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Court

Original: **English**

No.: **ICC-01/09-01/11**
Date: **17 April 2014**

TRIAL CHAMBER V (A)

Before: **Judge Chile Eboe-Osuji, Presiding**
Judge Olga Herrera Carbuccia
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG

Public

Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor
Ms Fatou Bensouda
Mr James Stewart
Mr Anton Steynberg

Counsel for William Samoei Ruto
Mr Karim Khan
Mr David Hooper
Ms Shyamala Alagendra

Counsel for Joshua Arap Sang
Mr Joseph Kipchumba Kigen-Katwa
Ms Caroline Buisman

Legal Representatives of Victims
Mr Wilfred Nderitu

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber V(A) (the 'Chamber') of the International Criminal Court in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, having regard to articles 4, 21, 64(6)(b), 86, 93, 99(1) of the Rome Statute (the 'Statute'), rules 65 and 193 of the Rules of Procedure and Evidence (the 'Rules') and regulations 29, 36 and 37 of the Regulations of the Court (the 'Regulations'), Judge Herrera Carbuccia dissenting, renders the following Decision on Prosecutor's Application for Witness Summonses and Resulting Request for State Party Cooperation.

I. PROCEDURAL HISTORY

1. On 28 November 2013, the Office of the Prosecutor ('Prosecution') filed the 'Prosecution's request under article 64(6)(b) and article 93 to summon witnesses'.[1] On 5 December 2013, a corrected and amended version of this filing was notified (the 'Summonses Request').[2]

2. On 8 January 2014,[3] responses were filed by the defence teams for Mr Ruto (the 'Ruto Defence')[4] and Mr Sang (the 'Sang Defence')[5] (collectively, the 'Defence').

3. On 29 January 2014, the Chamber issued a decision[6] which: (i) convened a status conference to discuss all matters related to the Summonses Request, (ii) granted the

[1] ICC-01/09-01/11-1120-Conf-Exp, with confidential annexes 1 to 8. The first confidential redacted version of this filing was notified on 28 November 2013, ICC-01/09-01/11-1120-Conf-Red. A corrigendum was filed on 2 December 2013, ICC-01/09-01/11-1120-Conf-Red-Corr. The first public redacted version of this filing was notified on 29 November 2013, ICC-01/09-01/11-1120-Red2. The page limit for this filing was extended to 39 pages pursuant to Decision on the Prosecution's request for extension of the page limit, 20 November 2013, ICC-01/09-01/11-1106-Conf. See also Prosecution request for an extension of page limit, 18 November 2013, ICC-01/09-01/11-1103-Conf.

[2] Corrected and amended version of "Prosecution's request under 64(6)(b) and art 93 to summon witnesses" (ICC-01/09-01/11-1120-Conf-Exp), ICC-01/09-01/11-1120-Red2-Corr.

[3] Pursuant to the Chamber's direction, responses were due by this date, Email Communication from Legal Officer of the Trial Chamber, 9 December 2013, at 12:37.

[4] Public redacted version of 'Defence response to the corrected and amended version of "Prosecution's request under article 64(6)(b) and article 93 to summon witnesses"', ICC-01/09-01/11-1136-Red2, with two confidential annexes and two confidential *ex parte* annexes [the 'Ruto Defence Response'].

[5] Sang Defence Response to the Prosecution's Request under Article 64(6)(b) and Article 93 to Summon Witnesses, ICC-01/09-01/11-1138-Red [the 'Sang Defence Response']. The page limit for this filing was extended to 39 pages pursuant to Decision on the Sang Defence request for an extension of the page limit, 7 January 2014, ICC-01/09-01/11-1134. See also Sang Defence request for an extension of the page limit, 2 January 2014, ICC-01/09-01/11-1131.

Prosecution leave to file a reply,[7] (iii) invited the Government of the Republic of Kenya (the 'Government of Kenya') to file written submissions on the Summonses Request and (iv) ordered that any responses to the observations filed by the Government of Kenya were to be given at the status conference.

4. On 10 February 2014, the Prosecution filed its reply.[8]

5. On 11 February 2014, the Government of Kenya filed its submissions on the Summonses Request.[9]

6. On 14 and 17 February 2014, the contemplated status conference was held and submissions were made by the Prosecution, Defence, Government of Kenya and Legal Representative of Victims (the 'LRV') on the relief sought in the Summonses Request (the 'Status Conference').[10] On 17 February 2014, the Chamber exceptionally permitted all parties and participants at the status conference to file within 14 days any further submissions related to the Summonses Request.[11]

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[6] Decision on status conference and additional submissions related to 'Prosecution's request under article 64(6)(b) and article 93 to summon witnesses', ICC-01/09-01/11-1165.
[7] See Prosecution request for leave to reply to the RUTO Defence's 8 January 2014 and the SANG Defence's 8 January 2014 response to the prosecution's request under Article 64(6)(b) and Article 93 to summon witnesses and variation of time limits under Regulation 35(2), 16 January 2014, ICC-01/09-01/11-1148. The request was reclassified as public on 29 January 2014. The Defence responded by asking that leave be rejected, see Joint Defence response to the "Prosecution request for leave to reply to the Ruto Defence's 8 January 2014 and the Sang Defence's 8 January 2014 response to the Prosecution's request under Article 64(6)(b) and Article 93 to summon witnesses and variation of time limits under Regulation 35(2)", 17 January 2014, ICC-01/09-01/11-1149.
[8] 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), ICC-01/09-01/11-1183-Red [the 'Prosecution Reply']. The public redacted version of the Prosecution Reply was notified 11 February 2014.
[9] The Government of the Republic of Kenya's submission on the 'Prosecution's request under article 64(6) (b) and article 93 to summon witnesses', ICC-01/09-01/11-1184 [the 'Government of Kenya Submission'].
[10] ICC-01/09-01/11-T-86-Red-ENG and ICC-01/09-01/11-T-87-ENG.
[11] Status Conference, ICC-01/09-01/11-T-88-CONF-ENG, p 1, lines 13-25 and p 5, lines 23—25.

7. On 20 February 2014, the Prosecution filed a supplementary request adding a witness to the relief sought in the Summonses Request (the 'Supplementary Request').[12]

8. On 26 February 2014, the Prosecution submitted an additional document in support of the Supplementary Request.[13]

9. On 4 March 2014,[14] the Defence[15] and LRV[16] filed their further submissions on the Summonses Request and their responses to the Supplementary Request.

10. On 5 March 2014, the Prosecution filed their further submissions.[17]

11. On 13 March 2014, the Government of Kenya indicated that, from their perspective, all material submissions had been placed before the Court and they would therefore file no further submissions.[18]

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[12] Prosecution's supplementary request under article 64(6)(b) and article 93 to summon a further witness, 19 February 2014, ICC-01/09-01/11-1188-Conf-Red, with confidential annexes 1 to 6. An *ex parte* version was filed on the same day, and the *ex parte* and confidential redacted versions were notified on 20 February 2014.

[13] Prosecution's submission of one additional document in support of the "'Prosecution's supplementary request under article 64(6)(b) and article 93 to summon a further witness" [ICC-01/09-01/11-1188-Conf-Exp/Red]', ICC-01/09-01/11-1192-Conf , with one confidential annex.

[14] The Chamber had indicated by email that responses were due on this date and that the response to the Supplementary Request was to form part of the submissions identified by the Chamber on 17 February 2014, Email Communication from Legal Officer of the Trial Chamber, 21 February 2014, at 10:29. Pursuant to regulation 37(2) of the Regulations and following a Defence request by email to make a 40 page joint submission, the Chamber also indicated the Defence's submissions could be a joint filing of 30 pages, Email Communication from Legal Officer of the Trial Chamber, 24 February 2014, at 13:39.

[15] Additional Defence submissions on the corrected and amended version of "Prosecution's request under article 64(6)(b) and article 93 to summon witnesses", ICC-01/09-01/11-1200-Red [the 'Defence Final Submission']. The public redacted version was notified on 5 March 2014.

[16] Common Legal Representative for Victims' Response to the Prosecution's Request and Supplementary Request under Article 64(6)(b) and Article 93 to Summons Witnesses, ICC-01/09-01/11-1201 [the 'LRV Submission']. The Chamber notes that this submission is well over the 6000 word limit derived from regulations 36 and 37 of the Regulations. On this occasion, the Chamber, pursuant to regulation 29 of the Regulations, will overlook this failure to comply with the required page limits and accepts this submission. However, the LRV is reminded to be mindful of the filing requirements when making written submissions.

[17] Prosecution's further submissions pursuant to the Prosecution's request under article 64(6)(b) and article 93 to summon witnesses, ICC-01/09-01/11-1202 [the 'Prosecution Final Submission']. The filing was reclassified by the Chamber as public on 13 March 2014, Email Communication from Legal Officer of the Trial Chamber, 13 March 2014, at 17:51. The Prosecution indicated by email that its submission was filed 39 minutes late on 4 March 2014 due to having to withdraw its submission filed in time and having to change its classification. The Chamber indicated that it would accept this submission, Email Communication from Legal Officer of the Trial Chamber, 5 March 2014, at 17:25.

12. On 8 April 2014, the Ruto Defence filed additional submissions relating to Witness 15's fitness to testify (the 'Witness 15 Fitness Request').[19] And, on 14 April 2014,[20] the LRV,[21] Prosecution[22] and Sang Defence[23] all responded to the Witness 15 Fitness Request.

II. SUBMISSIONS OF THE PARTIES

A. OVERALL SUBMISSIONS

13. In the Summonses Request and Supplementary Request, the Prosecution identifies eight witnesses who had initially provided to the Prosecution statements that the Prosecution views as highly relevant potential evidence (the 'Eight Witnesses'). But, according to the Prosecution, those witnesses are now no longer cooperating with the Prosecution or have affirmatively informed the Prosecution that they are no longer willing to testify.[24]

14. The Prosecution submits that it is competent of the Chamber to obtain the assistance of the Kenyan authorities, for purposes of the following compulsory measures: (i) to summons these individuals to begin with; and, if required, (ii) to secure their appearance at an appropriate location in Kenya so that they would testify before the

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[18] See Annex 2 of Registry Transmission of a note verbale received from the Attorney General of the Republic of Kenya, 18 March 2014, ICC-01/09-01/11-1220-Conf-Anx2. ICC-01/09-01/11-1220 is public but has two confidential annexes.
[19] Additional Defence Submissions concerning the Prosecution's request under Articles 64(6)(b) and 93 to summon witnesses and Prosecution Witness P-0015, ICC-01/09-01/11-1262-Conf (with one confidential annex).
[20] Pursuant to the Chamber's direction, responses were due by this date. Email communication from Legal Officer of the Trial Chamber, 9 April 2014, at 11:04.
[21] Response of the Common Legal Representative for Victims to the Additional Defence Submissions Concerning the Prosecution's Request Under Article 64(6)(b) and 93 of the Rome Statute to Summon Witnesses and Prosecution Witness P-0015, , ICC-01/09-01/11-1270-Conf [the 'LRV Response to Witness 15 Fitness Request'].
[22] Prosecution Response to "Additional Defence Submissions concerning the Prosecution's request under Articles 64(6)(b) and 93 to summon witnesses and Prosecution Witness P-0015", ICC-01/09-01/11-1262-Conf, ICC-01/09-01/11-1271-Conf [the 'Prosecution Response to Witness 15 Fitness Request'].
[23] Sang Defence Response to Urgent Additional Ruto Defence Submissions concerning the Prosecution's request under Articles 64(6)(b) and 93 to summon witnesses and Prosecution Witness P-0015, ICC-01/09-01/11-1272-Conf [the 'Sang Defence Response to Witness 15 Fitness Request'].
[24] Summonses Request, ICC-01/09-01/11-1120-Red2-Corr, paras 1, 5, 62; Supplementary Request, ICC-01/09-01/11-1188-Conf-Red, paras 2—3.

Chamber either sitting in Kenya or by means of video link relay of the testimonies to the Chamber sitting as usual in The Hague.[25]

15. In the result, the Prosecution requests the Chamber to direct the Registrar, in consultation and cooperation with the Prosecution, to request, in turn, the following manner of assistance from the Government of Kenya: (i) the service of the summonses by the Government of Kenya on each of the witnesses concerned; (ii) the employment of compulsory measures by the Government of Kenya as necessary to ensure the appearance of the summonsed witnesses at a location to be indicated on the territory of Kenya, for purposes of their testimonies before the Chamber; and, (iii) the Government of Kenya to make appropriate arrangements for the security of the witnesses until they appear and complete their testimonies before the Chamber.[26]

16. The LRV submits that the Chamber has the competence to grant the relief sought by the Prosecution; and that, to his knowledge, there is no Kenyan law that prohibits the procedure indicated in the Prosecution's application.[27] Given the possibility that the Eight Witnesses could turn hostile if compelled to come to the seat of the Court, the LRV leaves it to the Chamber to consider whether compulsion would advance or detract from the interests of participating victims.[28]

17. The Defence's response to the relief sought appreciably evolved over the course of the litigation. Originally, the Ruto Defence had agreed that the Government of Kenya may serve summonses on the Eight Witnesses and make appropriate arrangements for their security until they appear before the Court;[29] provided it is understood that the

[25] Summonses Request, ICC-01/09-01/11-1120-Red2-Corr, para 3. See also Supplementary Request, ICC-01/09-01/11-1188-Conf-Red, para 10.
[26] Summonses Request, ICC-01/09-01/11-1120-Red2-Corr, para 100; Supplementary Request, ICC-01/09-01/11-1188-Conf-Red, para 20.
[27] Status Conference, ICC-01/09-01/11-T-87-Red-ENG, p 7, line 21—p 8, line 2; p 9, line 16—p 10, line 2.
[28] LRV Submission, ICC-01/09-01/11-1201, para 49.
[29] Ruto Defence Response, ICC-01/09-01/11-1136-Red2, paras 29, 38.

Government of Kenya is under no statutory duty to enforce the summonses as served, nor can it seek to compel witnesses to appear before the Court.[30] The Sang Defence originally submitted that the relief sought in the Summonses Request should be wholly rejected.[31]

18. In the Defence's most recent joint submission (in their further submissions), their primary urge is that the Trial Chamber should reject the relief as sought. But, in the event and to the extent that the Chamber considers it necessary and appropriate, the Defence suggest that the Chamber may issue 'non-enforceable' summonses, inviting the Eight Witnesses to appear before the Court. The Defence also request the Chamber to order the Prosecution to disclose the evidence in its possession tending to show that intimidation, bribery or other improper influence has been the proximate cause of witness non-cooperation.[32]

19. The Government of Kenya submitted that it has no obligation to enforce the compulsory measure of witness summonses and that its domestic implementing legislation, the International Crimes Act of 2008 (the 'ICA'), does not allow any procedure of non-voluntary appearance of witnesses before this Court.[33]

B. SUBMISSIONS ON WHETHER THE CHAMBER HAS THE POWER TO COMPEL THE TESTIMONY OF WITNESSES

20. The Prosecution argues that '[i]f 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'.[34] The Prosecution submits that the Chamber has the competence to compel the appearance of

[30] *Ibid*, paras 29, 38.
[31] Sang Defence Response, ICC-01/09-01/11-1138-Red, para 100.
[32] Defence Final Submission, ICC-01/09-01/11-1200-Red, para 68.
[33] Status Conference, ICC-01/09-01/11-T-86-Red-ENG, p 49, lines 3—21.
[34] Summonses Request, ICC-01/09-01/11-1120-Red2-Corr, para 65. See also Prosecution Final Submission, ICC-01/09-01/11-1202, para 5.

witnesses under article 64(6)(b) of the Statute.[35] In the Prosecution's view, the compulsive character of article 64(6)(b) is evident from both its English and French versions—respectively saying '[r]*equire* the attendance and testimony of witnesses' and '[o]*rdonner* la comparution des témoins'.[36] [Emphasis added].

