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Date: **11 February 2014**

TRIAL CHAMBER V(A)

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

Prosecution reply to the RUTO Defence's 8 January 2014 and the SANG Defence's 8 January 2014 responses to the Prosecution's request under article 64(6)(b) and article 93 to summon witnesses and variation of time limits under Rule 35(2)

Source: **The Office of the Prosecutor**

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Introduction

1. On 5 December 2013 the Prosecution submitted its "Corrected and amended version of "Prosecution's request under article 64(6)(b) and article 93 to summon witnesses" (ICC-01/09-01/11/1120-Conf-Exp)", hereafter "Prosecution Application".[1] The Defences for Mr. RUTO and for Mr. SANG both submitted their responses to the Prosecution Application on 8 January 2014.[2]

2. On 16 January 2014 the Prosecution sought leave to reply to the Defence responses.[3] On 17 January 2014 the Defence for both accused filed their joint response, opposing the Prosecution request for leave to reply.[4]

3. On 29 January 2014 the Chamber partially granted leave to reply and ordered the Prosecution to file this by no later than 12 February.[5]

Confidentiality

4. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, the Prosecution requests that this reply be classified as confidential, since it relates to confidential Defence responses and since factual issues relating to witnesses are traversed. A public redacted version will be filed in due course.

Submissions

(i) Article 93(1)(e) deals exhaustively with witness appearance

5. The SANG Defence argues that article 93(1)(e) is "the exclusive provision when dealing with the very specific issue of witness appearance"[6] and the

[1] ICC-01/09-01/11-1120-Conf-Red-Corr2
[2] ICC-01/09-01/11-1136-Conf-Red and ICC-01/09-01/11-1138-Conf respectively.
[3] ICC-01/09-01/11-1148-Conf.
[4] ICC-01/09-01/11-1149-Conf.
[5] ICC-01/09-01/11-1165.
[6] ICC-01/09-01/11-1138-Conf, para. 59.

RUTO Defence that due to the phrase "'*[a]ny other type of assistance*'"[7] under article 93(1)(l) any other requested form of assistance with respect to witness testimony is therefore foreclosed.[8] Although the assistance type regulated under article 93(1)(e) refers to "*[f]acilitating the voluntary appearance* of persons as witnesses and experts before the Court" (emphasis added), the RUTO Defence argues that any assistance type which is similar is *per se* prohibited, as article 93(1)(e) exhaustively deals with the issue of witness appearance.

6. The Defence's submission seeks to limit the scope of article 93(1)(l) contrary to its express open-ended formulation. The Prosecution observes that article 93(1)(e) deals with requests for one possible form of witness appearance: a State's *facilitation* of *voluntary* witness appearance. It clearly does not treat other types of witness appearance, and as such cannot be said to exhaustively deal with witness appearance as an assistance "type".

7. No such limitation is present in article 93(1)(l), which the Prosecution recalls was intentionally drafted as "catch all" provision to encompass all other forms of assistance not expressly stipulated in articles 93(1)(a)-(k).[9] The fact that some States Parties have envisaged the Court requesting assistance beyond mere facilitation of voluntary witness appearance demonstrates that the presence of no such limitation should be presumed. To hold otherwise would be to suggest that States that have so provided in their domestic legislation have invited the Court to act *ultra vires* its own Statute.

8. The better position, as expressed by the Prosecution, is that States Parties retain a choice in how they implement the Rome Statute: they can go beyond

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[7] ICC-01/09-01/11-1136-Conf-Red, para. 8.
[8] ICC-01/09-01/11-1136-Conf-Red, para. 8.
[9] As the drafting history shows, there were different positions on whether the cooperation regime of the Court should include an exhaustive or non-exhaustive list of assistance types or categories. The solution was to provide for an enumerated list of assistance types that must be provided by all States Parties, and a non-exhaustive final provision that enabled the Court to request any other type of assistance; *see* UN Doc. A/51/22 Vol.I (1996), p.70 and A/51/22 Vol.II (1996), pp. 252-253. This is reflected in the approach taken in article 93(1)(a)-(k) and (l).

the minimum forms of assistance listed in article 93(1)(a)-(k) by providing for additional forms of assistance.[10] The Court, in turn, can request State Party assistance with respect to measures going beyond the minimum types stipulated in article 93(1)(a)-(k), by asking for any other type of assistance which is not prohibited in the national law of the requested State: meaning types of assistance that the State either expressly provides for vis-à-vis the Court, or measures which, even though not present in its ICC implementing legislation, can nonetheless be made available to the Court at its request, since there is no prohibition against the requested measure in national law.

