted from the Rift Valley, and the meeting on 14 December 2007 at Mr. RUTO's house in Sugoi, where planners made close-to-final preparations for mobilizing and arming Kalenjin youths to evict the Kikuyu. P-0016 also gave incriminating evidence against Mr. SANG and the use of his radio show on KASS FM to support the violence. Finally, P-0016 participated in and provided direct evidence of the attack on Turbo.

20. P-0016 was admitted into the ICCPP [REDACTED].

21. [REDACTED]. On 15 July 2013 the witness returned temporarily to Kenya, in order to renew his Kenyan travel documents. [REDACTED].

22. On 29 July, without informing the Prosecution, P-0016 [REDACTED] disappeared.

23. At roughly the same time, in late-July, [REDACTED] P-0016's return to Kenya had become known and he had been approached in Nairobi¹⁷ and offered 5 million shillings to recant his testimony.

¹⁶ Annex B. The Prosecution notes that the signed copy in its possession is missing page 2. Copy available online at <http://www.scribd.com/doc/179605007/Supplementary-Affidavit-Kimeli-doc> (last accessed 20/11/2013).

24. On 2 August 2013 the Prosecution managed to reach P-0016 by telephone. P-0016 said that he was remaining in Kenya for the sake of his children and that he had returned to Turbo, in the Rift Valley. The witness also expressed his dissatisfaction with the Court and refused to confirm his continued cooperation.
25. The Prosecution last contacted P-0016 on 5 August 2013. Again he refused to reaffirm his continued cooperation with the Court. The Prosecution did not, however, receive any notification of withdrawal or any affidavit recanting his statements. Despite repeated efforts, the Prosecution has been unable to communicate with him since the 5 August conversation.
26. Recently, outlets in the Kenyan media published statements attributed to P-0016. On 4 September 2013 the Daily Nation published a story in which a Prosecution witness identified as “VWUK16” alleged that the Prosecution had subjected him to “psychological trauma, physical abuse and separation from his family (*sic*)”, and that ICC officials manipulated his statement and compelled him to sign.¹⁸
27. The next day, The Star, a Kenyan online newspaper, reported that “ICC-OPTC2/VWUK16” claimed, *inter alia*, that he had been jailed, detained and humiliated by ICC officials; imprisoned by ICC officials for a year while his children were placed in care;¹⁹ that ICC officials had “inserted incriminating evidence against RUTO” into his statements; and that he was coached on what to say in court. The article also quoted the witness as saying that he recanted and that he signed a statement that he will no longer “stand by [his] falsehoods”.²⁰

¹⁷ [REDACTED].

¹⁸ Annex C.

¹⁹ [REDACTED].

²⁰ Annex D.

28. An interview with P-0016 was also reported in the 11 September Capital FM article and video report discussed previously in paragraph 16. According to these accounts, P-0016 – identified by name -- accused the Prosecution, *inter alia*, of having bribed him to testify against Mr. RUTO and having coached him on what to say. He also alleged that the Prosecution took his children from him to force him into testifying and, when he refused to testify, had him declared an illegal immigrant [REDACTED]. In the video report P-0016 (speaking in Swahili) stated that he was forced to lie, but that he refused to come to court and utter lies.

29. P-0016 also submitted an affidavit in the Kenyan High Court proceedings regarding Walter BARASA. P-0016 also repeats allegations of wrongdoing. P-0016 reaffirms his prior withdrawal and recantation, appending all such materials to the affidavit.²¹

P-0336

30. P-0336 is an insider witness whose identity was disclosed to the Defence on 11 February 2013. [REDACTED].

31. Roughly contemporaneous with the disclosure of his identity, P-0336 was provisionally admitted into the ICCPP [REDACTED] and, on 20 May 2013, offered a bribe to withdraw as a witness. [REDACTED].

32. However, in early August P-0336 broke off all contact with the VWU and the Prosecution. On 13 August 2013 the VWU told the Prosecution that P-0336 [REDACTED] had taken all of his possessions with him. P-0336 reportedly told the [REDACTED] that he was “returning home to his village”.

²¹ Annex E. Online copy available at <http://www.scribd.com/doc/179605009/Supplementary-Affidavit-Rotich-doc> (last accessed 20/11/2013).

33. On 28 August 2013 P-0336 contacted the Prosecution through another witness stating he wished to discuss, *inter alia*, the pressure being exerted on his family [REDACTED]. The OTP called P-0336 on 29 August 2013 and P-0336 agreed to meet with the Prosecution [REDACTED]. It was agreed that the Prosecution would call him the next day to discuss arrangements. However, the Prosecution was unable to re-establish communication.
34. On 30 August 2013, P-0336's wife called the [REDACTED] then received a text message from her saying "bye bye...for ever".
35. In the meantime, on 28 August 2013, [REDACTED], P-0336 had been offered 2 million shillings to withdraw as a witness and had returned to Eldoret to consider this offer. On 1 and 2 September, P-0336 telephoned [REDACTED] and confirmed that he had accepted the 2 million shillings and urged [REDACTED] to do the same.
36. On 2 September the online newspaper, The Star, reported that two ICC witnesses had withdrawn from the case. Referring to one of the witnesses as "witness K0336" the article stated that Eldoret lawyer Christopher Mitei of *Arap Mitei and Company Advocates* had submitted P-0336's affidavit of withdrawal to the ICC Office of the Prosecutor.²²
37. Finally, on 29 October 2013 it was reported in the Kenyan media that a third ex-Prosecution witness identified as "KWN (P-0336 or K-0336)" had also submitted an affidavit to the Kenyan Court in the Walter BARASA matter.²³ In his affidavit P-0336 avers that he has withdrawn as a witness based on his assertion that the ICC trials had become overly politicised and reconciliation, in his view, achieved in Kenya. He alleges the Prosecution refused to accept

²² <http://www.the-star.co.ke/news/article-134300/two-more-icc-witnesses-ruto-case-withdraw>
[REDACTED]

²³ See <http://www.nation.co.ke/news/politics/ICC-Walter-Barasa-Hague-Witness/-/1064/2052588/-/13nn1rt/-/index.html> (last accessed 20/11/2013).

