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No.: **ICC-01/09-01/11**
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THE APPEALS CHAMBER

Before: **Judge Akua Kuenyehia, Presiding Judge**
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Erkki Kourula
Judge Anita Ušacka

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR v.
WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG

Public

Defence appeal against the "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation"

Source: **Defence for Mr. William Samoei Ruto**

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

Counsel for William Ruto
Mr. Karim A.A. Khan QC
Mr. David Hooper QC
Mr. Essa Faal
Dato' Shyamala Alagendra

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

Legal Representatives of the Victims
Mr. Wilfred Nderitu

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims
Ms. Paolina Massida

The Office of Public Counsel for the Defence

States' Representatives
Mr. Githu Muigai, SC
Attorney General, Republic of Kenya

Amicus Curiae

REGISTRY

Registrar
Mr. Herman von Hebel

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. INTRODUCTION

1. In the *Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation* ("Decision"),[1] the defence for Mr. William Samoei Ruto ("Defence") submits that the Majority of Trial Chamber V(A) ("Majority") erred in law by reading into the Rome Statute ("Statute") a power that Trial Chambers can compel the appearance of witnesses and by finding that it can obligate Kenya to serve and enforce ICC summonses.[2] The justifications advanced for deeming the Court to have these powers[3] do not detract from the fact that they have no basis in the statutory regime and impose obligations on States Parties which were not anticipated or agreed to at the Rome Conference. If there are perceived deficiencies in the existing regime, then these should be properly addressed by the Court's legislature, the Assembly of States Parties.

2. On witness compellability, States Parties chose to legislate for a cooperation regime predicated on voluntary witness appearance[4] and complemented by the other cooperation provisions set out in Article 93 which include the power to take testimony using domestic proceedings.[5] Separately, States may – but are not obligated to - provide the Court with enhanced cooperation including by *propio motu* enforcing ICC summonses, via expressly enacted domestic legislation. Kenya has not enacted such legislation.

II. STANDARD OF REVIEW: ERRORS OF LAW

3. This Chamber has held that "*[o]n questions of law, [it] will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision*."[6]

[1] ICC-01/09-01/11-1274-Corr2.
[2] Decision, para. 193.
[3] *E.g.*, Decision, paras. 61, 64, 86, 87, 92, 99.
[4] Statute, Article 93(1)(e).
[5] Statute, Article 93(1)(b).
[6] ICC-02/05-03/09-295 (OA 2), para. 20.

III. FIRST GROUND OF APPEAL: THE MAJORITY ERRED BY FINDING THAT A CHAMBER HAS THE POWER TO COMPEL THE TESTIMONY OF WITNESSES

A. General

4. The Majority erred in law in concluding that, "*as a general proposition*",[7] a Trial Chamber "*has the power to compel the testimony of witnesses*".[8] The correct position is that a Trial Chamber may issue, and request a State Party to serve, a summons requiring a person to appear as a witness before it.[9] However, the Chamber may not order a State to enforce such summons, nor is there any independent duty on a State arising from the Statute to enforce it.[10] A State Party is only required to facilitate "*the voluntary appearance of persons as witnesses or experts before the Court*".[11] The single power of compulsion available to a Chamber in respect of witness testimony is that set out in Rule 65 of the Rules of Procedure and Evidence ("Rules"), which only applies to witnesses already "*before the Court*" and in respect of which penalties can be imposed under Rule 171. Rule 65 is not applicable in this case.

5. The Defence position is premised on a proper application of established rules of statutory interpretation, as set out in the Statute and the Vienna Convention on the Law of Treaties 1969 ("VCLT"). The Majority erred by failing to apply this approach in the Decision.

B. The correct approach to Statutory interpretation

6. Under Article 21(1)(a) of the Statute, the starting point for any inquiry into a Chamber's powers regarding witness compellability is the express provisions of the Statute. Article 64(6)(b) provides that a Trial Chamber may "*[r]equire the attendance and testimony of witnesses…by obtaining, if necessary, the assistance of States as provided in this Statute*". In the Decision, and based on the term "*require*",

[7] Decision, para. 59(i).
[8] Decision, para. 193(i).
[9] Statute, Article 93(1)(d).
[10] ICC-01/09-01/11-1274-Anx ("**Dissent**"), paras. 1, 8, 9, 11, 17, 27.
[11] Statute, Article 93(1)(e).

the Majority incorrectly found that this provision alone provides the Court with a "*specific power to compel the attendance of witnesses*".[12] Instead, the Defence submits that the article's significance is its direction that "*the assistance of States as provided in this Statute*" should be used "*if necessary*". This direction underlines that, beyond the confines of the Court's premises,[13] a Chamber has no means to compel attendance save through State cooperation.[14] Therefore, contrary to the Majority's approach, Article 64(6)(b) should not be read in isolation but must be considered in conjunction with Part 9 of the Statute.[15]

7. The key provision in Part 9 is Article 93 which "*provides a detailed and broad list of the forms of legal assistance, outside of surrender, available to the ICC.*"[16] Witness appearance is one form of assistance expressly provided for in Article 93(1)(e). This sub-article provides that a State Party shall comply with a request by the Court to facilitate "*the voluntary appearance of persons as witnesses or experts*".[17] Accordingly, and with one exception,[18] a person can only appear before the ICC as a witness if s/he consents. The Court has no ability itself, nor authority to seek State assistance, to compel appearance. The plain wording of Article 93(1)(e) shows that it applies regardless of where appearance before the Court is to take place or the medium used to secure the appearance.

