Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/09-01/11**
Date: **26 June 2014**

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

Corrigendum to Sang Defence appeal against the *Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation*

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

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I. INTRODUCTION

1. The Defence for Joshua arap Sang ("Defence") hereby submits its appeal against the *Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation*.[1]

2. On 23 May 2014, the Majority of the Trial Chamber, the Presiding Judge dissenting, granted leave to appeal in respect of the following two issues arising from the Impugned Decision, and which form the basis of the current appeal:[2]

   i. Whether a Chamber has the power to compel the testimony of witnesses ('First Issue');

   ii. Whether the Government of Kenya, a State party to the Rome Statute, is under an obligation to cooperate with the Court to serve summonses and assist in compelling the appearance of witnesses subject to a subpoena ('Second Issue').

3. In addition to the submissions contained herein, the Defence relies upon its submissions made in response to the Prosecution's request at first instance.[3]

II. STANDARD OF REVIEW

4. The Defence submits that in an appeal involving an alleged error of law, the Appeals Chamber "will only intervene if the error materially affected the Impugned Decision".[4] A material error occurs when the decision would have been "substantially different" in absence of the error.[5]

III. First Issue

(i) Rome Statute and Rules

Article 64(6)(b)

5. The Defence submits that the Court does not have the power to compel witnesses to testify because it has no enforcement mechanism. The Court has no power to subject a recalcitrant witness to penalties. Effectively, the Court can only seek to persuade a

[1] ICC-01/09-01/11-1274-Corr2, 17 April 2014.
[2] ICC-01/09-01/11-1313, para 40.
[3] ICC-01/09-01/11-1138-Red, 10 January 2014 and ICC-01/09-01/11-1200-Red, 4 March 2014. See also ICC-01/09-01/11-T-86-Red-ENG, 14 February 2014; ICC-01/09-01/11-T-87-ENG,17 February 2014, pp. 1-36.
[4] ICC-02/05-03/09-295 OA2, 17 February 2012, para 20. See also, ICC-01/05-01/08-962 OA3, 19 October 2010, para 133.
[5] ICC-01/04-169, 13 July 2006, para 84.

witness to appear before it and to testify voluntarily. As noted by the Minority Judge this equates to the absence of a "fundamental element" of a subpoena power.[6]

6. During the debates on whether the Court has the power to compel witnesses to testify, much has been said about the scope of Article 64(6)(b). In particular, the Chamber focused on whether the term "require" has the same meaning as "order" and as such allows the Chamber to compel witnesses to testify.[7] The Defence maintains that the term "require" is less forceful and firm than "order" and relies on its previous submissions in this regard.[8] Irrespective of whether "require" and "order" have the same meaning, Article 64(6)(b) does not make an explicit reference to a power of the Court to compel witnesses to testify through issuing subpoenas or otherwise. It also does not specify that witnesses whose attendance may be required must appear. This further supports the suggestion that the wording of Article 64(6)(b) was deliberately softened. Contrary to the Chamber's finding,[9] a clear obligation for witnesses to appear cannot be drawn from this provision.

7. Article 64(6)(b) does not grant the Court with a *subpoena* power compelling any witness to be called or re-called against his or her will.[10] In any event, Article 64(6)(b) must be read within the limitations of Article 64(1), pursuant to which the Chamber can only exercise its functions and power under Article 64 in accordance with the Statute and Rules. Neither the Statute nor the Rules provide for compulsory witness testimony.

Article 64(6)(b) in the Context of the Statute

8. The Defence submits that, in determining the meaning of a particular provision, it is proper to consider a provision in the context of a treaty as a whole. Article 31(1) of the Vienna Convention on the Law of Treaties ("VCLT") indicates ordinary meaning is to be interpreted with reference to context.

[6] ICC-01/09-01/11-1274-Anx, para 11.
[7] ICC-01/09-01/11-1274-Corr2, para 98; ICC-01/09-01/11-1138-Red, paras 29-30.
[8] ICC-01/09-01/11-1138-Red, paras 29-30.
[9] ICC-01/09-01/11-1274-Corr2, paras. 95-100; ICC-01/09-01/11-1274-Anx, para. 10.
[10] ICC-01/09-01/11-1138-Red, para. 35. *See also*, Sluiter, G. '"I beg you, please come testify" : The problematic absence of subpoena powers at the ICC' 12 *New Criminal Law Review* (2009), 599.

9. Importantly, when Article 64(6)(b) is read in the context of the Rome Statute as a whole, and not in isolation, it is clear that Article 64(6)(b) cannot be relied upon as a basis for compelling witnesses to testify.

10. As a starting point, looking at the Statute as a whole, it is clear that it includes no enforcement mechanism to compel witnesses to testify. The Court's power is limited to compelling a witness 'who appears before the court' to testify.[11] If such a witness refuses to testify he or she may be sanctioned under Rule 171. This power has not been extended to witnesses not appearing before the Court. No other provision in the Statute or Rules provides a basis for sanctioning witnesses who refuse to appear. Article 70 is silent on this issue, but Article 71 allows for Court imposed sanctions in case of "deliberate refusal to comply with its directions". However, only persons "present" before the Court, and not persons who have not yet appeared before the Court, can be sanctioned under Article 71.[12]

11. This stands in stark contrast with the position of the International Criminal Tribunal for former Yugoslavia ("ICTY") and International Criminal Tribunal for Rwanda ("ICTR"), where Chambers have both an inherent power and a power under the Rules to prosecute witnesses who refuse to comply with a subpoena.[13]