his withdrawal and threatened him with criminal prosecution should he refuse to sign pre-prepared statements implicating BARASA. The Prosecution has never in fact received such a withdrawal.²⁴

P-0397

38. P-0397 is an insider witness whose identity was disclosed to the Defence on 18 February 2013. [REDACTED].

39. Roughly contemporaneously with the disclosure, in February 2013, P-0397 was relocated [REDACTED].

40. On 10 May 2013, the Prosecution received correspondence from advocates *J.N. Njuguna and Company* in Eldoret. The correspondence forwarded a signed affidavit from P-0397 expressing his wish to withdraw as a Prosecution witness. P-0397 did not recant the statement he gave to the Prosecution, but stated only that he “reconsidered” his decision.²⁵

41. On 14 May 2013 the Prosecution informed the Chamber of the withdrawal, [REDACTED].²⁶

42. Following P-0397's stated withdrawal [REDACTED], the Prosecution contacted the witness a number of times to discuss the circumstances of his affidavit. The most recent contact was on 2 August. During these contacts the witness reassured the Prosecution of his continued cooperation despite the affidavit. However, each time a face-to-face meeting was arranged, P-0397 failed to attend. The Prosecution tried contacting him again after 2 August, but his phone line was switched off.

²⁴ Annex F. The affidavit is not signed - it is as received by the Prosecution.

²⁵ ICC-01/09-01/11-736-Conf-Exp-AnxB.

²⁶ [REDACTED].

43. Finally, [REDACTED] in July 2013 that P-0397's status as an ICC witness was well-known in the Rift Valley and that he was being pressured to cease cooperating with the Court.²⁷

P-0516

44. P-0516 is an insider witness whose identity was disclosed to the Defence on 18 February 2013. [REDACTED].

45. The witness remained in Kenya, where the Court assisted his family to relocate in December 2012 [REDACTED].²⁸ [REDACTED] and accepted a first payment of 100,000 shillings. [REDACTED] P-0516, who told [REDACTED] that "RUTO's people" were looking for ICC witnesses so they would withdraw from the process and urged [REDACTED] to return to Eldoret.

46. On 6 July 2013, P-0516 was scheduled to attend an [REDACTED] to determine [REDACTED]. However, he failed to attend the meeting and ceased communication with Court officials.

47. Also in July, [REDACTED], as was the case with P-0397, P-0516's status as an ICC witness was well-known in the Rift Valley and that he too was being pressured to cease cooperating with the ICC.²⁹

48. The Prosecution has been unable to establish contact with P-0516 to verify his continued willingness to testify. Though no affidavit signifying withdrawal has yet been received, [REDACTED].

P-0524

49. P-0524 is an insider witness whose identity was disclosed to the Defence on 17 April 2013. [REDACTED].

²⁷ ICC-01/09-01/11-811-Conf-Exp at para. 16.

²⁸ [REDACTED].

²⁹ ICC-01/09-01/11-811-Conf-Exp at para. 16.

50. The witness was enrolled into the ICCPP on 7 March 2013 [REDACTED]. The day after his identity was disclosed, [REDACTED], was threatened [REDACTED] in Nairobi. [REDACTED].³⁰ Since this incident, P-0524's [REDACTED] has pressured him to withdraw as an ICC witness and assured him that he would be offered a good job if he did so. [REDACTED] urged him not to report his communications [REDACTED] to the ICC.³¹
51. On 26 July P-0524 informed the Prosecution that [REDACTED], disapproving of his status as an ICC witness, was going to disown him, expel him from the tribe and commit suicide as part of the traditional expulsion ritual. P-0524 also stated he was reconsidering his continued participation with the Court and that he wanted to return home to Kenya.
52. Prosecution staff met with P-0524 on 30 July 2013 [REDACTED]. The witness reiterated that he was still reconsidering his continued participation with the Court, [REDACTED]. He also denied having been offered money to withdraw.
53. Two days later, on 1 August, P-0524 sent an email to the Prosecution stating that he was withdrawing as a witness. He stated he had come to this decision "after weeks and days of soul searching" and appended to his email a handwritten letter to this effect.³²
54. The Prosecution has been unable to contact P-0524 since this time. It has information that P-0524 returned to Kenya, and in his letter of withdrawal P-0524 provided an address [REDACTED].³³
55. On 31 August the Prosecution's Public Information Desk received an email and attachments from *Arap Mitei and Company Advocates* on behalf of P-0524.

³⁰ [REDACTED].

³¹ *Ibid.*

³² Annex G.

³³ [REDACTED].

The attachments consisted of a cover letter, the previously-received handwritten withdrawal letter of P-0524, and an affidavit wherein he reiterated the reasons for his withdrawal and return to Kenya.³⁴ [REDACTED].

P-0495

56. P-0495 is an insider witness whose identity was disclosed to the Defence on 13 March 2013. [REDACTED].

57. P-0495 was relocated [REDACTED]. The Prosecution remained in regular contact with the witness, last meeting in September 2013 to help him apply for a Dutch visa to come testify in The Hague.

58. [REDACTED].

59. [REDACTED].

60. [REDACTED].

61. [REDACTED]. However, the following day, the Prosecution arrived at P-0495's hotel to discover he had checked out overnight with no forwarding information. Despite repeated attempts, it has not been possible for the Prosecution to establish contact with P-0495 since this time.

Submissions

62. All of the above-identified insider witnesses have highly relevant evidence. Following disclosure of their identities, all are now either unresponsive to the Prosecution's requests or affirmatively decline to testify. Two of the witnesses, moreover, have recanted and the Defence cite their recantations to

³⁴ Annex H.

support, in part, its allegation of a conspiracy to bring false charges. For that additional reason, their evidence is critically important.

63. As developed more fully below, the Prosecution requests that the Chamber direct the Registrar to prepare and transmit a request for assistance to the Government of Kenya, pursuant to article 93(1)(d), for the service of summonses by the GoK upon each listed witness requiring their appearance before the Court. In so doing, the Court should request the GoK to take all available measures in accordance with national law to ensure each witness' compliance with the summons and to ensure their safety, pursuant to articles 93(1)(d), 93(1)(l) and 99(1).