8. There is nothing ambiguous or obscure about the terms of Article 93(1)(e). Therefore, the provision should be given its "ordinary meaning".[19] The Majority erred by failing to do so. Additionally, the "*wording [of Article 93(1)(e)] read in context and [in] light of its object and purpose*"[20] supports the conclusion that the

[12] Decision, para. 95. *See also* para. 111.
[13] Cf. Rule 65, discussed *supra*, para. 4.
[14] Dissent, para. 11.
[15] Dissent, para. 12.
[16] Kreß, C. and Prost, K., "Article 93", in Triffterer, O. (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2008), p. 1572.
[17] Emphasis added.
[18] Rule 193 of the Rules.
[19] VCLT, Article 31(1).
[20] ICC-01/04-168 (OA 3), para. 33.

Statute only provides for voluntary witness appearance. Again, the Majority failed to properly perform this analysis.

9. Article 93 was drafted against a backdrop of debates as to whether the Court should adopt a vertical or horizontal approach to cooperation. Commentators note that "*no single approach prevailed in totality, but the [Article 93] scheme reflects a creative and unique scheme for cooperation, primarily of a vertical nature.*[21]

10. While the scheme implemented was "primarily" of a vertical nature, it is evident that the scheme governing witness appearance followed the horizontal approach generally found in treaties dealing with inter-State assistance in criminal matters.[22] Such treaties generally[23] do not include mechanisms to compel a witness to comply with a summons issued by a State in which the individual does not reside.[24] Horizontal regimes usually permit evidence to be taken in the requested State.[25] A similar mechanism is included in the Statute in Article 93(1)(b).[26]

11. Given that the Court is a treaty organisation founded on the principle of complementarity, it is unsurprising that a horizontal approach to witness appearance was adopted. That said, <u>some</u> treaties dealing with mutual assistance in criminal matters now permit compelled appearance by video-link.[27] Nevertheless, such treaties have limited application and were <u>actively and expressly</u> agreed to by the signatory States.[28] In contrast, no deliberate change

[21] Kreß and Prost, *supra*, p. 1572 (emphasis not added).
[22] Sluiter, G., "I beg you, please come testify" – The Problematic Absence of Subpoena Powers at the ICC, 12 New Crim. L. Rev., 590 at 592, 595.
[23] *See* Sluiter, *supra*, fn 22, at 592-593 on exceptions between countries that closely cooperate.
[24] *E.g.*, European Convention on Mutual Assistance in Criminal Matters, 1959 ("**1959 Convention**"), Article 8; UN Model Treaty on Mutual Assistance in Criminal Matters 1990, A/RES/45/117 ("**UN Mutual Assistance Convention**"), Articles 14(2), 15(3).
[25] *E.g.*, 1959 Convention, Chapter II – Letters rogatory; UN Mutual Assistance Convention, Articles 1(2)(a), 11.
[26] *See* Kreß and Prost, *supra*, pp. 1574-1575, for the link between Articles 93(1)(b) and 93(1)(e).
[27] Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000/C 197/01).
[28] See guidance on the application of the 1959 and 200 Conventions at http://www.cps.gov.uk/legal/l_to_o/obtaining_evidence_and_information_from_abroad/index.html#a10.

has been made to the Article 93(1) regime by the ASP in order to provide for compelled witness appearance (whether by video-link or in person). This is despite the fact that the Statute's drafters were clearly aware of the possibility of giving testimony via video-link.[29]

12. Of further note is that Article 93 does provide for situations where a Chamber may request States to assist in the execution of its orders. However, this is limited to the execution of searches and seizures (see Article 93(1)(h)). Article 93(1)(e) does not include wording similar to sub paragraph (h) wherein a State may be requested to execute as opposed to serve a summons to appear.

13. Article 93(7) lends further contextual support for the conclusion that compelled appearance was deliberately excluded from the Statute. This provision, in conformity with the horizontal approach to witness appearance adumbrated above, prohibits the involuntary transfer of a person from a prior custodial setting. While, starkly, the Majority fails to consider Article 93(7), Judge Herrera Carbuccia's observation is correct:

> *[i]t does not make sense why a non-detained person could be compelled to testify under Article 93(1)(l) but a detained person could not be so compelled under Article 93(7). It makes more sense for voluntary testimony to be the rule in both cooperation contexts, and the Majority makes no effort to explain why they adopt an interpretation of the Statute which allows for this kind of disparate treatment between detained and non-detained persons*.[30]

14. Rule 193, which permits a prisoner sentenced by this Court to be transferred temporarily and without his/her consent from the State of sentence enforcement to the Court, does not, in any way, erode or undermine the Defence's submissions on Article 93(7). The subject of Rule 193 is a detained individual under this Court's jurisdiction rather than a detained individual under the jurisdiction of a State Party, as is the case in Article 93(7). The State sovereignty considerations which underpin Article 93(7), thus, do not arise.

[29] Statute, Article 69(2).
[30] Dissent, para. 14 (emphasis added).