(ii) States are under no obligation to enforce requests under article 93(1)(l)

9. The RUTO Defence also asserts that notwithstanding the fact that article 93(1)(l) and article 64(6)(b) may create an international obligation of persons to appear before the Court, "*States are under no duty to enforce that obligation*", citing the Triffterer commentary in support.[11]

10. The Prosecution submits that the Defence has incorrectly cited the authority. The authors responsible for the Triffterer Commentary chapter dealing with Part 9, Claus Kress and Kimberly Prost, both direct participants in the negotiations, make an entirely different point. In fact, the authors are rejecting the idea of forcibly enforcing the physical appearance of witnesses at the seat of the Court.[12] This is made clear when they subscribe "this view" to Bitti, another participant in the negotiations responsible for the 'article 64' entry in the same commentary. In the latter, Bitti resolves the apparent inconsistency between articles 64(6)(b) and 93(1)(e) by stating: "This does not mean that the Trial Chamber can not [*sic*] summon a witness but simply that a State Party is under no obligation according to article 93 to compel a witness to appear

[10] Prosecution application paras. 82-83.
[11] ICC-01/09-01/11-1136-Conf-Red, paras. 19-21.
[12] Kress, C. and Prost, K., 'Article 93', in Triffterer, O. (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd Ed, 2008), p. 1576-1577.

before the Court *although it may provide for such a procedure in its implementing legislation if it so wishes*".[13] Any doubt as to whether Bitti is referring to forcibly ensuring physical witness appearance is removed by the following sentence: "Thus, if a witness, whose attendance and testimony is required by the Trial Chamber, *doesn't want to travel to the seat of the Court* one solution could be for the Trial Chamber to obtain the assistance of the State Party for the testimony to be given before the national authority or by means of video-conference."[14]

11. Contrary to the RUTO Defence suggestion, Kress and Prost do not argue that States Parties have no obligation to enforce requests made pursuant to article 64(6)(b) beyond mere facilitation of voluntary appearance. This is made clear from the entry accompanying 'article 93(1)(l)' by the same authors, which reads: "In addition to the listed types of assistance, States Parties are *obliged* to grant any type of assistance to the ICC that is not prohibited by their national law. This 'catch all' provision was included to accommodate emerging or varied types of assistance which might be required in any particular case. However, in fairness to States Parties, as the type of assistance is not specified under this paragraph, it would not be appropriate to place a *general obligation* on a State to comply with such requests, when the nature of the obligation cannot be specified. Thus, the *obligation* is limited to that which is not prohibited under national law…"[15] (emphasis added).

12. In the above passage, the authors distinguish between a general obligation to provide cooperation and a specific obligation with respect to measures under

[13] Bitti, G., 'Article 64', in Triffterer (2008), p.1213. emphasis added.
[14] *Ibid.*, emphasis added. The Prosecution understands the latter two options described above as referring to requests under article 93(1)(b) or requests for oral witness testimony to be provided before the ICC via video-technology, as described in the Prosecution's application. Bitti concludes: "[i]ndeed, even if States Parties are not under an obligation to force the appearance of witnesses before the ICC, they should be under an obligation to comply with an order of the Trial Chamber requiring the attendance and testimony of a witness and summon that witness to appear before a national Court." As the Prosecution has submitted in its application, the same considerations should apply to requests for States to enable witness appearance and testimony before the ICC via video-conference; *see below* Kress/Prost.
[15] Kress, C. and Prost, K., 'Article 93', in Triffterer, O. (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd Ed, 2008), p. 1579.

article 93(1)(l).[16] As the authors make clear, States Parties *are obliged* to provide for requests under article 93(1)(l). The extent of that obligation (its scope), however, is not circumscribed by the Rome Statute (since article 93(1)(l) refers to non-specified measures), but by national law (namely, that which is not prohibited by national law). In view of this, the authors refer to "the less stringent character of the obligation to cooperate in *littera l*" generally[17]; but not to the absence of an obligation to comply.

