PARTLY DISSENTING OPINION OF JUDGE EBOE-OSUJI

1. On some related questions, I do concur with my highly esteemed colleagues. I agree with the Majority that the Government of Kenya should be granted leave to make intervener[1] submissions in support of the Defence request for leave to appeal. I also fully agree with the Majority regarding the need for speedy conclusion of the appeal, in order to avoid delay in the conduct of the trial,[2] especially in light of the Defence's constant urge (which they should be making) that the case be concluded with speed.[3] I also share in observing the paradox entailed in this pursuit of an interlocutory appeal[4]—with which the Prosecution agreed—in circumstances (I must worry) that are highly likely to result in further delay in the completion of the trial. Notwithstanding the preferences of the parties, it is strongly hoped that the trial in this case is able to proceed uninterrupted while the appeal is pending.

2. As the Majority has done[5], I, too, must recall here the request of the Ruto Defence that the Prosecution be ordered to close their case before the summer break, subject to any outstanding appeal of the subpoena decision and any ensuing proceedings thereafter. It was a very odd request indeed, which had to be summarily rejected.[6] In effect, the request bears the

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[1] The application of the Government of Kenya is styled as '*amicus curiae*'—a term appearing in the title but not the body of r 103. But there is an obvious strain on the applicability of that terminology in the particular circumstances of the subpoena litigation and its appeal. The more neutral term of 'intervener' would be more appropriate in the present circumstances.

[2] As the matter was put in the Majority decision: 'As to the question whether the proceedings may be materially advanced by an immediate resolution by the Appeals Chamber, the Chamber notes the apparent contradiction between the Ruto Defence's desire for the trial to proceed as speedily as possible and its opposition to adjournments requested by the Prosecution, on the one hand, and its request for an interlocutory decision by the Appeals Chamber on the matter. The Chamber affirms the right of the accused to be tried without undue delay and consequently this would be assisted by a prompt resolution of the appeal ...'[internal footnotes omitted]: *(Decision on defence applications for leave to appeal the "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation" and the request of the Government of Kenya to submit* amicus curiae *observations)*, 23 May 2014, [Trial Chamber V(A)], Majority Opinion of Judge Fremr and Judge Herrera Carbuccia, para 53.

[3] *Ibid.*

[4] *Ibid.*

[5] *Ibid.*

[6] 'Mr KHAN: [...] Your Honour, we want this case to close before the summer break. It is causing understandably huge difficulties for the clients, for Mr Ruto, for Mr Sang. Their name has been tarnished long enough. We want this case to come to an end. Your Honour, there is no reason why the Prosecution should be given an indulgence to have adjournments as if it's a matter of course. So what we're saying on this occasion, we're being once again reasonable, we're saying, okay, have your adjournment until June, even the beginning of July, but at that point you get your witnesses together and you close your case, once they have testified and been cross-examined, subject to the witnesses that are subject to the summons application. That ring fences our work. It's an efficient way of proceeding and we say it's the appropriate way. ...

'PRESIDING JUDGE EBOE-OSUJI: All right, let's stop there, Mr Khan. We're not going to require the Prosecution to close its case subject to the summons application, so I can tell you that upfront. It doesn't work that way. If there are some witnesses that are still in the zone or issues of that nature that remain to be resolved there are other ways of dealing with it other than saying close your case subject to possibility of calling some

appearance of an attempt on the part of the Ruto Defence to have their cake and eat it, too. What is more, such a procedure does not avoid delay. The better approach would be to proceed with the trial in the ordinary course (including hearing the testimonies of the subpoenaed witnesses without interruption). In the event of any appellate reversal of the subpoena decision, the Trial Chamber will simply not take into account the testimonies of those witnesses. That is a much better approach than to interrupt the trial pending the decision of the Appeals Chamber; with Government of Kenya taking no action in the meantime on the requested cooperation, and, only to start taking action after a confirmatory decision from the Appeals Chamber.

3. But, I do respectfully dissent on the main question as to the grant of leave itself. I reject the Defence application for leave to appeal (with or without the support of the Government of Kenya as an intervener).

PART I

4. I readily accept that the decision now sought to be appealed raises what some may see as 'novel'—even possibly 'complex'—issues for *this* Court, or issues of great significance (matters that really are non-issues for *any other* known criminal court in the world); on which it may be reassuring to receive the views of the Appeals Chamber on an interlocutory basis, to ease the minds of those involved in the ongoing proceedings at first instance. Those considerations do not, however, lead me to grant *leave* to launch an interlocutory appeal as such as a matter of article 82(1)(d); notwithstanding my sympathy for the idea of stating questions on an exceptional basis to the Appeals Chamber, where a Chamber of first instance considers it desirable to state such a question.[7] But, as regards grant of leave for purposes of

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other witnesses. Let's not do it that way. Your response now, the remainder of it, would be to require the Prosecution to make sure that upon the next session that the witnesses are there to be taken. That's it, isn't it?': Hearing on 16 May 2014, ICC-01/09-01/11-T-115-CONF-ENG, p 10, line 9—p 11, line 5.

[7] In the matter of the *Kenyatta* excusal application, I dissented from the Majority's decision to reconsider the matter and instead suggested seising the Appeals Chamber of the *Kenyatta* appeal, partly in order to afford 'the Appeals Chamber an opportunity to clarify many questions that their decision in the *Ruto* case ha[d] raised': *(Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial)*, 27 November 2013, [Trial Chamber V(B)], Dissenting Opinion of Judge Eboe-Osuji, ICC-01/09-02/11-863-Anx-Corr, Conclusion. Specifically, I argued that the question of 'when and how the Appeals Chamber may interfere with a primary Chamber's exercise of discretion' (*Ibid*, para 3) should be addressed by the Appeals Chamber for an 'informed and orderly administration of justice in this Court' (*Ibid*, para 33). I continue to see value in the *permissibility* of a mechanism of stating interlocutory questions to the Appeals Chamber in circumstances that do not clearly fit the terms of article 82(1)(d). I do nonetheless recognise that such a mechanism may not be *permissible* given the Appeals Chamber's decision in *Prosecutor v Lubanga Dyilo (Decision on the "Urgent Request for Directions" of the Kingdom of the Netherlands of 17 August 2011)*, 26 August 2011, [Appeals Chamber], ICC-01/04-01/06-2837, para 8; according to which the only basis for granting leave to appeal will be strictly the requirements of article 82(1)(d) of the Statute.

an interlocutory appeal as such, a bench of the first generation of the Pre-Trial Chamber splendidly expressed the correct position, when they said as follows:

> The Chamber is ... not convinced that the fact that an issue is new and has never been the subject of scrutiny by the Appeals Chamber necessarily constitutes a ground for admitting interlocutory appeals. The Court will face novel issues on an ongoing basis throughout its first proceedings. To claim that the novelty of an issue as such warrants the grant of leave to appeal pursuant to article 82 paragraph 1(d) of the Statute would essentially deprive its provisions of any meaningful content.[8]

5. To a similar effect, the Appeals Chamber has, broadly speaking, also clearly signalled its stance against referring interlocutory questions to the Appeals Chamber out of motivations similar to those indicated in the quote appearing above. As the Appeals Chamber put it:

> The Appeals Chamber recognizes that the Decision ... may have concerned issues of such significance or complexity that the Trial Chamber considered review by the Appeals Chamber necessary. However, the fact that the granting of appeal may, in the eyes of the Trial Chamber, be desirable or even necessary does not justify departure from the clearly enumerated grounds of appeal in the Statute.[9]

6. My concern then becomes this. In light of the clear sentiment in the jurisprudence that the 'novelty', the 'complexity', or the 'significance' of an issue is insufficient to 'justify departure from the clearly enumerated grounds of appeal in the Statute', parties and participants will no longer seek overtly to justify leave applications on those grounds. But, the temptation may then be to go to great lengths to hoist upon stilts (unnaturally constructed from article 82(1)(d) criteria) what really are malleations of 'novelty', 'complexity', and/or 'significance'. In doing so, sometimes, nothing is left to the 'kitchen sink', in the obvious hope that something may work.[10] In my view, the present applications for leave comprise a classic instance of the phenomenon. I am not persuaded by them.