15. Considering the statutory scheme as a whole,[31] and returning to Article 64(6)(b), there is no tension between that article, which states that a Trial Chamber may "*require the attendance and testimony of witnesses*", and Article 93(1)(e)'s qualifier that witness appearance be "*voluntary*". Contrary to the Majority's view,[32] the term "*require*" cannot be divorced from the other terms of the Statute and equated to compulsory "*order*"[33] for the following reasons. Trial Chambers "*cannot issue binding orders to states: it can only request their cooperation*".[34] Nor can a Chamber issue a summons directly to, or enforce it against, an individual. One OTP staff member who specialises in State cooperation matters has explained that the "*Statute does not authorise the issuance of orders and subpoenas to private individuals in the absence of enabling domestic legislation where a state has obstructed co-operation*".[35] This is in contrast to the *ad hoc* tribunals, created by the Security Council acting under Chapter VII and with primacy over national courts,[36] and reflects the fact that the ICC was created by treaty. Thus, in the absence of State assistance provided in accordance with the Statute or any Court mechanism to enforce a Court summons, a Trial Chamber has no power to compel the testimony of witnesses.[37]

16. The inability to compel is further underlined by the fact that there is no provision in the Court's legal documents or, indeed, in Kenya's domestic legislation, specifying either the offence witnesses will commit or the penalties they will face for failure to comply with a summons to appear. As discussed below, no offence and resulting penalty can be read into the Statute because this would be contrary

[31] *See*, *e.g.*, ICC-01/04-01/07-776 (OA 7), para. 73.
[32] Decision, paras. 95-100.
[33] Decision, para. 100.
[34] Rastan, R., Testing Co-operation: The International Criminal Court and National Authorities, Leiden Journal of International Law (2008), p. 436.
[35] *Ibid*.
[36] *See Prosecutor v. Blaškić*, IT-95-14, 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, where the power to issue binding orders to States and individuals was based on express legal provisions and the ICTY's primary jurisdiction.
[37] Dissent, paras. 11, 27.

to Articles 21(3), 22 and 23 of the Statute.[38] It, therefore, appears that the following view (couched in terms of "obligation", albeit unenforceable, rather than "order") which seeks to reconcile Article 64(6)(b) with Article 93(1)(e) is to be preferred:

> *The better view…is that the Trial Chamber may well, pursuant to article 64 para. 6(b) create an international obligation of persons to appear before the Court, but that States are under no duty to enforce that obligation..*[39]

17. The above reasoning establishes that Articles 64(6)(b) is inextricably linked to Part 9, in this case Article 93(1)(e), and that Article 64(6)(b) cannot be read to provide a standalone power to compel the attendance of witnesses.

18. In short, the Defence view of the witness appearance regime as expressly and unambiguously laid out in Articles 64(6)(b), 93(1)(b), 93(1)(e), 93(7) and Rule 193 is to be preferred because, in contrast to the reasoning in the Decision, it properly applies the law on statutory interpretation, conforms to a consistent, horizontal approach to cooperation on this matter and recognises the limits of a Trial Chamber's powers.

19. The *travaux préparatoires*[40] which "*confirm[] that the intention of the drafters was to explicitly and solely include the voluntary [rather than compelled] appearance of…witnesses*" supports the Defence submissions detailed above.[41] The perfunctory consideration[42] of these secondary sources of interpretation in the Decision constitutes a legal error which prevented the Majority from having proper regard to the intent of the drafters.[43]

[38] *See also infra*, paras. 32-37.
[39] Kreßs and Prost, *supra*, pp. 1576-1577 (emphasis added) (footnotes omitted). *See also* Bitti, "Article 64", in Triffterer, O. (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2008), p. 1213; Schabas, W., *The International Criminal Court – A Commentary on the Rome Statute*, Oxford University Press (2010), p. 768.
[40] *See* ICC-01/04-168 (OA 3), para. 40.
[41] Dissent, para. 13.
[42] Decision, para. 146.
[43] Decision, paras. 141-145.

20. Rather than being simply "*'shavings' from the workshop of treaty drafting*",[44] the *travaux préparatoires* show that the inclusion of the word "*voluntary*" was deliberate. In the original draft Statute, the precursor to Article 93(1)(e) was drafted in general terms, with States simply required to facilitate the appearance of persons before the Court.[45] However, during the drafting process the word "*voluntary*" was added to ensure that "*witnesses"* and "*experts may not be compelled to travel to appear before the Court*".[46] This explanation does not indicate that Article 93(1)(e) was included simply to prevent the forcible transfer of witnesses across international borders.[47] The plain wording of the draft provision makes no mention of "travel", "transport" or appearance at the seat of the Court.[48] Therefore, the explanation relates to the broad power to compel regardless of the Court's location or the manner of appearance. This conclusion complements and, thus, confirms the Defence's analysis regarding the proper interpretation of Article 93(1)(e).[49]

21. While Trial Chambers are not bound by the decisions of other Trial Chambers, it is of persuasive value to note that, not only has "*[t]he principle of voluntary appearance…been confirmed by other ICC Chambers*",[50] but the previously constituted Trial Chamber V acknowledged the significance of a witness' consent when a party is determining whether to call the witness or not.[51] The Majority fails to address these inconvenient precedents, which support the Defence submissions.