12. The drafters of the Rome Statute and Rules failed to include any power to sanction witnesses for refusing to appear before the Court, notwithstanding their knowledge of the position taken by the ICTY and ICTR. This failure is especially telling in light of the fact that a proposal had been made to the effect of including such a power, but was rejected.[14] The omission of any power to sanction witnesses who refuse to appear before the Court is therefore clearly deliberate, and further demonstrates that the drafters had no intention of compelling witnesses to appear before the Court.[15]

13. In addition, Article 64(6)(b) in its context must be read in light of Chapter 9 on cooperation with States, because the provision itself directs that, if necessary, "the assistance of States as provided in this Statute" should be obtained. This indicates that the Chamber depends on State cooperation to give effect to Article 64(6)(b), and that

[11] See Rule 65.
[12] *See also*, Schabas, W., *The International Criminal Court: A Commentary on the Rome Statute* (2010), 859-860.
[13] *Prosecutor v Tihomir Blaskic*, IT-95-14-AR108*bis*, Judgement on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997, 29 October 1997, para 59.
[14] Sluiter, (2009), 598.
[15] *Ibid*, 600.

the form of cooperation sought cannot go beyond the Statute. The most relevant provision in Chapter 9 is Article 93(1)(e). This provision cannot be circumvented by looking at Article 64(6)(b) in isolation.

14. Göran Sluiter, who participated in the Working Group on Part 9 of the Statute, notes that during the drafting process, the imposition of an obligation upon citizens to testify at the seat of the Court was met with strong opposition.[16] As also observed by the Minority Judge, it is only on 6 July 1998 that the term 'voluntary' was inserted into the provision,[17] which goes to show that the drafters consciously and deliberately limited the application of Article 93(1)(e) to facilitation of the voluntary appearance of witnesses. This is also clear from the footnote to Article 93(1)(e), as contained in the Report of the Working Group on Part 9 to the Plenary of the Conference, which states: "This includes the notion that witnesses or experts may not be compelled to travel to appear before the Court".[18]

15. The principle of voluntary appearance is strengthened by Article 93(7)(a): in the event that a person in custody is required to appear before the Court, such a person must give free and informed consent to the transfer.[19] The only exception to this rule is set out in Rule 193(1), which applies solely to detained individuals who are sentenced by, and thus under the responsibility of the Court.[20] It is submitted that no good reason has been advanced as to why witnesses in custody should be treated differently from witnesses who are not in custody, in terms of their compellability.

16. The Defence submits that the position stated by the Minority Judge is correct and that Articles 93(1)(e) and 93(7) read together leave no doubt that the drafters intended to incorporate the principle of voluntary appearance without the option for the Court to compel unwilling witnesses to appear before it.

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16 *Ibid*, 597.
17 ICC-01/09-01/11-1274-Anx, para 13.
18 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (1998), 329, fn. 221.
19 Sluiter, (2009), 600-601.
20 *Ibid*. See also Kress, C. and Prost, K., 'Article 93' in Trifterrer, O., *Commentary on the Rome Statute of the International Criminal Court* (2nd Ed, 2008), 1584, as cited in Joint Defence Submissions ICC-01/09-01/11-1149-Conf. There is also an argument that Rule 193 only removes the consent of the State and not the individual. See Schabas, (2010), 1023.

Scholarly Opinion and Relevant ICC Jurisprudence

17. Most academic authors agree that "conspicuously absent is any subpoena power. Neither the judges nor the prosecutor of the ICC appear to have any power to compel witnesses to appear".[21] Thus, the attendance of witnesses at the Court "is always voluntary …"[22] because "the *Rome Statute* does not contemplate the compulsory appearance of witnesses".[23]

18. In 2013, the International Bar Association ("IBA") held a Roundtable Discussion 'Witnesses under Threat?', attended by the ICC President and another Judge, the ICC Registrar and Prosecution staff, State representatives and academics.[24] As described by the IBA, the general view expressed by the participants without dissent was that the Court did not have the power to compel witnesses to testify before it: "[a]ll witnesses who appear to testify before the ICC do so voluntarily, even if they are key witnesses and their evidence is central to the case".[25]

19. International organisations, such as the International Centre for Criminal Law Reform and Criminal Justice Policy, and the Commonwealth Review Commission similarly stated the principle of voluntary appearance of witnesses requiring the witnesses' consent.[26]

20. Similar positions were taken both by the Pre-Trial Chamber in the *Situation in the Republic of Kenya*,[27] and the Trial Chamber in *Lubanga*.[28] In *Lubanga*, the Prosecution accepted that the Court had no power to compel witnesses to appear.[29]