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[8] *Situation in Uganda (Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58)*, 19 August 2005, [Pre-Trial Chamber II], ICC-02/04-01/05-20, para 55. The decision was unsealed in *(Decision on Prosecutor's Application for Unsealing of the Warrants of Arrest)*, 13 October 2005, [Pre-Trial Chamber II], ICC-02/04-01/05-52, para 28(v).

[9] *Prosecutor v Lubanga Dyilo (Decision on the "Urgent Request for Directions" of the Kingdom of the Netherlands of 17 August 2011), supra*, para 8.

[10] Take, for instance, the following argument (among the many unpersuasive arguments) made by the Ruto Defence for purposes of article 82(1)(d): as to how the subpoena decision engages a question that 'significantly affects the fair conduct of the proceedings'. They argued that the Rome Statute enshrines 'the principle of voluntary appearance'. 'This significantly affects the fair conduct of proceedings because it is submitted that voluntariness has intrinsic value in protecting the rights of an accused. Arguably, compelled witnesses, who appear before the Chamber in order to avoid fines and/or imprisonment, will feel coerced into adopting their original statements, even though prior to being compelled these witnesses went to great lengths to dissociate themselves from the content thereof. The creation of a coercive environment and the rejection of the principle of voluntary appearance, thus, significantly engage issues of fairness.' See Defence application for leave to appeal the "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", 5 May 2014, ICC-01/09-01/11-1291 [the 'Ruto Defence Leave to Appeal Submissions'], para 17.

7. I am particularly not persuaded by the argument of 'uncertainty' that the Defence have made, as a reason for granting leave. I respectfully part company with my colleagues who have given credence to that argument. In the context of interlocutory appeals, the juristic reckoning makes 'uncertainty' the synonym or sum of 'novelty', 'complexity', or/and 'significance'. This is in the sense that a Trial Chamber's decision (even a ruling on an objection in the course of testimony) that engages a question that is 'novel', 'complex' and/or 'significant' will almost invariably generate 'uncertainty' pending the pronouncement of the Appeals Chamber on the particular matter. I am, thus, unable to agree with my learned colleagues that 'uncertainty' claimed to arise from a Chamber's decision is either a proper factor of 'unfairness' for purposes of the relevant criterion under article 82(1)(d), or a proper basis for the grant of leave for interlocutory appeal generally under article 82(1)(d).

8. The purpose of article 82(1)(d) is to discourage interlocutory appeals that carry with them the prospect of delays in ongoing trials—a prospect that is all too clear in the circumstances of the present interlocutory appeal. To recognise 'uncertainty' as a factor to be taken into account in granting leave to launch interlocutory appeals 'would', as Pre-Trial Chamber II observed, 'essentially deprive [the article 82(1)(d)] provisions of any meaningful content.'

PART II

9. The crux of the legal matter in this litigation is adequately captured in the observation of Thomas Aquinas. '[T]he law should have,' he wrote long ago, 'coercive power ... in order to prove an efficacious inducement to virtue'.[11] We can agree with the scholar saint that the attainment of virtue, even induced by law, is a worthy human aspiration. But, short of that, the more modest ambition of the law remains the 'efficacious inducement' of people—using

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It may be possible to disregard, for the moment, the common wisdom that witnesses are more likely than not to be ill-disposed towards the party that compelled their appearance against their will. It may also be possible to ignore the Prosecution's suggestion that these particular witnesses' dissociation of themselves from the contents of their statements had resulted from corrupt dealings. But, besides any empirical value that those considerations may or may not have in the present case, it remains the case that any minimal vetting process undertaken before making submissions such as this will quickly reveal the following: (i) the Ruto Defence argument generally strikes against the idea of witness subpoena as an instrument in the administration of justice in any jurisdiction; hence, to accept the submission will be to impugn the idea of witness subpoena in any proceeding in any jurisdiction; and, (ii) if the argument is unsuccessful in negating the idea of the subpoena as an instrument of justice in any jurisdiction, it must then necessarily fail as an argument in support of the Defence and Kenyan Government contention that the State Parties had meant to enshrine only the idea of 'voluntary appearance' at the ICC. It is truly important for counsel on all sides to vet their submissions before deploying them in oral or written submissions. There have been too much unvetted submissions made in this case from all sides.

[11] Saint Thomas Aquinas, *Summa Theologica* (trs Fathers of the English Dominican Province) [London: Burns, Oates & Washburne, 1920-1924], First Part of the Second Part, Question 90, Article 3, Reply to Objection 2.

'coercive power' as necessary—to do the right thing, at least from time to time. That is the essential point of the instrument of subpoena. Regrettably, there is a risk that the histrionics of the present litigation may obscure the prosaic but more important value of the subpoena to the orderly administration of justice. The subpoena has a value as routine and modest as to ensure that trials are conducted smoothly, speedily and efficiently, without the trial process being left at the mercy of witnesses' whims and predilections as to their own availability when they are needed to appear in court.[12] With criminal trials speedily conducted and completed as scheduled, accused persons are left to carry on with their lives. For those reasons and more, the subpoena is a legal instrument that produces neither unfairness in the trial process nor miscarriage of justice in the trial's outcome.

10. In the final analysis, the instrument of subpoena is a standard mechanism recognised by general principles of international and national law—a source of law expressly recognised under article 21(1)(c) of the Rome Statute. There is no language in the Rome Statute that excludes the distillation of the subpoena power through that source law. And, that is an essential point of the decision now sought to be appealed.

11. The factual matter may be briefly summarised as follows. The eight witnesses concerned in the subpoena decision had given the Prosecutor statements alleging who might have been complicit in the apparent criminal conduct that was the Kenyan post-election violence of 2007-2008, which allegedly claimed the lives of over a thousand Kenyan citizens, maimed many more, and rendered even more dispossessed and homeless. The Prosecutor obviously thought she had a case, presumably based in part (as is typically the case with the work of prosecuting cases) on the potential offered by the testimonies of these witnesses. Enabled by such potential in the case, the Prosecutor came to the litigation on the merits of her indictment. But, then, the witnesses left the Prosecutor in the lurch. They decided not to testify after all. Some of the reneging witnesses did so in the colourful manner of levelling public allegations—in the media—of unsavoury conduct against the Prosecutor; and suggesting that as the reason for reneging. Considering that there may be some forensic value in any testimony to that effect, there is, then, no valid factual reason for the change of mind, other than the legal argument offered by the Defence that the witnesses have a right to change their minds, on the basis of a putative theory of 'voluntary appearance'. By majority, we granted the Prosecutor's request to summons these witnesses, as a compulsory measure, to

[12] In some jurisdictions, it is a practice of prudence for counsel to serve subpoenae routinely upon witnesses who have voluntarily agreed to attend and testify. That routine practice ensures that witnesses will indeed attend court (as promised) at the required time and place. The unsung benefits of the practice include a stable and predictable judicial calendar, according to which civil and criminal proceedings run smoothly, speedily and efficiently.

appear and give testimony. Now, the Defence seek leave to appeal the decision. I reject the applications. They do not persuade.