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[44] Decision, para. 143.
[45] Dissent, para. 13 citing to Article 90, Draft of the 1998 Preparatory Committee in Cherif Bassiouni, *The Legislative History of the International Criminal Court: An Article by Article Evolution of the Statute*, Transnational Publishers, 2005, Vol. 2, p. 685.
[46] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Vol. III, A/CONF.183/13, Document Conf.183/C.1/WGIC/L.11, p. 329, fn. 221 (emphasis added).
[47] *See*, *e.g.*, ICC-01/09-01/11-1120-Conf-Red-Corr2, para. 76.
[48] The draft provision read: "[f]acilitating the appearance of persons as witnesses or experts before the Court, which shall be voluntary".
[49] The Defence submit that the criticism that it is effectively approbating and reprobating (ICC-01/09-1/11-1313-Anx-Corr, para. 13) are unwarranted and unfair on numerous counts. For example, in the present case the issue of voluntary appearance was expressly considered by the state parties as evidenced in the *travaux préparatoires*. Whereas, on the issue of excusal of an accused, even the Trial Chamber noted the limited discussion surrounding the scope of Article 63 in *travaux préparatoires* (ICC-01/09-01/11-777).
[50] Dissent, para. 15 citing to ICC-01/04-01/06-T-355-ENG ET, p. 5, line 19; ICC-01/09-39, para. 20.
[51] Dissent, para. 15 citing to ICC-01/09-01/11-449-Anx, p. 1.

C. The erroneous approach to Statutory interpretation

22. The Decision's fundamental error is its failure to apply the above systematic approach to statutory interpretation to determine whether a Chamber has the power to compel witness testimony.[52] Rather than begin with an analysis of the Statute as required by Article 21(1)(a), the Majority immediately presumed that there is a statutory lacuna which must be addressed primarily by relying on the principle of implied powers, as a general principle of international law, and as codified in Article 4(1) of the Statute,[53] in addition to customary international criminal procedural law[54] and Article 64(4)(b).[55] This approach is incorrect and constitutes a clear error of law.

23. *First*, this is not a situation where recourse should be made to implied powers. This Court's jurisprudence endorses the view that implied powers may be invoked to ensure that "*an international body or organisation '[is]…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.*"[56] As argued above, witness appearance is expressly and comprehensively dealt with in the Statute. Therefore, the Majority erred by conducting an extensive, but wholly unnecessary, analysis regarding whether the power to issue compellable summonses is a "*necessary implication*". This error resulted in the overriding of the express agreement of the States Parties.

24. The Majority also failed to properly direct itself regarding the limits of implied powers. The jurisprudence establishes that it is appropriate to go outside the "*extensive legal framework of instruments in which the States Parties have spelt out the powers of the Court to a great deal of detail*" only in limited circumstances.[57] This is

[52] ICC-01/04-02/12-4, para. 10.
[53] Decision, paras. 65-87, 94, 104-110. See also Dissent, para. 19.
[54] Decision, paras. 88-93.
[55] Decision, paras. 95-100. *See also* para. 111.
[56] ICC-02/05-03/09-410, para. 77 citing the International Court of Justice, Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations (1949), ICJ Reports 174, page 182. Emphasis added.
[57] ICC-02/05-03/09-410, para. 78.

because "*[c]onsiderable effort was made in drafting the Rome Statute and its Rules*" in part to create a "*system, which is much more rigid to judicial amendment than that of the ad hoc tribunals, [in order] to provide procedural certainty…and to limit judicial discretion.*"[58] Further, even if it were appropriate to have recourse to implied powers, Article 4(2) of the Statute and the jurisprudence demonstrate that such powers can only be exercised in a restrictive manner in order to guard against "*broad judicial law-making*".[59] The import of an enforceable summons power into the Statute is a clear example of improper judicial law-making. Such judicial activism will result in the triumph of judge-made law over treaty-made law.[60] This has the capacity to erode confidence amongst States – and, indeed, act as a disincentive to States signing and ratifying the Statute - because of a concern that obligations may later be foisted upon them that had not been agreed to by them. Proper regard to the scope and application of treaties fosters respect for the rule of law. Judicial activism which arrogates powers to a judicial institution that were not conferred upon it is detrimental to this goal. This is particularly so when the arrogated powers were <u>expressly</u> considered and rejected by the Statute's drafters.

25. *Second*, customary international procedural law is a subsidiary source which may only be relied upon when there is a lacuna in the Court's legal instruments.[61] As argued above, and contrary to the Trial Chamber's approach, no lacuna exists. Even if, *arguendo*, it was appropriate to consider this source, the reasoning in the Decision is flawed. As a preliminary issue, great care is needed when importing the approach taken at other international courts on this subject. Not only are "*the sources of law on which the ICC can draw…significantly different from the law applied at the ad hoc tribunals*"[62] but these institutions all have unique origins and founding instruments. In addition, the statement in the Decision that it would be

[58] ICC-01/04-01/06-2707, para. 7 (internal footnotes omitted).
[59] ICC-01/04-01/06-2707, para. 6; ICC-02/05-03/09-410, para. 78.
[60] Additional Defence Submissions, para. 2.
[61] ICC-01/04-02/12-4, para. 10.
[62] ICC-01/04-02/12-4, para. 9.

incredible for the ICC to "*be the only known criminal court in the world (at the international and national levels) that has no power to subpoena witnesses to appear for testimony*" is incorrect.[63] As previously submitted - but wholly ignored in the Decision[64] - the Special Court for Sierra Leone only had the power to compel witnesses residing in Sierra Leone,[65] yet was able to function effectively[66] without claiming powers beyond those provided for in its legal instruments.[67]