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[21] Maogoto, J., 'A Giant without Limbs: The International Criminal Court's State-Centric Cooperation Regime', *The University of Queensland Law Journal* 23 (2004), 14.
[22] Mochochoko, P., and Harhoff, F., 'International Cooperation and Judicial Assistance', in Lee, R., *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (2001), 660.
[23] Schabas, (2010) at 768 (emphasis added by the author). See also: commentary on article 93(1)(e), *ibid* at 1020; and Maogoto, (2004), 102, 114.
[24] The event was held by the International Bar Association ICC Program at The Hague Institute for Global Justice. *See* http://www.ibanet.org/Article/Detail.aspx?ArticleUid=EDFE91E7-ED49-4CB1-B125-528EB35C35B9.
[25] International Bar Association, *Witnesses before the International Criminal Court, An International Bar Association International Criminal Court Programme report on the ICC's efforts and challenges to protect, support and ensure the rights of witnesses*, July 2013, ('IBA July 2013 Report'),15.
[26] ICC Manual for the Ratification and Implementation of the Rome Statute, pg 93; International Criminal Court (ICC) Statue and Implementation of the Geneva Conventions, Meeting of Commonwealth Law Ministers and Senior Officials, Sydney, Australia, 11-14 July 2011, paras 55-57.
[27] ICC-01/09-39, para 20 (emphasis added).
[28] *Prosecutor v. Lubanga*, Transcript, ICC-01/04-01/06-T-355-ENG, 20 May 2011, 5 at line 19 ("The Chamber has no power to compel the attendance of witnesses").
[29] *Prosecutor v. Lubanga*, Transcript, ICC-01/04-01/06-T-355-ENG, 2 at line 5.

Article 93(1)(l)

21. The Minority Judge agrees that any power of the Court to compel witnesses under Article 64(6)(b) is limited by reference to "the assistance of States as provided in this Statute", and the applicable assistance provided for in the Rome Statute is facilitating the voluntary appearance of persons as witnesses under Article 93(1)(e).[30] In her opinion, which is shared by the Defence, this interpretation is consistent with the intention of the drafters of the Rome Statute.[31]

22. In this regard, the Defence submits that no distinction is to be made between the physical appearance of a witness in The Hague, appearance elsewhere, or testimony by video-conference. In all cases, the witness appears before the Court, and this must be voluntary pursuant to Article 93(1)(e). This is clear from Pre-Trial Chamber II's holding: "[a]ccording to the Statute, the Court may request a State Party to facilitate the voluntary appearance of a witness before the Court, but not to compel a witness to testify before the national authorities of that State".[32]

23. Nonetheless, in the Majority's view, the inclusion of Article 93(1)(e) does not exclusively deal with the appearance of witnesses. It held that Article 93(1)(e) can be circumvented by relying on Article 93(1)(l), which is referred to as a 'catch-all' provision.[33]

24. The Defence submits that the Majority's opinion is untenable because Article 93(1)(l) refers to "any other type of assistance". Clearly then, this provision was not meant to cover types of assistance explicitly provided for in another provision under Part 9, here Article 93(1)(e). In particular, Article 93(1)(l) is not meant to allow that which the drafters intended to expressly exclude elsewhere. Indeed, previous jurisprudence confirms that if the Statute or Rules set out a more specific procedure, then that specific procedure should be considered the *lex specialis,* which displaces the application of more general procedures.[34] Relying on a catch-all provision, and thereby circumventing a more explicit provision dealing with the same subject matter, is contrary to the principle of *lex specialis derogate legi generali*.[35]

[30] ICC-01/09-01/11-1274-Anx, para 12, emphasis in original.
[31] ICC-01/09-01/11-1274-Anx, paras 13-14.
[32] ICC-01/09-39, para 20 (emphasis added).
[33] ICC-01/09-01/11-1274-Corr2, paras 115-119.
[34] For example, ICC-01/09-14, 3 February 2010, para 9.
[35] Shaw, Malcolm M., *International Law* (6th ed, 2008), 124 and fn 228.

(ii) Implied Powers

25. The Majority holds that, where the relevant legal provisions leave gaps or uncertainty, it can rely on its implied powers to fill such gaps.[36] As demonstrated above, no such gaps exist in relation to the question of summons. Yet, the Majority principally relies on Article 4 of the Rome Statute to conclude that the Statute has incorporated the doctrine of implied powers, and that a Chamber has implied powers to compel witnesses to testify.[37]

26. The fact that Article 4(1) of the Statute grants the Court international legal personality does not automatically lead to the conclusion that the Court has implied powers, and definitely not to the extent found by the Majority. The ICC differs from the United Nations ("UN") and International Court of Justice ("ICJ"). Unlike the UN, which is an international organisation, or the ICJ whose jurisprudence the Majority heavily relies upon, the ICC has jurisdiction over individuals for criminal conduct. Given the Court's power to impose criminal penalties, which goes to the heart of civil liberties, its law must be clear and unambiguous. Constructions based on international principles and implied powers, instead of the law as expressly prescribed, should be avoided by all means.[38] Implied powers should therefore be exercised with extreme caution, if at all.

27. The Defence nonetheless accepts that the Court, like any other court, has limited implied powers to fill a vacuum in the Court's legal provisions, in a way which best promotes the objectives and effective functioning of the Court. However, the Defence agrees with Rückert that: "The legal capacity of the ICC, however, extends only as far as the purpose and functioning of the ICC requires. Here, the functional limitation of the legal capacity is explicitly provided for in the Statute".[39] Accordingly, to the extent that the Court has implied powers, they are limited by, and cannot exceed the Statute.

28. In light of this limitation, the Defence submits that implied powers cannot be relied upon to re-write the Statute and create a power to compel witnesses to testify where a plain reading of the Statute and Rules, particularly when read in light of the *travaux preparatoires*, clearly indicate that States Parties did not intend for the Court to have

[36] ICC-01/09-01/11-1274-Corr2, paras 65-87.
[37] *Ibid*, para 94.
[38] Wiebke Ruckert, 'Article 4, Legal Status and Powers of the Court' in Triffterer, O., *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd Ed, 2008), 127, para 16.
[39] *Ibid*,124, para 7.

such a power. In other words, a general, implied power cannot override explicit provisions in the Statute.