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12. As a preliminary matter, it is noted that the motivation for the desire to appeal apparently rests in part on a certain view that the decision of the Majority in granting the Prosecutor's request for summonses had resulted from a 'novel' reading of the Statute that goes beyond its express words.[13]

13. Well. That Jeremy Bentham may have correctly observed that 'the rarest of all human qualities is consistency'[14] is inadequate a basis to promote purposeful inconsistency as a cherished virtue in courtroom advocacy. Not long ago, it must be recalled, the Ruto Defence urged this Chamber to excuse Mr Ruto from continuous presence at trial, in order to enable him to discharge his functions as the Deputy President of Kenya. The Sang Defence lent support. The urge was made in the very face of article 63(1) that provided that the 'accused shall be present at trial.' There was no provision in the Statute that expressly indicated the discretion to permit Mr Ruto to be excused from continuous presence at trial. But Mr Khan argued with characteristic passion that a closer look at the entire Statute, in light of its context and its objects and purposes, should permit the Chamber to find the discretion to grant the excusal. We took a closer look. And, by the same Majority that granted the Prosecutor's request now sought to be appealed, the Chamber found that the discretion to grant the excusal is there indeed. So, the excusal request was granted—conditionally. Both the Defence and the Government of Kenya welcomed the decision as sensible, fair and just. They did not complain that the decision resulted from a 'novel' reading that went beyond what was obvious from the words of the Statute, because of the absence of language in it that expressly supported the excusal decision.

14. There is something remarkable, then, in the current stance of the same Defence counsel and Government; hinged, as it were, upon a complaint about novel reading that went beyond express words. More surprising is that this claim of 'novel and arguably expansionist reading of the Statute', as the Sang Defence now complains (a complaint that the Government so evidently supports), is made in the very face of certain provisions of the

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[13] See Sang Defence Request for Leave to Appeal the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, 5 May 2014, ICC-01/09-01/11-1293 [the 'Sang Defence Leave to Appeal Submissions']. See also The Government of the Republic of Kenya's Request for Leave Pursuant to Rule 103 (1) of the ICC Rules of procedure and Evidence to join as Amicus curiae and make Observations in the Applications by the Ruto and Sang Defence Teams for Leave to Appeal, 12 May 2014, ICC-01/09-01/11-1304 [the 'GoK Intervener Submissions'], para 22 .

[14] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (first published 1780) [Oxford: Clarendon Press, 1907 reprint of 1823 edition] ch I.13.

Rome Statute that combine in their effect to bear out the subpoena decision; let alone the principles of international law upon which the Majority decision in question is also founded. The provisions of the Rome Statute are article 4, article 21(1)(c), article 64(6)(b), article 86 and article 93(1)(e) and (l). For easier appreciation, they are set out below:

> **Article 4**
>
> 1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.
>
> 2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.
>
> **Article 21(1)(c)**
>
> The Court shall apply:
>
> [...]
>
> Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
>
> **Article 64(6)(b)**
>
> In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:
>
> [...]
>
> Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute; [...].
>
> **Article 86**
>
> States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.
>
> **Article 93(1)**
>
> States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:
>
> [...]
>
> (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;
>
> [...]; and
>
> (l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

15. It should take very little imagination for the Defence and the Government of Kenya to see that the legal construction that resulted in the grant of the request for excusal from continuous presence at trial, also reasonably held the possibility of granting the Prosecutor's request for summonses, particularly in the face of the provisions set out above, let alone such general principles of international law as were also relied upon for the decision of the Majority.

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16. In the first issue presented in their application for leave, the Sang Defence poses the following question: 'whether implied powers can be relied upon to create a compulsory subpoena power for the Court where a holistic, plain reading of the Statute, Rules and *travaux préparatoires* are sufficiently clear that the States Parties did not intend for the Court to have such a power'.[15] One may note the parity of mention made there to *travaux préparatoires* alongside 'plain reading of the Statute'. It is problematic. I explain why next.

17. In deliberating upon the decision now sought to be appealed, it was not thought necessary to do more than echo the reminder sounded in the *Kenyatta* case, that international law does not require routine consultation of *travaux préparatoires* when interpreting treaties. It was recalled that article 32 of the Vienna Convention on the Law of Treaties merely *permits* such consultation in limited circumstances, as 'supplementary means of treaty interpretation'. But the question posed by the Sang Defence, in their manner of framing that question, makes it more prudent now to underscore the circumstances in which international law gave *travaux* the *subordinate* and *optional* treatment that they now enjoy—in a manner that is not on par with the reading of the actual text of the treaty being interpreted.

18. Notably, it must be kept in mind that this dispensation of mere permission—and not a requirement—to consult *travaux* was not a chance occurrence in article 32 of the VCLT. This may be seen in the particular light of the paroxysmal debate in the Committee of the Whole Conference on the Law of the Treaties in 1968. The leading voices in that debate were Professor Myers McDougal (a member of the US delegation), on the one side, and Sir Ian Sinclair (a member of the UK delegation) on the opposing side.

[15] Sang Defence Leave to Appeal Submissions, *supra*, para 3(1)(a).

19. McDougal had thrown down the gauntlet in the course of his submissions on behalf of his delegation.[16] His delegation had proposed an amendment that sought to replace with a single article the provisions of article 31 [then draft article 27] and article 32 [then draft article 28] of the VCLT that respectively comprised a 'general rule of interpretation' and a 'supplementary' means of interpretation. The proposed amendment was premised on the view that 'the text of those articles, as adopted by the International Law Commission, embodied over-rigid and unnecessarily restrictive requirements.'[17] The object of the amendment that McDougal was urging[18] was plainly to place all the interpretative factors indicated in article 32—notably including 'preparatory work of the treaty' (i.e. *travaux préparatoires*) and 'the circumstances of its conclusion'—on an equal footing with the interpretative factors indicated in article 31 (chief among which are indicated in the provision that a 'treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and the light of its object and purpose'). The aim of the proposed

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[16] See generally 'Official Documents: the Vienna Conference on the Law of Treaties, Statement of Professor Myers S McDougal, United States Delegation, to Committee of the Whole, April 19, 1968' (1968) 62 *American Journal of International Law* 1021 ['McDougal Statement'].

[17] United Nations, United Nations Conference on the Law of Treaties, Official Records, Summary of records of plenary meetings and of the meetings of the Committee of the Whole, Thirty-first meeting—19 April 1968, p 167, para 38.

[18] The US proposal of 10 April 1968 (A/CONF.39/C.1/L.156) reads:

> 'Amend article 27 to read as follows:
>
> > "A treaty shall be interpreted in good faith in *order to determine the meaning to be given to its terms in the light of all relevant factors, including in particular:*
> >
> > (a) *the context of the treaty;*
> >
> > (b) *its objects and purposes;*
> >
> > (c) any agreement between the parties *regarding the interpretation* of the treaty;
> >
> > (d) any instrument made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty;
> >
> > (e) any subsequent practice in the application of the treaty which establishes the *common* understanding *of the meaning of the terms as between the parties generally;*
> >
> > (f) *the preparatory work of the treaty;*
> >
> > (g) *the circumstances of its conclusion;*
> >
> > (h) any relevant rules of international law applicable in the relations between the parties;
> >
> > (i) *the* special meaning *to* be given to a term if the parties intended *such term to have a special meaning.*"
>
> 'Delete article 28'.