21. The LRV submits that this Court can compel witnesses to testify. In that regard, he points out that there would be 'no logical reasoning in law' for any dispensation that would permit compulsory measures of attendance against 'a witness in respect of very, very light offences' in the domestic contexts, while not permitting similar measures to be taken 'in respect of offences which [...] shock the conscience of [hu]man[ity]'.[37]

22. The Ruto Defence concedes in its written submissions that the Court may create an obligation upon persons to appear before the Court, but emphasised that States are under no duty to enforce that obligation.[38] However, at the status conference the Ruto Defence appeared to have changed its position to be that the Chamber cannot compel witnesses to appear in any circumstances.[39]

23. The Sang Defence submits that the Court's legal framework does not provide this Chamber with the power to summons witnesses against their will.[40] The Sang Defence argues that there is a principle of 'voluntary appearance' in this Court's statutory framework, relying on articles 93(1)(e), 93(7), the Court's drafting history, the

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[35] Summonses Request, ICC-01/09-01/11-1120-Red2-Corr, paras 66—67.
[36] Status Conference, ICC-01/09-01/11-T-86-Red-ENG, p 8 line—p 9, line 1. See also Prosecution Final Submission, ICC-01/09-01/11-1202, para 6 for similar translations across the Spanish, Arabic, Russian and Chinese versions of the Statute.
[37] Status Conference, ICC-01/09-01/11-T-87-ENG, p 10, lines 15—25.
[38] Ruto Defence Response, ICC-01/09-01/11-1136-Red2, paras 19—20.
[39] Status Conference, ICC-01/09-01/11-T-86-Red-ENG, p 19, line 6—p 20, line 8; ICC-01/09-01/11-T-87-ENG, p 22, line 20—p 23, line 13.
[40] Sang Defence Response, ICC-01/09-01/11-1138-Red, para 1(1); Status Conference, ICC-01/09-01/11-T-86-Red-ENG, p 32, line 22—p 34, line 3 and p 43, lines 6—10; Status Conference, ICC-01/09-01/11-T-87-ENG, p 25, line 3—p 26, line 17.

jurisprudence of other Chambers of this Court and the opinions of academic commentators.[41]

24. The Sang Defence also argues that the difference between 'requires' and 'ordonner', respectively in the English and French versions of article 64(6)(b) of the Statute, suggests a deliberate softening of the wording in a manner that falls short of compulsion.[42] The Sang Defence's submission is that on a proper reading, article 64(6)(b) contemplates no more than the Chamber's function to assure itself of the sufficiency of evidence and the adoption of expeditious and fair procedures.[43]

25. The Government of Kenya argues in its written submissions that the Statute employs the principle of voluntary appearance of witnesses to testify before the Court, whether at the seat of the Court or within the territory of Kenya.[44] At the status conference, the Attorney-General of Kenya appeared to have conceded the point of principle in the example that if a witness was at a hotel in The Hague and refused to come to Court, the Chamber did have the authority to order his/her arrest and production before the Court.[45] The Attorney-General added, however, that the consideration was 'immaterial' for his Government's own purposes in the circumstances of the matter now at hand. This concession was later described as follows: 'if this witness is a witness already in the seat of the trial court [and] brought to the trial court through a regular legal legitimate procedure,

[41] Sang Defence Response, ICC-01/09-01/11-1138-Red, paras 13-25. See also Status Conference, ICC-01/09-01/11-T-86-Red-ENG, p 34, lines 4—24.
[42] Sang Defence Response, ICC-01/09-01/11-1138-Red, paras 29—30; Status Conference, ICC-01/09-01/11-T-86-Red-ENG, p 35, line 14—p 36, line 14; Status Conference, ICC-01/09-01/11-T-87-ENG, p 26, line 18—p 27, line 4.
[43] Sang Defence Response, ICC-01/09-01/11-1138-Red, para 35; Status Conference, ICC-01/09-01/11-T-86-Red-ENG, p 38, lines 11—17.
[44] Government of Kenya Submission, ICC-01/09-01/11-1184, paras 6(a), 7—11; Status Conference, ICC-01/09-01/11-T-86-Red-ENG, p 51, line 17—p 52, line 9.
[45] Status Conference, ICC-01/09-01/11-T-86-Red-ENG, p 56, line 8—p 59, line 18.

there may – there may be a residual authority on [the Chamber's] part to compel him to testify'.[46]

C. WHETHER STATES CAN BE OBLIGATED TO COMPEL AND ENSURE THE APPEARANCE OF WITNESSES

(1) Prosecution

26. The Prosecution recognises that it cannot issue its own subpoenas to require the Eight Witnesses to leave Kenya and testify in The Hague.[47] However, the Prosecution submits that the Chamber has the competence to obtain the assistance of the Government of Kenya to subpoena these individuals and, if required, to secure their appearance at an appropriate location in Kenya for purposes of testifying before the Chamber (*in situ* or by means of video link technology).[48] The Prosecution argues that 'it was never intended that a Trial Chamber of the International Criminal Court dealing with the most serious crimes of concern to humanity would be denied this ability [to secure the evidence it requires]. It's an ability any criminal court in any jurisdiction must have'.[49]

27. The Prosecution's view of the legal basis for the Chamber's authority in this regard results from the combined operation of articles 64(6)(b), 93(1)(d) and 93(1)(l) of the Statute.[50] The Prosecution argues that since the Court has no enforcement mechanism beyond its premises, the obligation under article 93(1)(d) of the Statute to serve a summons on its behalf necessarily includes an obligation to give effect to the requirement that the person appear. The Prosecution contends that '[i]ndeed, without enforceability, a summons would not "require" the person's attendance – it would be no more than an

[46] *Ibid*, p 60, lines 2—5.
[47] Summonses Request, ICC-01/09-01/11-1120-Red2-Corr, para 2.
[48] Summonses Request, ICC-01/09-01/11-1120-Red2-Corr, para 3.
[49] Status Conference, ICC-01/09-01/11-T-86-Red-ENG, p 4, lines 10—14.
[50] Summonses Request, ICC-01/09-01/11-1120-Red2-Corr, para 3.

invitation to appear – and the Court would have no need for the assistance of the State to issue such an invitation .'[51]

28. The Prosecution also argues that its position is supported by the Court's drafting history.[52] While conceding that there had been some controversy as to whether witnesses and experts could be compelled to travel to the seat of the Court, the Prosecution argues that the drafting history does not suggest that the Court could not compel the attendance of witnesses to testify in-country.[53] The Prosecution also submits that the relevant provisions of the Statute were derived from traditional mutual legal assistance instruments between nations, and that these instruments support the proposition that requesting a State to compel witness testimony is not contrary to the letter of the Statute.[54]

29. The Prosecution distinguishes the relief it seeks from what is contemplated in article 93(1)(e) of the Statute.[55] The Prosecution argues that, if article 93(1)(e) represented the limit of assistance that States may provide in securing the appearance of witnesses before the Court, this interpretation would clash with article 64(6)(b) and limit the scope of article 93(1)(l) 'contrary to its express open ended formulation'.[56] The Prosecution submits that article 93(1)(e) only deals with facilitating voluntary witness appearance, meaning that it is possible to request involuntary witness appearance under article 93(1)(l).[57]

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[51] Summonses Request, ICC-01/09-01/11-1120-Red2-Corr, para 73.
[52] *Ibid*, paras 75—76.
[53] Summonses Request, ICC-01/09-01/11-1120-Red2-Corr, para 76; Prosecution Final Submission, ICC-01/09-01/11-1202, paras 8—12.
[54] Status Conference, ICC-01/09-01/11-T-86-Red-ENG, p 15, line 19—p 17, line 21. The Prosecution references the European Convention on Mutual Assistance in Criminal Matters (adopted 20 April 1959, entered into force 12 June 1962, supplemented between the Member States of the European Union on 29 May 2000, 2000/C197/0) 75 UNTS 185. See also Prosecution Final Submission, ICC-01/09-01/11-1202, paras 13—14.
[55] Summonses Request, ICC-01/09-01/11-1120-Red2-Corr, para 70, n 42.
[56] *Ibid*, para 92.
[57] Prosecution Reply, ICC-01/09-01/11-1183-Red, paras 5—8.

(2) LRV

30. The LRV submits that, once the Chamber makes an order under article 64(6)(b) of the Statute, the Government of Kenya has a duty to enforce it.[58] The LRV sees no material distinction between this Court operating in Kenya through a Kenyan judge and the Court operating in Kenya directly.[59] The LRV also agrees with the proposition that, if a State has primary jurisdiction over a case because of complementarity and does not try the case and compel witnesses to testify, then this Court would have those powers to do what the State was required to do under the Statute.[60]

31. In its written submissions, the LRV conducted his own assessment of relevant drafting history and scholarship to conclude that the Prosecution's relief sought is legally sound.[61]

(3) Defence

32. The Ruto Defence describes the relief sought in the Summonses Request as a 'creative but legally improper attempt to place a duty on some States Parties [...] to compel witnesses to appear and testify before the Court'.[62] On issues of witness compellability, the argument goes, States Parties 'deliberately chose to implement a cooperation regime of horizontal nature complemented by the other broad provisions governing legal assistance set out in article 93'; and, the Ruto Defence argues, '[t]his regime cannot be circumvented in the manner proposed in the Request'.[63]

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[58] Status Conference, ICC-01/09-01/11-T-87-ENG, p 3, line 30—p 4, line 6.
[59] *Ibid*, p 6, line 21—p 7, line 19.
[60] Status Conference, ICC-01/09-01/11-T-87-ENG, p 9, line 11—p 10, line 6. See also LRV Submission, ICC-01/09-01/11-1201, paras 28—31.
[61] LRV Submission, ICC-01/09-01/11-1201, paras 1—12, 43—47.
[62] Ruto Defence Response, ICC-01/09-01/11-1136-Red2, para 3.
[63] *Ibid.*

33. As to the relationship between clauses 93(1)(e) and (l) of the Statute, the Ruto Defence argues that clause 93(1)(e) is the *lex specialis* provision and that 'it is implausible to argue that the non-voluntary appearance of witnesses is a type of assistance different to the voluntary appearance of witnesses which would be left unaddressed and, thus, can be dealt with under another more general provision'.[64] The Ruto Defence argues that the proposed analogy to mutual legal assistance instruments is inapposite, as the Rome Statute does not include some of the possibilities offered in those instruments.[65]

34. The Sang Defence submits that the Court's legal framework does not provide the Chamber with the power to request, let alone require, States to issue subpoenas ordering witnesses to appear against their will.[66] Relying upon an alleged 'horizontal nature of the Court's legal structure and cooperation', and contrasting this structure with that of the *ad hoc* tribunals, the Sang Defence argues that States are under no duty to compel the presence of an individual before the Court.[67] The Sang Defence submits that the Prosecution is circumventing article 93(1)(e) of the Statute by relying on clauses 93(1)(d) and (l).[68]

35. Ultimately, the Defence argues that article 93(1)(e) expressly and comprehensively deals with the appearance of witnesses before the Court and to find otherwise 'would be to see the triumph of judge-made law [...] over the law carefully and deliberately drafted, negotiated and agreed by States Parties at the Rome Conference'.[69] The Defence submits that the relief sought by the Prosecution cannot be granted by exercising inherent powers

[64] Ruto Defence Response, ICC-01/09-01/11-1136-Red2, para 8 [emphasis removed]; Status Conference, ICC-01/09-01/11-T-86-Red-ENG, p 26, line 15—p 27, line 4 and p 40, line 22—p 41, line 17. See also Ruto Defence Response, ICC-01/09-01/11-1136-Red2, paras 9—12; Status Conference, ICC-01/09-01/11-T-86-Red-ENG, p 23, line 20—p 25, line 10. The argument is supported by the drafting history and the distinguishable practices of other Tribunals.
[65] Status Conference, ICC-01/09-01/11-T-86-Red-ENG, p 41, line 18—p 42, line 2; Status Conference, ICC-01/09-01/11-T-87-ENG, p 24, lines 7—23.
[66] Sang Defence Response, ICC-01/09-01/11-1138-Red, para 1(2).
[67] *Ibid*, paras 43—48.
[68] *Ibid*, paras 50—51, 59—60.
[69] Defence Final Submission, ICC-01/09-01/11-1200-Red, para 2. See also paras 7—32.

that lie in the penumbra of the Statute because doing so would offend the principle of legality and the prohibition against retroactive penalties.[70]

(4) Government of Kenya

36. The Government of Kenya submits that, as the Court has no power, in the first place, to compel unwilling witnesses to appear and testify before the Court, the Government of Kenya has no obligation to enforce a request to compel the attendance of any witness before the Court.[71] The Government of Kenya emphasises the point that, if the drafters of the Statute had intended for there to be compellability of witnesses generally, then it would have included this power expressly.[72] The Government of Kenya concedes that, where the witness wishes to testify, there is a positive duty on the Government of Kenya to facilitate that person in going to testify 'wherever the forum will be'.[73]

37. The Government of Kenya argues that any comparison to the ordinary procedures of Kenyan national criminal law is necessarily 'metaphorical' and not 'juridical' because Kenyan courts are set up in the Constitution and there is no reference to this Court.[74]

D. WHETHER THE RELIEF SOUGHT IS PROHIBITED BY THE LAW OF THE REPUBLIC OF KENYA

38. With examples of national practice, the Prosecution argues that States Parties have adopted three categories of domestic implementing legislation with respect to how a summons for witness appearance should be constructed and what possibilities the Court has to request assistance.[75] These categories are as follows: (i) some States Parties have

[70] *Ibid*, paras 3, 33—54.
[71] Government of Kenya Submission, ICC-01/09-01/11-1184, para 6(a).
[72] Status Conference, ICC-01/09-01/11-T-86-Red-ENG, p 54 line 23 to p 55 line 21.
[73] *Ibid*, p 66 lines 6—8.
[74] *Ibid*, p 93 lines 13—19.
[75] Summonses Request, ICC-01/09-01/11-1120-Red2-Corr, para 77.

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 Court; (ii) some States Parties provide for service of a summons for a witness' appearance before the Court, but are silent in their 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); and, (iii) some States Parties link the operation of article 93(1)(d) to article 93(1)(e) of the Statute, specifying that a summoned witness is under no obligation to appear before the Court.[76]

39. The Prosecution submits that, by virtue of the ICA's silence on any prohibition of witness summonses, Kenya falls into the second category mentioned above.[77] Since Kenyan law does not prohibit the requested relief, the Prosecution submits that, pursuant to article 93(1)(l) of the Statute, the Chamber may request Kenya's cooperation to compulsorily summons witnesses and create an obligation on the Government of Kenya to comply.[78]

40. The LRV submits that the ICA makes it clear that the legislative intent is that the Court's summonses to witnesses will be implemented by the Government of Kenya in the manner specified.[79] The LRV argues that it ought to be borne in mind that witnesses are generally compellable under Kenya's Criminal Procedure Code and that the Attorney General is under an obligation to execute a request for compulsory measures, using Kenyan national law to compel the attendance of any witness summonsed by this Court.[80]

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[76] *Ibid*, para 77.
[77] *Ibid*, paras 77, 79—80; Prosecution Final Submission, ICC-01/09-01/11-1202, para 20.
[78] Summonses Request, ICC-01/09-01/11-1120-Red2-Corr, paras 81—84; Prosecution Reply, ICC-01/09-01/11-1183-Red, paras 9—20.
[79] Status Conference, ICC-01/09-01/11-T-87-ENG, p 3 line 14—p 5 line 21. See also LRV Submission, ICC-01/09-01/11-1201, para 18.
[80] LRV Submission, ICC-01/09-01/11-1201, paras 14—27.

The LRV submits that if the Court's orders are obstructed, then the obstructing person has committed an offence under the ICA and is liable to punishment upon a conviction.[81]

41. The Ruto Defence appeared to agree that the Chamber may request the Government of Kenya to serve summonses on the Eight Witnesses pursuant to article 93(1)(d) of the Statute and to make appropriate arrangements for the security of the witnesses should one or more of them respond to the summons.[82]

42. However, the Ruto Defence argues that the ICA follows the wording of the Statute carefully and that the ICA includes no provisions enhancing cooperation such that a duty is placed on the Government of Kenya to compel witnesses to appear before the Court.[83]

43. The Sang Defence submits that Kenya's domestic law does not provide for a power to issue subpoenas ordering witnesses to appear before this Court against their will.[84] The Sang Defence argues that it 'cannot be the case that the Court itself has different powers vis-à-vis different States Parties depending on how they have decided to implement the Rome Statute in domestic legislation'.[85] Relying on sections 86—92 of the ICA, the Sang Defence alleges that these sections emphasise the requirement of consent and that the Prosecution is seeking to circumvent this requirement.[86] The Sang Defence reads the silence of the ICA as regards sanctions for failing to respond to an ICC summons as meaning that no such sanctions can be imposed.[87]

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[81] Status Conference, ICC-01/09-01/11-T-87-ENG, p 12, line 6—p 13, line 7.
[82] Ruto Defence Response, ICC-01/09-01/11-1136-Red2, para 29; Status Conference, ICC-01/09-01/11-T-87-ENG, p 23, lines 18—24.
[83] Ruto Defence Response, ICC-01/09-01/11-1136-Red2, para 22.
[84] Sang Defence Response, ICC-01/09-01/11-1138-Red, para 1(3); Status Conference, ICC-01/09-01/11-T-86-Red-ENG, p 44, line 6—p 47, line 3; Status Conference, ICC-01/09-01/11-T-87-ENG, p 30, line 25; p 31, line 17.
[85] Sang Defence Response, ICC-01/09-01/11-1138-Red, para 57.
[86] *Ibid*, paras 69—73.
[87] *Ibid*, para 74.