29. It is also clear from Article 4(2), which can be used only "as provided in this Statute", that implied powers cannot exceed the bounds of the Statute. This provision:

> makes clear that the Court's functions and powers are limited to those provided for in the Statute. Restating the obvious, the provision is directed against an expansion of the Court's powers beyond the Statute. Such an expansion could possibly derive, for example, from the application of a broad implied-powers-doctrine, according to which an institution has to possess the powers which are necessarily implied in the definition of a certain goal to be reached. Furthermore, customary law or new treaty law provide avenues for the expansion of the Court's powers and functions. Article 4 para. 2 of the Statute, however, circumscribes all such means of expansion of the Court's power, given its requirement that the Court's powers and functions be provided in the Statute, not elsewhere.[40]

30. Contrary to the Majority's holdings,[41] it is not necessary for the Statute to clearly exclude a subpoena power. It is sufficient that a subpoena power has been omitted from the Statute. The issue of compellability of witnesses was discussed and rejected by the drafters of the Court's regime. The omission is therefore deliberate and consistent with Article 93(1)(e), which expressly deals with the voluntary appearance of witnesses. Accordingly, the Minority Judge is correct in her finding that implied powers cannot be relied upon to justify compelling testimony. There is no lacuna in the statutory scheme to fill, given that the States Parties comprehensively legislated for this possibility through Article 93(1)(e).[42] Relying on implied powers in the manner proffered by the Majority goes beyond what was provided for in the Statute and thus contravenes the principle of legality.[43]

31. Moreover, the imposition of sanctions on unwilling witnesses on the basis of implied powers, instead of a clear legal provision, has serious human rights implications.[44] It is well established in human rights law that nobody shall be subjected to sanctions unless

[40] *Ibid*,126, para 14.
[41] ICC-01/09-01/11-1274-Corr2, para 110.
[42] ICC-01/09-01/11-1274-Anx, para 21.
[43] ICC-01/09-01/11-1274-Anx, para 22.
[44] *See also Bagosora & Nsengiyumva v. Prosecutor*, ICTR-98-41-A, Appeals Judgment (14 December 2011), at http://unmict.org/files/acclrt/judgements/2011/Bagosora%20and%20Nsengiyumva%20AJ.pdf, 16: "Subpoenas should therefore not be issued lightly for they involve the use of coercive powers and may lead to the imposition of a criminal sanction".

on the basis of a clear and unambiguous legal provision. The retroactive imposition of penalties violates all recognised human rights conventions and the express provisions of the Statute. Indeed, it would be contrary to the principle of *nullum crimen sine lege*, as set out in Article 22(1) of the Statute, to impose a penalty on a witness who refuses to testify before the Court. Nowhere in the Majority's judgment did they consider the arguments regarding retroactive penalties.[45]

32. Article 22(1) similarly applies to the imposition of sanctions on witnesses who refuse to appear before the Court. The refusal to comply with a summons is normally treated as a contempt of court or an offence against the administration of justice. As such, it may be considered in the same fashion as a crime, which must be defined before a penalty can be imposed.

33. In addition, Article 23 of the Rome Statute prohibits the Court from imposing any penalty unless in accordance with the Statute. Thus, clearly, a penalty cannot be imposed on the basis of implied powers. Rather, before any witness can be penalised by the Court for failing to testify, the Statute must adopt a clear definition of the wrongdoing. Indeed, pursuant to Article 22(2), "[t]he definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted." This was recognised by the Minority Judge in her dissent.[46]

34. The principle of narrow construction has also been recognised by the European Court of Human Rights ("ECrtHR").[47] An explicit legal basis is particularly required when the sanction is imprisonment. In no circumstances can an individual be deprived of his or her liberty without a prescribed legal procedure. This follows, *inter alia*, from Article 5(1) of the European Convention on Human Rights.[48]

35. Even if the Court envisages imposition of a fine only, and such a fine is regarded as an administrative sanction rather than a punishment for a crime as such, these principles still apply. According to the jurisprudence of both the ECrtHR and European Court of Justice ("ECJ"), administrative sanctions and tax surcharges amount to criminal

[45] ICC-01/09-01/11-1200, paras 47-49 and 52.
[46] ICC-01/09-01/11-1274-Anx, paras 23-24.
[47] *Martirosyan v Armenia*, No. 23341/06, Third Section, Judgement, 5 February 2013, para 56.
[48] Commentary on Art 5(1), *Guide on Article 5, Right to Liberty and Security, Article 5 of the Convention*, as applicable to deprivation of liberty, para 22, referring to, among recent authorities, *Creanga v Romania*, para. 120; and *Medvedyev and Others v. France* [GC], para 80. *See also*, Articles 9.1 and 9.5 of the International Covenant of Civil and Political Rights ("ICCPR") for similar provisions.

charges.[49] The gravity of the sanction does not play a real role, as even minor offences may be criminal in nature.[50]

36. By virtue of Article 21(3) of the Statute, the ECrtHR's jurisprudence and international human rights instruments are authoritative in interpreting the provisions in the Statute. They provide further support for the submission that no power to impose sanctions – whether a fine or imprisonment – can be inferred on the basis of implied powers, without a clear legal basis.