13. Moreover, that the obligation of States under Part 9 also extends to complying with requests under article 93(1)(l) is evident from the wording of article 93(3), which refers to possible difficulties that may arise for a State in respect of a request presented under article 93(1). In such case, the requested State must consult promptly with the Court in order to try to "resolve the matter", to consider whether the assistance "can be rendered in another manner or subject to conditions", or if the request needs to be modified as necessary. No distinction is made from requests presented under separate limbs of article 93(1). Clearly, if States Parties were under no duty to comply with requests under article 93(1)(l), such consultations or modalities would not be stipulated as necessary.[18]

14. Notably, the authors cited by the RUTO Defence actually go on to describe the very scenario envisaged by the Prosecution as an assistance type that would fall within the scope of article 93(1)(l) - which, as the Prosecution has argued, could be pursued pursuant to a decision under article 64(6)(b).[19] Moreover, although as noted above Kress and Prost suggest that requests

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[16] This arises from the structure of Part 9, which provides in article 88 that "States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation *which are specified* under this Part" (emphasis added). As it is only in subparagraphs (a)-(k) of article 93(1) that forms of cooperation are specified, it is in relation to these measures that States Parties must ensure the existence of national procedures – as States cannot be requested to ensure something that is not specified.

[17] Kress, and Prost, in Triffterer, p. 1579. However, see para. 14.

[18] The obligation to consult to resolve apparent difficulties arising from requests under Part 9 is found in article 97.

[19] Kress, and Prost, in Triffterer, p. 1579.

under article 93(1)(l) would generally carry a less stringent obligation since there is a risk that States Parties may be "surprised by a request for an unforeseen form of cooperation alien to their national order", they go on to observe that "[t]his consideration is inapplicable to the specific case of a witness interview to be conducted through video-link".[20] This is because the importance of such assistance is "explicitly recognised" in article 69(2) and rule 67. As the authors note, "State Parties can hardly be allowed to first recognise in Part 6 the importance and desirability of video-conferences in Part 6 and then deny cooperation upon being requested accordingly". As such, in the light of the explicit contemplation of the hearing of oral testimony by such means in the Statute and Rules, the authors state that a request for such measures pursuant article 93(1)(l) would in fact carry a "more stringent obligation" to cooperate, including, notably, "the duty to compel the witness to appear and to testify before the Court through use of the technique in question".[21]

(iii) Article 93(1)(l) cannot permit different outcomes based on different national laws

15. The RUTO Defence and the SANG Defence further argue that the Statute excludes an interpretation of article 93(1)(l) that would allow for different outcomes from different States Parties depending on the provisions of their national laws.[22]

16. Although the Prosecution acknowledges that divergence in national implementation may detract from the overall uniformity of the cooperation regime among States Parties, scope for such divergence is inevitable from the

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[20] I.e. "the establishment of a video-link from the Hague to the location of the witness"; Kress, and Prost, in Triffterer, p. 1579.
[21] *Ibid*. The authors go on to suggest that the Court should bear related costs in the use of such technology, and cite to the regime outlined in article 10 of the European Union Convention on Mutual Legal Assistance in Criminal Matters of 29 May 2000 (2000/C 197/01) entitled "Hearing by videoconference", which deals *inter alia* with matter related to organisation, objections, costs, rights, summonses, compellability of appearance and under whose jurisdiction and direction the hearing is conducted.
[22] ICC-01/09-01/11-1136-Conf-Red, para 26; ICC-01/09-01/11-1138-Conf, para. 57.

fact that any assistance that relies on article 93(1)(l) is *ipso facto* dependent on the permissible scope of national law ("any other type of assistance *which is not prohibited by the law of the requested State*…", emphasis added).