See United Nations, United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference, First and Second Sessions, Vienna 26 March—24 May 1968 and 9 April—22 May 1969, 'Report of the Committee of the Whole', p 149.

amendment was, thus, 'to avoid any fixed hierarchy among the elements of interpretation and make accessible to interpreters whatever elements—be they "ordinary meaning" or "subsequent practice" or "preparatory work" or other—which may be of significance in any particular set of circumstances.'[19] That portended for the interpreter the routine task of 'a systematic and disciplined examination of all potentially relevant indices of common intent' of the parties to the treaty.[20]

20. In arguing, in the main, against the 'hierarchical distinction' in the interpretative norms codified respectively in article 31 and article 32 of the VCLT, McDougal made the following submissions:

A. The 'primary means' comprised in the 'general rule' of treaty interpretation laid 'the predominant emphasis' on the text of the treaty, 'which was to be interpreted in accordance with the so-called "ordinary meaning" to be given to the terms "in their context and in the light of its object and purpose"'. McDougal complained that the 'commentary to [draft article 31] explained, however, that the reference to "the context" was not to factual circumstances attending the conclusion of the treaty but to the verbal texts, and that the reference to "object and purpose" was not to the actual common intent of the parties, but rather to mere words about "object and purpose" intrinsic to the text'. In fact, the commentary apparently flatly rejected that common intent as the goal of interpretation'.[21] And,

B. The 'so-called "supplementary" means of interpretation' (codified in article 32) which permitted consultation of '"the preparatory work of the treaty and the circumstances of its conclusion" were barred to the interpreter, except merely to confirm the meaning resulting from the application of the "general rule" in article [31], in all cases other than the exceptional ones set forth in sub-paragraphs (a) and (b) of article [32]'.[22]

21. McDougal had particularly complained that the '"supplementary means" which an interpreter is authorized to employ only after taking certain high, preclusionary hurdles—include "the preparatory work of the treaty and the circumstances of its conclusion."' Quite significantly, for our present purposes, he had observed that those 'high preclusionary hurdles' were 'designed to foreclose automatic, habitual recourse to such "supplementary means"'.[23] He was correct in that observation.

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[19] See McDougal Statement, (1968) 62 *American Journal of International Law, supra*, p 1027.
[20] *Ibid*, p 1026.
[21] *Ibid*, para 39.
[22] *Ibid*, para 40.
[23] See McDougal Statement, (1968) 62 *American Journal of International Law, supra*, p 1022.

22. In arguing that this 'hierarchical distinction' or 'rigidities and restrictions' of articles 31 and 32 would prove unworkable, McDougal contended that it 'was based on the assumption that a text had a meaning apart from the circumstances of its framing, and that it could be interpreted without reference to any extraneous factor.'[24] According to him, 'the "plain and ordinary" meanings of words were multiple and ambiguous and could be made particular and clear *only* by reference to the factual circumstances of their use.'[25] He argued that an interpreter 'could not hope' to apply the general rule codified in article 31, let alone invoke the 'supplementary means' authorised in article 32, without at the same time violating the rule of textual interpretation laid down in article 31.[26] In his view, it was '*only* by examining the circumstances of the conclusion of the treaty that a meaning could be ascribed to the text; and it was only by means of that examination, and by having recourse to the preparatory work, that it was possible to arrive at the conclusion that an "interpretation according to article [31] (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable", and that the "supplementary means" could be used under article [32]'.[27]

23. In his turn, Sir Ian Sinclair, speaking for the UK delegation, diametrically disagreed with McDougal. He took the view that part of McDougal's arguments had been 'directed towards reviving the doctrine' to the effect that 'the primary aim of treaty interpretation ... was to ascertain the common intention of the parties, independently of the text'. Sinclair observed that the proposed doctrine 'had ultimately been decisively rejected' by the Institute of International Law after 'fierce criticism'.[28]

24. In his substantive submissions, in the main, rejecting the US delegation's proposal to elevate the value of *travaux* in treaty interpretation, Sinclair insisted upon their limited value. In that connection, he argued as follows:

> Part of the purpose of the United States amendment seemed to be to place preparatory work on a parity with other means of interpretation, and the United States representative had argued that article [32] imposed on the use of preparatory work restrictions which were inconsistent with established practice. The United Kingdom delegation considered that recourse to the preparatory work of a treaty as a guide to interpretation should always be undertaken with caution. In the first place, preparatory work was almost invariably confusing, unequal and partial: confusing because it commonly consisted of the summary records of statements made during the process of negotiation, and early statements on the positions of delegations might express the intention of the delegation at that stage, but bear no relation to the ultimate text of the treaty; unequal, because not all delegations spoke on any particular issue; and partial

[24] United Nations, United Nations Conference on the Law of Treaties, Official Records, *supra*, p 167, para 44.
[25] *Ibid*, [emphasis added].
[26] *Ibid.*
[27] *Ibid*, [emphasis added].
[28] United Nations, United Nations Conference on the Law of Treaties, Official Records, *supra*, Thirty-first meeting—22 April 1968, p 177, para 3.

> because it excluded the informal meetings between heads of delegations at which final compromises were reached and which were often the most significant feature of any negotiation. If preparatory work were to be placed on equal footing with the text of the treaty itself, there would be no end to debate at international conferences.[29]

25. The limited value that article 32 of the VCLT allows to *travaux* is, in Sinclair's view, further justified by the following considerations:

> [I]f greater significance were attributed to preparatory work than in the Commission's text of article [32], a greater degree of risk would be created for new States wishing to accede to treaties in the drafting of which they had taken no part. The text of the treaty was what those new States had before them when deciding whether or not to accede; if more weight were attached to preparatory work in the rules of treaty interpretation, new States would be obliged to undertake a thorough analysis of the preparatory work before acceding to treaties, and even a thorough analysis was likely to give them limited enlightenment on the intentions of the parties.[30]

26. In the outcome, the proposed amendment that McDougal had so strongly urged was put to a vote and was clearly rejected by a very wide margin.[31] In the result, article 31 remains the 'general rule' of treaty interpretation and article 32 remains the 'supplementary' rule—contrary to McDougal's wish. Article 32 only permits the decision maker optionally to consult *travaux*, where application of the general rule embodied in article 31 would leave the meaning of the treaty ambiguous or obscure, or lead to manifestly absurd or unreasonable result. There was no requirement to make such consultations in circumstances that did not entail those mischiefs.