37. This is all the more so because in the present case the witnesses have been told explicitly and on multiple occasions, both by the Prosecution and the Victims and Witnesses Unit ("VWU") that their participation is voluntary.[51]

(iii) Principles of Interpretation

Good Faith and Object and Purpose

38. The Majority considers that it must in 'good faith' be assumed that the intention of the States Parties was to create an effective court – not one at the mercy of witnesses' voluntariness – and thus the Rome Statute must be taken to include a power to compel witnesses to testify.[52]

39. It is respectfully submitted that the reliance on the 'good faith' principle is misplaced here. In fact, the Majority uses this principle to justify judicial activism. Indeed, in interpreting the legal provisions, the Majority does not feel constrained by the letter of the law.[53]

40. While compulsory subpoena powers would no doubt be helpful for the court, the Defence does not agree that a Court cannot be effective without it.[54] The ICC has finalised three cases where nearly all witnesses appeared before the Court to testify. In general, witnesses mostly volunteer to give testimony. Only exceptionally do witnesses refuse. Often this is because of security concerns, which cannot easily be

[49] *Martirosyan v Armenia*, No. 23341/06, Third Section, Judgement, 5 February 2013, para 56.
[50] A small fine for a driving regulation infringement qualified as a criminal penalty in *Öztürk v Germany*, para 54; and a €3 fine was considered sufficiently serious to amount to a criminal penalty in *Ziliberberg v Moldova*, para 34.
[51] ICC-01/09-01/11-1274-Anx, paras 15, 25.
[52] *Ibid*, paras 123-124.
[53] *Ibid*, para 66.
[54] See for instance ICC-01/09-01/11-1200-Red, para 8.

resolved by the Court.[55] Reluctant witnesses can often be persuaded to testify. Accordingly, to state that a court without a power to compel witnesses to testify is "illusory or nominal" is a serious exaggeration.[56]

41. When considering the spirit of a treaty, it is necessary to consider "the common and real intention of the parties at the time the treaty was concluded."[57] Here, the "common and real intention of the parties" was to create a Court and endow it with the appropriate mechanisms, and they did precisely that. However, the States Parties did not consider the absence of a compulsory subpoena power fatal to operations. In their collective view, the pursuit of international justice was possible without a compulsory subpoena power. In fact, the "common and real intention of the parties" was clearly to exclude the involuntary appearance of witnesses.

42. The 'good faith' argument, therefore, does not hold because any 'good faith' interpretation must be consistent with the spirit and object of the text and cannot circumvent the intention of the drafters. This is all the more so because it concerns the interpretation of a treaty governing criminal law and procedure. Academic commentators have noted that aspects of the customary rules of treaty interpretation, as enshrined in Articles 31-32 of the VCLT, should be applied with some caution in the context of an international instrument concerning criminal liability.[58] Recourse to additional means of treaty interpretation "might lead to a temptation to construe ambiguous provisions more liberally than might appear from simple textual interpretation".[59]

43. Also, to the extent there is any ambiguity arising from an interpretation of the relevant legal provisions in their context and in light of the object and purpose, Art 22(2) of the Rome Statute trumps any proposed liberal interpretation under Article 32 of the VCLT.[60] This is because once ambiguity is established, the interpretation most favourable to the accused must be adopted,[61] regardless of what the preparatory texts suggest. In any event, here, recourse to Article 32 of the VCLT and reliance on the

[55] ICC-01/09-01/11-704-Anx, para 10.
[56] CC-01/09-01/11-1274-Corr2, para 123.
[57] Cheng, B., *General Principles of Law as Applied by International Courts and Tribunals* (2006), at 114.
[58] Schabas, W., *The UN International Criminal Tribunals* (2006), 80-81.
[59] Akande, D., "Sources of International Criminal Law" in Cassese, Akande et al (eds), *Oxford Companion to International Criminal Justice* (2009), 44.
[60] *Ibid*, 45.
[61] The ICTY has adopted a relatively low threshold for ambiguity in this context – a "plausible difference in interpretation or application" is sufficient: *Prosecutor v Radislav Krstic*, Judgment, IT-98-33-7, 2 August 2001, para 502.

preparatory texts actually supports the reading which is most favourable to the accused: the drafters did not intend to grant the Court a power to compel witnesses to appear before it.[62]

44. In addition, the application of the "good faith" principle cannot lead to a conclusion that would run counter to international human rights standards and thus infringe Articles 22 and 23, as discussed above. The spirit of the treaty, in light of the clear intention of the parties at the time of entering into the treaty, is that the Court is to operate in compliance with important substantive and procedural human rights norms.

Blaskic and Good Faith

45. The Majority refers at length to the ICTY case of *Blaskic* as a 'good faith' example.[63] The Defence submits that the ICC cannot be compared with the ICTY or ICTR because of their differences in terms of legal basis and character.[64]

46. A very significant distinction between the *ad hoc* tribunals and the ICC is their drafting and amendment processes. The International Legal Office ("ILO") drafted the ICTY Statute in a rush and without the involvement of States.[65] Many issues were omitted – not deliberately, but rather through the lack of time and foresight. The inclusion of an explicit subpoena power may have been one such omission. The Rome Statute, on the other hand, took many years to complete and involved debates among many States.[66] The ICC drafters had the ICTY and ICTR Statutes and Rules to consider, which indeed they did.[67] Their omissions, including of a compellable subpoena power, are therefore deliberate.