26. *Third*, as argued above, the reliance placed solely on Article 64(6)(b) in terms of a providing a Chamber, as a compulsory measure,[68] a power to compel witnesses is misplaced and constitutes an error.[69]

IV. SECOND GROUND OF APPEAL: THE MAJORITY ERRED BY FINDING THAT THE GOK IS OBLIGATED TO COMPEL THE APPEARANCE OF WITNESSES

A. General

27. The Majority erred in law by finding that: (i) "*pursuant to article 93(1)(d) and (l) of the Statute, [the Chamber] 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*"; and (ii) "*there are no provisions in Kenyan domestic law that prohibit this kind of cooperation request*".[70] The Defence notes that, in addition to the arguments which follow, the arguments made under the first ground of appeal apply equally to this second ground.

[63] Decision, para. 92.
[64] ICC-01/09-01/11-1200-Red, para. 8.
[65] Agreement between the United Nations and the Government for Sierra Leone on the Establishment of a Special Court for Sierra Leone, Article 17.
[66] Cf. Decision, para. 99 (there is a "very clear potential for the perpetuation of impunity" if a subpoena power is denied to this Court). *See also* para. 124.
[67] *See Prosecutor v. Taylor*, SCSL-03-01-T-996, Decision on Prosecution Motion for the Issuance of a Subpoena to Naomi Campbell, 30 June 2010, p. 7, the authorities of the State in which Naomi Campbell resided were requested to assist with enforcement of a subpoena *ad testificandum*.
[68] Decision, para. 100.
[69] Decision, paras. 95-100. *See also* para. 111.
[70] Decision, para. 193(ii), (iii).

B. The Majority erred by finding that Kenya can be requested under Article 93(1)(l) to facilitate the compelled appearance of witnesses

28. The Majority made two errors of law when it determined that Kenya, as a State Party, is obligated pursuant to Article 93(1)(l) "*to assist in compelling the attendance (before the Chamber) of the witnesses*" who are the subject of the Decision.

29. *First*, the Majority erred by again failing to apply the correct principles of statutory interpretation when considering the forms of cooperation which might properly fall within Article 93(1)(l). Rather than give effect to the ordinary meaning of both Articles 93(1)(e) and 93(1)(l), read in their statutory context, the Majority, erroneously invoked subsidiary concepts such as the principle of implied powers, as well as the "rule of good faith" and "considerations of complementarity".[71] The importation of such concepts has no place in the Statute wherein matters are unambiguously and expressly dealt with.

30. Based on its plain terms, Article 93(1)(l) is a catch-all provision, requiring a State to provide "*[a]ny other type of assistance which is not prohibited by the law of the requested State*". The key phrase is "*[a]ny other type of assistance*".[72] This phrase makes clear that Article 93(1)(l) only applies to types of assistance which are not otherwise specifically dealt with in Articles 93(1)(a) to (k) and provides a second limitation on the scope of Article 93(1)(l),[73] the first being the requirement that the assistance not be prohibited under national law. As discussed above, Article 93(1)(e) deals with one "type" of assistance, the appearance of witnesses. Applying the clear and well established rules of statutory interpretation, the Defence submits that the appearance of witnesses is dealt with under Article 93(1)(e) and not Article 93(1)(l).[74]

[71] Decision, paras. 104-110, 120-140.
[72] Emphasis added.
[73] *See* Greenberg, D., *Craies on Legislation*, Sweet & Maxwell (10th ed.), p. 789 on the restrictive interpretation of general provisions.
[74] This approach is supported by the maxim *expressio unius est exclusio alterius*.

31. In contrast, and informed by its erroneous approach to statutory interpretation, the Majority erred by interpreting Article 93(1)(e) too narrowly and finding that this sub-article only addresses one type of witness appearance - "voluntary" appearance.[75] Given that the appearance of witnesses is an essential fundamental element of cooperation for a fully functioning court, the Majority's finding that compelled appearance (as opposed to voluntary appearance) would be specifically left unaddressed by the Statute's drafters and dealt with under another more general provision such as Article 93(1)(l) is not only implausible but is not supported by the statutory context.[76] The Defence observes that, within Article 93, sub-article 93(1)(b) expressly provides for the appearance of witnesses before national courts. Looking at the Statute more broadly, Article 69(2) provides for the "*viva voce (oral) or recorded testimony of a witness by means of video or audio technology*". These provisions demonstrate that States Parties made considerable effort to address all scenarios regarding witness appearance. This context lends further support to the Defence submission that witness appearance "*before the Court*" generally was addressed in Article 93(1)(e) and such appearance must be "*voluntary*".

32. *Second*, the Majority further erred by assuming that national law considerations are the only bar to the types of request which a Trial Chamber might properly make of a State Party under Article 93(1)(l).[77] This assumption is incorrect. As previously submitted,[78] Article 21(3) of the Statute states that "*the application and interpretation of law [by a Trial Chamber] pursuant to [Article 21] must be consistent with internationally recognised human rights*". In addition, Articles 22 and 23 are also engaged. These Articles were correctly referenced and discussed in the Dissent[79] but completely ignored by the Majority. This was a serious omission

[75] Decision, paras. 117, 147-148.
[76] ICC-01/04-168 (OA 3), para. 33.
[77] Decision, paras. 115, 151, 152, 155, 156.
[78] Additional Defence Submissions, fn. 64.
[79] Dissent, paras. 22-24, 26.

because the relief ordered contravenes basic internationally recognised human rights standards and guarantees of due process.