27. The outcome of the debate between McDougal and Sinclair, in which the Committee of the Whole clearly rejected the urge to remove 'any fixed hierarchy among the elements of interpretation and make accessible to interpreters whatever elements [including "preparatory work" in particular] which may be of significance in any particular set of circumstances', is entirely consistent with the note of caution that the Trial Chamber V(B) Majority had sounded in the following way: 'In the absence of ... a clear policy statement [indicated in the VCLT preferring resorts to *travaux*], caution is called for against a practice that results by accretion to an ever-present expectation that consultation *should* be had to *travaux*

[29] *Ibid*, p 178, para 8.
[30] *Ibid*, para 10.
[31] As the outcome of the voting was reported in the Official Records: 'The United States [proposed] amendment to articles 27 and 28 (A/CONF.39/C.1/L.156) was rejected by 66 votes to 8, with 10 abstentions.' See *ibid*, p 185, para 75. 'Mr BADEN-SEMPER (Trinidad and Tobago) asked whether the rejection of [the amendment and a similarly rejected proposed amendment by Vietnam] would preclude the Drafting Committee from using any of the ideas which they contained.' See *ibid*, p 185, para 76. 'The Chairman said that, since the amendments had been rejected, no part of them would be referred to the Drafting Committee.' See *ibid*, p 185, para 77.

préparatoires as a matter of anyone's conception of "best practices" in treaty interpretation.'[32]

PART III

28. I now come to the substance of the present applications for leave. In a previous filing, the Government of Kenya had sought an advance indication about the Chamber's inclination to grant either an application for leave to appeal or leave to support a Defence application for leave. The Chamber declined to give such an advance ruling, leaving it up to the Government to proceed as it thought appropriate, upon which the Chamber would rule upon any actual application that the Government might present. In the end, the Government preferred to proceed by way of an intervener status in support of the Defence application for leave to appeal.

29. As indicated earlier, I concur with my colleagues in granting intervener status to the Government of Kenya in their support of the Defence application for leave to appeal the summonses decision. However, that concurrence does not prevent my respectful parting of ways with my colleagues. The explanation is as follows.

30. The Government of Kenya notably bears the burden of obligation created by the summonses decision, which engages issues and legal reasoning in the decision. For that reason alone, I have great sympathy for the idea of presenting before the Appeals Chamber, on an exceptional basis, the question of the correctness of the Majority's decision that granted the summonses request. I do see some value in removing any lingering doubt from the mind of a State Party, regarding whether or not it must comply with a request for cooperation that a Chamber has made in a decision said to involve questions of novelty and complexity. As already indicated, the difficulty is that the Appeals Chamber has considered that novelty and complexity are insufficient bases to present interlocutory questions to the Appeals Chamber that did not meet the test of article 82(1)(d).[33] Indeed, the Appeals Chamber has held that the *Lubanga* Trial Chamber was wrong to grant leave on an exceptional basis to the Government of the Netherlands, where the application for leave did not pass the test of article 82(1)(d).[34] On the basis of that precedent, it may be of questionable value to present the question of the correctness of the summonses decision to the Appeals Chamber, at the instance of the

[32] *Prosecutor v Uhuru Muigai Kenyatta (Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial)*, 18 October 2013, [Trial Chamber V(B)] ['*Kenyatta* Excusal Decision'], ICC-01/09-02/11-830, Majority Decision of Judge Fremr and Judge Eboe-Osuji, para 77.
[33] *Prosecutor v Lubanga Dyilo (Decision on the "Urgent Request for Directions" of the Kingdom of the Netherlands of 17 August 2011)*, *supra*, para 8.
[34] *Ibid.*

Government of Kenya; as I see no improved basis than in the *Lubanga* precedent to proceed in that fashion.

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31. But, I should make clear that my sympathy for the idea of presenting to the Appeals Chamber the question of the correctness of the summonses decision is purely for the reason indicated above—i.e. removal of doubt from the mind of the Government that it must comply with the demands of the request for cooperation. It is not for purposes of other questions raised by either the Attorney General of Kenya or by the Defence, in the form of 'issues' arising for interlocutory appeal. The Prosecution's agreement with the Defence that leave should be granted on some of these 'issues' (though not all of them) does not, *pro tanto*, improve the Defence urge for leave.

32. 'Issues' for interlocutory appeals are not issues at large. They are issues that are 'significantly' textured by realistic concerns about fair and expeditious conduct of the trial or wrongful outcome for the proceedings, as well as by the opinion of the Chamber that a resolution of the Appeals Chamber may materially advance the proceedings. Among the issues that do not—in particular—inspire in that regard is the complaint that the Attorney General stated as follows:

> To suggest, as the majority does, that the Kenyan Government must now make itself subservient to orders of the Court on the basis of a notion of implied powers, a residual powers provision in Article 93(1)(1), *and an interpretation of Kenyan law provided by the Common Legal Representative of Victims and a Kenyan High Court judge sitting in a different matter, rather than that espoused by the Attorney General of the Republic of Kenya negatively impacts on the integrity and sovereignty of Kenya as a nation State. This is improper and certainly not fair*.[35]

33. The correctness of the Majority decision and its motivating reasoning stand for their own appreciation in the distillate result that comprise a synthesis of the principle of implied powers as a general principle of international law, together with article 4, article 21(1)(c), article 64(6)(b), article 86 and article 93(1)(e) and (l) of the Rome Statute.

34. As a matter of the tests required, under article 82(1)(d), for grant of leave for interlocutory appeals, I see nothing in that complaint that raises 'an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.' Merely to say: 'This is improper and certainly not fair' appears more a protest of indignation than an argument.

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[35] GoK Intervener Submissions, *supra*, para 23 [emphases added].

35. As to the substance of the complaint itself, it may be gently said that the propositions implicated in the Attorney General's complaint could never be reasonable. It may be noted, first, that in his oral submissions during the hearing on the subpoena application, the Attorney General had observed as follows:

> Now, what is our understanding of the law? Happily for us, we do not, we do not share the views expressed either by the Defence or by the Prosecution that there is a complex question of law that requires much learning to resolve. The Kenyan government takes the view that what is before the Court is a very simple, very straightforward issue, and that we can resolve it if we have fidelity to the treaty and to the Kenyan law affecting the treaty.[36]

36. He was eminently correct in that observation: the point of concurrence being, of course, not so much about the complexity or novelty of the questions presented, as it is that the questions of law presented '[do not require] much learning [on the part of any experienced lawyer] to resolve'—where there is 'fidelity to the treaty and to the Kenyan law affecting the treaty'.

37. Conditioned by that correct observation, then, it would also be possible to take the view that the common law system to which Kenya belongs and the English language in which it is expressed in that country (along with the Constitution and the International Crimes Act of Kenya) are not beyond the ken of this Chamber. They implicate no juristic mystery that compels this Court to accept the Attorney General's words about Kenya's law at face value without further examination of the correctness or reasonableness of his views—including by taking into account the views from Kenyan judges and lawyers who are no less qualified than the Attorney General to express views on the laws of Kenya that may be taken into account in legal proceedings before this Court.

38. Second, the Attorney General clearly asserts that his views of the laws of Kenya must be preferred to those of an independent member of the Kenyan Bar, who is not a subordinate functionary in the Attorney General's department. And failure so to prefer his views amounts to a violation of the sovereignty of Kenya. It is a difficult argument to accept. It has no known substantive basis in law or practice.

39. An attorney-general is usually the chief law officer of a country (or a state or province within a country), and the head of her (or his) governmental department. The attorney general gives legal advice and opinions to his (or her) principals, peers and subordinates *within* the government. Protocol, convention or operating procedures *within* the government in which s(h)e serves may command binding force for the attorney-general's advice and opinions *within* the government. As the chief law officer to the government, the attorney-general may

[36] Transcript of Status Conference of 14 February 2014, ICC-01/09-01/11-T-86-RED-ENG, p 48, line 22–p 49, line 2.

in person appear in court to represent the government's position or interest. On such occasions, etiquette at the Bar may command for the attorney-general dignitary precedence in the sitting order or presentation of case in the courtroom.

40. But, it is never known to be the case that a judge conducting litigation[37] is expected, let alone required, to prefer the legal submissions of an attorney-general over those of any other member of the same Bar, merely because an attorney-general has 'espoused' the law. An attorney-general may have conflict of interest in the case.