44. The Government of Kenya submits that the Prosecution's reading of Kenya's national law regarding the appearance of witnesses to testify before the Court is flawed.[88] Relying on sections 86 to 89 of the ICA, the Government of Kenya argues that the ICA relates only to the voluntary appearance of witnesses.[89] The Government of Kenya avers that it cannot, without violating the Constitution of Kenya, compel the appearance of any involuntary witness before the Court.[90]

45. The Government of Kenya admits that Kenya's laws do not contain a provision which expressly excludes the relief sought by the Prosecution.[91] The Government of Kenya insists, however, that Kenya's laws are not written 'to say what will not be done by the Court or somebody else'.[92] In his submissions on behalf of the Government of Kenya, the Attorney General argues that '[m]y duty is a simple one, which is to say I have shown you everything that the Statute demands me to do. I cannot show you things it doesn't demand me to do, because it is not written to exclude'.[93]

E. WHETHER THE PROSECUTION HAS JUSTIFIED ISSUING SUMMONSES FOR THE EIGHT WITNESSES

(1) *Whether the Prosecution has justified issuing summonses for the Eight Witnesses*

46. The Prosecution explains why it believes that the Eight Witnesses will not voluntarily testify; and provides specific details related to each of them, namely Witness 15,[94] Witness 16,[95] Witness 336,[96] Witness 397,[97] Witness 516,[98] Witness 524[99], Witness 495[100]

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[88] Government of Kenya Submission, ICC-01/09-01/11-1184, para 6(c).
[89] *Ibid*, paras 19—22.
[90] Status Conference, ICC-01/09-01/11-T-86-Red-ENG, p 49, lines 16—21; p 84 line 22—p 86, line 24.
[91] *Ibid*, p 87, line 4—p 89, line 5.
[92] Status Conference, ICC-01/09-01/11-T-86-Red-ENG, p 80, lines 14—20.
[93] *Ibid*, p 81, lines 12—19.
[94] Summonses Request, ICC-01/09-01/11-1120-Red2-Corr, paras 8—18; Prosecution Reply, ICC-01/09-01/11-1183-Red, paras 40—41, 43—44. See also Annexes A and B of the Summonses Request, ICC-01/09-01/11-1120-Conf-AnxA, ICC-01/09-01/11-1120-Conf-AnxB.

and Witness 323.[101] The Eight Witnesses, according to the Prosecution, currently live in Kenya.[102] The Prosecution submits that the Chamber has an 'indisputable interest in hearing the witnesses' evidence to fulfil its mandate to discover the truth'.[103]

47. The Prosecution emphasises that it has a good faith basis for its belief that the original statements of the Eight Witnesses represent truthful accounts and that any subsequent denials or recantations are false.[104] Even if it is assumed that the witnesses would recant during their testimony before the Court, this kind of evidence could have legitimate forensic purposes relating to whether there is a deliberate scheme to falsify evidence or whether the Prosecution's witnesses are being intimidated or corrupted to recant or otherwise withdraw their testimony.[105]

48. The Prosecution argues: (i) that the testimony of the Eight Witnesses is necessary 'with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court'; and, (2) that the issuance of the requests for cooperation, and the Government of Kenya's assistance, is necessary to obtain the testimony of the witnesses.[106]

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[95] Summonses Request, ICC-01/09-01/11-1120-Red2-Corr, paras 19-29; Prosecution Reply, ICC-01/09-01/11-1183-Red, paras 40, 42. See also Annexes A and C—E of the Summonses Request, ICC-01/09-01/11-1120-Conf-AnxA, ICC-01/09-01/11-1120-Conf-AnxC, ICC-01/09-01/11-1120-Conf-AnxD, ICC-01/09-01/11-1120-Conf-AnxE.
[96] Summonses Request, ICC-01/09-01/11-1120-Red2-Corr, paras 30—37. See also Annex F of the Summonses Request, ICC-01/09-01/11-1120-Conf-AnxF.
[97] Summonses Request, ICC-01/09-01/11-1120-Red2-Corr, paras 38—43.
[98] *Ibid*, paras 44—48.
[99] *Ibid*, paras 49—55. See also Annexes G and H of the Summonses Request, ICC-01/09-01/11-1120-Conf-AnxG, ICC-01/09-01/11-1120-Conf-AnxH.
[100] Summonses Request, ICC-01/09-01/11-1120-Red2-Corr, paras 56—61.
[101] Supplementary Request, ICC-01/09-01/11-1188-Conf-Red, paras 11—17. See also Annexes 1 to 6 of the Supplementary Request, ICC-01/09-01/11-1188-Conf-Anx1, ICC-01/09-01/11-1188-Conf-Anx2, ICC-01/09-01/11-1188-Conf-Anx3, ICC-01/09-01/11-1188-Conf-Anx4, ICC-01/09-01/11-1188-Conf-Anx5, ICC-01/09-01/11-1188-Conf-Anx6.
[102] Summonses Request, ICC-01/09-01/11-1120-Red2-Corr, para 2. See also Supplementary Request, ICC-01/09-01/11-1188-Conf-Red, para 15.
[103] Summonses Request, ICC-01/09-01/11-1120-Red2-Corr, paras 2, 6.
[104] Status Conference, ICC-01/09-01/11-T-87-ENG, p 33 line 12—p 34, line 6.
[105] Status Conference, ICC-01/09-01/11-T-87-ENG, p 34, line 21—p 35, line 24; Prosecution Final Submission, ICC-01/09-01/11-1202, paras 28—33.
[106] Prosecution Reply, ICC-01/09-01/11-1183-Red, para 37.

49. The Ruto Defence claims that the Prosecution makes certain errors and misrepresentations of fact regarding certain witnesses in the Summonses Request.[107]

50. The Ruto Defence also argues that it is unethical for the Prosecution to call evidence which it knows to be false and that 'you can't use a procedural device to call a witness who you know is saying something different simply to get them before the Court to then controvert them with a previous statement'.[108] The Ruto Defence submits that the evidential utility of calling hostile witnesses is minimal, and that this fact should militate in favour of rejecting the relief sought by the Prosecution.[109]

51. The Sang Defence submits that summonses ordering witnesses to appear cannot be issued on a speculative basis.[110] The Sang Defence argues that the Prosecution has not presented any basis for the belief that the Eight Witnesses are in Kenya, meaning that the Government of Kenya may not be able to carry out the contemplated cooperation.[111]

52. The Sang Defence also submits that, even if both the Statute and Kenyan law allow for the issuance of subpoenas, this mechanism should not be resorted to in this case because the Prosecution has neither shown that the anticipated testimony would materially assist its case (given that many have recanted their evidence) nor that the evidence is not otherwise obtainable.[112]

53. The Defence jointly submit that, even if the Chamber has the power to grant the relief sought, this power should not be exercised in this instance, because none of the Eight Witnesses satisfy the evidentiary threshold which must be met before a court may resort to

[107] Ruto Defence Response, ICC-01/09-01/11-1136-Red2, paras 30—37.
[108] Status Conference, ICC-01/09-01/11-T-86-Red-ENG, p 21 line 24—p 23 line 16.
[109] *Ibid*, p 26, lines 3—14.
[110] Sang Defence Response, ICC-01/09-01/11-1138-Red, para 1(4).
[111] *Ibid*, paras 76—77.
[112] Sang Defence Response, ICC-01/09-01/11-1138-Red, paras 1(5), 78—99.

coercive powers.[113] The Defence also makes witness specific observations as relates to securing the testimony of Witness 15,[114] Witness 16[115] and Witness 323.[116]

54. The LRV and Government of Kenya did not take any position on whether enforceable summonses should be issued for the Eight Witnesses beyond their submissions on the legal viability of the relief sought.[117]

(2) Witness 15 Fitness Request

55. In the Witness 15 Fitness Request, the Ruto Defence requests the Chamber:

(i) to consider available information regarding the health condition of Witness 15 when deciding whether or not it would be appropriate to issue a summons against Witness 15; or, alternatively,

(ii) to order the Prosecution to: (a) make all necessary inquiries and to conduct further investigations in order to determine whether or not Witness 15 will be fit to testify in this case in the event a summons is issued; and (b) if necessary, to delay its decision concerning the issuance of a summons compelling Witness 15 to attend until such inquiries and investigations are completed and the Prosecution provides the Chamber and the parties with all relevant information in this regard.[118]

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[113] Defence Final Submission, ICC-01/09-01/11-1200-Red, paras 5, 55—62.
[114] *Ibid*, paras 63—64.Witness 15 may be willing to voluntarily testify and that, given the reliability and credibility of this witness has been 'irrevocably compromised', no legitimate forensic purpose would be served by compelling testimony.
[115] *Ibid*, para 65. The probative value of compelled testimony is subject to the same criticisms as for Witness 15.
[116] *Ibid*, para 66. The testimony is largely irrelevant to the charges.
[117] But see Status Conference, ICC-01/09-01/11-T-86-Red-ENG, p 61, lines 3—12. The Government of Kenya mentioned the potential difficulty of finding the witnesses, whose identities are presently unknown to the Government of Kenya.
[118] Witness 15 Fitness Request, ICC-01/09-01/11-1262-Conf, para 19.

56. The LRV submits that the relief sought in the Witness 15 Fitness Request should be rejected, arguing in particular that 'a determination as to whether a witness has the capacity to testify [...] can only properly be made when the witness is before the Trial Chamber, and this would therefore presuppose the issuance and execution of a summons compelling his attendance'.[119] The LRV also provides certain passages from an indicated expert report to show that this report's conclusions cannot justify the relief sought.[120]

57. The Prosecution submits that: (i) the Witness 15 Fitness Request should be rejected *in limine* as it was filed 'well outside of the applicable time limits pertaining to the litigation of the issue of the issuance of summons to appear'[121] and (ii) were the Chamber minded to take into consideration the Witness 15 Fitness Request, the relief sought should be rejected because the conclusions the Ruto Defence invites are premature and do not accurately reflect the conclusions of the indicated expert.[122]

58. The Sang Defence joins and supports the relief sought in the Witness 15 Fitness Request.[123]

III. DISCUSSION

59. The discussion of the issues engaged in this litigation may be broadly arranged in four separate but related parts, dealing with the following questions:

(i) Whether an ICC Trial Chamber is competent to subpoena witnesses, as a general proposition, to appear before an ICC Trial Chamber;

[119] LRV Response to Witness 15 Fitness Request, ICC-01/09-01/11-1270-Conf, para 9, page 7.
[120] LRV Response to Witness 15 Fitness Request, ICC-01/09-01/11-1270-Conf, paras 3-7.
[121] Prosecution Response to Witness 15 Fitness Request, ICC-01/09-01/11-1271-Conf, paras 3, 5-11, 29.
[122] Prosecution Response to Witness 15 Fitness Request, ICC-01/09-01/11-1271-Conf, paras 4, 12-27, 29.
[123] ICC-01/09-01/11-1272-Conf, paras 2, 8.

(ii) Whether a Trial Chamber is competent to obligate a State Party to compel a witness to appear before the Chamber further to the Trial Chamber's subpoena to that witness;

(iii) Whether a request of Kenya to compel the appearance of a witness is prohibited by Kenyan law or by the Rome Statute operating as part of the laws of Kenya; and,

(iv) Whether the Prosecution has justified issuing the subpoena as requested, as a matter of the probative value of the anticipated testimonies.

60. In the course of the arguments, terminology varied between 'ordering' and 'compelling' the appearance of the witness. One may also speak of 'subpoena' or 'summons' as derivative verbs of the obvious nouns indicated. They all mean the same thing; and are commonly understood as commanding the appearance of a witness who refuses to appear voluntarily. It is in that sense that these terms are employed in this decision.

A. THE COMPETENCE OF THE ICC TRIAL CHAMBER TO SUBPOENA WITNESSES

61. It was argued that an ICC Trial Chamber has no power to subpoena witnesses to appear before it. According to this argument, appearance of witnesses is dependent on the so-called 'principle of voluntary appearance.' The ultimate upshot of this theory would be this. A witness who has been brought to The Hague by the Court's Victims and Witnesses Unit will be wholly free to refuse to come to court on the appointed day and give his testimony, preferring instead to go sightseeing in the Netherlands. And the Chamber would be powerless to order him to appear in court for his testimony.

62. That theory does not deserve serious consideration at all. It is quite simply not supported by a correct understanding of international law, customary practice in the administration of international criminal justice, and, indeed, the relevant provisions of the Rome Statute itself. The conclusion is explained below.

(1) The Objects and Purposes of the ICC

63. The right resolution of the issues presented in this litigation requires keeping in view at all times the objects and purposes of the ICC as indicated in the Rome Statute. The clearest expression of those objects and purposes are to be found in the Statute's preamble. For present purposes, the most material parts of the preamble are set out immediately below. And, in the particular context of this litigation, it is crucial to reflect carefully on each of the messages communicated in the Statute's preamble. And, here they are:

> **The States Parties to this Statute,**
>
> **Conscious** that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,
>
> **Mindful** that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,
>
> **Recognizing** that such grave crimes threaten the peace, security and well-being of the world,
>
> **Affirming** that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,
>
> **Determined** to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,
>
> **Recalling** that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

> [...]
>
> **Determined** to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,
>
> **Emphasizing** that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,
>
> **Resolved** to guarantee lasting respect for and the enforcement of international justice,
>
> **Have agreed as follows: [the establishment of the ICC, delineation of its jurisdiction, and the outlines of its powers, etc]**

64. Some may find it more convenient to see the preamble as hortatory prose that induces feelings of goodness all around and nothing more.[124] The Chamber has a different view. The Rome Statute preamble is a compendious expression, in all solemnness, of the serious and urgent concerns that frame the mandate that the States Parties have given the ICC and from which derives the powers and attributes that are reasonable for the achievement of the Court's purposes. A particularly luminous beacon among those purposes is the *determination* of the States Parties 'to *put an end to impunity* for the perpetrators of [unimaginable atrocities that deeply shock the conscience of humanity] and thus to contribute to the prevention of such crimes.' So, too, is the resolve of the States Parties 'to *guarantee* lasting respect for and the *enforcement* of international justice.' All these ends are to be achieved by insisting upon accountability through the international criminal justice that is administered at the ICC, as part of the States Parties' collective hope and desire to protect humanity from the sorts of atrocities made manifest in the crimes over which the Court has been given jurisdiction.

[124] In his oral arguments before the Chamber, the Attorney General of Kenya preferred to see the preamble to the Rome Statute as mere 'poetry' (as he also viewed the preamble to the Constitution of Kenya).

(2) International Law

65. The different circumstances of international law always recommend caution in any view of an international institution as the analogue of its domestic approximation. But, when international law itself offers a basis to place an international institution on an analogous footing with its domestic equivalent, then the analogy may reasonably be drawn. On the question of whether an ICC Trial Chamber may compel the appearance of a witness, not only do general principles of international law—including those derived from national laws, pursuant to article 21(1)(c) of the Rome Statute—offer a basis to place an ICC Trial Chamber in an analogous position as a domestic criminal court, the customary international criminal procedural law has now firmly recognised and settled the idea of compellability of a witness for purposes of a criminal trial before an international criminal court.

66. Customary international criminal procedural law will be examined later. But, we must first examine now the broader basis upon which general principles of international law are to be reasonably taken as having placed an international criminal court—as an institution—on a similar footing with a domestic criminal court. It is, perhaps, helpful to keep in mind, for purposes of this analysis, that article 21 of the Rome Statute does not limit the applicable law to only the letters of the Statute. It recognises the applicability of 'treaties and the principles and rules of international law' as appropriate, as well as general principles of national law, particularly from States with sovereign connection to the case.

67. Centrally to be considered in this regard is the import of the judgments of the International Court of Justice in a number of cases concerning the incidental or implied powers of an international institution. In the *Reparation Case*, notably, the ICJ held that 'under international law', an international body or organization '*must* be deemed to have

those powers' which, 'though not expressly provided' in the constitutive instrument, 'are conferred upon it by necessary implication as being essential to the performance of its duties.'[125]

68. The pronouncement of the ICJ, as reported above, was not made in passing. It arose in the Court's answer to the following question in particular (concerning the legal competence of the United Nations to make reparation claims against States for injuries done to UN functionaries in the performance of their functions):

> In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him?[126]

69. Notably, 'the actual terms of the [UN] Charter' had no answer to that question.[127] Hence, in order to answer the question as to UN's 'capacity to bring an international claim', the ICJ began by 'defining what is meant by that capacity'. In that connection, the Court considered the characteristics of the Organisation, with the view to determining whether, in general, those characteristics did or did not include a right to present an international claim. In the process of that examination, the Court felt it necessary, as a preliminary step, to consider, in turn, whether the Organisation possessed 'international personality'. In the Court's view, possession of international personality would make the Organisation 'an entity capable of availing itself of obligations incumbent upon its

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[125] *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* (1949) ICJ Reports 174 [International Court of Justice], p 182 [emphasis added]. See also Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice: International Organisations and Tribunals', (1952) 29 *British Yearbook of International Law* 1, at pp 5—6; and Chittharanjan Felix Amerasinghe, *Jurisdiction of International Tribunals* [The Hague: Kluwer, 2003] p 171.

[126] *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)*, *supra*, n 125, p 175 [emphasis added].

[127] See, *ibid*, pp 178 and 182.

Members.'[128] Following a review of the characteristics of the Organisation and of the mandates entrusted to it by its Member States, the Court concluded that the organisation had international legal personality.[129]

70. It is important to note that attribution of an international legal personality to the UN resulted purely from the ICJ's judicial pronouncement in the *Reparation Case,* following an analysis of the characteristics and functions of the UN. The Chamber, in the present case, is spared a similar exercise. This is because the Rome Statute expressly recognises in article 4(1) that the ICC has international legal personality.