17. Clearly, States Parties are expected to uniformly provide for the forms of assistance specified under article 93(1)(a)-(k). Indeed, such uniformity is a necessary consequence of the obligation under article 88 to "ensure that there are procedures available under their national law for all of the forms of cooperation *which are specified* under this Part" (emphasis added). Thus, with respect to the minimum forms of judicial cooperation specified under article 93(1)(a)-(k), the Statute does not permit variation between States Parties.[23]

18. The situation is quite different, however, with respect to those others forms of assistance that may be requested pursuant to article 93(1)(l). The latter provision has two components: it refers to (i) unspecified measures, which (ii) must not violate national law. As the possible range of unspecified measures not violating national legislation will depend on the limitations in each State's laws, there will be no uniformity across States Parties in how they might receive and implement requests under article 93(1)(l).

19. Thus, beyond the minimum specified forms of assistance, variation of practice is to be expected. Indeed, such variation is specifically envisaged in Article 93(1)(l). This is also evident from the practice of States Parties, which shows that national ICC implementing legislation, in relation to measures going beyond the minimum provided for in article 93, differ in what they explicitly provide for, what they prohibit, and what they remain silent on (neither prescribe nor proscribe).[24] Unless the Court is to hold States Parties in violation of the Statute by exercising their sovereign discretion to implement

[23] As mentioned earlier, while States Parties may go beyond those minimum measures, a baseline standard for judicial assistance is established by the forms of cooperation stipulated in article 93(1)(a)-(k).
[24] Prosecution Application paras. 77-78.

the Statute in this manner, national law will always permit different possibilities for requests from the Court based under article 93(1)(l) – based on the scope of such national law.

20. Indeed, differences between States in their domestic law is one of the reasons why States during the negotiations adopted only a minimal list of measures that all States Parties must expressly provide for, together with an open-ended "catch all" provision for other assistance types not prohibited by national law.[25] By way of further illustration in reply to the Defence responses, with respect to witness appearance specifically, negotiating States were concerned that "*the arrest and forcible transfer of recalcitrant witnesses to the Court creates problems for many States*" - i.e. variation in national law did not permit an agreed formulation for the taking of compulsory measures against recalcitrant witnesses.[26] The suggested solution noted in footnote 95 of the 1996 Preparatory Committee document addressing this matter, however, was not to deprive the Court of the possibility of seeking testimony from such witnesses, but to contemplate other options. As the footnote continues: "*Provision could be made in the rules of the Court for the Court to accept testimony recorded by the requested State in alternative ways, for instance by way of video recordings (see footnote 106 below). Another alternative would be to allow the Prosecutor/ Court to take a deposition from such a witness within the territory of the requested State, provided of course that the defence would also be allowed to cross-examine the witness if the Prosecutor takes the deposition*."[27] Footnote 106 referred to in the quotation above reads: "*In this regard it is conceivable that testimony could, for instance, be recorded electronically and made available to the Court in that format. It should be considered whether it is necessary to include a specific provision to the effect that the Court will be allowed to receive and consider such testimony. See*

[25] Prosecution Application, para. 82.
[26] A/51/22 Vol.II (1996), p. 253, fn.95.
[27] *Ibid*.

footnote 95 above."[28] The Prosecution observes that the Statute and Rules provide sufficient scope for all of options discussed above, as reflected *inter alia* in articles 64(6)(b), 69(2), 93(1)(b), 93(1)(d), 93(1)(l), as well as rules 67 and 68.

(iv) Rule 193 is ultra vires the Statute

21. The Defence cites as authority the suggestion that rule 193 of the Rules, which expressly grants the Court authority to compel the appearance of any person sentenced by the Court, "derogates explicitly from the *Statute*" and is therefore *ultra vires*.[29] It further cautions that it is not clear whether rule 193 removes the requirement of consent by the State of enforcement or by the prisoner.