33. The Majority asserts various legal justifications for the issuance of enforceable summonses. This is so despite the fact that the "Conclusion" is only premised on Article 93(1)(l).[80] The common denominator amongst the various justifications postulated by the Majority is that neither the "offence" (failure to comply with the summons by the witness) nor the applicable penalties are specified in any of the Court's legal documents.

34. Where deprivation of liberty is concerned, it is well established in international human rights instruments that the general principle of legal certainty must be satisfied.[81] What this means in the context of this case and in practical terms is that:

> *It is…essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application […] to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail*.[82]

35. This basic requirement of notice in the context of the right to liberty ensures the legitimacy of a legal system and is part of the principle of legality. At this Court, Article 22 of the Statute enshrines another aspect of legal certainty and due process and provides that the "*the definition of a crime shall be strictly construed and shall not be extended by analogy. In the case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.*"

[80] Decision, para. 193(ii).
[81] *E.g.*, Article 6, African Charter on Human and People's Rights ("**African Charter**"); Article 5(1), European Convention on Human Rights ("**ECHR**"); Article 9(1), International Covenant of Civil and Political Rights.
[82] Guide on Article 5, Right to Liberty and Security, Article 5 of the Convention, European Court of Human Rights (2012), para. 22 (emphasis added), referring to, among recent authorities, Creangă v. Romania, § 120; and Medvedyev and Others v. France [GC], § 80 (available at http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf).

36. The prohibition against the imposition of retroactive penalties is also an internationally recognised human right[83] which is expressly included in the Statute. Article 23 prohibits the Court from imposing any penalty unless in accordance with the Statute. This prohibition covers the imposition of fines as well as the deprivation of liberty.

37. None of the above fundamental requirements have been satisfied in this case. Neither the Statute nor any of the Court's other legal instruments articulate in sufficiently precise terms that individuals who no longer wish to testify may be summoned to appear on penalty of arrest and/or fine. Article 70, which deals with offences against the administration of justice, is silent on this matter and provides no support for the position of the Majority.[84] In the dispositive part of the Decision, the Majority rely on Article 93(1)(l). This catch-all provision can hardly be described as providing reasonable notice to an individual of the consequences of non-compliance with an ICC summons including the penalties which s/he might face. This lack of notice is particularly concerning when it is recalled that all the witnesses who are the subject of the Decision were repeatedly assured by the OTP on previous occasions that they were participating in a voluntary process.[85] In these circumstances, the order obligating Kenya to assist in enforcing the summonses contravenes the Statute and fundamental human rights principles and, thus, should be reversed.

C. <u>The Majority erred by finding that Kenyan domestic law does not prohibit the request to facilitate the compelled appearance of a witness</u>

38. Contrary to the Majority's finding,[86] Kenyan domestic law does prohibit the request to facilitate the compelled appearance of a witness.

[83] *E.g.*, Article 7(2), African Charter; Article 7, ECHR.
[84] Cf. Rules 65 and 171.
[85] Dissent, fn. 21.
[86] Decision, para. 193(iii). *See also* paras. 157-179.

39. The necessary starting point is Kenya's International Crimes Act 2008 ("ICA") which implements, *inter alia*, Kenya's cooperation obligations under the Statute. A review of the ICA establishes that its provisions carefully follow the wording of the Statute. Therefore, the Government of Kenya ("GoK") is only required to serve Court issued summonses and facilitate the voluntary appearance of witnesses. The relevant provisions of the ICA are as follows.

40. Section 86 of the ICA implements Article 93(1)(d) of the Statute. The margin of the Act expressly states that this section concerns the provision of "*[a]ssistance in arranging service of documents*".[87] The term "*document*" is defined in section 86(3)(a) and includes "*a summons requiring* [as opposed to ordering] *a person to appear as a witness*". Section 86(2)(a)(ii) provides that, when having the process "*served*", "*if no procedure is specified, [service shall be effected] in accordance with the law of Kenya*". Recourse to Kenyan law is, thus, specifically directed in this instance. However, crucially, no equivalent provision is included in section 86 which could cover the enforcement, rather than service, of any summons issued by this Court.[88] Thus, the plain wording of the section establishes that it is concerned solely with service of documents and not with their enforcement.

41. Of further relevance is section 108 of the ICA which implements Article 93(1)(l) of the Statute. This section concerns "*[r]equest[s] for other types of assistance*" but nothing in this provision indicates that it may be used to enforce documents served under section 86.

42. Sections 87 to 89 of the ICA implement Article 93(1)(e) of the Statute. The Defence submits that the repeated emphasis in these sections on ensuring that a witness has consented to giving evidence[89] clearly demonstrates that the regime accepted by the Kenyan Parliament and enacted into law is predicated on voluntary appearance. No provision was made by the Kenyan legislature for

[87] Emphasis added.
[88] There is no link to section 144, Criminal Procedure Code. *See infra*, para. 49.
[89] *See*, *e.g.*, ICA, sections 20(1)(a)(vi), 88(2), 89(1).

"enhanced cooperation" under which the Kenyan authorities could independently act to sanction or otherwise compel a witness who is unwilling to appear before the Court. In the absence of any provision, such action by the State would be *ultra vires* and in breach of the Constitution and rights of the citizen.