71. But, what are the consequences of attribution of international legal personality to an international institution (such as the ICJ had declared for the UN and the Rome Statute for the ICC)? In the *Reparation Case,* the ICJ considered it to mean that the Organisation possesses, in turn, rights and duties that are made necessary by 'its purposes and functions as specified or implied in its constituent documents and developed in practice.'[130] It is to be recalled that the Court had earlier indicated that the possession of international personality would make the Organisation 'an entity capable of availing itself of obligations incumbent upon its Members.' That finding, of course, necessarily implies that the purposes or functions of the Organisation indicate a given right for it—in express or implied terms. That is to say, the finding of a right generally implicates a latent obligation somewhere, as a jural correlative—and vice versa.

72. It is against that background that the ICJ found as follows (as regards the UN): 'The functions of the Organization are of *such a character that they could not be effectively discharged* if they involved the concurrent action, on the international plane, of fifty-eight or more Foreign Offices, *and the Court concludes that the Members have endowed the*

[128] *Ibid.*
[129] *Ibid,* p 179.
[130] *Ibid,* p 180.

Organization with capacity to bring international claims when necessitated by the discharge of its functions.'[131]

73. The ICJ had similarly observed as follows in a different passage: 'It must be acknowledged that its Members, *by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.'*[132]

74. The resulting principle of—or legal formula for—implied power thus becomes this. If the power (capacity or competence) under consideration is such that the functions (that the States Parties entrusted to an international body or institution) 'could not be effectively discharged' without the power (capacity or competence) in question, the international body or institution '*must* be deemed to have [that power]'.[133] For, the power is 'necessitated by the discharge of its functions'.[134] In fact, the ICJ said as much, as regards the powers of the UN. The Court said this: 'Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.'[135]

75. In the *Effect of Awards Case,*[136] the ICJ once more was confronted with the question of implied powers of the UN. The question on that occasion was whether, in the absence of explicit provision in the UN Charter, the UN General Assembly had the power to establish the United Nations Administrative Tribunal that adjudicated employment disputes between the UN and its staff members. Recalling the principle it had earlier enunciated in

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[131] *Ibid.*
[132] *Ibid*, p 179 [emphasis added].
[133] See, *ibid*, p 182.
[134] See, *ibid*, p 180.
[135] *Ibid*, p 182.
[136] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (Advisory Opinion)* (1954) ICJ Reports 47 [International Court of Justice], pp 47 and 57.

the *Reparation Case*, the Court concluded that 'the power to establish a tribunal, to do justice as between the Organization and the staff members, was essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter.'

76. In an advisory opinion to the ICJ in the matter of the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*,[137] the ICJ declined to give an advisory opinion to the World Health Organisation on the question of legality of use by a State of nuclear weapons in armed conflict. [This case is not to be confused with the similarly titled advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*[138] that the Court had delivered on the same day to the UN General Assembly, rendering in substance the same advisory opinion that the WHO had sought.] The Court's reason for declining to render the opinion to the WHO was that the use of nuclear weapons by States in armed conflict fell outside the field of the WHO's speciality (considering the different specialities in international life that have been entrusted to different international organisations); thus involving no implied powers in the WHO to seek the advisory opinion on that particular question.[139]

77. Even so, the ICJ was—quite significantly for the purposes of the matter now to be decided by the Trial Chamber—careful to restate the following general principle of international law relating to 'implied powers' of 'international organisations' in general:

> The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of

[137] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* (1996) ICJ Reports 66 [International Court of Justice].
[138] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (1996) ICJ Reports 226 [International Court of Justice].
[139] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion), supra*, n 137, para 76. As the Court put it: 'In the opinion of the Court, to ascribe to the WHO the competence to address the legality of the use of nuclear weapons—even in view of their health and environmental effects—would be tantamount to disregarding the principle of speciality; for such competence could not be deemed a necessary implication of the Constitution of the Organization in the light of the purposes assigned to it by its member States'.

> international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as "implied" powers.[140]

78. And, in the *Nuclear Tests Cases*, the ICJ directly iterated the principle of implied powers in the context of international courts and tribunals—writing in terms of 'inherent jurisdiction' of the court. As the Court put it:

> [I]t should be emphasized that the Court possesses an inherent jurisdiction *enabling it to take such action as may be required,* on the one hand, to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the 'inherent limitations on the exercise of the judicial function' of the Court, and to 'maintain its judicial character' . . . . *Such inherent jurisdiction,* on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, *derives from the mere existence of the Court as a judicial organ* established by the consent of the States, *and is conferred upon it in order that its basic judicial functions may be safeguarded.*[141]

79. It is, perhaps, useful to avoid misunderstanding what the ICJ had in mind in the above quotation with exercising its implied powers as a court of law in (a) a positive manner that is essential to the realisation of its express jurisdiction; as well as (b) a negative manner to ensure the observance of the 'inherent limitations on the exercise of the judicial function' of the Court, and to 'maintain its judicial character'. The focus, for the moment, is on the latter indication. Notably, the Court had, in the *Northern Cameroon Case,* explained what it had in mind in that regard. The explanation was this:

> It is the act of the Applicant which seises the Court but even if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one

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[140] *Ibid.*

[141] *Nuclear Tests Case (New Zealand v France) (Judgment)* (1974) ICJ Reports 457 [International Court of Justice], para 23 [emphasis added]. *See also Nuclear Tests Case (Australia v France) (Judgment)* (1974) ICJ Reports 253 [International Court of Justice], para 23.

> hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity.[142]

80. Instances in which the Court may so decline to exercise its jurisdiction will include those instances in which the Court is invited to make decisions that have little or no real judicial value, in comparison to the political ramifications of the matter in the prevailing circumstances of the particular case; thus avoiding needless and unwitting submission of the judicial process into the arena of political conflict. Notably in that connection, the Chamber declined, in this case, to require the accused in this case (as the executive Deputy President of Kenya) to be continuously present at trial in The Hague, when it was possible to conduct his trial under a carefully couched decision conditionally excusing him from continuous presence at trial. A criminal court is also not bound by a plea agreement between the Prosecution and the Defence, especially as regards the sentencing to be handed out by the court. A particularly interesting example that the ICJ gave as an instance of negative exercise of implied powers had been expressed as follows: 'the Court cannot as a general rule be compelled to choose between constructions [of a treaty] determined beforehand none of which may correspond to the opinion at which it may arrive.'[143] The example is telling. For, in this case, we had been urged to follow constructions of the Rome Statute by academics who offered their views well ahead of an actual case, and before the Chamber has had the opportunity of arguments of counsel litigating the actual case. (This is not to say, of course, that academic views offered well ahead of actual cases are always unhelpful. It is just that the circumstances and factual contours of actual cases in their own time may detract from the utility of academic opinions offered well ahead of time: and the court may reject them.) Ultimately, the point of negative exercise of implied powers is that a Court of law may also use the power to preserve its judicial integrity.

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[142] *Case concerning the Northern Cameroons (Judgment)* (1963) ICJ Reports 15 [International Court of Justice], p 29.
[143] *Ibid.*

81. But, the general principle of international law reiterated in the *Nuclear Tests Cases* and the line of jurisprudence reviewed above had long crystallised as follows. An international institution—particularly an international court—is deemed to have such implied powers as are essential for the exercise of its primary jurisdiction or the performance of its essential duties and functions.

82. Indeed, that general principle of international law had been recognised as such by classical publicists of the greatest authority—long before the creation of the ICJ. Hugo Grotius, for instance, wrote as long ago as 1625 that 'besides words and letters', treaties 'admit of tacit consent' that 'has the power of conveying a right'. And, such powers 'indeed naturally rising out of the action itself.'[144] Christian Wolff agreed. He accepted that more, by way of rights and obligations, may be implied into a treaty, beyond what is plainly expressed.[145] And, in a language strikingly similar to the implied powers pronouncements of the ICJ, Emer de Vattel wrote in 1758 that in the interpretation and application of treaties, 'everything which is indispensably necessary to give effect to the articles agreed on, is tacitly granted'.[146]

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[144] Hugo Grotius, *On the Law of War and Peace* [AC Campbell tr, first published 1625, Elibron Classics Series, 2005] p 415. As he put the proposition: '[P]ublic, private, and mixed, conventions admit of tacit consent, which is allowed by custom. For in whatever manner consent is indicated and accepted it has the power of conveying a right. And, as it has been frequently observed in the course of this treatise, there are other signs of consent besides words and letters: some of them indeed naturally rising out of the action itself'.

[145] Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* [Joseph H Drake tr, first published 1764, Clarendon Press, 1934] p 221. As he commented: 'We willingly agree that right arises only from declared intention, but when that is not plainly expressed, the question is what ought to be presumed concerning it. But no one will criticize if that should be presumed which is in perfect accord with equity, which is to be determined by a sense of duty'.

[146] Emer de Vattel, *The Law of Nations* [Bela Kapossy and Richard Whatmore eds, first published in 1758, Liberty Fund, 2008] p 394. The fuller quote appears as follows: 'Our faith may be tacitly pledged, as well as expressly: it is sufficient that it be pledged, in order to become obligatory: the manner can make no difference in the case. The tacit pledging of faith is founded on a tacit consent; and a tacit consent is that which is, by fair deduction, inferred from our actions. Thus, as Grotius observes, whatever is included in the nature of certain acts which are agreed upon, is tacitly comprehended in the agreement: or, *in other words, everything which is indispensably necessary to give effect to the articles agreed on, is tacitly granted*' [emphasis in original]. See also *The Betsy* (1797) 4 *International Adjudications* 179 at p 187. It may be further mentioned that in *The Betsey* arbitration, in 1797, an objection was raised that the UK—US Mixed Claims Commission (constituted under Articles V to VII of the Jay Treaty) had not been expressly granted the power to determine the extent of its own jurisdiction. In dismissing the objection, Commissioner Gore invoked 'the doctrine of implication, and tacit grants derived from, though not expressly included in, the terms of the contract'.

* * *

83. It is not surprising then that the Rome Statute has codified this doctrine of implied powers—no doubt out of an abundance of caution. To that effect, article 4(1) provides as follows: 'The Court shall have international legal personality. It shall *also* have *such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.*' [Emphasis added]. There is no doubt at all in the Chamber's mind that 'legal capacity' in the sense of article 4(1) includes competence, power, ability and capability.

84. Concerning the capacity to compel the appearance of witnesses before the ICC, the operation of this principle of implied powers could not have been put in terms stronger than those in which the European Court of Human Rights had put the proposition in *Djokaba Lambi Longa v The Netherlands*. As the ECtHR put it:

> It would, in the Court's view, be unthinkable for any criminal tribunal, domestic or international, not to be vested with powers to secure the attendance of witnesses, for the prosecution or the defence as the case may be. The power to keep them in custody, either because they are unwilling to testify or because they are detained in a different connection, is a necessary corollary.[147]

85. It may be helpful to stress that the ECtHR made the foregoing observations specifically in relation to the character of the ICC as an international criminal court. This Chamber fully shares their view.

86. The application of the principle of implied powers—running through the *Reparation Case* (and its progeny), the *Djokaba Lambi Longa Case*, and codified in article 4(1) of the Rome Statute—in relation to an ICC Trial Chamber is quite straightforward. An ICC Trial Chamber, in its functions, is the fulcrum of the *raison d'être* of the ICC as an international institution—specifically, an international criminal court. Its function is to conduct criminal

[147] *Djobakaba Lambi Longa v The Netherlands*, Application No 33917/12, Judgment of 8 November 2012 [ECtHR], para 72.

trials in cases over which the Court has jurisdiction for purposes of accountability for alleged violations of the norms listed in the Rome Statute. Can the Trial Chamber 'effectively discharge' that function if every witness is left free to decide to decline appearance, and the Chamber is left incapable of compelling appearance? Certainly not. That being the case, the power to compel the attendance of witnesses is an incidental power that is critical for the performance of the essential functions of the Court.

87. Standing alone, this principle of implied powers, as a general principle of international law, is ample to justify incidental competence in an ICC Trial Chamber to compel the appearance of witnesses. It makes it unnecessary to agonise over the import of any provision of the Rome Statute that does not expressly and clearly exclude the possibility to imply the power. For fuller analysis, however, an examination of the Rome Statute will also be done below. But before that examination, it may be helpful to consider customary international criminal procedural law on the matter.

(3) Customary International Criminal Procedural Law

88. In addition to the foregoing analysis, it is also a matter of customary international criminal procedural law that a Trial Chamber of an international criminal court has traditionally been given the power to subpoena the attendance of witnesses.

89. It may be helpful to note that article 18(2) of the ICTR Statute provides that '[u]pon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.' An identical provision appears in article 19(2) of the ICTY Statute. It is arguable that this provision pertains only to the power of a judge that has confirmed an indictment, and that it is not a power given directly to a Trial Chamber. The consequences of that argument would, of course, be to

strengthen the incident of rule 54 of the ICTR Rules [to be discussed presently] which, in directly granting the Trial Chamber the power to subpoena or summons witnesses, in the absence of express power indicated in the Statute to that effect, must be taken to be rationally founded upon the principle of implied powers enunciated in the *Reparation Case* and its progeny.

90. And, in its own terms, indeed, rule 54 of the ICTR Rules clearly grants the ICTR Trial Chamber the power to order the appearance of witnesses. It provides as follows: 'At 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.' This is a replica of rule 54 of the ICTY Rules.

91. Rule 54 common to ICTR and ICTY Rules is a general template that is repeatedly seen in identical[148] or varying formulations[149] in the procedural laws of the Special Court for Sierra Leone, the Special Tribunal for Lebanon and Extraordinary Chambers in the Courts of Cambodia. The result of these repeated procedural laws is inescapably the crystallisation of customary international criminal procedural law, which recognises that a trial chamber of an international criminal court may subpoena a witness to appear for testimony. The picture is wholly consistent with the intendment of article 21(1)(c) of the Rome Statute, including in allowing general principles of national law to augment the provisions of the Rome Statute and related instruments. Subpoena powers are an undoubted element of general principles of national law in the administration of criminal justice.

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[148] Rule 54 of SCSL Rules appears in identical formulation as r 54 common to the ICTR and ICTY Rules. Rule 77(a) and (e) [read together with r 130(b)] of the STL Rules similarly appears in near identical terms.

[149] Rule 78(a) and (b) [read together with r 130(b)] of the STL Rules also make clear that the Trial Chamber has the power to issue summons to appear to a witness. So, too, do rr 41(1) and 84(2) of the ECCC Internal Rules show the power of the Chamber to order the appearance of witnesses.

92. In the circumstances of that settled and accepted practice in international (and national) criminal procedural law, it would require very clear language indeed for the States Parties to the Rome Statute to be taken to have intended that the ICC—as the permanent international criminal court established for the primary purpose of eliminating impunity for grave violations of international criminal norms—should be the only known criminal court in the world (at the international and the national levels) that has no power to subpoena witnesses to appear for testimony.

93. But, as will be seen next, the clear intention of the States Parties, as is manifest in the Rome Statute, is in the opposite direction. That is to say, they clearly intended the ICC Trial Chambers to have the power to compel the attendance of witnesses.

(4) The Rome Statute

94. A starting point in the consideration of the intention of the States Parties in favour of an ICC Trial Chamber's possession of the power to subpoena witnesses begins with the import of article 4(1) of the Rome Statute, which, it may be recalled, provides as follows: 'The Court shall have international legal personality. It shall *also* have *such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.*' [Emphasis added]. On the basis of the principle of implied powers as a settled general principle of international law, as discussed earlier, article 4(1) would be an ample basis to imply any reasonable power necessary for the effective discharge of the mandate of the ICC. The power to subpoena witnesses is clearly first among the powers necessary for the performance of ICC functions.

95. But, as regards the specific power to compel the attendance of witnesses, the States Parties did not leave the power merely to the process of implication. The intention was indicated in explicit language. That intention is immediately apparent in the French, the

Spanish and the Arabic texts of article 64(6)(b) of the Statute—which are no less authoritative than the English text. The French version provides as follows: 'Dans l'exercice de ses fonctions avant ou pendant un procès, la Chambre de première instance peut, si besoin est … *Ordonner la comparution des témoins* …'. The Spanish version says this: 'Al desempeñar sus funciones antes del juicio o en el curso de éste, la Sala de Primera Instancia podrá, de ser necesario … *Ordenar la comparecencia y la declaración de testigos* …'. 'Ordonner' in French and 'ordenar' in Spanish translate into 'to order' in English. The equivalent word in the Arabic text is الأمر [*al amr*], meaning to issue an order or a command.

96. As Mr Stewart (the Deputy Prosecutor) correctly pointed out during oral arguments, in the French text of the Statute, the phrase 'ordonner la comparution des témoins' where the phrase 'require the attendance … of witnesses' appears in the English text. The focus is on the verbs 'ordonner' in the French and 'require' in the English text. The French verb 'ordonner' translates into 'to order' in English.