64. Adversarial legal systems generally emphasise the importance of witness appearance and testimony and dispose of tools to enforce it. The ICC Statute, which envisages an essentially adversarial litigation procedure during the trial phase, similarly places great emphasis on the principle of orality of evidence.³⁵ However, whilst the principle of orality articulated in article 69(2) provides that priority be given to live witness testimony at trial, the Court's statutory framework does not exclude the possibility that the evidence of witnesses may be adduced through alternative means in appropriate circumstances.³⁶

65. If the Court's ability to hear oral evidence were to depend entirely on the inclination of witnesses to appear voluntarily, it would be hostage to the continuing good will of its witnesses and at the mercy of external forces. As a result, its truth-finding function and public confidence in the accuracy of its

³⁵ Article 69(2). Although the Statute also incorporates various provisions drawn from the civil law tradition, none of these detract significantly from the importance given to live testimony of witnesses at trial.

³⁶ See for instance ICC-01/05-01/08-1386, paras. 78-80. While article 69(2) allows other forms of testimony, including oral or recorded testimony via video or audio technology, as well as the introduction of documents and written transcripts, the general rule under the provision denotes a preference for oral testimony in person.

final judgment could be significantly compromised. The Court, therefore, should take all available steps within its authority to secure the attendance of witnesses.³⁷

66. The Prosecution submits that the Court has the authority to require – through requests made to States as required – the attendance and testimony of witnesses at trial. Thus, article 64(6)(b) provides that the Trial Chamber may “[r]equire 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”.³⁸

67. Notwithstanding the Court’s statutory authority to require such attendance and testimony of witnesses, 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. That is why the article 64(6)(b) adds that the Court can require the attendance and testimony of witnesses “by obtaining, if necessary, the assistance of States as provided in this Statute”. The authority of the Court to make binding requests for judicial assistance, in turn, is set out in article 93(1), which provides that “States Parties *shall ... comply* with requests by the Court” (emphasis added).³⁹

68. As a State Party, the GoK is both empowered and obliged to assist the Court in accordance with articles 64(6)(b) and 93(1). Despite recent steps taken by

³⁷ A Trial Chamber of the ICTY faced comparable difficulties in the *Haradinaj* case: “The difficulty in obtaining evidence was a prominent feature of this trial and a few witnesses who were expected to give evidence on central aspects of the case were never heard. As described, the Trial Chamber made use of all its powers under the Rules to facilitate the reception of evidence without stepping beyond its role as an impartial finder of fact”; *Haradinaj et al.* (IT-04-84), Judgement (3 April 2008), para 22-28.

³⁸ It should be noted that these submissions relate to the compellability of witness *appearance*, not the separate issue of the compellability of witnesses to answer questions or particularly whether witnesses may be forced to incriminate themselves or family members or abandon the protections of legal privileges.

³⁹ Such requests are to accord to the forms of assistance set out in article 93, and are to be given effect under the procedures of national law. At the same time, article 88 emphasises that such national procedures must be available to enable those forms of cooperation which are specified in Part 9.

the Kenyan parliament to withdraw from the Statute and to repeal its implementing legislation, the GoK has publicly reassured the Chamber that it intends to fully cooperate with regard to the cases before the Court.⁴⁰ Moreover, even if it were to withdraw or to repeal its International Crimes Act, the GoK's obligation to assist would endure, since withdrawal or repealing of legislation does not discharge a State from its obligation to cooperate in pending cases.⁴¹ Thus, notwithstanding the Prosecution's ongoing concerns with respect to the non-execution of a number of pending requests, there is no reason why this specific request cannot be made.

69. In short, the Court has the legal authority to seek cooperation (set out below) and the treaty imposes an obligation on States to provide assistance to the Court. The Court should accordingly proceed on the assumption that the GoK will comply with its treaty obligations.

70. There are two statutory mechanisms for requesting State cooperation to secure the testimony of a non-voluntary witness under Part 9 of the Statute.⁴² Upon request of the Court, a State Party may be requested to:

- A. serve judicial documents, including a summons requiring a witness to appear before the Court, and to take measures to secure its enforcement if required, pursuant to article 93(1)(d) and 93(1)(l); or
- B. take evidence from a witness under oath before its competent authorities following national procedures and produce that evidence to the Court, pursuant to article 93(1)(b).

⁴⁰ ICC-01/09-01/11-1043, para. 15.

⁴¹ Article 127(2). Similarly, pursuant to article 27 of the Vienna Convention on the Law of Treaties, the repealing of domestic legislation would not relieve a State Party of its obligations under the ICC Statute, since a State cannot plead deficiencies or lacunae in its national laws for failure to perform a treaty.

⁴² This is to be distinguished from a State's obligation to "[f]acilitate the *voluntary* appearance of persons as witnesses or experts before the Court" (article 93(1)(e), *emphasis added*). That provision requires the States to take steps to enable voluntary witnesses to testify – such as, for example, providing essential travel documents -- and to eliminate barriers that might otherwise hinder the voluntary witness's ability to appear.

71. As set out more fully below,⁴³ due to the obstacles to the pending Prosecution requests to the GoK to secure witness testimony under option B, which the GoK appears to be unable to overcome for whatever reason, these submissions focus principally on the first option. Specifically, article 93(1)(d) provides for State cooperation in the “service of documents, including judicial documents”. Observers interpret the provision to refer to “all forms of writs and judicial records, as well as any other documentation”.⁴⁴ In other words, 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.

72. This is reflected in the implementing legislation of different States Parties, which typically include 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).⁴⁵ Pertinently, Section 86(3) of Kenya’s International Crimes Act provides for the service on behalf of the ICC of a “summons requiring a person to appear as a witness”. The preliminary part of Section 86 (at paragraph 1) cites, *inter alia*, article 64 of the Statute⁴⁶ as the legal basis for such service.

⁴³ See para. 97 below.

⁴⁴ Kress, C. and Prost, K., ‘Article 93’, in Triffterer, O. (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2008), 1576.