47. Unlike at the ICTY and ICTR, where the process of amending the rules is relatively easy and done under the responsibility of the judges,[68] the ICC amendment procedure

[62] ICC-01/09-01/11-1274-Anx, paras 13-14.
[63] ICC-01/09-01/11-1274-Corr2, paras 130-133.
[64] ICC-01/09-01/11-1138-Red, paras 43-48; ICC-01/09-01/11-1200-Red, paras 34-45.
[65] For further information on the drafting process, see M. Cherif Bassiouni & P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996), 219-226; V. Morris & M. Scharf, *The International Criminal Tribunal for Rwanda* (Volume II) (1998), Preface xvii.
[66] See, among others, Philippe Kirsch QC, Introduction, XXIII – XXVIII; and: Morten Bergsmo / Otto Triffterer: Preamble; and Otto Triffterer: Part I. Establishment of the Court, in O. Triffterer (Ed.), Commentary on the Rome Statute of the International Criminal Court, Observers' Notes. Article-by-Article (2nd Ed,2008), 1321.
[67] D. Piragoff, *Article 69*, in Triffterer, *ibid*, 1318; Friman, *Inspiration from the International Criminal Tribunals*, in Triffterer, *ibid*, 377-379.
[68] See ICTY/ICTR Rule 6.

is much more cumbersome and involves the Assembly of States Parties. It was a deliberate choice not to leave amendments of the rules to the judges.[69]

48. Accordingly, if at this stage, the general view is that a compulsory subpoena power must exist at the ICC, the Assembly of States Parties and not the judges should amend the Rules. Even the Presiding Judge acknowledged, "it remains the prerogative of the legislature to fill any gaps they see a need to fill, regardless of the interpretations offered by judges".[70] Yet, now he is part of the Majority that has firmly taken the seat of the legislator in reaching its conclusions in the Impugned Decision.

(iv) Customary International Criminal Procedural Law

49. The Majority places great emphasis on the fact that all courts in the world have the power to compel a witness to testify and the anomaly of the Court under the status-quo.[71]

50. The Defence respectfully disagrees that on the basis of Article 21(1)(c) the ICC can be placed in an analogous position as domestic courts. The Rome Statute can certainly not be "augmented" by domestic legal principles.[72] At most, these principles can be looked at in interpreting the provisions of the Rome Statute.

51. It is clear from Article 21(1) that these principles can only be applied if the Statute and Rules leave gaps, and even so, only if they are not inconsistent with the Statute; the Majority errantly reversed the order of analysis in turning first to implied powers and ICJ jurisprudence.

52. The Majority also holds that the existence of Rule 54 of the ICTY and ICTR Rules indicates that subpoena powers are part of customary international criminal procedural law.[73] The Defence submits there is no established concept of customary international criminal procedural law, and in particular a customary norm that international criminal tribunals can compel witness testimony.

[69] See Article 51 of the Rome Statute. See also S. Ferandez de Gurmendi, *Elaboration of the Rules of Procedure and Evidence*, in Triffterer, Commentary on the Rome Statute, *supra* note 81, 235-257.
[70] See ICC-01/09-01/11-1186-Anx, para 15.
[71] ICC-01/09-01/11-1274-Corr2, para 92.
[72] ICC-01/09-01/11-1274-Corr2, paras 65 and 91.
[73] ICC-01/09-01/11-1274-Corr2, para 91.

53. Customary international law has traditionally been State-centred – it is the practices accepted as law by States that give rise to customary norms.[74] Moreover, the International Law Association ("ILA") in 2000 recognised that "although international courts and tribunals ultimately derive their authority from States, it is not appropriate to regard their decisions as a form of State practice".[75] Rather, the decisions of international courts are relied on as expressing the status of a customary international law norm, or as support for the existence or non-existence of such a norm.[76] Accordingly, international courts' practices are not in and of themselves constitutive of customary international law.

54. Even when relevant State practice and *opinio juris* is considered, it cannot support the existence of a customary international legal norm that the ICC can compel witness testimony. In terms of the degree of practice required, as the ICJ held in the *North Sea Continental Shelf cases*, State practice must be uniform, extensive and representative in character.[77] The Defence submits this is not the case here. Rather, State practice with regard to a compulsory subpoena power is inconsistent – recognised as such in the Prosecution's own submissions in support of its application to summon witnesses: five States were identified as imposing sanctions; 11 States provided for service of summons but did not define sanctions for non-compliance; and eight States specified a summoned witness is under no obligation to appear.[78]

55. Furthermore, for one of the States the Prosecution identifies as authorising the imposition of sanctions for failure to comply with an ICC summons, Finland, the domestic legal position is more complex than the Prosecution makes out, further undercutting the idea of uniformity of State practice. In Finland, while the implementing legislation provides a summoned witness "shall be under an obligation to comply with the summons", the legislation does not provide for use of coercive measures against a recalcitrant witness. This was deliberate – the Finish Parliament rejected coercive measures based on its interpretation of the Rome Statute, particularly

[74] International Law Association Committee on Formation of Customary (General) International Law, *Final Report of the Committe: Statement of Principles Applicable to the Formation of General Customary International Law* (2000), 16.
[75] *Ibid*,18.
[76] International Law Commission, *Formation and evidence of customary international law: Elements in the previous work of the International Law Commission that could be particularly relevant to the topic*, 14 March 2013, A/CN.4/659, 25.
[77] North Sea Continental Shelf Cases (*Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* 1969 ICJ 3, paras 73-74.
[78] ICC-01/09-01/11-1120-Conf-Red-Corr2, para 77.