22. The Prosecution notes that the terms of rule 193 are very clear. They state: "[t]he provisions of article 93, paragraph 7, shall not apply". Thus, whether in terms of the condition that "[t]he person freely gives his or her informed consent to the transfer" or that "[t]he requested State agrees to the transfer, subject to such conditions as that State and the Court may agree", neither applies for the purpose of rule 193. As this rule further provides "The Chamber that is considering the case *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" (emphasis added). The meaning and purport of this rule are clear: the Chamber may seek the compelled appearance of a sentenced person for his/her testimony before it.

23. The import of rule 193 is significant, as it shatters the argument that as a matter of principle the Rome Statute prohibits the compelled appearance of

[28] A/51/22 Vol.II (1996), p. 257, fn .106.
[29] ICC-01/09-01/11-1138-Conf, para. 25.

witnesses. There is no reason why this rule should be held to conflict with the Statute under article 51(5), except if the highly specific and narrow regime created by article 93(7) is artificially extended to apply to all potential ICC witnesses. As the Prosecution has submitted, article 93(7) creates the exception, not the rule. Absent any limiting clause with respect to other categories of witnesses and, indeed, in the face of a provision in the rules that provides for the exact opposite, there is no reason, as a matter of statutory interpretation, why the Prosecution's Application cannot be granted. Rule 193 is only *ultra vires* the Statute when interpreted through the lens of the Defence's argument.

24. The States Parties had no such misgiving when they adopted rule 193, and it is argued, neither should the Court. Instead, an interpretation of the rules must be sought that allows for their consistent reading with the Statute. This, the Prosecution submits, derives from the absence of any general principle in the Statute that compelled witness appearance is prohibited.

(v) The Prosecution is estopped from making its application

25. The SANG Defence argues that the Prosecution's decision to neither challenge the *statement* of the Presiding Judge in the *Lubanga* case that "[t]he Chamber has no power to compel the attendance of witnesses", nor apply for a witness summons on that occasion, amounts to an acknowledgment that the Court is unable to issue a witness summons.[30]

26. Firstly, this argument fails because this Chamber is not bound by the decisions of another Chamber. Thus, this Chamber is free to consider and decide on the issue afresh.

[30] ICC-01/09-01/11-1138-Conf, para. 20.

27. Secondly, the SANG Defence's assertions in respect of the Presiding Judge's comments are misleading and have been cited out of context. A clear reading of the entire transcript of the hearing on 20 May 2011,[31] demonstrates that the Chamber was not seized of, nor did it pronounce on the issue of, whether it had authority to issue a witness summons in respect of a witness. The observation was clearly *obiter dictum* and does not appear to have been properly addressed in the parties' arguments, nor was it the subject of any detailed legal analysis by the Chamber. On the contrary, the hearing related to particular facts and circumstances that concerned a single witness due to give evidence two weeks prior to closing submissions. Furthermore, prior to making the statement relied on by the SANG Defence, the Presiding Judge noted that "the Prosecution in its submissions has indicated that it does not press the Chamber to take further steps to try and secure the testimony of this witness."[32] A proper reading of the transcript therefore reveals that the Presiding Judge did not rule out contemplating further steps to try and secure the [witness] testimony. Therefore, even as merely persuasive authority, the Prosecution submits that this *obiter* statement should not be afforded much weight.

28. In addition, the comment is distinguishable on the facts. It was not directed at the question of whether the Chamber had the authority to issue a witness summons for a non-voluntary witness, but rather was made in response to the particular facts and circumstances and the position taken by the Prosecution on that occasion.

29. The implicit assertion that the Prosecution's reaction to Presiding Judge's comments amounts to an admission that the Chamber has no authority to issue a witness summons is similarly misguided. Whether or not the

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[31] ICC-01/04-01/06-T-355-ENG ET WT.
[32] *Ibid.*, page 5, lines 7-9.

Prosecution elects to take steps to secure the attendance of a witness in a particular case, and the manner it chooses to do so, is a matter for the discretion of the Prosecution. There is no reason in law or logic why the Prosecution cannot exercise this discretion differently in a subsequent case and in different circumstances. In this regard, the facts and circumstances of the Prosecution's current application for a witness summons can be distinguished dramatically from the facts and circumstances of that in the *Lubanga* case.