⁴⁵ See e.g. Section 86, *International Crimes Act* 2008 [Kenya]; Section 72, *International Criminal Court Act* 2002, Act No. 41 of 2002 as amended [Australia]; Section 5, *Act on the implementation of the provisions of a legislative nature of the Rome Statute of the International Criminal Court and on the application of the Statute* [Finland]; Section 19, *Implementation of the Rome statute of the International Criminal Court Regulations, 2002 Act* [South Africa]; Section 18, *Cooperation with the International Criminal Court Act N. 2002.329* (of 8 May 2002)[Sweden]; Article 37, *Federal Law on Cooperation with the International Criminal Court of 22 June 2001*, [Switzerland], Section 48, *The International Criminal Court Act 2010* [Uganda]; Article 17, - *Law on cooperation with the ICC and other international tribunals*, of 20 October 2004 [Lichtenstein]; Section 58, *Law on Cooperation with the International Criminal Court* [Germany]; Section 91, *The International Criminal Court Act 2006* [Trinidad & Tobago]; Section 91, *The International Criminal Court Act 2000* [New Zealand]; Section 54, *International Criminal Court Act 2006* [Ireland]; Article 28, *International Criminal Court Act 2011* [Mauritius], Article 61, *International Criminal Court Act 2007* [Samoa].

⁴⁶ Which includes the Court’s power to “require” a witness’ attendance and testimony by means of State cooperation.

73. Since the ICC has no enforcement mechanism beyond the premises of the Court, except through the authority of States, the obligation under article 93(1)(d) to serve a summons on its behalf necessarily includes an obligation to enforce -- to give effect to -- the requirement that the person appear. Indeed, without enforceability, a summons would not “require” the person’s attendance - it would be no more than an invitation to appear - and the Court would have no need for the assistance of the State to issue such an invitation.

74. Comparing the Court to other international tribunals, article 64(6)(b) also tracks, albeit not word-for-word, the authority granted to the Trial Chamber in common ICTY/R Rule 98 (Power of Chambers to Order Production of Additional Evidence).⁴⁷ Although the ICC Statute generally refrains from using the term “order” throughout the text in connection with States or third parties, it is reasonable to suggest that *requiring* attendance (ICC) and *ordering* attendance (ICTY/R) is tantamount to the same – both result from a decision by the court that attendance is necessary.

75. The Prosecution’s position that compelled witness appearance can be requested by the Court is not only driven by the logical consequences of the Chamber’s power, it is further consistent with the drafting history of the Rome Statute. Article 64(6)(b) is based, without significant variation, on draft article 38(5) of the International Law Commission’s (ILC) 1994 draft Statute. This provided that “[t]he Chamber shall, subject to this Statute and the Rules have, *inter alia*, the power on the application of a party or of its own motion, to....(b) Require the attendance and testimony of witnesses”.⁴⁸ The use of the

⁴⁷ Common ICTY/R Rule 98 provides: “A Trial Chamber may order either party to produce additional evidence. It may *proprio motu* summon witnesses and order their attendance”. Compare article 64(6)(b) “the Trial Chamber may, as necessary ... 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” – such assistance including under article 93(1)(d) “The service of documents, including judicial documents”. See also Terrier, F., ‘Powers of the Trial Chamber’, in Cassese, A. et al (eds.) *The Rome Statute of the International Criminal Court: A Commentary* (2002), 1271-1273.

⁴⁸ *Report of the International Law Commission on its work on its forty-sixth session*, 49 UN GAOR, Supp. No. 10, A/49/10 (1994), 53-54

term “require” from the outset, rather than for example, “request”, is significant in denoting from the outset that, for a criminal process to succeed, it is necessary to secure witness appearance.

76. The official records of preparatory meetings similarly reflect the absence of serious debate about this common-sense underlying assumption. The only serious controversy centred on whether witnesses and experts could be compelled to travel to the seat of the Court, including whether States could be compelled to forcibly transport witnesses across international borders to deliver them to the Court.⁴⁹ The records do not further suggest, however, that the Court could not compel *in any manner* the attendance of witnesses.⁵⁰ Indeed, the contrary appears to be true. It was accepted generally that if a witness declined to travel to the seat of the Court, their testimony would be taken in-country. Thus, draft article 56 in the Report of the 1996 Preparatory Committee provides that “witnesses or experts may not be compelled to testify at the seat of the Court. If they do not wish to travel to the seat of the court, their testimony shall be taken in the Country in which they reside or in some other place which they determine by common accord with the Court”.

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77. In this regard, the approaches adopted by various States Parties in implementing their cooperation obligations domestically are instructive, namely: how a summons for witness appearance should be constructed and what possibilities the Court has to request assistance. These approaches may be divided into three distinct categories:

⁴⁹ *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court* (A/50/22), para 233.

⁵⁰ *Ibid.*

⁵¹ *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Volume II, (A/51/22), 282.

1. Some States Parties, in implementation of article 93(1)(d), have enacted laws that expressly authorise the imposition of sanctions by the national authorities on a witness who fails to comply with a duly served summons to appear before the ICC.⁵²
2. The implementing legislation of other States Parties, including Kenya, provide for service of a summons for a witness' appearance before the Court, but are silent in their ICC implementing legislation on the consequences of non-appearance: meaning that they neither specify that a summons is purely voluntary, nor expressly define sanctions for non-compliance.⁵³ In these circumstances, however, article 93(1)(l) is engaged, which requires States Parties to provide "[a]ny other type of assistance which is not prohibited by the law of the requested State"(emphasis added).
3. A third category of States link the operation of article 93(1)(d) to article 93(1)(e) and specify that a summoned witness is under no obligation to appear before the ICC.⁵⁴

⁵² See e.g. Section 72, *International Criminal Court Act 2002* [Australia]; Section 5, *Act on the implementation of the provisions of a legislative nature of the Rome Statute of the International Criminal Court and on the application of the Statute* [Finland]; Section 19, *Implementation of the Rome statute of the International Criminal Court Regulations, 2002 Act* [South Africa]; Section 53, *Law on Cooperation with the International Criminal Court* [Germany]. See also Article 38 *Law of Georgia on the cooperation between the International Criminal Court and Georgia* (of 2003), [Georgia], stating the a summoned person is not obliged to appear if his transportation expenses are not covered by the ICC, implying that an obligation otherwise exists if such expenses are provided.