Art 93(1)(e).[79] In addition, certain States relied upon by the Prosecution as providing for coercive measures, or providing for the service of a summons but not a specific penalty, still incorporate Art 93(1)(e) or otherwise highlight the importance of voluntariness.[80] Consequently, the Defence submits State practice is in no way uniform, extensive or representative in character.

(v) Complementarity

56. Unlike any other court, the ICC is based on complementarity and as such is a court "of last resort".[81] It therefore operates differently from any other courts as it is based on voluntary participation. As long as States are members of the ICC, they have certain obligations under the Statute, most notably those set out in Part 9. However, the language used is more one of requesting, than imposing on States a duty, to cooperate. States are not obligated to ratify the Rome Statute and they can withdraw. By contrast, the *ad hoc* Tribunals, having been established by the UN Security Council under Chapter 7 of the UN Charter, exercise binding powers over States. The Security Council can also exercise pressure on States that do not adequately cooperate.[82]

57. The Majority's decision only ensures the Court can compel witnesses to appear from some States. It does not permit the Court to compel witnesses from States that have explicitly excluded compellability of witnesses. Accordingly, all the Majority's decision will achieve is greater disparity between trials emanating from different situation countries.

58. On the basis of the above considerations, the first ground of appeal should be upheld.

IV. Second Issue

59. The Defence submits that the GOK is not under an obligation to cooperate with the Court to serve summonses and assist in compelling the appearance of witnesses subject to a summons. The Court is authorised to request the GOK to serve non-compellable summonses on witnesses sought by the ICC, and the GOK is under an obligation to provide assistance in serving these summonses. However, as stated by

[79] Kress, Claus (eds. et al), *The Rome Statute and Domestic Legal Orders* (Vol. 11, 2005), 87.
[80] Australia: Kress, *ibid*, 22; South Africa: Implementation of the Rome statute of the International Criminal Court Regulations, 2002 Act, s14(e); New Zealand: The International Criminal Court Act 2000, ss 92-93; Sweden: Kress, *ibid*, 409.
[81] ICC-01/09-01/11-1274-Corr2, para 136.
[82] Rastan, R., Testing Co-operation: The International Criminal Court and National Authorities, in Leiden Journal of International Law (2008), 436.

the Minority Judge,[83] the GOK is under no obligation to compel unwilling witnesses to appear before the Court, irrespective of whether the appearance is sought in The Hague or Kenya through a video-link.

60. The argument is three-fold. First, it is unfair to the GOK to oblige it to serve summonses compelling witnesses to appear when other States Parties are not similarly obligated. Second, relevant Kenyan domestic law explicitly prohibits the compulsion of witnesses to appear before the ICC. Third, it is not necessary for Kenya's domestic law to explicitly prohibit compellability of ICC witnesses; it suffices that the law does not explicitly allow it.

(i) Unequal Treatment between different States Parties

61. The Majority takes the position that States, which have explicitly excluded any powers to issue compellable subpoenas, are allowed to limit their cooperation with the Court to facilitating voluntary testimony only. On the other hand, the Majority finds that States that have not included an express provision either permitting or excluding the ability to compel witnesses to testify are under an obligation to compel witnesses to appear. This latter category includes States that have essentially copied the provisions of the Rome Statute, including Article 93(1)(e), into domestic law. The Majority would impose an obligation on these States to enforce a summons through sanctions, even without an explicit legal basis for such either in the Rome Statute or domestic legislation.

62. The Defence submits that it is neither fair, nor practical to treat States in such a fundamentally different manner. It is not practical because the result is that the ball is in the hands of the States, rather than the ICC. It means that the ICC can be more effective in certain situations than in others, depending on the domestic legislation of the situation State. It results in total confusion as to the exact powers of the ICC. Rather than allowing each State to resolve this issue individually, it should be for the Assembly of States Parties to take a uniform and express position. Until and unless that is done, the ICC should operate on the principle of voluntary testimony only.[84]

63. Following the Majority's decision, it is now for the ICC to interpret the legislation of domestic jurisdictions and decide, on a case-by-case evaluation, whether a State is under an obligation to compel witnesses to appear before it. This is unfair to States

[83] ICC-01/09-01/11-1274-Anx, paras 9, 17.
[84] See also Sluiter, (2009), 601.

Parties and contrary to their sovereignty, in particular where the State itself, as in the present situation, interprets its own law differently from the Court. Here, contrary to the Majority's position, Kenya maintains that it does not have the power to compel witnesses to testify and that domestic legislation requires the consent of the witnesses concerned. If States are allowed to adopt legislation which excludes compelled testimony, then surely States should also be allowed to interpret their own legislation in a manner that excludes compelled testimony. It is not for the Court to interpret a State's domestic legislation in a manner most desirable to it, nor to impose on the State an obligation to compel witnesses to testify, against the explicit will of the State.[85]

(ii) Explicit Prohibition of Compellability

64. Contrary to the Majority's assertions,[86] the relevant Kenyan law, the International Crimes Act ("ICA"),[87] explicitly prohibits compellability of witnesses. Both the GOK and the Defence have indicated as much in oral and written submissions.[88]