30. The Prosecution is thus not barred from applying for a witness summons in this instance and reiterates the specific facts and circumstances as detailed in its application warrant its granting.

(vi) The Prosecution's application is an attempt to bring article 70 allegations against the Accused

31. The SANG Defence further asserts that the Prosecution Application for a witness summons amounts to a "back-door attempt . . . to bring Article 70 allegations against the accused or others into the main trial."[33]

32. In so doing, the SANG Defence unfairly mischaracterises the Prosecution Application in a manner that attacks the good faith intention of the Prosecution. Nowhere in the Application does the Prosecution either expressly or implicitly allege that "the accused or others in[..] the main trial" have committed an offence under article 70. Nor does the Prosecution Application attempt to "create [a] … cloud of suspicion surrounding the accused" by insinuating that the accused is the reason why a witness summons is now required.

[33] ICC-01/09-01/11-1138-Conf, para. 96.

33. Rather, the reason the Chamber must grant a witness summons in this instance is because each formerly cooperative witness provides evidence that is highly relevant, probative and necessary to determine the truth in relation to the specific charges against the accused. Specifically, the Prosecution Application explains that in respect of two of the witnesses who have "recanted" their original evidence, such recantations must be deemed to be unreliable on the basis that the indications are that the change of behaviour of these two witnesses has been brought about by inducement or coercion. The same is true for the remaining five now non-cooperative witnesses. The Prosecution therefore seeks a witness summons in order to introduce evidence from these witnesses based on their original account of events.

34. The reasons for these witnesses being no longer willing to cooperate with the Prosecution is, however, relevant to the request for at least the following reasons: (i) To explain why they are unlikely to attend voluntarily; (ii) To explain why their attendance is necessary in order to determine whether their original accounts are credible and reliable or not; and (iii) To explain why other means of securing their evidence, such as the possibility of admitting their prior statements, would be less satisfactory.

35. For this purpose, article 69(3) of the Statute protects the fair trial rights of both parties and the integrity of proceedings by empowering the Chamber to hear all evidence that is "necessary". Moreover, the Chamber will treat the information provided in support of the summons request appropriately without prejudice to the ability of the accused to receive a fair trial. Article 64(6)(b) together with articles 93(1)(d) and 93(1)(l) provide the judicial tools through which the Chamber is best able to serve that end by issuing a witness summons in circumstances such as those in this case. The parties' rights as well as a determination of the truth would be severely undermined, if as the

SANG Defence request, the Chamber refrains from considering evidence that is highly relevant, probative and necessary.

(vii) Preconditions to the issuance of a summons

36. The SANG Defence argues that the Chamber should apply the criteria set out by the *ad hoc* tribunals and special courts to issue subpoenas.[34] The Prosecution acknowledges that the jurisprudence of those tribunals and courts may be of assistance, in particular where there is a similarity between the relevant provisions.[35] In this instance, however, not only does the wording of the provisions differ,[36] but there are also important differences between the corresponding legal frameworks.[37]

37. The test advocated by the Prosecution does require a legitimate forensic purpose justifying the necessity of the witness's appearance. It is also consistent with the wording of the relevant provisions, read in context and in light of their object and purpose.[38] The Prosecution Application demonstrates that (1) the testimony of the witnesses is necessary "with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court";[39] and that (2) the issuance of the requests for cooperation – and the GoK's assistance - is necessary to obtain the testimony of the witnesses.[40] The Prosecution has shown that it has tried without success to obtain their

[34] ICC-01/09-01/11-1138-Conf, paras.78-83.
[35] ICC-01/04-01/06-1433 OA11, para. 78.
[36] Rule 54 reads "[a]t the request of either party or proprio motu, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be *necessary for the purposes of an investigation or for the preparation or conduct of the trial*." [Emphasis added]. Article 64(6)(b) reads: "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" and Article 93(1)(l) indicates that "[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." [Emphasis added].
[37] Read ICTY/ ICTR/ SCSL Rule 77 against Article 70.
[38] ICC-01/04-168 OA3, para. 33.
[39] Prosecution Application, paras. 5-61 ("Statement of Facts").
[40] *Ibid.*

voluntary testimony.[41] The relevant criteria have therefore been met in the instant case.