⁵³ Section 86, *International Crimes Act 2008* [Kenya], Section 66, *Cooperación con la Corte Penal Internacional en Materia de Lucha contra el Genocidio, los Crímenes de Guerra y de Lesa Humanidad* (of 4 October 2006) [Uruguay], Section 54, *International Criminal Court Act 2006* [Ireland], Article 28, *International Criminal Court Act 2011* [Mauritius], Article 61, *International Criminal Court Act 2007* [Samoa], Section 91, *The International Criminal Court Act 2006* [Trinidad & Tobago], Section 91, *The International Criminal Court Act 2000* [New Zealand], Section 31, *International Criminal Court Act 2001* [United Kingdom]; Section 18, *Cooperation with the International Criminal Court Act N. 2002.329* (of 8 May 2002) [Sweden]; Section 48, *International Criminal Court Act 2010* [Uganda]; Article 20 *Law No. 07-002 Law on cooperation with the ICC* [Comoros].

⁵⁴ Section 16, *Federal Law n° 135: Cooperation with the International Criminal Court 2002* [Austria]; Article 37 *Federal Law on Cooperation with the International Criminal Court of 22 June 2001* [Switzerland]; Article 17, *Law on cooperation with the ICC and other international tribunals* [Lichtenstein]; Section 433, *Code of Criminal Procedure (Act No. 141/1961 Coll., as amended)* [Czech republic]; Article 154, *Law No. 144/99, of 31 August, on International Judicial Cooperation in Criminal*

78. Thus, this brief analysis of the implementing legislation of States Parties shows that the Court can request State assistance to secure the appearance of a non-cooperative witness where the national law of the requested State either *expressly permits* (Category 1),⁵⁵ or in the alternative *does not prohibit* (Category 2),⁵⁶ the Chamber from requesting such assistance.

79. With respect to Kenya, the International Crimes Act appears to distinguish between (i) “a summons *requiring* a person to appear as a witness” (emphasis added) pursuant to article 93(1)(d) (regulated under Section 86 of the Act) and which contains no reference to voluntariness, from (ii) the facilitation of “voluntary appearance” pursuant to article 93(1)(e) of the Statute (regulated under Sections 87-89 of the Act) where voluntariness serves as a prerequisite.

80. Since the mechanism for providing the assistance depends on the procedure under national law, the meaning of the term “summons”, as interpreted and applied under national law, may establish enforceability of a summons issued pursuant to article 93(1)(d). Under Sections 144-149 of the Kenyan Criminal Procedure Code, witnesses who are summoned to appear following service by the competent national authorities are compellable, and their non-appearance is punishable.⁵⁷ It thus appears that a “summons” – an existing legal term under Kenyan law and the same term used in the International Crimes Act -- means a judicial order that can be enforced through coercive means when required. As the ICC’s requests are given effect through domestic procedures,⁵⁸ the Court can request the GoK to enforce a summons

Matters [Portugal]; Article 473, *Criminal Procedure Code* (of 29 April 2006) [Bulgaria], Section 536 *Criminal Procedure Code* (Law No. 301 of 2005) [Slovakia]; Introduction to the *International Criminal Court (Implementation) Act* [Netherlands]. Accordingly, with respect to obtaining assistance from witnesses located in such States, the Court might have to pursue assistance under article 93(1)(b). For reasons set forth *infra*, the Prosecution does not consider that a request to the GoK pursuant to article 93(1)(b) is feasible as an alternative in the instant case.

⁵⁵ Pursuant to domestic modalities implementing article 93(1)(d).

⁵⁶ Meaning that the Court can make a request for any other type of assistance under article 93(1)(l).

⁵⁷ Criminal Procedure Code (Rev. 2009) [Kenya], Sections 144 -149.

⁵⁸ Articles 88, 93(1) and 99(1).

duly served on its behalf in accordance with relevant procedures under national law and in the manner specified by the Court in its request.

81. As prefaced above, apart from article 93(1)(d) the Court can also rely on article 93(1)(l) to request the enforcement of a summons duly served, if required. This provision enables the Court to seek “[a]ny other type of assistance which is not prohibited by the law of the requested State”. This sub-article has been described 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.⁵⁹

82. Article 93(1)(l) was expressly formulated as an open-ended provision given the many varied and as yet unpredictable types of assistance the Court may need in the future. Thus, article 93(1) is structured into (i) a list of minimum measures that all States Parties must provide for (including by having national procedures available for each specified form pursuant to article 88); and (ii) a catch-all, open ended proviso that enables the Court to request of States “any other type of assistance”. Since the latter is potentially limitless and to avoid placing on States obligations to execute measures that might potentially be illegal in the requested State, the formulation stipulated is that the requested State is not obliged to provide something that is prohibited under its national laws.

83. Put another way, article 93(1)(l) does not rely on the positive inclusion of an enabling provision in national law for the measures sought, but is drafted in the negative – the absence of a prohibition. If the national law of a requested State is silent, and thus does not prohibit the requested measure, the ICC can request it. It is thus open for the Court to seek State assistance in not merely “serving” a summons, but more specifically in securing compliance with it.

⁵⁹ Kress and Prost, in Triffterer (2008), 1579. See also article 93(3).

To the Prosecution's best information, nothing in Kenya's law prohibits a request that the GoK require the presence of the summoned witness through compulsory measures.⁶⁰ On the contrary, as noted above, its national law elsewhere provides for the enforcement of a 'summons' through coercive measures.⁶¹

84. Thus, a request to the GoK for its assistance in the appearance of witnesses pursuant to articles 93(1)(d) and 93(1)(l) would give effect to the power of the Trial Chamber to "require the attendance and testimony of witnesses ...by obtaining, if necessary, the assistance of States as provided for in this Statute".

85. To be clear, the Prosecution is not asking the Court to request Kenya to physically transport witnesses to The Hague to give testimony at the seat of the Court. However, the ICC can request Kenya to take a number of other measures to enforce summonses served on witnesses in order to secure their appearance before the Court.