97. But, despite this submission, Defence Counsel and the Attorney-General of Kenya insisted that the English version of article 64(6)(b) does not indicate that the Trial Chamber has the power to order the attendance of witnesses. Notably, the English text provides as follows: 'In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary … [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; …'.

98. In particular, Ms Buisman (for the Sang Defence), in response to a question from the Bench, insisted that the word 'require' in the English language may not mean 'order' or 'compel'. In making the argument, she was no doubt persisting with the argument that the Attorney General of Kenya had made in his written submission, to the effect that the

ordinary meaning of the word 'require' in the English language implicates a voluntary action. In the course of the debate, it was pointed out to Ms Buisman that the primary entries for the word in the *Oxford Thesaurus* principally indicate the meaning of the word as 'order' and 'command' and that word was also indicated as co-terminous with 'coerce' and 'force'. Indeed, the primary entry appears as follows: '**require** *v* **1** order, command, ask (for), call (for), press (for), instruct, coerce, force; insist, demand; make: *I am required to appear in court on Monday. The teacher required that I bring my mother to school.*'[150]

99. But, it may be observed that the absurdity of the proposition that it was the intention of the Rome Statute States Parties to deny subpoena power to the ICC goes beyond the possibility that such an understanding has a very clear potential for the perpetuation of impunity—that is to say, freedom from accountability—for a person accused of international crimes even as grave as genocide. It also holds the equally disturbing potential that a person accused of a crime so grave may be denied critical defence if possibly exonerating evidence in his defence lies in the mouth of a witness who would not or could not appear voluntarily. The peculiar preferences and strategies of the defendants in the case at bar do not warrant the creation of judicial precedent that would have such serious general implication on the fair trial rights of other accused persons arraigned now or in future before this Court.

100. In light of the above, there is no doubt at all in the Chamber's view that when article 64(6)(b) says that the Chamber may 'require the attendance of witnesses', the provision means that the Chamber may—as a compulsory measure—*order* or subpoena the appearance of witnesses as the Arabic, the French and the Spanish texts so clearly say.

[150] Laurence Urdang, The Oxford Thesaurus [Oxford: Clarendon Press, 1991]. Notably, the secondary meaning to the verb 'require' in the *Oxford Thesaurus* is indicated as follows: '**2** need, want, lack, be lacking, be missing, be short (of); desire: *We require one more trainee in order to fill our quota.*' But, the sense of article 64(6)(b) does not implicate this meaning by any interpretation that is reasonable.

101. For present purposes, however, that conclusion does not resolve the matter of this litigation. The next question, and as presented, becomes whether any such order or subpoena of the Chamber summonsing a witness may occasion an obligation upon an ICC State Party to employ compulsory measures to procure the attendance of the witness in question, as a matter of the Court's request to the State Party concerned.

B. THE GENERAL OBLIGATION OF STATES TO COMPEL WITNESS APPEARANCE AT THE REQUEST OF A TRIAL CHAMBER

102. For the reasons that follow, there is a clear obligation upon the Republic of Kenya as a State Party to the Rome Statute—and particularly one that has domesticated the Rome Statute in the terms of the International Crimes Act—to assist the Court in compelling to appear before the Trial Chamber any witness in Kenya who is the subject of a subpoena issued under article 64(6)(b). That is to say, the Trial Chamber is competent to make that request of Kenya; and Kenya is obligated to employ compulsory measures against the witness in order to perform the demands of the request.

103. It is noted from the outset that article 86 imposes upon States Parties a general obligation to 'cooperate *fully*' with the Court in its 'prosecution' of crimes within the jurisdiction of the Court. According to the provision: 'States Parties shall, in accordance with the provisions of this Statute, *cooperate fully* with the Court in its investigation and *prosecution* of crimes within the jurisdiction of the Court.' [Emphasis added.] The wording saying that full cooperation shall be rendered 'in accordance with the provisions of this Statute' affords no refuge to non-cooperation, such as may result purportedly from any claim that the subject-matter of the request was not spelt out explicitly in the Statute. Cooperation in accordance with 'the provisions of this Statute' fully comprises cooperation resulting from a reasonable construction of other 'provisions of this Statute'—including (but not limited to) article 21 of the Rome Statute (that recognises the applicability of

'treaties and the principles and rules of international law' as well as general principles derived from national law beyond the Rome Statute) and article 4 (that gives the Court 'such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes').

(1) International Law — implied powers that make a Court an effective international institution

104. The starting point for an appreciation of the Court's power to make a proper request of Kenya's assistance in compelling the attendance of witnesses before the Trial Chamber stems, once again, from a proper appreciation of the notion of implied powers—as a general principle of international law—so clearly reiterated by the ICJ (as we have seen before) in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*. It is necessary to repeat the pronouncement: '[T]he necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as "implied" powers'.[151]

105. That, it is to be recalled, is a restatement of the principle of implied powers enunciated in the *Reparation Case*, where the ICJ pronounced that the UN was an organisation that possessed international personality, thus making it an entity that 'possesses, in regard to its Members, rights which it is entitled to ask them to respect'[152]; that is to say, 'an entity capable of availing itself of obligations incumbent upon its Members';[153] or, an organization that has 'the undeniable right ... to demand that its Members shall fulfil the obligations entered into by them in the interest of the good

[151] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion), supra*, n 137, para 76.
[152] *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion), supra*, n 125, p 178.
[153] *Ibid.*

working of the Organization'[154]—as a matter of the international organisation's implied powers. Hans Kelsen similarly articulated the legal consequences of legal personality as meaning 'the *capacity of being a subject of legal duties and legal rights,* of performing legal transactions and of suing and being sued at law.'[155]

106. But, the greater jurisprudential value of the *Reparation Case* and the long line of cases to the like effect is that these duties and rights and powers derive not only from the express words of an international organisation's constitutive instrument, but also from the process of implication in the light of the functions and purposes of the organisation in question.

107. The colocation of the notion of *rights* (for the international organisation) and corresponding *obligations* (on the Member States) in the ICJ analysis in the *Reparation Case* is not fortuitous. It is an accepted axiom that the right in someone engages the jural correlative of obligation or duty on someone else or other persons, in a manner that makes the right meaningful as such. In his analysis of the *Reparation Case,* Fitzmaurice spelt out the jural correlative (between the international organisation and its members) in the following way: 'Its duties have as their counterpart obligations owing to it by member states, the performance of which the organization has a right to expect and, if necessary, to require.'[156] Grotius had similarly observed as follows: 'It is a right, which natural reason dictates, that everyone who receives a promise, should have the power to compel the promiser to do what a fair interpretation of his words suggests.'[157] As has already been observed, Grotius had particularly reiterated that idea of jural correlatives in the context of

[154] *Ibid*, p 184.
[155] Hans Kelsen, *The Law of the United Nations* [first published 1950, The Law Book Exchange, 2008] p 329.
[156] Fitzmaurice, *supra*, n 125, p 3—4.
[157] Grotius, *On the Law of War and Peace*, *supra*, n 144, p 176.

implied power, '[f]or, in whatever manner consent is indicated and accepted it has the power to convey a right.'[158]

108. All told, the lessons of the *Reparation Case* and the related sources of international law (ancient and modern), as indicated above, are particularly instructive in the matter now at hand. There was no express provision in the UN Charter that authorised the UN to demand reparation from a member State for injuries done to UN functionaries in the course of their work for the UN. But, the ICJ found that there was an implied power or right in the UN to exact such reparation, because such implied power or right was made necessary by the nature of the work that Member States had entrusted to the UN. In the result, the UN was put in the position to avail itself of the resulting obligations incumbent upon its Member States—as the jural correlative of the Organisation's implied right or power to pursue the claims of reparation.

109. Notably, for the UN (as observed earlier) the international legal personality resulted from the process of construction of the UN Charter. For the ICC, international legal personality was not left to statutory construction, as has also been seen. It was expressly granted to the Court in article 4(1). The provision also states explicitly that the Court 'shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.' The effect of the general principle of international law stated in the *Reparation Case*—and restated in article 4(1) of the Rome Statute—is that the Court has been put in a position to avail itself of the resulting obligations incumbent upon States Parties to the Rome Statute.

110. The foregoing outcome is further buttressed by article 4(2) of the Rome Statute, which provides: 'The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party …'. The general statement is that the Court may

[158] *Ibid*, p 415.

exercise its functions and powers on the territory of any State Party. But, that statement comes with the qualifier 'as provided in this Statute'. The significance of that qualifier will, of course, require an examination of provisions of the Rome Statute that affect—positively or negatively—the Court's power to avail itself of the obligations incumbent upon States Parties to the Rome Statute. That examination will necessarily include, first, the incidence of article 4(1) as described above—i.e. that the Court 'shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.' That provision is surely one indication of the 'functions and powers' of the Court 'provided in this Statute', within the meaning of article 4(2). In light of the principle of implied powers, as a general principle of international law, article 4(2) will recognise the power to subpoena witnesses in Kenya to appear before the Chamber, in the absence of any other provision of the Rome Statute that clearly excludes that power.

111. The second provision to examine is article 64(6)(b). As discussed earlier, it clearly indicates—in terms—that the Trial Chamber has the power to order the attendance of a witness. That being the case, by operation of article 4(2), the Chamber may exercise that power in the territory of a State Party (particularly in the light of domestication of the Rome Statute) in the absence of any other provision of the Rome Statute that clearly excludes that outcome.

112. The third provision that must be examined is article 93 of the Statute. The provision had generated much debate in the course of the litigation on this matter. The relevant provisions of article 93 appear as follows:

> 1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:
>
> ...
>
> (d) The service of documents, including judicial documents;

> (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;
>
> ...; and
>
> (l) Any 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.
>
> ...
>
> 3. Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary.
>
> ...
>
> 5. Before denying a request for assistance under paragraph 1(l), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them.

113. The Prosecution relies on the combined effect of article 93(1)(d) and article 93(1)(l). In that regard, their central argument is this. A Trial Chamber's subpoena to a witness falls under what is indicated as 'service of documents, including judicial documents', being a manner of assistance that States Parties are obligated to render under article 93(1)(d); and, on that premise, an ICC request to the Kenyan Government, to use 'procedures of national law' of Kenya—as contemplated in the chapeau of article 93(1)—to compel the attendance of the concerned witnesses before the Trial Chamber, is a request that falls under article 93(1)(l), as '[a]ny other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the ... prosecution of crimes within the jurisdiction of the Court.'

114. The Defence and the Attorney-General of Kenya seek to defeat the Prosecution's objective by pointing to the provisions of article 93(1)(e). In the view of the Defence and the Attorney-General, that provision nominates '[f]acilitating the voluntary appearance of persons as witnesses ... before the Court'. According this argument, the fact alone of this nomination, with no express mention of facilitation of compelled appearance, deprives the Court of the legal competence to obligate Kenya to facilitate any appearance of witness that is not voluntary.

115. The Chamber, by Majority (Judge Herrera Carbuccia dissenting), is not at all persuaded by the argument of the Defence and the Attorney-General. It is very clear that article 93(1) does not provide an exhaustive list of the types of requests that the ICC may make of States Parties, in order to enable the Court carry out its essential functions. Article 93(1)(l) makes that very clear. But, care was taken to show sensitivity to national laws in the provision of article 93(1)(l). It is then up to the State on whom a request has been made to specify how national law *prohibits*—in good faith—the type of the request that was made. Notably, the prohibition must be seen to be in good faith, because article 93(3) states that the prohibition needs to be 'on the basis of an existing fundamental legal principle of general application'. *Ad hominem* prohibitions patently or latently directed against the ICC for no good reason will be insufficient.

116. The indication in article 93(1)(e) of 'voluntary appearance' of witnesses among types of assistance listed in article 93(1) does not readily preclude a State Party from rendering assistance in the manner of compelling the appearance of witnesses under the subpoena of a Trial Chamber.

117. That the drafters of the Statute saw fit to indicate assistance in the nature of facilitating 'voluntary appearance' of witnesses as an assistance that a State Party shall give, when requested, will always have the value of ensuring not only that a State Party

has an obligation to assist such witnesses to appear voluntarily (rather than leave them to their own devices); but it also obligates a State Party to refrain from impeding the voluntary appearance of a witness. It does not follow, then, that there could not be an obligation upon the State to render assistance to the ICC by compelling a witness, in accordance with national law, to appear before a Trial Chamber, at the request of the Chamber. The latter kind of assistance clearly falls under the rubric of '[a]ny other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the ... prosecution of crimes within the jurisdiction of the Court'.

118. The Chamber's rejection of the arguments of the Defence and the Attorney-General fully takes into account their argument that the adjective 'voluntary' was deliberately employed to qualify 'appearance', in the drafting history of article 93(1)(e). The Chamber's consideration of that element of the submissions is set out below, under the subheading 'The Limited Value of *Travaux Préparatoires*'.

119. Similarly, in arriving at the interpretation that determined the meaning of article 93(1)(e) relative to article 93(1)(l), the Chamber was not oblivious of certain canons of interpretation that may be thought of as lending ostensible support to the arguments of the Defence and of the Attorney-General. Such canons would include those expressed in the maxims *generalia non specialibus derogant* and *expressio unius est exclusio alterius*. The Chamber is, however, satisfied that no 'canon' of interpretation of legal texts is ever exclusive in its control over the process of interpretation. And, as Karl Llewellyn pointed out many years ago, there is seldom a canon for which a proper research will not reveal a countervailing principle.[159] 'Plainly,' then, 'to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon: The good sense of the situation and a simple construction of the available

[159] Karl Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed', (1950) 3 *Vanderbilt Law Review* 395, generally and especially at p 401 *et seq*.

language to achieve that sense, by tenable means, out of the statutory language'.[160] It has been correctly urged that *context* is one consideration that overrides the value of any particular canon.[161] Indeed, in the sphere of interpretation of treaties, this urge enjoys normative standing in the provisions of article 31(1) of the VCLT which requires 'ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.' This directive, then, does override the role of any canon that urges a meaning to be given to the provisions of any treaty regardless of its context and object and purpose. That is to say, context constitutes what Llewellyn would describe as the more 'tenable means' to achieve the 'good sense of the situation'.

(2) The Rule of Good Faith

120. The various elements of the analysis considered above are further enhanced in their joint and several import by the rule of good faith, as a principle of international law in the interpretation and implementation of treaties.

121. The rule of good faith enjoys a pride of place in both the *performance* and *interpretation* of treaties. It is restated as comprised within the notion of *pacta sunt servanda.* It is codified in article 26 of the VCLT in the following terms: 'Every treaty in force is binding upon the parties to it and must be *performed* by them *in good faith.*' [Emphasis added]. The rule of good faith is reiterated in article 31(1) of the VCLT as follows: 'A treaty shall be *interpreted in good faith* in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.' [Emphasis added].

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[160] *Ibid*, p 401.
[161] United States Congressional Research Service, 'Statutory Interpretation: General Principles and Recent Trends', 31 August 2008, p 4. Available at:< http://mspbwatch.files.wordpress.com/2013/02/statutory-interpretation-general-principles-and-recent-trends.pdf >.

122. Explaining the importance that the rule (expressed as *pacta sunt servanda*) has in international law, the International Law Commission described 'the rule that treaties are binding on the parties and must be performed in good faith' as '*the fundamental principle* of the law of treaties.'[162] For his part, Professor Bin Cheng observed as follows: 'The law of treaties is closely bound with the principle of good faith, if indeed not based on it; for this principle governs treaties from the time of their formation to the time of their extinction.'[163] And, according to him, in the absence of the rule of good faith, '[i]international law ... would be a mere mockery'.[164]

123. Relating back to the formation of treaties, the rule of good faith operates to exclude the idea that in negotiating and concluding treaties, the parties had intended to create a regime that is merely 'illusory or nominal'.[165] Similarly, treaty parties are not to be 'presumed to have intended anything which would, under the circumstances, have been unreasonable, absurd or contradictory, or which leads to impossible consequences.'[166]

124. In the Chamber's view, the efforts of the States Parties in creating a permanent criminal court of last resort, and giving it the mandate to ensure accountability on the part of those suspected of committing crimes that shock the conscience of humanity, would have been reduced only to creating a merely 'illusory or nominal' institution—were it to

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[162] United Nations, 'Report of the International Law Commission on the work of its eighteenth session' (1966) *Yearbook of the International Law Commission*, Doc No A/CN.4/SER.A/1966/Add.1, 172 at p 211.
[163] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* [Cambridge: Cambridge University Press, 1993] p 106.
[164] *Ibid*, p 113 [footnotes omitted].
[165] *Ibid*, page 106 [footnotes omitted]. See *The Betsy* (1797), *supra*, n 146, p 239: As part of his reasoning in dismissing the objections, in *The Betsy*, that the UK-US Mixed Claim Commission had not power to determine the extent of its arbitral jurisdiction conferred under Article VII of the Jay Treaty, Commissioner Gore decried the objections as having the effect of 'render[ing] the provisions of the article *illusory*—a consequence not to be admitted in the most trifling contract, if by any ways it can be avoided; still more inadmissible in a solemn bargain between two wise and respectable nations ...'[emphasis added]. See also Vattel, *The Law of Nations*, *supra*, n 146, p 419: to a similar effect, Vattel had observed that an 'interpretation ... which would render a treaty null and inefficient, cannot be admitted. ... for it is a kind of absurdity to suppose that the very terms of a deed should reduce it to mean nothing. *It ought to be interpreted in such a manner, as that it may have its effect, and not prove vain and nugatory*' [emphasis added].
[166] Cheng, *General Principles of Law as Applied by International Courts and Tribunals, supra*, n 163, p 106 [footnotes omitted].

be accepted that the States Parties did not intend the Court to have the power to compel the appearance of witnesses either of its own force or with the assistance of States Parties. Such is to conceive of an ICC that is 'in terms a substance, in truth a phantom'.[167] In light of the Court's mandate and the resulting global expectations, the theory of such a degree of fundamental impotence would yield an outcome that is 'unreasonable, absurd or contradictory', and 'impossible consequences' as regards the fulfilment of the mandate and the expectations. Indeed, both the 'weightier quality of the parties' and 'the greater magnitude of the subject-matter'[168] seriously give the lie to the proposition. Such an intention—or its effect—is not to be lightly presumed on the part of ICC States Parties in their creation of the Court. Quite the contrary, they must be presumed to have created a court with every necessary competence, power, ability and capability to exercise its functions and fulfil its mandate in an effective way. The intention of the States Parties to create an effective court—and not an illusory one—is sufficiently clear from the provisions of article 4(1), saying, as seen earlier, that the Court 'shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.'