43. As argued under the first ground of appeal, nothing in the Statute provides for the compelled appearance of witnesses. Therefore, the Majority's reliance on section 4(1) of the ICA which states that certain parts of the Statute, including Part 6 (which relates to the conduct of trials and in which Article 64(6)(b) is found) and Part 9 (which relates to international cooperation and judicial assistance and in which Article 93 is found), "*shall have the force of law in Kenya*" is wholly misplaced.[90] In any event, such a convoluted approach contravenes the principle of legal certainty.

44. Rather than being permissive,[91] the ICA's silence on compelled appearance should be considered restrictive. The Majority fell into error by focussing on whether an express provision existed which prohibited the coerced attendance of a witness.[92] However, as the Attorney General explained Kenya is not a nation where simply because something is not expressly prohibited under Statute means it is permitted.[93] Rather, as discussed below, Kenya can only coerce or impose penalties on its citizens in accordance with the law. The ICA reflects Kenya's understanding of its treaty obligations as enshrined in the Rome Statute. Kenya cannot be ordered to go beyond these obligations save in circumstances where it has deliberately decided to provide enhanced cooperation to the Court and has enacted the relevant domestic legislation.[94]

[90] Decision, paras. 173, 175-177.
[91] Decision, para. 164.
[92] Decision, para. 158.
[93] ICC-01/09-01/11-T-86-CONF-ENG ET, p. 94, line14 to p. 97, line 14.
[94] *E.g.* Germany has legislated to provide enhanced cooperation on witness appearance. *See* Broomhall, B. and Kreß, C., "Implementing Cooperation Duties under the Rome Statute: A Comparative Synthesis", Kreß et al (ed.), *The Rome Statute and Domestic Legal Orders*, Vol. 2, Nomos (2005), p. 529.

45. Additionally, Kenya is prohibited by "*existing fundamental legal principle[s] of general application*", from assisting to compel witnesses to appear before the Court.[95]

46. The Defence notes the following useful guidance in assessing what is meant by the phrase "*existing fundamental legal principle[s] of general application*":

> *'Existing' means that the principle must already be in place and is designed to prevent the introduction of future legislation to prohibit certain investigative measures. 'General application' means that invoking the national principle as a ground of refusal may not be restricted to the context of the Court.*
> *[…]*
> *'Fundamental legal principles' will in many jurisdictions coincide with human rights norms and general principles of (criminal) law.*[96]

47. The Defence agrees that "*the requested state is in the best position to determine whether execution of a request for assistance would violate one of the fundamental legal principles of its own legal order.*"[97] In this regard, it is of note that the GoK's representative in these proceedings, the Attorney General, submits that the GoK compelling witnesses to appear before the ICC would be in contravention of Kenyan domestic law. In addition, the concerns regarding the principle of legality, the prohibition against the imposition of retroactive penalties and guarantees of due process discussed above similarly arise in the Kenyan domestic context. The Majority's statement that the Defence and the Attorney-General failed to draw the Chamber's attention to these concerns is wholly incorrect and without basis.[98] Rather, this issue was subject to extensive oral and written submissions by both the Defence and the Attorney General.[99] The Majority erred by failing to note these submissions and, instead, erroneously

[95] Statute, Articles 93(1)(l), 93(3).
[96] Sluiter, G., *International Criminal Adjudication and the Collection of Evidence: Obligations of States*, Intersentia (2002), pp. 161-162.
[97] *Ibid*, p. 162.
[98] Decision, para. 164.
[99] ICC-01/09-01/11-T-86-CONF-ENG ET, p. 84, lines 1-7; Additional Defence Submissions, paras. 46-52. The Defence also notes that neither the Attorney General nor the Defence "avoided giving an answer" as to whether there is any Kenyan law that prohibits Kenya from providing the requested assistance (Decision, para. 158). The referenced oral and written submissions were intended to answer this question but were not considered by the Majority.

focused on the identification of an express statutory provision prohibiting the relief requested by the OTP.[100]

48. The right not to be "*deprived of freedom arbitrarily or without just cause*" is enshrined in Article 29 of the Kenyan Constitution. The prohibition against the imposition of retroactive penalties is contained in Article 50(2)(n) of the Constitution. These fundamental principles are also contained in the African Charter,[101] of which Kenya is a signatory.[102] The decisions of the two legal bodies charged with interpretation of the Charter, namely the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights have persuasive effect in Kenya.[103] As identified above in respect of the Court's regime,[104] domestic Kenyan legislation, including the ICA, similarly does not provide that a witness' withdrawal from the ICC process and failure to comply with an ICC summons is a punishable offence. Therefore, the existing fundamental legal principles of general application enshrined in the Kenyan Constitution and the African Charter prevent Kenya from being able to assist in the compelled appearance of witnesses before this Court.