86. Specifically, the Court can request the GoK to serve a summons for a witness to appear before the ICC at a suitable venue on the territory of Kenya. Such testimony could then be heard by means of video-link technology, through a confined series of *in situ* hearings, or through the possible use of video-link in combination with counsel present in Kenya.⁶² The exact modalities of how such testimony would be heard could be determined separately, following submissions from the parties and participants and the Registrar.⁶³ The critical

⁶⁰ *Supra* para 79. *See also* the open-ended formulation of Section 108 of the International Crimes Act [Kenya], implementing article 93(1)(l) of the Statute. Only in the cases of States Parties that have affirmatively declined to impose a legal obligation on summoned witness to appear before the Court, is the Court barred from making a request to seek to have a summons enforced – *see supra* para 77.

⁶¹ *Supra* para 77.

⁶² Kress and Prost in Triffterer (2008), 1579; Bitti in Triffterer (2008), 1213.

⁶³ Modalities for the hearing of live witness testimony by means of video-link technology in accordance with Rule 67, for example, have been considered in the *Lubanga* and *Bemba* cases *see* ICC-01/05-01/08-2865-Red, paras 13-14, citing ICC-01/05-01/08-2490-Red and ICC-01/05-01/08-2497, 6 February 2013, ICC-01/05-01/08-2500, paras 29-30; ICC-01/05-01/08-2101-Red2, para 6; ICC-01/05-01/08-947-Red,

aspect is that national authorities could thereby be requested to apply their existing domestic powers to secure the attendance of summoned witnesses in Kenya for the purpose of testimony before the ICC.

87. Turning to scholarly authorities for and against the Prosecution's submissions, several commentators accept that the ICC has the power to request States Parties to summon witnesses to appear before it, as a consequence of the Trial Chamber's authority under article 64(6)(b) to require witness attendance.⁶⁴ In so doing, they note that the facilitating of voluntary appearance under article 93(1)(e) is but one form of possible assistance and does not prevent the Court from requesting other types of assistance. These include assistance sought pursuant to the Chamber's authority to require witness attendance pursuant to article 64(6)(b) and the Court's power to seek "any other type of assistance" under article 93(1)(l).⁶⁵

88. In contrast, some commentators appear to take as granted, without further discussion, that the States' obligation to facilitate "voluntary appearance" under article 93(1)(e) constitutes the sum total of their duty to the Court.⁶⁶ One commentator offers a more detailed exposition of why the Court cannot

paragraph 10; ICC-01/05-01/08-2525-Red, para 7; ICC-01/05-01/08-2101-Red2, para 7; ICC-01/05-01/08-947-Red, para 13.

⁶⁴ Kress, C. and Prost, K., 'Article 93', in Triffterer, O. (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2008), 1576-77, 1579; Bitti, G., 'Article 64', *ibid*, 1213; Friman H. 'Sweden', in Kress et al (eds.), *The Rome Statute and Domestic Legal Orders Vol II* (2004), 409; Terrier, F., 'Powers of the Trial Chamber', in Cassese et al (2002), 1271-1273; Broomhall B and Kress C, 'Implementing Cooperation Duties under the Rome Statute: A Comparative Synthesis', in Kress et al (2004), 529; Rastan, R. "Testing Co-operation: The International Criminal Court and National Authorities", 21 *Leiden Jrnl Int'l Law* (2008), 436.

⁶⁵ See *ibid*.

⁶⁶ Ciampi, A., 'Other Forms of Cooperation', in Cassese et al (2002), 1729; 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; Ambos, K. "The Right of Non-Self-Incrimination of Witnesses Before the ICC", *Leiden Journal of International Law* 15:169; Schabas, W., *The International Criminal Court – A Commentary on the Rome Statute* (2010), 1020.

require non-voluntary witness attendance and that States Parties that so provided in their implementing legislation have acted *ultra vires* the Statute.⁶⁷

89. Sluiter considers firstly, notwithstanding the wording of article 64(6)(b), that this provision is of minimal effect because no notion of compellability is linked to witness appearance in article 93, which refers only to facilitating voluntary appearance under article 93(1)(e). Noting the apparent “discrepancy” between the two provisions (which is ascribed to poor legislative drafting), the author suggests that article 64(6)(b)’s ability to “require” witnesses to attend could only have been intended to apply to witnesses already before the Court.⁶⁸ A distinction is further suggested between “requiring” the testimony of witnesses and “ordering” them to testify.⁶⁹ The Court’s authority to “require the attendance and testimony of witnesses”, in this regard, is said to merely reflect the Chamber’s function to assure itself of the sufficiency of evidence and the adoption of expeditious and fair procedures.⁷⁰

90. Sluiter further argues that, since a witness’ consent is required for his/her transfer to the Court to testify where that witness is held in the custody of a State (article 93(7)), logically the same requirement of voluntariness should be afforded prospective witnesses who are not in custody.⁷¹ Because article 70 does not provide a sanction if summoned witnesses fail to appear before the Court, it is further argued that the Statute deliberately excluded compulsion of witness appearance.⁷² In fact, witnesses are deemed to

⁶⁷ Sluiter, G. “I Beg You, Please Come Testify”– The Problematic Absence of Subpoena Powers at the ICC’, 12 *New Criminal Law Review* (2009), 590-608.

⁶⁸ *Ibid*, 596-600.

⁶⁹ *Ibid*, 600.

⁷⁰ *Ibid*, 599. The argument appears to suggest that a Chamber might require, e.g., a witness who previously testified to be recalled in order to satisfy itself as to the credibility or weight to be attributed, but the burden would remain on the parties to ensure appearance and testimony, rather than on the witness.

⁷¹ *Ibid*, 600.