125. Further observations may be especially made as regards the operation of the rule of good faith as expressed in article 31(1) of the VCLT: 'A treaty shall be *interpreted in good faith* in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.'

126. Professor Cheng describes as 'an act of faith'—which has long been recognised by international tribunals and reaffirmed by the United Nations—the 'principle that treaty obligations should be fulfilled in good faith and not merely in accordance with the letter of the treaty'.[169] Good faith, in the circumstances, means that treaties are to be interpreted

[167] See *The Betsy* (1797), *supra*, n 146, page 187.
[168] See Cheng, *General Principles of Law as Applied by International Courts and Tribunals, supra*, n 163, p 112.
[169] *Ibid*, p 114.

according to the 'common and real intention of the parties',[170] with the view to 'carrying out the substance of this mutual understanding honestly and loyally'.[171] The result is that 'treaties ought not to be interpreted exclusively according to their letter, but according to their spirit'.[172] It is perhaps notable that Sir Humphrey Waldock (special rapporteur to the ILC on the law of treaties, later an ICJ judge) felt it 'desirable to underline a little that the obligation to observe treaties is one of good faith and not *stricti juris*'.[173] In an application of the element of good faith in the case concerning *Gabčíkovo-Nagymaros Project*, the ICJ expressed the view that, *'it is the purpose of the Treaty, and the intentions of the parties in concluding it,* which *should prevail over its literal application'*. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realised'.[174]

127. The development of international law away from exclusive reliance on the literal text of the treaty to the emphasis on its spirit—as what is required by the rule of good faith—was not accidental. Professor Anthony D'Amato outlines the evolution as follows:

> In the early days of legal systems, including the international system, there was a strong tendency to interpret documents literally. The words of agreements, especially solemn international treaties or letters written on parchment and elaborately sealed, were invested with an almost magical literal power ... .
>
> Strict and literal construction of the earliest treaties often led to unintended and unjust consequences to one or more parties. As a result, the treaties began to include clauses designed to deal with questions of interpretation and performance. Early treaties concluded between kings of England and foreign monarchs contained separate clauses that the treaties were meant to be *bonae fidei negotia*–that they were to be kept in good faith. As time went on, these clauses gradually were reduced in size and prominence because the principle of good faith was increasingly understood to be implicit in the

[170] *Ibid.*
[171] *Ibid*, p 115.
[172] *Ibid* [footnotes omitted].
[173] United Nations, 'Third report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur' (1964) *Yearbook of the International Law Commission*, Doc No A/CN.4/SER.A/1964/Add.1, 5 at p 7.
[174] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Judgment)* (1997) ICJ Reports 7 [International Court of Justice], p 79 [emphasis added].

> treaties. Today it is clear that there need to be no explicit mention of the principle of good faith in a treaty because, unless that principle were specifically negated, it is an implicit provision of all treaties.[175]

128. The foregoing review underscores the importance of discerning the object and purpose of the Rome Statute, which is to 'put an end to impunity' for the perpetrators of 'unimaginable atrocities that deeply shock the conscience of humanity', by establishing an international criminal court that would conduct judicial inquiries for that purpose. The rule of good faith in the circumstances requires the pursuit of that objective, notwithstanding the inevitable imperfections or unintended gaps in the literation of particular passages in discrete places in the Rome Statute. No party appearing before the Court should be free 'to make capital out of inexact expressions'[176] in the Rome Statute.

129. To that end, 'the spirit' of a treaty (based on good faith), that ought to prevail over its imperfect letter, will doubtless comprise what, according to the ICJ, are powers of an international organisation that derive from 'necessary implication as being essential to the performance of its duties'. For the ICC, it will include the power to require States Parties to lend necessary assistance in compelling the attendance of witnesses, using compulsory measures, without which the ICC will be unable to discharge its essential function of conducting judicial inquiries designed to foster accountability for conducts that shock the conscience of humanity, in hopes of 'put[ting] an end to impunity for such crimes'.

(3) Blaškić—A Good Faith Precedent

130. The ICTY Appeals Chamber has also underscored the critical role of the *good faith assistance of States* in the ability of the ICTY—another international criminal court—to discharge its functions. As the Appeals Chamber put it in *Blaškić*: '[T]he International

[175] Anthony D'Amato, 'Good Faith', *Encyclopedia of Public International Law*,Volume 2 (Rudolf Bernhardt) [Amsterdam: North-Holland, 1992] 599 at p 600.
[176] Cheng, *supra*, n 163, p 118.

Tribunal may discharge its functions *only* if it can count on the *bona fide* [i.e. good faith] assistance and cooperation of sovereign States.'[177] The incidence of this dependency on the good faith assistance of states was elaborated upon as follows:

> Turning then to the power of the International Tribunal to issue binding orders to States, the Appeals Chamber notes that Croatia has challenged the existence of such a power, claiming that, under the Statute, the International Tribunal only possesses jurisdiction over individuals and that it lacks any jurisdiction over States. This view is based on a manifest misconception. Clearly, under Article 1 of the Statute, the International Tribunal has criminal jurisdiction solely over natural "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since [1 January] 1991". The International Tribunal can prosecute and try those persons. This is its primary jurisdiction. *However, it is self-evident that the International Tribunal, in order to bring to trial persons living under the jurisdiction of sovereign States, not being endowed with enforcement agents of its own, must rely upon the cooperation of States. The International Tribunal must turn to States if it is effectively to investigate crimes, collect evidence, summon witnesses and have indictees arrested and surrendered to the International Tribunal.* The drafters of the Statute realistically took account of this in imposing upon all States the obligation to lend cooperation and judicial assistance to the International Tribunal. This obligation is laid down in Article 29. ...[178]

131. Taken at face value, the *Blaškić* decision may appear overtly in thrall to the element of the reasoning which indicates that the ability of the ICTY to make orders that bind States derives from the filiation of the ICTY with the UN Security Council. Upon a closer look, however, it is easy to discern the golden thread of good faith that runs through the reasoning of the Appeals Chamber. This is in the sense that the incidence of the ICTY's dependency on the good faith assistance of States (in the ability of that international criminal tribunal to discharge its mandate) is clearly implicated in the Appeals Chamber's determination that an ICTY Trial Chamber may address '"orders or requests"' to States.[179] This is apparent from the emphasised part of the quote set out above. It is, thus, evident

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[177] *Prosecutor v Blaškić (Judgement on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997)* 29 October 1997, [ICTY Appeals Chamber], IT-95-14-A para 31 [emphasis and parenthesis added].
[178] *Ibid*, para 26 [emphases added].
[179] *Ibid*, para 25.

that a certain value of the *Blaškić* decision lies in the idea that the ICTY—as an international criminal court—derived the power to address *orders* to States from the incidence of good faith assistance of States being critical to the ability of the ICTY to fulfil its functions effectively.

132. Granted, the ICTY Appeals Chamber did go on to say that the 'binding force [of the Tribunal's orders to States] derives from the provisions of Chapter VII and article 25 of the United Nations Charter and from the Security Council resolution adopted pursuant to those provisions'.[180] But, in the view of this Trial Chamber, the feature of the Security Council's authority to bind UN Member States (under article 25 of the Charter) and power to take measures to maintain and restore international peace and security (under Chapter VII of the UN Charter), as supplying 'the binding force' of the ICTY's *orders* to States, should not detract from the broader role of good faith as making it necessary for the ICTY to address orders and requests to States. The ICJ had captured that point in the *Nuclear Tests Cases*, where the Court observed as follows:

> One of the basic principles governing the *creation and performance of legal obligations, whatever their source, is the principle of good faith.* Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is *the binding character of an international obligation* assumed by unilateral declaration.[181]

133. This is to say that the question of 'binding force' of the resulting obligation on States to respect requests (or orders at the ICTY) from an international criminal court is controlled by the specific circumstances of the source of the obligation within the formal structure of international law. In relation to the ICTY and ICTR, that source of obligation was the authority and powers of the Security Council—respectively indicated in article 25

[180] *Ibid*, para 26.
[181] *Nuclear Tests Case (Australia v France) (Judgment)*, *supra*, n 141, para 46; and *Nuclear Tests Case (New Zealand v France) (Judgment)*, *supra*, para 49 [emphases added].

and Chapter VII of the UN Charter—on the basis of which the Security Council created the ICTY and ICTR by resolutions rather than by treaties. As regards the ICC or any other treaty-based international institution including the UN itself (not created by the Security Council under article 25 authority and Chapter VII of the UN Charter), the source of the binding force of an obligation on the States Parties is necessarily the old fashioned rule of *pacta sunt servanda* that houses the rule of good faith.

(4) Considerations of Complementarity

134. The consideration of an international institution that is effective in the performance of its functions and the fulfilment of the mandate entrusted to it by member States firmly justifies, as a matter of good faith, a general obligation on Rome Statute States Parties to assist the Court in compelling the appearance of a witness who is under the subpoena of a Trial Chamber. For that purpose, the concern of the 'international custom by which witnesses and experts are completely free not to go to the requesting country'[182]—in the context of mutual legal assistance requests between countries—must be viewed with circumspection. That international custom made perfect sense as between States, whose judicial systems are jural strangers to one another. But, the ICC is not in the same juristic position as a State whose jurisdiction is a legal stranger to that of another State.[183] It is an international court that the States Parties have created together and to which they have entrusted mandate and functions of great magnitude; and, those States Parties have a shared interest in the effective discharge and performance of the Court's mandate and

[182] See Council of Europe, 'Explanatory Report', European Convention on Mutual Assistance in Criminal Matters (1959) .Available at: < http://conventions.coe.int/Treaty/EN/Reports/Html/030.htm>, for a commentary to article 8.
[183] See *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* (2002) ICJ Reports 3 [International Court of Justice], paras 58—61. In the *Arrest Warrant Case*, for instance, the ICJ reasoned that while customary international law recognises immunity to the incumbent Foreign Affairs Minister of one country before the criminal courts of another country, no such immunity is afforded to that incumbent Minister of Foreign Affairs in cases before an international criminal court (specifically the ICC) in the exercise of jurisdiction over the case.

functions. And, that begets the obligation, by necessary implication, on the States Parties to the Court in that regard. Interests and obligations of States in their horizontal relationships do not operate in the same way. To put it in the imagery of daily life: the legal obligations of co-parents to their own child are not always identical to their obligations to their neighbour's child.

135. Furthermore, alongside the principle of good faith and effective discharge of the Court's mandate and functions, for the State Party in right of whose situation the ICC is seised of the case on trial for which the subpoena request was made, considerations of complementarity press even harder on the obligation of that State Party to assist in compelling the appearance of the witness subpoenaed by an ICC Trial Chamber.

136. According to the doctrine of complementarity, the primary jurisdiction to try anyone accused of a crime over which the ICC has jurisdiction lies with the State that has the strongest sovereign connection with the case, in the applicable terms of the Rome Statute. The State must exercise that primary jurisdiction genuinely. The ICC is a court of last resort. Its purpose is to *ensure* that those accused of the crimes are indeed tried, for purposes of accountability, when the State with the strongest sovereign connection with the case has failed to exercise its criminal jurisdiction in good faith.

137. In the circumstances, the question of jurisdiction of the ICC, as a court of last resort, will hardly seriously arise if the State with proper sovereign jurisdiction conducts a genuine criminal trial using the procedures of its domestic courts. The procedures of domestic courts in criminal cases will ordinarily include the power to subpoena witnesses to appear before it. On no reasonable view, of course, does it become a serious proposition that a domestic court with powers to subpoena witnesses to appear in a case of theft will suddenly lose that power—by some peculiar legal reasoning purportedly anchored on the Rome Statute—in cases of genocide, crimes against humanity or war crimes. Indeed, an

international crimes trial aborted in a domestic court on the basis that a domestic court (that could subpoena a witness to appear in a domestic case of theft) thought itself powerless to subpoena witnesses to appear in a genocide trial, will seldom qualify as a genuine criminal trial.

138. That is to say, a genuine international crimes trial in a domestic court must comprise the power of the domestic court to compel witnesses to appear. That being the case, the doctrine of complementarity should, in good faith, put the ICC in no weaker stead to conduct such trials in cases before it. In other words, the ICC will have an equal ability—as does a domestic criminal court genuinely trying an international crimes case—to subpoena witnesses to appear, as an incidence of the doctrine of complementarity—and given especial anchor by the operation of article 21(1)(c) of the Rome Statute that notably allows national legal systems (especially of situation countries) to supply powers and remedies not clearly or expressly provided for in the Rome Statute and related instruments. For, the doctrine of complementarity subrogates the ICC into the position of a national criminal court that is exercising jurisdiction genuinely and in good faith in the search for the truth. Anything less would detract from the ability of the ICC to *ensure* that those accused of the crimes are indeed tried, for purposes of accountability, when the State with sovereign jurisdiction over the crimes has not done so genuinely.

139. And, again, considerations of complementarity, by virtue of which the ICC is subrogated to the jurisdiction of a particular State that has not investigated or prosecuted the case in question genuinely, acutely accentuates the need for circumspection when relying on any 'international custom' in the context of mutual legal assistance requests 'between countries'; by virtue of which witnesses from the situation country are readily to be viewed as completely free to decline appearance before the ICC, while the Court shrugs or looks on helplessly with no facility of compulsory measures.

140. In other words, for purposes of compellability, witnesses from situation countries must be deemed to be under the same legal obligation to appear under an ICC subpoena as they would be if their national courts were genuinely exercising jurisdiction over the case being tried by the Trial Chamber.

(5) The Limited Value of Travaux Préparatoires

141. In arriving at the decision in this matter, the Chamber did not consider the *travaux préparatoires* to have afforded much assistance. In that connection, the Chamber does not, in particular, consider that its interpretation of the applicable provisions of the Rome Statute leaves their meaning either ambiguous or obscure, nor has it led to manifestly absurd or unreasonable result—noting that it is in those circumstances that the VCLT permits resort to *travaux.*[184]

142. In the *Kenyatta Case,* the Majority of the Trial Chamber V(B) had occasion to discuss at length the limited value of *travaux* to a proper interpretation of the Rome Statute in some instances.[185] In light of the importance of that consideration, that discussion is worth recalling in summary. Caution was sounded against the ever-present expectation that 'consultation *should* be had to the *travaux préparatoires*' as a matter of best practice.[186] Such an expectation carries the risk of shackling the Chamber's freedom to construe the Rome Statute, as a living legal document, in the best way the Chamber sees as achieving the ends of fairness, reasonableness, good faith and justice in the case, while 'having *particular*

[184] See article 32 of the VCLT.
[185] *Prosecutor v Kenyatta* (*Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial*) 18 October 2013, [Trial Chamber V(B)] [the '*Kenyatta* Excusal Decision'], ICC-01/09-02/11-830, Majority Decision of Judge Fremr and Judge Eboe-Osuji, paras 76—77.
[186] *Ibid*, para 77.

regard to the text of the provision in context and bearing in mind the overall object and purpose of the Statute.'[187]

143. In codifying the principles of international law, the drafters of the VCLT appear to have well understood that *travaux*, as an ill-defined assemblage of inchoate, unused materials and other 'shavings' from the workshop of treaty drafting, could not deliver full service to the juristic needs of the living world. For, important treaties are not to be 'fossilised in the remains of *travaux* that may not embody improved content or understanding of the necessary tributaries of the law than at the time the treaty was drafted.'[188] Indeed, there is hardly a basis to insist upon such consultation of *travaux préparatoires* as a matter of routine or best practices in treaty interpretation. That international law did not see fit to *require* such consultation is a consideration that must always be kept foremost in the mind. Article 32 of the VCLT merely *permits* such consultation in limited circumstances, as 'supplementary means of treaty interpretation'.[189]

144. It should further be observed that the essence of *permitting* the decision-maker to engage in *optional* consultation of *travaux* is to remove fault from such a consultation whenever made. But, that essence of the *permission* does not readily create a converse fault in a decision-maker that sees no need to engage in the consultation, where the decision-maker feels well able to interpret the provisions of the treaty reasonably 'in their context and in the light of [the treaty's] object and purpose.' Any flaw to speak of in the

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[187] *Ibid.*
[188] *Ibid.*
[189] See *Situation in the Democratic Republic of the Congo (Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal)* 13 July 2006 [Appeals Chamber], ICC-01/04-168, para 40: as the Appeals Chamber has held, the *travaux préparatoires* of the Statute may, in accordance with Article 32 of the Vienna Convention on the Law of treaties, be resorted to as a 'supplementary means of interpretation designed to provide (a) confirmation of the meaning of a statutory provision resulting from the application of Article 31 of the Vienna Convention of the Law of Treaties and (b) the clarification of ambiguous or obscure provisions and (c) the avoidance of manifestly absurd or unreasonable result'. See also *Kenyatta* Excusal Decision at para 77: as remarked by the Majority of the Trial Chamber, it is obvious that Article 32 of the VCLT is a permissive rule which was mainly a 'compromise achieved been the opposing stances of the systems of law (the common law) that traditionally forbade consultation to preparatory material and the systems that did not similarly forbid it.'

circumstances *must* be—if that is truly so—that the interpretation preferred by the decision-maker is appreciably repugnant to the *text* of the treaty 'in their context and in the light of [the treaty's] object and purpose.' Nothing less will do as a matter of sensible criticism of the interpretation engaged in.