49. Finally, the existence of a power to enforce summonses in domestic Kenyan proceedings is of no assistance in this case. There is no legislative link between either the ICA or the Statute and the relevant domestic law, namely section 144 of the Criminal Procedure Code.[105] Therefore, the constitutionally enshrined principle of legal certainty is not satisfied. Further, any assertion that the ICC is a Kenyan Court and, thus, domestic remedies are somehow equally available to it does not withstand the barest scrutiny. Nowhere in the Kenyan Constitution is

[100] Decision, paras. 158, 164.
[101] *Supra*, fns. 81, 83.
[102] Kenya ratified on 23 January 1992.
[103] *See*, *e.g.*, *Amnesty International and Others v. Sudan*, 48/90-50/91-52/91-89/93, African Commission on Human and Peoples' Rights (1999), on Article 6, African Charter; *Media Rights Agenda and 3 Others v. Nigeria*, 105/93-128/94-130/94-152/96, African Commission on Human and Peoples' Rights (1998), on Article 7(2), African Charter.
[104] *Supra*, para. 37.
[105] Section 144(1), Kenyan Criminal Procedure Code (available at http://www.kenyalaw.org/Downloads/Acts/Criminal%20Procedure%20Code.pdf).

this Court expressly referred to a being part of the Kenyan court system.[106] Moreover, the Majority's reliance on the Kenyan High Court case of *Barasa v. Cabinet Secretary of the Minister of Interior* can be distinguished on the basis that the case concerns the surrender of an accused rather than the compelled attendance of witnesses.[107] It provides no support to the impugned findings of the Majority on this issue. In fact, as highlighted by the Attorney-General, the only applicable principle that can be gleaned from the *Barasa Case* is that Kenyan citizens have rights in the domestic context which they are entitled to exercise when interacting with this Court.[108]

V. REQUEST FOR SUSPENSIVE EFFECT

50. Pursuant to Article 82(3) of the Statute and Rule 156(5) of the Rules, the Defence requests that the appeal have suspensive effect to parts of the Decision.[109] This remedy is required because full implementation of the Decision, specifically those parts directed towards compelling witnesses to testify: "*(i) 'would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant, (ii) would lead to consequences that 'would be very difficult to correct and may be irreversible', or (iii) 'could potentially defeat the purpose of the appeal'*."[110]

51. To implement the Decision, the GoK must take immediate action to put in place the practical and legal steps required to provide the detailed assistance ordered by the Majority.[111] The intended result is that the eight witnesses will be compelled to testify under pain of, as yet unspecified, penalties. If the Decision is reversed, then not only will the GoK's efforts have been expended in pursuit of an incorrect decision, but the witnesses at issue will have suffered considerable psychological stress and anxiety and may have been subjected to detention

[106] *See*, Parts 2 and 3 of Chapter 10 – Judiciary, of the Kenyan Constitution 2010.
[107] Decision, paras. 178-179.
[108] ICC-01/09-01/11-T-86-CONF-ENG ET, p. 117, lines 14-19.
[109] ICC-01/05-01/08-499 (OA 2), para. 14 where suspensive effect was applied to isolated parts of the decision.
[110] ICC-01/09-01/11-862 (OA 5), para. 6 citing to ICC-01/04-01/07-3344 (OA 13), para. 6.
[111] Decision, pp. 77-78.

and/or fines under an unregulated criminal process. The Defence respectfully submits that no government should be required to act illegally and contrary to the Statute and, crucially, its own Constitution. With respect, the consequences of an incorrect decision are not simply improperly obtained witness testimonies which can be stricken from the record.[112] In these circumstances, the consequences of implementing the Decision in full prior to the issuance of a judgement on this appeal "*would be difficult to correct and may be irreversible*".[113]

52. In addition, at the core of this appeal is the question as to whether the GoK is required to compel witnesses to testify before this Court. If witnesses are compelled to testify before a judgement is rendered in this appeal, then the purpose of the appeal will be defeated. This fact warrants the granting of suspensive effect.[114]

53. If the request for suspensive relief is granted, the Defence submits that, in order to safeguard Mr. Ruto's right "*[t]o be tried without delay*"[115] and pending determination of this appeal, there is no reason why the OTP and the Registry cannot accept the GoK's offer "*to locate and serve [all summonses issued by the Court on] the eight witnesses*" in order that "*any witness who is found and served and who indicates he/she is now, in light of the subpoena or otherwise, ready and willing to testify, will be availed to the Court without delay*".[116]

[112] ICC-01/09-01/11-1313-Anx-Corr, para. 2.
[113] ICC-01/09-01/11-862 (OA 5), para. 10.
[114] ICC-01/05-01/08-499 (OA 2), para. 13; ICC-01/04-01/06-1444 (OA 12), para. 10.
[115] Statute, Article 67(1)(c).
[116] ICC-01/09-01/11-1304, para. 8. The Defence advises that, if suspensive effect is granted, it intends to file a request with the Trial Chamber that the Registry and the OTP be ordered to liaise with the GoK to make as much progress as possible without resorting to compulsion pending judgement in this appeal.

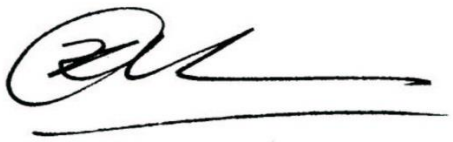
VI. RELIEF REQUESTED

54. As argued above, the Defence submits that a series of fundamental errors of law were made in the Decision which, either individually or cumulatively, materially affect the Decision. Accordingly, the Defence respectfully requests that the Appeals Chamber:

    a. grant the request for suspensive effect by ordering that the GoK is not required to compel the attendance of the witnesses; and

    b. reverse the Decision.

Respectfully submitted,



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

Dated this 5th Day of June 2014
At The Hague, Netherlands