65. As also noted by the Majority,[89] the ICA closely resembles the text of the Statute. The relevant sections are sections 86-92. Section 86(3) allows for the issuing of summons requiring witnesses to appear. However, similarly to the Rome Statute, the ICA does not incorporate a power to impose sanctions in a case of non-compliance.[90] Accordingly, persons are not compellable to appear as witnesses under section 86(3), since the same essential component of witness compellability is missing as it is from the Rome Statute. In addition, section 86(3) must be read in light of the following sections 87-92. The totality of these sections unambiguously require that any prospective witness consents to giving evidence or assisting the Court, irrespective of the location where the evidence is to be given or other assistance to be provided to the Court.[91] The fact that sections 144-149 of the Kenyan Criminal Procedure Code[92] authorise Kenyan domestic courts to issue compellable summons to witnesses does not have any bearing on the issue at hand. As previously noted, these sections cannot simply be transplanted from one piece of legislation to another without a specific

[85] This point was made previously in ICC-01/09-01/11-1200-Red, para 32.
[86] ICC-01/09-01/11-1274-Corr2, paras 157-161.
[87] http://www.issafrica.org/anicj/uploads/Kenya_International_Crimes_Act_2008.pdf.
[88] ICC-01/09-01/11-1138-Red, paras 66-75 ; ICC-01/09-01/11-T-86-Red-ENG, 14 February 2014, 44-47, 64-67.
[89] ICC-01/09-01/11-1274, para 162.
[90] This was also conceded by the Prosecution: ICC-01/09-01/11-1120-Red, para 77(2).
[91] ICC-01/09-01/11-1138-Red, paras 66-75.
[92] Criminal Procedure Code (Rev. 2009) [Kenya], Sections 144-149, cited in ICC-01/09-01/11-1120-Red, para 80.

provision providing for such dual applicability. It cannot be assumed, merely on the basis that the same legal term "summons" is used, that a failure to respond to a summons under section 86(3) of the ICA is subject to the same sanctions as described in the Criminal Procedure Code, in particular because the ICA, in sections 87-92, emphasises the requirement of consent of witnesses to appear before the Court.[93]

66. The Majority has stressed that, through section 4(1) of the ICA, the relevant parts of the Rome Statute are directly applicable in Kenya.[94] The Majority further relies on section 20(2). These propositions reinforce the position of the Defence. As is clear from section 20(2), the type of assistance available to the ICC is limited by the constraints of the Rome Statute and the ICA. Neither the Rome Statute, nor the ICA include a power to impose sanctions, and both operate on the principle of voluntariness of witnesses. Accordingly, Kenya cannot be obligated to apply by analogy its Criminal Procedure Code, applicable to domestic criminal proceedings, to witnesses who fall under the ICA.

(iii) No explicit legal basis for compellability

67. The Defence submits that the Majority has applied the wrong standard of assessment in considering whether the GOK has an obligation to compel ICC witnesses to appear before the Court. Contrary to the Majority's,[95] but consistent with the Minority Judge's position,[96] the Defence submits that it is sufficient for Kenya (or any other State Party) to demonstrate that its relevant legal provisions do not provide for an explicit basis allowing it to compel involuntary witnesses to appear before the ICC, irrespective of the location. As aforementioned,[97] a necessary component of issuing compellable subpoenas is a power to impose sanctions on witnesses who fail to comply with such subpoenas. To impose any sanctions, in particular when such sanctions include imprisonment, an explicit legal basis is required.[98] In addition, the Kenyan constitution, which has the highest legal authority in Kenya and must be abided by at all times, requires an explicit legal basis to interfere with an individual's

[93] ICC-01/09-01/11-1138-Red, paras 66-75.
[94] This was also noted by the Majority at ICC-01/09-01/11-1274-Corr2, paras 164-168, 173. *See also* the Minority Judge, who emphasised that Article 93(1)(e) is incorporated into Kenyan law under section 20(1)(a)(vi) of the ICA: ICC-01/09-01/11-1274-Anx, para 17.
[95] ICC-01/09-01/11-1274-Corr2, paras 157-161.
[96] ICC-01/09-01/11-1274-Corr2, paras 157-164.
[97] *See above*, para 9.
[98] This is to comply with international human rights standards. *See above*, paras 36-42.

rights and privileges, including his or her liberty.[99] An individual cannot be deprived of his or freedom, or be subjected to financial sanctions, on the basis of a law, which is applied by analogy.[100]

68. Whether Article 93(1)(l) of the Rome Statute is directly or indirectly applicable in Kenya is irrelevant, as such unspecific catch-all provision cannot override fundamental internationally-recognised human rights law and/or the constitution of a country. Accordingly, it is not necessary for Kenya, or other States Parties, to show an explicit prohibition against using such an intrusive power on individual witnesses.

69. On the above grounds, the second ground of appeal should be upheld.

V. RELIEF REQUESTED

70. The Defence submits that for the reasons set out above the Trial Chamber erred in law in determining that it could request the GOK to summon eight witnesses and enforce said summons. Accordingly, the Majority made material errors affecting the Impugned Decision because absent any of these errors, the decision would have been substantially different. The Defence respectfully requests that the Appeals Chamber intervene to rectify the Majority's errors.

Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua arap Sang
Dated this 26th day of June 2014
In Nairobi, Kenya

[99] Constitution of Kenya, 2010, Article 29 (Freedom and Security of the Person), available at: http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010. *See also* ICC-01/09-01/11-T-86, 14 February 2014, 84 at lines 1-7.
[100] *See above*, paras 36-42.