41. The serious inconsonance that such a requirement or expectation poses to the rule of law is readily apparent in any society in which citizens may come to court with their counsel to contest decisions and positions of their governments.

42. Mr Nderitu is a member of the Bar of Kenya. As the counsel for Kenyan victims of the PEV, he is precisely in the same position in this Court as any other counsel who appears in court to represent private citizen clients adverse in interest to their government as represented by an attorney-general. There is no known legal basis to suggest that the Chamber is required to subjugate Mr Nderitu's views to those of the Attorney General. Indeed, the law reports in the average democracy are full of reported cases in which governments represented by an attorney-general (or his or her department) lost legal arguments or entire cases to opposing lawyers in private practice.

43. But, the Attorney General's argument appears to go even further down the difficult road of acceptability. For, he appears also to complain that the Chamber wrongfully preferred 'an interpretation of Kenyan law provided by ... a Kenyan High Court judge sitting in a different matter, rather than that espoused by the Attorney General of the Republic of Kenya.' The most generous value that may be given to that complaint will have to be anchored in the words 'sitting in a different matter'. For, it is to take a proposition much too far to suggest plainly that views of the law 'espoused by [an] Attorney General' rank higher than those expressed by a high court judge as part of the *ratio decidendi* of the judgment of a court of law. As it would be an error of the most elementary kind for any lawyer to state the proposition, it must be presumed that the learned Attorney General intended to state no such proposition.

44. Yet, again, even 'the most generous value' (as indicated above) given to the Attorney General's complaint is nullified by his failure to explain the complaint beyond its mere statement. Could it really be correct to suggest that a principle of law exposed by a superior court judge in a different case could never be taken into account in a case at hand?

[37] As opposed to the Chairperson of a diplomatic conference of plenipotentiaries.

45. Ultimately, there is good sense in the view that 'the Government of Kenya is best placed to explain to the Court ... the national Kenyan context and legal system'.[38] It is for that reason that the Chamber makes every effort to invite the views of the Government of Kenya on the appropriate occasion—as was done in the subpoena litigation. But that general proposition of good sense does not require the Chamber to accept whatever explanations that the Government offers on or about 'the national Kenyan context and legal system', regardless of how those explanations may resonate in the realm of reasonableness, let alone when they may have been offered in circumstances that may be pregnant with questions of conflict of interest.

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46. As a related matter, also implicated in the Attorney General's complaint quoted above is a concern about 'sovereignty' of states. I am constrained to observe in that regard that sovereignty of states is a reverent notion in international law and international relations. It is an important notion and a general rule that finds its proper place *within* the rule of law and not outside of it—hence, the respect and recognition that the notion enjoys in the right circumstances. The judges comprising the Majority in the decision granting the summonses request have striven to give the notion of sovereignty of states the right regard in this Court—at the instance of Kenya. It is partly for that reason that Mr Ruto's and Mr Kenyatta's respective requests for excusals from continuous presence at trial were granted by the same judges who granted the Prosecution's request for summonses, so that they may discharge their important functions as the topmost leaders of the country while their trials proceed in this Court.[39]

47. But, all care must be taken to avoid reducing, in effect, the august notion of sovereignty of states to a hackneyed bogeyman that is conjured up at every convenient opportunity, with the evident aim of frightening judges of an international criminal court, as one would frighten small children. The *raison d'être* of this Court particularly implicates, as an exception to the general rule of sovereignty, the firm crystallisation of the current international legal order in which sovereignty was long rejected as an argument whose effect or claim was to leave to the government of a State and its officials to do as they pleased with the human rights of their citizens. The plea of 'sovereignty' in such an unfortunate sense was

[38] GoK Intervener Submissions, *supra*, para 17.
[39] See *Prosecutor v Ruto and Sang (Separate Further Opinion of Judge Eboe-Osuji to the 'Reasons for the Decision on Excusal from Presence at Trial under* Rule 134*quater')*, 19 February 2014, [Trial Chamber V(A)], ICC-01/09-01/11-1186-Anx, paras 24 and 25; *Kenyatta* Excusal Decision, *supra*, paras 92 and 104. See also *Prosecutor v William Samoei Ruto and Joshua Arap Sang (Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial)*, 18 June 2013, [Trial Chamber V(A)], Majority Opinion of Judge Eboe-Osuji and Judge Fremr, ICC-01/09-01/11-777, paras 50—53, 85—88, 91—98.

an old bogeyman that was interred long ago in the graveyard of international legal history, following the Second World War. The epitaph is engraved in the language of obligations *erga omnes*[40] and burnished in the terms of 'R2P'—'responsibility to protect' that the international community no longer leaves to the exclusive domain of the States whose populations are in the need of the protection.[41]

48. Also, the apparent reference (in the complaint) to 'the Kenyan Government [now having to] make itself subservient to orders of the Court' is similarly unpersuasive as an argument. There is nothing at all unusual about a Government needing to comply with an obligatory request from a court of law. Such is the nature of democracy and the rule of law.

49. Ultimately, the victims who were killed in the Kenyan post-election violence were citizens of Kenya, too. And so also are the victims who lived to tell the story—but with enduring scars to mind and body. We have heard the uncontroverted testimonies of some of them in this case. From the witness box, they have recounted the horror that they experienced in the face of what, to all intents and purposes, was violence deployed with mortal purpose. We will consider the forensic value of these testimonies in due course. But, in the meantime, these victims (dead or alive) deserve a meaningful share in the bounty of their country's sovereignty; which in full integrity should be pleaded by the country's high officials to ensure the victims' right to the truth, through a proper trial conducted in accordance with the generally accepted principles of national and international law with substantive forensic significance, regardless of the ultimate verdict in the case.

50. To that end, the march of justice will continue along its own competent course, undeterred by convenient pleas of 'sovereignty' the aim or effect of which is to deflect justice as it should be done.

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51. But, as already indicated, I am unable to concur with my highly esteemed colleagues that either the Ruto Defence or the Sang Defence application for leave satisfies the tests of article 82(1)(d). Nor am I prepared, in the assessment of their applications, to compensate for

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[40] See *Barcelona Traction, Light and Power Company Limited, Second Phase* (1970) ICJ Reports 3 at p 32. See also *East Timor (Portugal v Australia)* (1995) ICJ Reports 90 at p 102; *Legality of the Threat or Use of Nuclear Weapons* (1996) ICJ Reports 226 at p 258; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Preliminary Objections)* (1996) ICJ Reports 595 at pp 615—616; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (2012) ICJ Reports 422 at pp 449 and 450.

[41] See UNGA Res 60/I (24 October 2005) '2005 World Summit Outcome' 60th Session, paras 138 and 139. See also UNGA Doc A/59/565 (2 December 2004) '*A More Secure World: Our Shared Responsibility*—Report of the High-Level Panel on Threats, Challenges and Change' 59th session.

the obstacle that the *Lubanga* precedent placed in the way of presenting the matter to the Appeals Chamber for the benefit of the Government of Kenya.

PART IV

52. I do accept, as already indicated, that the decision sought now to be appealed presents some novel and complex 'issues' for the eventual determination of the Appeals Chamber. But, as confirmed by the Appeals Chamber's decision in *Lubanga*, those are not reason enough to grant leave for an interlocutory appeal.