38. In the alternative, even if the Chamber were inclined to import the requirements set out in the *ad hoc* tribunals' jurisprudence, as the SANG Defence requests, the Prosecution Application should still be granted since it fulfils all of the alleged requirements, namely: the witnesses' evidence can materially assist the case and is necessary and appropriate for the conduct and fairness of the trial; the Prosecution has made reasonable attempts to obtain the voluntary co-operation of the potential witnesses but has been unsuccessful; and the evidence cannot be obtained through other means.[42]

(viii) Misstatements of fact

39. In addition to the above issues of law, the Prosecution also sought leave to reply to two factual submissions which the Prosecution asserts have been misstated or misrepresented by the RUTO Defence in its filing.[43]

40. Firstly, the RUTO Defence asserts that P-0015 and P-0016 [REDACTED] could not be said to have opted to leave their protection locations and return to their homes.[44] However, this conflates two separate issues. Whilst it is the case that these two witnesses [REDACTED], [REDACTED]. In fact, they remained ICC witnesses, [REDACTED].[45]

41. In the case of P-0015, [REDACTED]. As stated by the Prosecution in its original filing,[46] the witness insisted on returning to Kenya against strong opposing advice. As the Prosecution cannot compel a witness to accept a new

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[41] *Ibid.*
[42] *Prosecutor v. Krstic*, Appeals Chamber, Decision on Application for Subpoenas, IT-98-33-A, 1 July 2003, paras. 10-12, 14; *Prosecutor v. Halilovic*, Appeals Chamber, Decision on the Issuance of a Subpoena (AC), IT-01-48-AR73, 21 June 2004, paras.5-7.
[43] ICC-01/09-01/11-1136-Conf-Red, paras. 31 & 33.
[44] ICC-01/09-01/11-1136-Conf-Red, para. 31.
[45] [REDACTED].
[46] ICC-01/09-01/11-1120-Conf-Red-Corr2, para. 9

protection location, and given the insistence of the witness to return to Kenya, there was no option but to acquiesce to the witness's return to Kenya in October 2012. It was only once back in Kenya that P-0015 indicated he was withdrawing his cooperation with the ICC. As such, that P-0015 [REDACTED] in no way refutes that the witness opted himself to return to his native Kenya where it appears he was almost immediately interfered with.

42. Similarly, P-0016 [REDACTED]. As stated in the Prosecution Application,[47] P-0016's return to Kenya was intended to be temporary and only for the purposes of renewing his travel documents before being moved to a new protection location [REDACTED]. It was during this temporary stay that the witness absconded and has remained in Kenya since.[48] As such, the RUTO Defence's assertion that this witness did not opt to leave his protection location is incorrect. The witness absconded whilst on a transit-stay in Kenya in order to, the Prosecution submits, accept payment in exchange for his unilateral withdrawal from the ICC process. [REDACTED].

43. Secondly, it is simply incorrect for the RUTO Defence to state that the Prosecution's own investigations indicate that witness P-0015 was <u>not</u> kidnapped and forced at gunpoint to sign an affidavit recanting his statements and withdrawing as a witness.[49] In support of this assertion the RUTO Defence appends an Investigator's Report disclosed by the Prosecution.[50]

44. However, upon any reading of report it is clear that it would be a misrepresentation to assert that, *"[t]he Prosecution's own investigations…indicate that no such kidnap occurred."*[51] [REDACTED]. The

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[47] *Ibid.*, para. 21.
[48] *Ibid.*, para. 24.
[49] ICC-01/09-01/11-1136-Conf-Red, para. 33.
[50] *Ibid.*, Annex B.
[51] *Ibid.*, para. 33.

conclusion the RUTO Defence invites of the Chamber simply cannot be reached on the basis of the appended Investigator's Report alone.

Relief Requested

45. For the foregoing reasons, the Prosecution reiterates the relief requested in its Application.

Fatou Bensouda, Prosecutor

Dated this 11th day of February, 2014
At The Hague, The Netherlands