145. Indeed, it has been rightly remarked by several prominent authorities that in circumstances where treaties give birth to an international organisation, such as is the case with the ICC, resort to *travaux préparatoires* is not always appropriate.[190]

* * *

146. Notwithstanding the inability of *travaux* to assist, the Chamber will still address the argument made in this litigation: to the effect that *travaux* may suggest that the appearance of the adjective 'voluntary' is significant in the phrase 'voluntary appearance' listed in article 93(1)(e) as a type of assistance that a State Party is required to render at the request of the ICC. The argument is that the word 'voluntary' was a later addition in the drafting history. And, therein lays its significance. It indicates, it is submitted, that the drafters deliberately meant that the limit of assistance that the States Parties are required to render as regards appearance of witnesses is *only* voluntary assistance—nothing more.

147. The Chamber is not persuaded that this is the only construction possible—nor is it the reasonable one—in the circumstances of that drafting history. In particular, the

[190] See *Akehurst's Modem Introduction to International Law*, 7th revised edn (Peter Malanczuk) [London: Routledge, 1997] p 366. *Akehurst*'s teaches: '[*T*]*ravaux préparatoires* are used less for interpreting treaties setting up international organisations than for interpreting other kinds of treaty. Treaties setting up international organisations are intended to last longer than most other types of treaty, and recourse to *travaux préparatoires* would not always be appropriate in such circumstances, because it would mean looking at the (possibly distant) past, instead of looking at the present and the future ...'. As the majority explained in the *Kenyatta* Excusal Decision, *supra*, n 185, para 78: 'Accordingly, the intentions of the States Parties at the time of conclusion of a treaty may have evolved overtime. Moreover, the fact that a large number of States Parties who joined the international organisation may not have been represented at the negotiation and conclusion of the treaty will make it "politically awkward to rely on the *travaux préparatoires*" of the treaty.' Other commentators have also diminished the value of *travaux préparatoires* more generally, See Anthony Aust, *Modern Treaty Law and Practice* [Cambridge: Cambridge University Press, 2007] p 244; Lord McNair, *The Law of Treaties* [Oxford: Clarendon Press, 1961] p 413; *Oppenheim's International Law*, Volume 1 (Peace), 9th edn (Sir Robert Jennings and Sir Arthur Watts) [London: Longman, 1996] p 1271.

Chamber is not convinced that the requirement in article 93(1)(e) that States Parties shall provide assistance in the manner of 'facilitating voluntary appearance of witnesses' is the only assistance that States Parties are required to give; when article 93(1)(l) further requires States Parties to render '[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'.

148. The construction urged by the Defence and the Attorney-General is not reasonable. For, it requires reading the article 93(1)(e) in isolation, without regard to article 93(1)(l). In the Chamber's view, the better construction of article 93(1)(e) is a construction that makes sense of it in its very own context—which must recognise the necessary interaction of that provision with article 93(1)(l), in a manner that gives each its proper value. The more reasonable approach, then, is an articulated construction of article 93(1)(e) (which requires States Parties to facilitate 'voluntary appearance' of witnesses) and article 93(1)(l) which requires States Parties to render to the ICC '[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.' Such an articulated construction makes eminent sense, given the nature of the jurisdiction of the ICC as complementary to the jurisdiction of the State.

149. The correct construction that gives proper value to each of the two provisions in their interaction with one another is this. The ICC, being a court that exercises jurisdiction that is complementary to the jurisdiction of national courts, is not given powers of primacy that are inconsistent with the domestic legal order, on matters of compellability of witnesses located within the particular domestic forum. That being the case, when a witness indicates a wish to appear voluntarily, the State Party is obligated to realise that wish without further condition—pursuant to article 93(1)(e). The good sense of imposing that particular obligation on States Parties is all too apparent. For one thing, it is right to

require States Parties to respect the wishes—and facilitate the appearance—of persons who wish to appear voluntarily as ICC witnesses. The obligation is particularly important as such wishes tend towards assisting the Court in the conduct of an international criminal trial that is the Court's chief mandate.

150. It may further be observed that 'voluntary appearance' carries low or no risk of essential legal antagonism between the volunteering witness and the State that is obligated to facilitate the witness's voluntary appearance. In that sense, article 93(1)(e) of the Rome Statute is, legally speaking, a relatively risk-free imposition upon all States Parties, as a matter of general obligation.

151. Compelled appearance, on the other hand, involves, by definition, essential legal antagonism between the unwilling witness and any person (including the police) or entity (including a State) that seeks to compel the witness into something that s(h)e does not wish to do. The essence of the rule of law in the average law-abiding State is that each State Party would have organised its internal affairs in such a manner that adversarial relationships between the State (or its agents) and the subject are to be governed by the law. Since the laws that govern such adversarial relations vary in their detail and complexity from one State to the other in each State's relationship with its own subjects, it is sensible that the Rome Statue had refrained from imposing on all States Parties—in the stroke of any one provision in the Statute—a standard obligation to facilitate compelled appearance (foreseeably to be resisted by the witness) at the request of the ICC. But, this does not mean that article 93(1) eschews every obligation on States Parties to facilitate compelled appearance. It means only that it is to be done in accordance with article 93(1)(l)—i.e. if *bona fide* domestic law does not forbid it. It must be observed, once more, that any domestic law purporting to prohibit the requested assistance stands to be appraised for *bona fides*, in light of the indication in article 93(3) that the prohibition needs to be 'on the basis of an existing fundamental legal principle of general application'.

152. That is to say, where the witness does not wish to appear voluntarily, then article 93(1)(l) requires that due respect must be accorded to *bona fide* domestic laws on matters of witness compellability in circumstances where the ICC requests a State Party to facilitate the compelled appearance of the witness as 'any other type of assistance'. Notably, the sensitivity that the drafters have indicated for national laws is apparent not only in clause 93(1)(l) (which requires States Parties to comply with 'any other type of assistance' that is not prohibited by *bona fide* national laws), but also in the *chapeau* provision of paragraph 93(1) which requires States Parties to comply with requests of the Court 'in accordance with the provisions of this Part [i.e. Part 9 of the Rome Statute] and under procedures of national law'.

153. Canada affords a serviceable example of how the facilitation of 'voluntary appearance' under article 93(1)(e) does not pose an inevitable obstacle to compellability of a witness who does not intend to appear voluntarily in a criminal trial abroad. As regards mutual legal assistance to foreign judicial proceedings on a range of criminal matters, the domestic law of Canada permits that 'Canada may provide the following assistance:... compelling witness testimony, including compelling witnesses to give evidence in foreign proceedings by means of audio or video-link; ... '.[191] Nevertheless, 'any actions taken by Canadian authorities in relation to a foreign request are governed by the Canadian Charter of Rights and Freedoms. The most relevant provisions are the following: Section 8—The right of any person to be secure against unreasonable search and seizure; Section 11(c)—The right of any person charged with a criminal offence not to be compelled to be a witness in proceedings against him or her in respect of that offence; and Section 13—The

[191] See Government of Canada, 'First Report of Canada on the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography', submitted to the UN on 3 February 3, 2009, Part VII-International Assistance and Cooperation, para 12. Available at: < http://www.pch.gc.ca/eng/1356024902950/1356025121577 >.

right of any person not to have any incriminating evidence given in a proceeding used against him or her in any other proceeding, except in the case of false testimony'.[192]

154. The foregoing example shows how a witness may still be compelled to appear in foreign criminal proceedings against her or his voluntary inclination, as long as domestic law is respected on questions of compellability. That is precisely how article 93(1)(e) and article 93(1)(l) must work together to achieve legal harmony under the Rome Statute.

155. It may be observed that on a casual view, article 93(1)(l) of the Rome Statute appears to be an oddity in international law; as it permits States Parties to decline assistance if their national law forbids the particular assistance requested. The general principle of international law is that no State may invoke internal law as justification for failure to perform a treaty.[193] But the exception prescribed in article 93(1)(l) is wholly consistent with the doctrine of complementarity on which the Court's jurisdiction is based.

156. Hence, in the light of the doctrine of complementarity, it is quite easy to see the good sense of requiring States Parties to comply with the request only if their domestic laws do not forbid the assistance that the ICC requested. In the absence of a showing that national law forbids the request in good faith, there is an obligation on the State Party to render the assistance in question.

C. KENYA'S OBLIGATION TO HONOUR THE REQUEST TO COMPEL WITNESS ATTENDANCE

157. In light of the foregoing discussion, it is clear that the question presented is ultimately dependent on whether the laws of the requested State can be seen in good faith as forbidding the request made. In other words, in the present case, do Kenya's laws

[192] *Ibid*, at para 16.
[193] See article 27 of the VCLT.

preclude (in good faith) an obligation on Kenya to assist the ICC in the facilitation of compelled appearance of a witness under an ICC subpoena—a witness whose attendance a Trial Chamber requires?

158. In the course of the oral submissions, clarification was repeatedly sought from the Attorney-General of Kenya and the Defence to indicate whether there was any Kenyan law that *prohibits* Kenya as a State Party from complying with an ICC request for the facilitation of the compelled appearance of a witness before the Trial Chamber. And just as repeatedly, the Attorney-General and the Defence avoided giving an answer to that question. The Attorney-General and Defence were particularly urged to file further written submissions, affording them a further opportunity to indicate any law of Kenya that *prohibits* such manner of assistance. The Defence filed further written submissions at length; but they provided no such information. The Attorney-General opted to file no further submissions, stating (as he had also done during oral submissions) that he had nothing further to add to his earlier written and oral submissions.

159. Mr Nderitu is the Counsel for Victims in this case. He is a member of the Bar of Kenya. In his own submissions, he was categorical that there is no Kenyan law that prohibits Kenya from rendering to the ICC the manner of assistance urged in the Prosecution's application. Any such prohibition, according to him, is controlled by the laws of Kenya that ordinarily govern questions of compellability of witnesses in criminal trials in the domestic courts of Kenya.

160. The Chamber is persuaded that Mr Nderitu's position summarises the correct answer to the question addressed in this part of the decision. That is to say, no one has brought to the attention of the Chamber any *bona fide* law of Kenya that specially precludes an obligation on Kenya to assist the ICC in the facilitation of compelled appearance of a witness under an ICC subpoena for purposes of appearance before a Trial Chamber.

161. That conclusion takes fully into account not only (a) a careful review of the *International Crimes Act* of Kenya, being the domestic statute by which Kenya regulates the procedure governing its relationship with the ICC; but also (b) the reception that the laws of Kenya has given relevant provisions of the Rome Statute to operate directly in the territory of Kenya, as part of the laws of Kenya.

(1) The International Crimes Act does not Prohibit Kenya from Compelling the Attendance of a Witness

162. The drafters of the ICA understood that article 93(1) of the Rome Statute does not contain an exhaustive list of the requests that might be made of Kenya. Notably, section 20(1)(a) of the ICA enumerates the same range of assistance indicated in article 93(1) of the Rome Statute.[194] Section 20(1)(a) similarly permits '(xiii) any other type of assistance that is not prohibited by the law of Kenya, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the ICC.' Section 20(1)(b) of the ICA also recognises a further range of assistance that the ICC may request of Kenya, including

[194] As Section 20(1)(a) provides: 'This Part shall apply to a request by the ICC for assistance that is made under— a) Part 9 of the Rome Statute, in relation to—
(i) the provisional arrest, the arrest, and the surrender to the ICC of a person in relation to whom the ICC has issued an arrest warrant or given a judgment of conviction;
(ii) the identification and whereabouts of persons or the location of items;
(iii) the taking of evidence, including testimony under oath, and the production of evidence, expert opinions, and reports necessary to the ICC;
(iv) the questioning of any person being investigated or prosecuted;
(v) the service of documents, including judicial documents;
(vi) facilitating the voluntary appearance of persons as witnesses or experts before the ICC;
(vii) the temporary transfer of prisoners;
(viii) the examination of places or sites, including the exhumation and examination of grave sites;
(ix) the execution of searches and seizures;
(x) the provision of records and documents, including official records and documents;
(xi) the protection of victims and witnesses and the preservation of evidence;
(xii) the identification, tracing and freezing, or seizure of proceeds, property and assets, and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; or
(xiii) any other type of assistance that is not prohibited by the law of Kenya, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the ICC; ...'.

assistance under '(iii) Article 64 (which relates to various measures that can be taken by the Trial Chamber)'.[195]

163. But, in a clear recognition of the non-exhaustiveness of the assistance that may be requested (by the ICC) and must be provided (by Kenya), section 20(2) provides as follows:

> Nothing in this section—(a) limits the type of assistance that the ICC may request under the Rome Statute or the ICC Rules (whether in relation to the provision of information or otherwise); or, (b) prevents the provision of assistance to the ICC otherwise than under this Act, including assistance of an informal nature.

164. In short, there is no word of limitation anywhere in the ICA that prohibits Kenya from compelling witnesses in its territory from appearing before an ICC Trial Chamber in conformity with that Chamber's subpoena. And, despite repeated specific invitation by the Chamber, the Defence and the Attorney-General have not drawn the Chamber's attention to any aspect of Kenyan law, beyond the ICA, that prohibits Kenya from rendering that kind of assistance to the ICC. Considering the vigour with which they opposed this application, the Chamber is confident that the Defence and the Attorney-General would have brought any such law to the attention of the Chamber.

(2) The Direct Operation of the Rome Statute within the Territory of Kenya

165. In addition to the competence of the Trial Chamber to order the appearance of witnesses in Kenya, which in turn generates an obligation that Kenya must respect as a

[195] Section 20(1)(b) provides: '(b) any of the following provisions of the Rome Statute—
(i) paragraph 8 of article 19 (which relates to various steps that the Prosecutor may take with the authority of the ICC);
(ii) article 56 (which relates to various measures that can be taken by the Pre-Trial Chamber);
(iii) article 64 (which relates to various measures that can be taken by the Trial Chamber);
(iv) article 76 (which relates to the imposition of sentence by the Trial Chamber);
(v) article 109 (which relates to the enforcement of fines and forfeiture measures).'

State Party, by operation of the various provisions of the ICA reviewed above, the Chamber is also satisfied that article 64(6)(b) of the Rome Statute, together with article 93(1)(d) and article 93(1)(l) have a direct force of law in Kenya, in fuller complement of any discrete provision of the ICA that also speaks to the subject matter.

166. This follows from the process of discrete reception or adoption or domestication or incorporation of treaties into domestic law—as a deliberate legislative act that is separate from mere accession or ratification of the treaty in question by the executive. Professor Malcolm Shaw describes the doctrine that explains the process in this way:

> This is based upon the perception of two quite distinct systems of law, operating separately, and maintains that before any rule or principle of international law can have any effect within the domestic jurisdiction, it must be expressly and specifically 'transformed' into municipal law by the use of the appropriate constitutional machinery, such as an Act of Parliament.[196]

167. In many common law jurisdictions in the Commonwealth zone, to which Kenya belongs, such a separate legislative enactment is generally followed for purposes of domesticating international treaties; while organic incorporation through case law is followed for purposes of customary international law.[197]

168. Nothing turns on the terminology of 'transformation', 'incorporation', 'domestication', etc, as a term of art that describes the process by which international law (treaty-type or custom) is given force within the domestic forum. The actual usage in the literature and case law is neither uniform nor consistent. Rather, the point of the distinction between the operation of customary international law and treaties is notably

[196] Malcom Shaw, *International Law*, 6th edn [Cambridge: Cambridge University Press, 2008] p 139.
[197] *Ibid*, pp 166-171. See also p 140. According to the doctrine of incorporation, 'international law is part of the municipal law automatically without the necessity for the interposition of a constitutional ratification procedure'. See also William Blackstone, *Commentaries on the Law of England*, IV, Ch 5: As Blackstone put it: 'the law of nations, wherever any question arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law, and it is held to be part of the law of the land'

that treaties are not 'self-executing' within the domestic forum, without an act of parliament giving them direct force of law as part of the law of the forum.