53. As indicated earlier, I am not persuaded by the Prosecution's view that some of the 'issues' identified in the Defence leave requests do pass the tests laid down in article 82(1)(d). The Prosecutor argues that 'an issue under Article 82(1)(d) is constituted by a subject, the resolution of which is essential for the determination of matters arising in the judicial cause under examination.'[42] But, it would be difficult to conceive of a different definition of an issue for purposes of a final appeal, mostly involving an appeal against conviction or acquittal. Yet, there must be something that separates an 'issue' for purposes of interlocutory appeal and an issue for purposes of a final appeal.[43] What could that be?

54. It is accepted that 'issues' presented for interlocutory appeal must, crucially, pass the tests represented in the following comminution of article 82(1)(d):

> (a) 'would significantly affect'
> (b) 'the fair and expeditious conduct of the proceedings' or 'the outcome of the trial' and
> (c) 'in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.'

55. Since it is the foregoing elements that give an interlocutory appeal 'issue' its own particular character, it is more helpful, then, to consider the need for an interlocutory appeal from an integrated appreciation of those elements as deserving the emphasis. The approach of defining the meaning of 'issues' and identifying an appealable issue from the perspective of that definition—as the initial task—runs the risk of a misprision of the interlocutory appeal

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[42] See Prosecution's Consolidated Response to the Applications filed by the Defence for Mr Ruto and Mr Sang for Leave to Appeal the "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation" and the Government of the Republic of Kenya's Request for Leave pursuant to Rules 103(1) to join as *amicus curiae*, 16 May 2014, ICC-01/09-01/11-1309, para 10.

[43] Although article 81 is not specifically framed in the terms of 'issues', it remains the case that any of the 'errors' indicated in that provision will invariably involve an issue from the definitional terms of 'a subject, the resolution of which is essential for the determination of matters arising in the judicial cause under examination'.

process. For, it runs the risk of failing properly to see the interlocutory appeal 'issues' for the issues more appropriately left for a final appeal. The side-effect of that approach is the unwitting reduction of interlocutory appeals to mere disagreement with the Chamber's decision, despite disavowals in that regard.

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56. To require that an issue be one that *would significantly affect* (a fair and expeditious conduct of the proceedings or the outcome of the trial) calls for a probability beyond mere speculation. What is required then is that the incidence of the decision will produce issues that would affect 'the fair and expeditious conduct of the proceedings or outcome of the trial', as a matter of probability, beyond mere speculation. Such probability beyond mere speculation has not been demonstrated by either Defence application. The test is not met by the mere assertion that the testimonies of the witnesses implicated in the subpoena decision may result in either conviction or acquittal of the accused. This is speculative, because of the third possibility—the Chamber may discount their testimonies.

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57. The *fair and expeditious conduct of the proceedings* requirement is a cumulative test. Both the *fairness* and the *expeditiousness* components must be met. One without the other will not do. In addition to the failure of the applications to meet the requirement that the issue must be one that 'would significantly affect' the fair and expeditious conduct of the proceedings, the applications also fail to meet the test, for the following reasons. First, the requirement of fairness, for instance, is, for purposes of article 82(1)(d), about 'fair ... conduct of the proceedings'. But the Defence applications primarily complain repeatedly about *fairness to the witnesses* indicated in the decision. Second, even the complaint about the fairness to the witnesses is largely based on the various iterations of the argument that 'the Majority erred in the Decision by failing to properly consider Articles 21 (which establishes the hierarchy of applicable law and enshrines the obligation to interpret the law consistent with internationally recognised human rights) and 22 (which enshrines the principle of *nullum crimen sine lege*)'.[44] The chief error in that argument lies, obviously, in its refusal to be restrained by clarification in international human rights law that the rule against retroactive punishment is not violated when there is existing national *or* international

[44] See Ruto Defence Leave to Appeal Submissions, *supra*, paras 9-11. See also Sang Defence Leave to Appeal Submissions, *supra*, issue ii(b).

law that contemplated the punishment. In that regard, article 15 of the International Covenant on Civil and Political Rights provides as follows:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission *which did not constitute a criminal offence, under national or international law, at the time when it was committed.* Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
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> 2. *Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.* [Emphasis added.]

58. It is to be recalled that 'the assistance of the Government of Kenya in ensuring the appearance of the witnesses,' as indicated in the decision, is to be achieved 'using all means available under the laws of Kenya'.

59. That manner of requesting the assistance of Kenya's Government is fully in keeping with the tradition of interaction between international law and national legal systems; through which enforcement is often achieved for international law for its own purposes. That usage of interaction has been correctly described by one commentator in this way: 'National courts are, in many respects, the most important institutions for enforcement of international law'.[45] The same author noted: 'The enforcement of international law through national courts is the most commonly used method of international law enforcement'.[46] To the same effect, another commentator observed that 'the truly legal function of international law essentially is found in the internal systems of States.'[47] That state of affairs is sensibly explained thus: 'Unlike the international system, all functioning nation-states have institutions for enforcing the law.'[48] These institutions exist principally in the form of 'the police and courts, but include administrative agencies and the military.'[49] The absence of similar institutions for the enforcement of international law, thus makes it necessary to rely upon 'the existing means in domestic systems ... that exercise effective control over persons and assets.'[50] The same phenomenon was more robustly expressed as follows: 'Only through what we could term "domestic legal operators" can we describe the binding character of international law or, better still, its ability to be implemented in a concrete and stable fashion.'[51]

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[45] Mary Ellen O'Connell, *Power and Purpose of International Law* [Oxford: Oxford University Press, 2008] p 328.
[46] *Ibid*, p 329.
[47] Benedetto Conforti, *International Law and the Role of Domestic Legal System* [Dordrecht: Martinus Nijhoff, 1993] p 8.
[48] O'Connell, *supra*, p 329.
[49] *Ibid.*
[50] See *ibid.*
[51] Conforti, *supra*, p 8.

60. This tradition of interaction between international law and national legal systems carries an obvious value in the enforcement of international criminal law.[52]

61. In addition to its own general service in other respects, the indicated tradition of interaction should also render sterile any issue as to 'whether the Chamber is allowed under the Rome Statute to treat different States differently, depending on whether [or not] their domestic law explicitly prohibits a subpoena'.[53] The sterility of that issue is particularly underscored by the consideration that international law encourages rather than discourages States to use their domestic systems to enforce international law.[54] In the circumstances, it would be quite strange for this Court to accept the urge to convert any ambiguity on the part of the Rome Statute into case law that runs against the current of interaction indicated above. And, the improvidence of such a conversion is all too evident in the light of observations such as that made by Mr Justice Felix Frankfurter (of the US Supreme Court) about the incidence of 'purposeful ambiguity' in legislation, or expressing legislative text 'with generality for future unfolding'; all of which form part of the legislator's occasional strategy of '[solving] problems by shelving them temporarily.'[55]