⁷² *Ibid*, 598-601.

possess a general right under the Statute not to be compelled to appear before the Court.⁷³

91. Overall, Sluiter's analysis appears to equate the absence of an obligation on States or the Court to compel a witness to *travel*, with the absence of a power to compel witness *appearance*. It also relies on a distinction between "requiring" and "ordering", but cites nothing in the Statute, Rules, or drafting history to support the proposition that the two words, in this context, have divergent meanings. The argument that the Chamber's powers under article 64(6)(b) apply only to witnesses already before the Court is also unsatisfactory, since it renders wholly meaningless the phrase "by obtaining, if necessary, the assistance of States as provided in this Statute": if the Chamber has the power only to require the attendance and testimony of persons who are already attending and testifying, that quoted language could never be invoked, because State assistance would never be necessary. If, as the commentator alternatively appears to suggest, the demand for particular witnesses or evidence were to be made only of the parties, the Statute would not have authorized the Chamber to seek "the assistance of States". It would also render superfluous article 64(6)(d).

92. The related arguments against powers of compulsion seem to give decisive weight to the impact of article 93(1)(e) – facilitating the voluntary appearance of a witness or expert – in order to suggest that this represents the limit of the assistance that States may provide in securing the appearance of a witness before the Court. However, not only does this conflict with the provisions of article 64(6)(b), which authorizes the Court to seek the assistance of States in requiring witnesses attendance, this argument also ignores article 93(1)(d). As noted above, the latter provision obligates States to serve judicial documents and has been typically understood (and implemented) by States

⁷³ *Ibid*, 599-601.

Parties, including Kenya, to include summonses for witnesses to appear before the Court. Furthermore, another provision, article 93(1)(l), includes in the Statute a catch-all provision to enable the Court to request “any other types of assistance” that is not “prohibited by the law of the requested State”.⁷⁴ Therefore, to argue that article 93(1)(e), which is included in a non-exhaustive list, has the consequence of excluding all other non-mentioned measures would limit the scope of article 93(1)(l) contrary to its express open-ended formulation. It would also be contrary to ordinary rules of treaty interpretation, as it would defeat the application and scope of the latter provision.⁷⁵ As has previously been held, the provisions of the Statute must be interpreted in a manner which results in a coherent, rather than an internally inconsistent, whole.⁷⁶

93. The argument that since witnesses in custody must consent to their transfer, so too must non-detained persons, is also unsatisfactory. Sluiter’s argument incorporates an express prohibition against the involuntary transfer of a person from a prior custodial setting (article 93(7)) into a wholly different provision (article 93(1)), as if the aspect of custody that distinguishes the two provisions were irrelevant. There are particular penal policy considerations that render the situation of prisoners distinguishable from that of ordinary citizens.⁷⁷ That is why it is commonly provided in modern-day treaty

⁷⁴ Kress and Prost, in Triffterer, (2008), 1579.

⁷⁵ Article 31-32, *Vienna Convention on the Law of Treaties* (1969). Notably, article 93(1) of the Statute is structured into (A) a list of minimum measures (sub-paragraphs (a)-(k)) that all States Parties must provide for, and in respect of which national procedures must be available pursuant to article 88 for each specified form of cooperation, and (B) a catch-all open ended provision (sub-paragraph (l)) that enables the Court to request “any other type of assistance”. Since the latter is potentially limitless and to avoid placing on States obligations to execute measures that might potentially be illegal in the requested State, the provision stipulates that the Court cannot request the State to provide something that is prohibited under its national laws.

⁷⁶ *Lubanga*, Decision on the confirmation of charges, ICC-01/04-01/06-803-tEN (29 January 2007), para. 283-4; *Bemba*, Decision Adjourning the Hearing pursuant to Article 61 (7)(c) (ii) of the Rome Statute, ICC-01/05-01/08-388, paras. 34-36.

⁷⁷ For examples of penal policy objectives and humanitarian considerations that give rise to traditional consent requirements for inter-State prisoner transfers see Explanatory Report, *Convention on the Transfer of Sentenced Persons* (Council of Europe ETS No. 112), para 9; <http://conventions.coe.int/Treaty/EN/reports/html/112.htm>.

relationships that the consent of the person as well as the State be required in this context.⁷⁸ Indeed, the drafting history suggests that article 93(7)'s requirement for prisoner consent to temporary transfer was copied from traditional inter-State vocabulary without detailed consideration.⁷⁹ As described above, States themselves in their implementing legislation do not appear to be troubled by any apparent incongruity between the need for consent before temporarily transferring a prisoner and the absence of a consent requirement in other witness appearance contexts. Nor should this Court. In any case, Sluiter's argument is not applicable in the instant application as the Prosecution is not seeking the transfer of any prisoner out-of-Kenya to the seat of the Court to testify. All witnesses referred to in this application are located within Kenya, and none (to the best of the Prosecution's knowledge) are in custody.

94. Moreover, rule 193, which provides for the temporary transfer of a prisoner sentenced by this Court from the State of enforcement has no requirement of consent before transfer. On the contrary, it envisages compelled appearance.⁸⁰ The argument that article 93(7) creates an absolute principle, thus, is defeated by rule 193. If there is no general principle that bars non-voluntary appearance for all sentenced persons, still less can one be extrapolated to apply as a fundamental right to all persons generally.

⁷⁸ For near identical provisions to those contained in article 93(7) see *International Convention for the Suppression of the Financing of Terrorism*, A/RES/54/109 (9 December 1999), article 16; *United Nations Convention against Transnational Organized Crime*, A/RES/55/25 (15 November 2000), article 18(10); *United Nations Convention against Corruption*, A/RES/58/4 (31 October 2003), article 46(10). See also *Model Treaty on Mutual Assistance in Criminal Matters*, A/RES/45/117 (14 December 1990), article 13.

⁷⁹ Kress and Prost, in Triffterer (2008), at 1576, describe as "unconvincing" the proposition that as the transfer of persons in custody to the ICC is dependent on consent the same must be *e fortiori* true for all other witnesses, arguing that it "gives by far too much prominence to a provision that deals with a very specific procedural scenario and, regrettably, does so in the form of a wording that was too hastily copied from tradition [*sic*] inter-State vocabulary".

⁸⁰ Rule 193(1) specifies that the Chamber may order the temporary transfer of a sentenced person whose testimony is necessary to the Court and that the provisions of article 93(7) shall not apply.