169. The rationale for the insistence that an act of parliament is necessary to give treaties direct force within the realm is explained by the theory of separation of powers between the executive and the legislature. Conclusion of treaties is the prerogative of the executive in matters of foreign relations, while it is the legislature that makes laws that operate within the realm. Hence, to give treaties direct force of law within the realm without an act of parliament will be to give the executive the power of direct legislation without the involvement of the legislature.[198]

170. It is particularly to be noted that it is sensitivity to the alteration of 'the rights and duties of ... subjects' of the domestic sovereign[199]—alongside sensitivity to altering existing law—that particularly accentuates the importance of the requirement of a legislative act that gives treaties the direct force of law.

171. Thus, as long as the legislature has expressly adopted the treaty, through an act of parliament, the treaty will have force of law directly in its own terms—to the precise result of altering the law and directly affecting rights and obligations of citizens as such. It may be stressed that the incidence of such alteration of the legal regime is that the treaty in question—to the extent that it has been given direct force of law—thus has direct effect on the rights and obligations of citizens and the domestic authorities. This is part of the idea of the rule of law. And when rights and obligations are altered in that way, it will be wrong to consider the alteration as an arbitrary process that had occurred beyond the rule of law. That footing is thus much stronger and certain than whether or not any legitimate expectation such as may result from the reasoning that 'ratification of an international

[198] Shaw, *supra*, n 196, p 151.
[199] *Ibid*, p 152.

treaty (where no incorporation has taken place) may give rise to legitimate expectations that the executive, in the absence of statutory or executive indication to the contrary, will act in conformity with the treaty.'[200]

172. Notably, Professor Shaw informs that '[t]here is no rule specifying the precise legislative method of incorporation of a treaty and a variety of means are available in practice. For example, a treaty may be incorporated into domestic law by being *given the force of law in a statute with or without being scheduled* to the relevant act; by being referred to in a statute otherwise than in an incorporating statute; by tangential reference in a statute; and by statutory referral to definitions contained in a treaty.'[201]

173. Against the foregoing background, it is readily seen that the laws of Kenya have, at the minimum, given the following provisions of the Rome Statute direct force of law in Kenya: article 64(6)(b)—the power of the Trial Chamber to order witnesses to appear; article 93(1)(d)—the power of the Court to request a State Party to serve court processes; and, article 93(1)(l)—the power of the Court to make any other request upon a State Party that is not prohibited by the law of the forum. As such, they do operate to affect rights and obligations of both the citizens and the Government of Kenya. As will be seen next, these conclusions clearly flow from the language of both the Constitution of Kenya and the ICA.

174. The Constitution of Kenya provides in section 2(6) that '[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.' It may be accepted that a key point of that provision is that the provisions of the Rome Statute, as part of the law of Kenya, will not be given the force of law in Kenya to the extent of any inconsistency with the Constitution of Kenya.

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[200] Shaw, *International Law*, *supra* n 196, p 151.
[201] *Ibid*, p 152.

175. It is also to be noted that section 4(1) of the ICA of Kenya provides as follows: 'The provisions of the Rome Statute specified in subsection (2) *shall have the force of law in Kenya* in relation to the following matters—(a) the making of requests by the ICC to Kenya for assistance and the method of dealing with those requests; ... (c) the bringing and determination of proceedings before the ICC; ...'. [Emphasis added].

176. The provisions of the Rome Statute specified in subsection (2) of section 4 include 'Part 6 (which relates to the conduct of trials)' and 'Part 9 (which relates to international co-operation and judicial assistance); ...'.[202] Article 64(6)(b) appears in Part 6 of the Rome Statute, while article 93 appears in Part 9.

177. It is thus that the specification of those parts in section 4(2) of the ICA gives them the direct force of law in Kenya, by virtue of the operation of section 4(1) of the ICA.

178. The foregoing analysis is amply supported by the recent judgment of Justice Mwongo, Principal Judge of the High Court of Kenya in *Barasa v Cabinet Secretary of the Ministry of Interior*. In particular, his judgment left no doubt at all that 'the Rome Statute forms part of the laws of Kenya to the extent stated' in section 4 of the ICA,[203] and that the 'stipulated parts of the Rome Statute ... have the force of law in Kenya.'[204] In the circumstances, as he further observed: 'The ICC is therefore a Court duly recognized and incorporated by the Constitution as a court with which, in terms of the preamble and objects of the ICA, Kenya *must* cooperate *in the performance of its functions.*'[205] Principal Justice Mwongo specifically noted that, in accordance with section 4(1)(c) of the ICA, the

[202] See ICA, sections 4(2)(e) and (h).
[203] *Barasa v Cabinet Secretary of the Ministry of Interior and National Coordination & Ors*, Petition No 288 of 2013, judgment delivered on 31 January 2014 [High Court of Kenya], para 59; See also para 83.
[204] *Ibid*, para 61. See also, para 84.
[205] *Ibid*, para 84 [emphasis added].

Rome Statute that 'have the force of law' in Kenya include the provisions in relation to 'the bringing and determination of proceedings before the ICC.'[206]

179. Indeed, Principal Justice Mwongo's findings afford further and independent support to the findings of this Chamber to the same effect.

D. HAS THE PROSECUTION JUSTIFIED THE REQUESTED SUBPOENAS?

180. Following the Chamber's determination that it *can*, as a question of law, issue a binding cooperation request requiring the Government of Kenya to employ compulsory measures to compel the appearance of witnesses summonsed by a Trial Chamber, this section will set out whether the Chamber is satisfied that it *should* (as a practical matter) make such a request in this instance.

181. This Chamber agrees with Trial Chambers IV and V(B) that any cooperation request to a State Party must satisfy the tripartite principles of (i) relevance, (ii) specificity and (iii) necessity.[207] In evaluating necessity in the context of whether to issue summonses to witnesses, the Chamber will consider both whether: (i) the witness' anticipated testimony is potentially necessary for the determination of the truth (noting that the value of any witness's testimony in a case may not be prejudged by the judge ahead of that witness's testimony and its appropriate evaluation in due course) and (ii) a summons, as a compulsory measure, is necessary to obtain the testimony of the witness.

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[206] *Ibid.*

[207] See *The Prosecutor v Uhuru Kenyatta (Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date)* 31 March 2014, [Trial Chamber V(B)], ICC-01/09-02/11-908, n 216, para 100; *The Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus (Decision on the third defence application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute)* 12 September 2013, [Trial Chamber IV], ICC-02/05-03/09-504-Red, para 4; *The Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus (Decision on "Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union")* 1 July 2011, [Trial Chamber IV], ICC-02/05-03/09-170, paras 13-14.

(1) Relevance and Specificity

182. As to relevance, the Chamber is satisfied by the Prosecution's arguments that the testimony of the Eight Witnesses sought by the Prosecution is relevant to the case and the crimes charged.[208]

183. Both defence teams challenge the relevance of Witness 323's testimony on grounds that much of it falls outside the geographical and temporal scope of the crimes charged.[209] But, to the extent that those features of the testimony are clearly admissible (assuming that they are), this objection does no more than quarrel with only the scope of the testimony of the particular witness. It does not speak to the irrelevance of the testimony in its entirety. At least some aspects of the anticipated testimony of this witness potentially engage important matters that fall within the scope of the crimes charged. Notably, the Defence undercuts its own objection as to this witness, given it submissions in recent filings that the testimony of Witness 323 is relevant to the Defence case.[210] The Chamber is satisfied that the anticipated content of Witness 323's testimony has a sufficient nexus to the crimes charged so as to be considered relevant for the purposes of issuing a summons to appear.

184. As to specificity, the Chamber is satisfied that the Prosecution has identified its relief sought with sufficient specificity. The Eight Witnesses are all clearly identified and, on the basis of the information provided by the Prosecution,[211] the Chamber is satisfied that each of them is or may be within the jurisdiction of the Kenyan national authorities.

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[208] Summonses Request, ICC-01/09-01/11-1120-Red2-Corr, paras 8 (Witness 15), 19 (Witness 16); Summonses Request, ICC-01/09-01/11-1120-Conf-Red-Corr2, paras 30 (Witness 336), 38 (Witness 397), 44 (Witness 516), 49 (Witness 524), 56 (Witness 495); Supplementary Request, ICC-01/09-01/11-1188-Conf-Red, para 11 (Witness 323).
[209] Defence Final Submission, ICC-01/09-01/11-1200-Red, para 66.
[210] ICC-01/09-01/11-1218-Conf; ICC-01/09-01/11-1222-Conf.
[211] Summonses Request, ICC-01/09-01/11-1120-Red2-Corr, paras 9, 15 (Witness 15), 22-25 (Witness 16), 32, 35 (Witness 336), 45 (Witness 516), 54 (Witness 524); ICC-01/09-01/11-1120-Conf-Exp-Corr, paras 39—43 (Witness 397), 57 (Witness 495); ICC-01/09-01/11-1188-Conf-Exp, para 13 (Witness 323).

(2) Necessity

185. As to the first necessity consideration mentioned above, the Chamber is persuaded that the Eight Witnesses' anticipated testimonies are potentially necessary for the determination of the truth. Each of these witnesses may provide important testimony on the crimes charged and the individual criminal responsibility of the accused. This information includes anticipated testimony regarding: (i) the alleged presence and participation of Mr Ruto in planning meetings before the attacks; (ii) Mr Ruto's alleged role in supporting, planning and financing the post-election violence; (iii) Mr Ruto's alleged inciting statements at the locations where violence occurred; (iv) the alleged involvement of named members of the Network in violence occurring at locations charged in the case; (v) how Mr Sang's radio show allegedly supported and incited the post-election violence; and, (vi) descriptions by the perpetrators of violence in locations charged in the case.[212]

186. The Chamber notes the Defence arguments that the potential hostility of the Eight Witnesses limits the value of their anticipated testimonies[213] and the submissions made in support of the Witness 15 Fitness Request. The Chamber is not persuaded by these arguments.

187. Regarding the potential hostility of the Eight Witnesses, until any witness has been given an opportunity to take the stand, take the oath and take questions in examination-in-chief, it would be speculative to declare the witness hostile. Even then, there is no known wisdom that hostile witnesses are incapable of testifying to the truth under oath. The usual

[212] See Summonses Request, ICC-01/09-01/11-1120-Red2-Corr, paras 8 (Witness 15), 19 (Witness 16); Summonses Request, ICC-01/09-01/11-1120-Conf-Red-Corr2, paras 30 (Witness 336), 38 (Witness 397), 44 (Witness 516), 49 (Witness 524), 56 (Witness 495); Supplementary Request, ICC-01/09-01/11-1188-Conf-Red, para 11 (Witness 323). See also Corrigendum to Annex A to the Prosecution's Submission of Updated Document Containing the Charges pursuant to the Decision on the content of the updated document containing the charges (ICC-01/09-01/11-522), 7 January 2013, ICC-01/09-01/11-533-AnxA-Corr.
[213] Defence Final Submission, ICC-01/09-01/11-1200-Red, paras 59—60

danger is that the calling party runs the risk of the witness in question testifying in a manner that is more favourable to the opposing party, such that may not aid the case of the calling side. But that possibility is not without value in the search for the truth, especially in the light of the provisions of article 54.

188. In view of the foregoing, the Chamber wishes to make clear (in light of both the Prosecution's own submissions and those of the Defence) that the purpose of the subpoena against any witness who is known to have recanted any narrative of the events (previously given to the Prosecution) is not to conduct an inquiry into the cross-allegations of bribery or intimidation of witnesses that have consistently been traded between the Prosecution and the Defence in this case. The purpose rather is to examine the potential of the witness's testimony to contribute to the search for the truth—on either side of the case—with specific focus on the crimes as charged.

189. Regarding the relief sought in the Witness 15 Fitness Request, the Chamber here now disposes of that question on the merits; but is not persuaded that the information provided by the Ruto Defence justifies a rejection or delayed ruling on the Prosecution's request to summons Witness 15. Even if it were assumed that a witness had health issues, it will not necessarily result in an inability on the part of the witness to contribute to the search for the truth.

190. The Chamber, also, does not consider that the determination of a witness' fitness to testify is a prerequisite to issuing a subpoena. No legal precedent of any sort was cited for any proposition to the contrary. In the circumstances, the Chamber sees no reason that any additional information should be sought related to Witness 15 prior to rendering its ruling.

191. As to the second necessity consideration mentioned above, the Chamber is also persuaded that summonses are necessary to obtain the testimony of the Eight Witnesses. The Prosecution has detailed reasonable attempts to obtain the voluntary cooperation of

the Eight Witnesses, and has been unsuccessful. As regards Witness 15, the Defence notes a signed affidavit of Witness 15 and points out that this witness may still be willing to voluntarily testify.[214] However, given the degree of non-cooperation the Prosecution has experienced with this witness and the context in which that assertion was made, the Chamber does not consider it appropriate to rely on it for the purpose of this assessment.[215]

* * *

192. For the foregoing reasons, the Chamber finds that justification exists for issuing the requested summonses for the Eight Witnesses and rejects the relief sought in the Witness 15 Fitness Request.

IV. CONCLUSION

193. For the reasons above, the Chamber finds that: (i) it has the power to compel the testimony of witnesses; (ii) pursuant to article 93(1)(d) and (l) of the Statute, it can, by way of requests for cooperation, obligate Kenya both to serve summonses and to assist in compelling the attendance (before the Chamber) of the witnesses thus summonsed; (iii) there are no provisions in Kenyan domestic law that prohibit this kind of a cooperation request; and, (iv) the Prosecution has justified the issuance of the summonses to compel the appearance of the Eight Witnesses.

194. As a final matter, the Chamber notes the Defence request to 'order the Prosecution to disclose the evidence in its possession which shows that intimidation, bribery or other

[214] Defence Final Submission, ICC-01/09-01/11-1200-Red, para 63. See also Annex B of the Summonses Request, ICC-01/09-01/11-1120-Conf-AnxB, pp 27—28.
[215] See Annex B of the Summonses Request, ICC-01/09-01/11-1120-Conf-AnxB, pp 21—28.

improper influence has been the proximate cause of witness non-cooperation'.[216] As indicated earlier, the purpose of the present exercise is the search for the truth—with specific reference to the crimes as charged. For purposes of the present decision, therefore, the Chamber does not deem it a prerequisite to make any prior order for purposes of any inquiry the objective of which is to discover the proximate cause of witness non-cooperation.

FOR THE FOREGOING REASONS, THE CHAMBER, BY MAJORITY, HEREBY

GRANTS the relief sought in the Summonses Request and Supplementary Request;

REQUIRES the appearance of the witnesses bearing the pseudonyms indicated below, as a matter of obligation upon them, to testify before this Trial Chamber by video-link or at a location in Kenya and on such dates and times as the Prosecutor or the Registrar (as the case may be) shall communicate to them:

> Witness 15, Witness 16, Witness 336, Witness 397, Witness 516, Witness 524, Witness 495, and Witness 323;

REQUESTS the assistance of the Government of Kenya in ensuring the appearance of the witnesses as indicated above, using all means available under the laws of Kenya; the requested and required assistance shall include, but is not limited to the following :

(i) to communicate to the concerned witnesses the Chamber's requirement of their attendance as indicated above;

(ii) to facilitate, by way of compulsory measure as necessary, the appearance of the indicated witnesses for testimony before the Trial Chamber by video-link

[216] Defence Final Submission, ICC-01/09-01/11-1200-Red, para 68.

or at a location in Kenya and on such dates and times as the Prosecutor or the Registrar (as the case may be) shall indicate;

(iii) to make appropriate arrangements for the security of the indicated witnesses until they appear and complete their testimonies before the Chamber;

DIRECTS the Registry to prepare and transmit, in consultation with the Prosecutor, the necessary subpoenas to the concerned witnesses (with or without the assistance of the Government of Kenya) as well as the necessary cooperation request to the relevant authorities of the Republic of Kenya in accordance with articles 93(1)(d), 93(1)(l), 96 and 99(1) of the Statute, in accordance with this decision; and

REJECTS the Defence request in relation to the fitness of Witness 15.

Judge Herrera Carbuccia's dissenting opinion will be filed in due course.

Done in both English and French, the English version being authoritative.

Judge Chile Eboe-Osuji, Presiding

Judge Olga Herrera Carbuccia **Judge Robert Fremr**

Dated 17 April 2014

At The Hague, The Netherlands