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[52] See O'Connell, *supra*, p 329.
[53] See Sang Defence Leave to Appeal Submissions, *supra*, p 4(iii).
[54] O'Connell, *supra*, pp 329 and 332.
[55] In highlighting some of the difficulties that judge must keep in mind in the task of statutory interpretation, Mr Justice Frankfurter had observed, 'A statute is an instrument of government partaking of its practical purposes but also of its infirmities and limitations, of its awkward and groping efforts'. The difficulties are partly explained by the realisation that 'government sometimes solves problems by shelving them temporarily. The legislative process reflects that attitude. Statutes as well as constitutional provisions at times embody purposeful ambiguity or are expressed with a generality for future unfolding': Felix Franfurter, 'Some Reflections on the Reading of Statutes' (1947) 47 *Columbia Law Review* 527 at p 528. To the same effect, Mr Justice Jerome Frank (of the US Court of Appeal for the Second Circuit) had similarly observed: 'Centuries ago, Aristotle illuminatingly discussed the problems of statutory interpretation. When judges today grumble that invariably their difficulty in learning the meaning of statutes is the fault of the legislature, they should be told to recall that long ago he wrote that on many subjects a wise legislature will deliberately use vague and flexible standards': Jerome Frank, 'Words and Music, Some Remarks on Statutory Interpretation' (1947) 47 *Columbia Law Review* 1259 at 1259. In my own view, when truly confronted with ambiguity or silence in legislation—not merely when the answer to the question presented may actually lie in the construction of the entire instrument in its context and in the light of its object and purpose—the correct approach for the judge is not to promptly declare *non liquet* and walk away. The correct approach is to explore other sources of applicable law, besides the unhelpful piece of legislation. In the common law system, the judge will, in such a situation, explore solutions offered by common law. In the international justice system, the judge must explore solutions offered by other sources of international law besides the silent or ambiguous treaty under review. In international law (that also applies at the ICC), those sources have now been accepted, as a matter of customary international law, to be the sources indicated in article 38(1) of the ICJ Statute. But, more specifically at the ICC, the same sources have, consistently, been indicated in article 21(1) of the Rome Statute. Notably, article 21(1) makes that indication in the very clear manner of saying to the judges, 'When the answer to the problem at hand is truly not in one source of applicable law indicated here in its own rank, do not throw your hands up and resign without doing more. You "shall" search the next source down the rank, and the one after it. Keep searching for an answer, until you have exhausted all the sources indicated in this provision.' The 'shall' in article 21(1) must have a minimum of a directory import, if not a mandatory one.

62. Article 15 of the ICCPR inures to the benefit of the usage of interaction between international law and national legal systems, by ensuring that pleas of retroactive penalisation are not invoked when either national law or international law has proscribed as an offence the conduct implicated in the enforcement measure. It similarly obviates the need for extraordinary parliamentary amendments of national laws in every case of a need to enforce international law by means of national legal systems. Such parliamentary amendments of the law will not only be dilatory as correctly identified by the Defence Counsel in this case,[56] they will also be needlessly and undesirably fragmentary when there are existing local laws that could readily be employed to achieve the enforcement of international law.

63. In order, then, to succeed in their argument that the subpoena decision contemplated retroactive penalty, article 15 of the ICCPR requires the Defence to demonstrate that any ultimate *poena* or penalty contemplated for the witness indicated in the decision, would be for an 'act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed'; nor for an 'act or omission which, at the time when it was committed, was [not] criminal according to the general principles of law recognized by the community of nations'.

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64. And, just as unpersuasive is the Attorney General's suggestion that his stance against the subpoena is in defence of the rights of citizens of Kenya to choose not to come and testify in this trial.[57] Such an ostensible assertion of diplomatic protection for Kenyan citizens thus summonsed invites the obvious question whether the many more citizens of Kenya who were, and are, victims of the PEV are not deserving of due consideration in the context of a judicial inquiry the aim of which is to find out who may be responsible for what happened to them.

65. In the end, the complaint of *unfairness* to the witnesses becomes truly one of mere *inconvenience*. It is noted that the Defence have not argued—except for only one of the eight witnesses—that requiring the witnesses to testify would result in any harm to the witnesses, such as makes it unfair to require them to appear. For the most part, the Defence objection is simply a matter of a witness's freedom to choose not to come to court, after an earlier

[56] See Ruto Defence Leave to Appeal Submissions, *supra*, para 19.
[57] See GoK Intervener Submissions, *supra*, para 20: 'The question of fairness of the proceedings arises not just with respect to the parties and the participants in the trial, but to all those impacted by the decisions of the Court. Here, the Government will focus its observations on the fairness of the Decision *vis-a-vis* the eight witnesses (who are seemingly Kenyan citizens) and *vis-a-vis* the Government of Kenya itself as a State Party.' See also, *ibid*, para 22: 'When Kenya signed the Rome Statute, there was nothing in the terms of the treaty that put the State on notice that one of the forms of assistance it might be required to provide was to compel its citizens to involuntarily provide testimony before the Court and to criminally sanction them if they failed to do so.'

promise to appear, that possibly assisted in leading the Prosecutor to proceed with the prosecution. The inconvenience of the witnesses in the circumstances—in which the Court is conducting a judicial inquiry into the alleged killings of over one thousand people and the maiming and displacement of many thousands more—does not readily translate into a matter of unfairness. But, if there be any unfairness in that, it would be one amply accommodated within John Rawls dictum that 'an injustice is tolerable only when it is necessary to avoid an even greater injustice...'[58] The greater injustice in the circumstances would be to frustrate proper judicial inquiry merely because the indicated witnesses preferred not to come to court, for no good reason other than the mere exercise of free will.

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66. As regards the 'expeditious conduct of the proceedings' part of the first cumulative criterion of article 82(1)(d), the need to avoid granting leave on the basis of a speculative possibility remains important. There needs to be a demonstrable probability that the issue 'would significantly affect' the expeditious conduct of the proceedings. In my view that need is not demonstrated, in the present applications, by the speculation-upon-speculation that the summonsed witnesses *may* give testimonies that the Chamber *may* rely upon in rendering a verdict in the case. For, it is also possible that the witnesses *may not* testify in the anticipated manner. But if they do, it is also possible that the Chamber *may not* rely upon their testimonies in rendering a verdict in the case.

67. But what is less speculative than the foregoing is the effect the interlocutory appeal is likely to have on the expeditious conduct of the proceedings. That consideration should not be ignored in any dispensation in which the need to conduct expeditious trials enjoys a pride of place. The likelihood of delay to the trial that the interlocutory appeal poses is very real. And that consideration is an important factor in my view that the leave should not be granted.

68. It is much better to proceed with the trial and complete it as speedily as possible. All questions arising from the summons decision can, without irreparable prejudice, be taken in the round in any final appeal in the case.

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69. Next, we come to the matter of the incidence of an interlocutory issue as one that *would significantly affect* 'the outcome of the trial'. The argument seems to be that if the witnesses testify as suggested by their statements, they will indeed implicate Mr Ruto; but,

[58] John Rawls, *A Theory of Justice* [Cambridge, Mass: Belknap Press of Harvard University Press, 1999] p 4.

that they would exonerate him, if they come and truthfully testify that they had been procured as part of an illicit enterprise to frame Mr Ruto with something he did not do. Either result is an 'outcome of the trial' that should warrant leave to appeal the issue. I am unable to agree. There must be a mischief in the outcome of a trial for it to warrant interlocutory appeal. And the mischief must be the risk of miscarriage of justice. If not, every decision becomes interlocutory appealable, if it holds the possibility of affecting the outcome of the trial. It will reduce to an absurdity the purpose of article 82(1)(d) as a gate-keeping measure, if its intendment is to permit the interlocutory appeal of a decision which would have a positive effect on the outcome of the trial that is perfectly fair.

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70. In the final analysis, I am unable to come to 'the opinion' that 'an immediate resolution' of the interlocutory appeal 'by the Appeals Chamber may materially advance the proceedings.' To the contrary, I have great concerns that the interlocutory appeal itself carries greater prospect of material delay in the proceedings than its material advancement.

71. In light of all the foregoing considerations, I would dismiss the applications for leave to appeal.

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

Chile Eboe-Osuji
(Presiding Judge)

Dated 23 May 2014
At The Hague, The Netherlands