95. Finally, the unavailability of a criminal penalty under article 70 for the failure of a witness to comply with a summons is similarly non-dispositive. Clearly, the drafters could have included this as an affirmative obstruction offense.⁸¹ They chose not to do so. There is no reason, however, to read that decision as a signal that witness summonses cannot be enforced. Instead, article 64(6)(b) envisages that *States* will provide cooperation to secure witnesses attendance; thus, it is left to the relevant State, rather than the Court, to enforce compliance. And, in fact, some States have expressly done so at the national level.⁸²

96. The Prosecution notes that as an alternative to requesting a State Party to serve and enforce a summons on a witness to appear before the Court, there is a second potential remedy, as noted above.⁸³ Article 93(1)(b) requires a State Party, in accordance with its treaty obligation, to take sworn witness testimony domestically and to produce that evidence to the Court.⁸⁴ Typically, States Parties, including Kenya, rely on domestic powers under national law to enable that witness' compelled appearance, if required, in the same way they would in relation to any national criminal case.⁸⁵

⁸¹ This is perhaps the key difference with the *ad hoc* Tribunals which do list as a contempt offence "without just excuse fails to comply with an order to attend before or produce documents before a Chamber" (Rule 77(A)(iii)). However, this is because the ICTY Appeals Chamber has held that the Tribunal has the power to directly address itself to individuals acting in a private capacity (as opposed to State officials) (see *Blaskic Subpoena Interlocutory Appeal*, IT-94-14, 29 October 1997), whereas under the Rome Statute the system under Part 9 is that all witness summonses (to both individuals acting in a private capacity and State officials) are to be served through the national authorities, meaning that the ICC addresses itself to the requested State, not directly to individuals.

⁸² *Supra* fn 51.

⁸³ *Supra* para 70.

⁸⁴ Article 99(1) further provides that State Parties are to execute assistance requests, unless prohibited under national law "in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process". Thus, the Court could request conceivably that the parties and participants be permitted to attend and participate in domestic evidence taking process by posing questions, either directly or through the competent magistrate, to the witness.

⁸⁵ See e.g. Section 77-80, *International Crimes Act 2008* [Kenya]; Section 69, *International Criminal Court Act 2002*, Act No. 41 of 2002 as amended [Australia]; Sections 18(1), 23 *Mutual Legal Assistance in Criminal Matters Act R.S., 1985, c. 30 (4th Supp)* [Canada]; Section 29(3)(a), *International Criminal Court Act 2001* [United Kingdom]; Section 52(3)(a)(i), *International Criminal Court Act 2006* [Ireland], Section 46, *The International Criminal Court Act 2010* [Uganda]; Section 85, *The International Criminal Court Act*

97. Though the statutory provision exists, the Prosecution does not believe that it is currently practicable in Kenya. As has been noted previously,⁸⁶ requests pending since 2010 to interview police witnesses about their observations of PEV have been indefinitely thwarted by a Kenyan High Court preliminary interim injunction against the taking or recording evidence from “any Kenyan” for the purposes of the “International Criminal Court” process.⁸⁷ As long as that injunction remains in place, a request to GoK under article 93(1)(b) would not be effective.⁸⁸ Even if this obstacle could be overcome, however, the Prosecution submits that, given the current circumstances, it would be far preferable to have the witnesses testify directly before the Chamber, for a number of reasons, *inter alia*:

- A. While option B is a convenient method of obtaining evidence during the investigation stage, it is less suitable for use during a running trial. There are inherent delays in obtaining the evidence through formal channels which may unduly delay proceedings.
- B. Secondly, the written record of the proceedings (or even a video recording thereof) which would be transmitted to the Court would be a poor substitute for the ability to observe the witnesses’ evidence live and have the opportunity to detect nuances in the evidence and demeanour which might otherwise be missed.
- C. Thirdly, direct testimony before the Court will allow the Chamber to apply uniform standards for the conduct of proceedings, security of witnesses which will enhance the probative value of the evidence

2006 [Trinidad & Tobago]; Section 85; *The International Criminal Court Act 2000* [New Zealand]; Article 50(1)(a),

the *International Criminal Court (Implementation) Act* [Netherlands]; Section 18, *Implementation of the Rome statute of the International Criminal Court Regulations, 2002 Act* [South Africa].

⁸⁶ ICC-01/09-01/11-730-Red, paras 20-24.

⁸⁷ High Court Petition Number 2 of 2011, *Jackson Mwangi et al., v. The Attorney General et al.*, 1 February 2011.

⁸⁸ ICC-01/09-02/11-755, para 7.

and ensure the physical and psychological wellbeing of the witnesses.

- D. Finally, if option B is followed, the direct participation of the parties (at least those who do not have right of appearance in Kenya) will not be possible. This may be satisfactory in relation to routine witnesses giving evidence of a formal or technical nature, but not in the present circumstances. Given the importance of these witnesses, the complexity of their evidence and the fact it may be anticipated that some if not all may be hostile to the party calling, requiring possible impeachment procedures, the direct participation of those seized with the prosecution and defence of the case is imperative.

Conclusion

98. The Prosecution has exhausted all avenues of legitimate persuasion with the seven witnesses to secure their voluntary attendance. The indications are that, for whatever reason or reasons, they will not attend to give evidence unless compelled to do so.

99. The presence of these witnesses is particularly important. The statements provided by these witnesses address the core planning events and the allegations of personal involvement by the two Accused. The witnesses' evidence will be necessary for the Prosecution's presentation of its case and for the Chamber's determination of the truth. The interests of justice are best served by having these witnesses appear and testify.

Relief requested

100. The Prosecution respectfully requests the Chamber to order the Registrar, in consultation and cooperation with the Prosecution, to request assistance, pursuant to article 93(1)(d), article 93(1)(l) and article 99(1),

- A. for the service of summonses by the Government of Kenya on each of the witnesses concerned;
- B. for the Government of Kenya's assistance in compelling and ensuring the appearance of the summoned witnesses for testimony before the Court on the territory of Kenya; and
- C. for the Government of Kenya to make appropriate arrangements for the security of the witnesses until they appear before the Court.



Fatou Bensouda, Prosecutor

Dated this 29th day of November 2013

At The Hague, the Netherlands