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No.: **ICC-01/09-01/11**
Date: **8 July 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
with Public Annexes A and B

Prosecution consolidated response to Mr. Ruto and Mr. Sang's appeals against the "Decision on the Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", updated at the invitation of the Appeals Chamber

Source: **Office of the Prosecutor**

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Introduction

1. On 17 April 2014, the Trial Chamber, by majority,[1] issued its "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", finding that:

> (i) it has the power to compel the testimony of witnesses; (ii) pursuant to article 93(1)(d) and (l) of the Statute, it can, by way of requests for cooperation, obligate Kenya both to serve summonses and to assist in compelling the attendance (before the Chamber) of the witnesses thus summonsed; (iii) there are no provisions in Kenyan domestic law that prohibit this kind of a cooperation request; and, (iv) the Prosecution has justified the issuance of the summonses to compel the appearance of the Eight Witnesses.[2]

2. The Decision does not contemplate compelling the physical attendance of the summonsed witnesses at the seat of the Court, but rather their appearance to testify by other means provided in the Statute and the Rules, such as by video-conference link or at an *in situ* hearing of the Court on the territory of Kenya under Articles 64(6)(b), 93(1)(d), 93(1)(l) and 99(1) of the Statute.[3]

3. The appeals against the Decision filed by the Defence for Mr. Ruto ("the Ruto Defence") and the Defence for Mr. Sang ("the Sang Defence") should be dismissed. They fail to show any error. Although the Decision provided a "fuller analysis" (including by reference to the doctrine of implied powers), its core conclusion by reference to the express terms of the Statute was correct. Read together, Articles 64(6)(b) and 93(1)(d) and (l)—among others—establish that the Chamber has the power to compel the appearance of witnesses by means of summonses enforced by the Government of Kenya ("GoK"). Nothing in the Statute, read individually or as a whole, contradicts this finding. Although the Ruto Defence and the Sang Defence

[1] *See* ICC-01/09-01/11-1274-Corr2 ("Decision"); ICC-01/09-01/11-1274-Anx ("Dissent").
[2] Decision, para.193.
[3] As explained below, Article 93(1)(b) represents an alternative basis to uphold the correctness of the Decision, and could equally support these outcomes.

criticise the Decision's discussion of implied powers, it does not render the Trial Chamber's ultimate conclusion incorrect.

4. Nothing in the drafting history of the Statute undermines or contradicts the analysis in the Decision. The Decision correctly rejected the Defence proposition that the drafters intended to limit the Court's powers to require witness attendance by virtue of the wording of Article 93(1)(e). To the contrary, the drafting history confirms that States sought *to ensure* the Court had the necessary tools to obtain witness attendance, including by compulsion if necessary, and sought only to prevent imposing obligations on State Parties to force witnesses to travel to the seat of the Court.[4]

5. Nor does anything in Kenyan law prohibit the Trial Chamber from requiring the GoK to enforce summonses issued by the Court. To the contrary, as the Decision notes, express provisions of Kenyan law enable the GoK's compliance with its cooperation obligations under the Statute. The Decision correctly observed that Kenya's International Crimes Act ("ICA") cannot be read in isolation but rather is embedded in the domestic legal order and linked to other pertinent laws of Kenya including but not limited to the Criminal Procedure Code.

6. There are also cogent policy reasons why the Appeals Chamber should uphold the Decision, recognise the clear language of the Statute and the intention of its drafters, and so reject the appeals. It would contradict the Court's mandate and function—to conduct trials where States are unable or unwilling to do so—if it enjoyed lesser powers to obtain testimony from witnesses than the criminal courts of those States themselves. If the Court's ability to hear oral evidence were to depend entirely on the inclination of witnesses to appear voluntarily, it would be hostage to

[4] *See also* Decision, para.93 ("the clear intention of the States Parties, as is manifest in the Rome Statute, is in the opposite direction").

the vagaries of human nature and at the mercy of external forces who may seek to frustrate the Court's mission. This could significantly compromise its truth-finding function and affect public confidence in the accuracy of its decisions and judgment. The Trial Chamber recognised this danger.[5] So should the Appeals Chamber.

Procedural Background

7. On 17 April 2014, the Trial Chamber issued its Decision, having received extensive written and oral submissions from the parties and participants,[6] and by the GoK as *amicus curiae*.[7]

8. On 23 May 2014, the Trial Chamber, by majority, granted the Ruto Defence and the Sang Defence leave to appeal two issues arising from the Decision:

> [w]hether a chamber has the power to compel the testimony of witnesses ('First Issue')

and

> [w]hether the [GoK], 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').[8]

9. On 5 June 2014, the Ruto Defence and the Sang Defence filed their appeals.[9] At their request, the Appeals Chamber authorised an extension of the applicable page limits to 25 pages, with an average page not exceeding 300 words.[10]

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[5] *See*, *e.g.*, Decision, para.86.
[6] *See* Decision, paras.1-4, 6-10, 12. *See further*, *inter alia*, ICC-01/09-01/11-1120-Red2 ("Prosecution Request"); ICC-01/09-01/11-1136-Red2 ("Ruto Response"); ICC-01/09-01/11-1138-Red ("Sang Response"); ICC-01/09-01/11-1183-Red ("Prosecution Reply"); ICC-01/09-01/11-T-86-Red-ENG and ICC-01/09-01/11-T-87-ENG (oral submissions); ICC-01/09-01/11-1188-Conf-Red ("Prosecution Supplemental Request"); ICC-01/09-01/11-1200-Red ("Ruto and Sang Further Submissions"); ICC-01/09-01/11-1201 ("LRV Submissions"); ICC-01/09-01/11-1202 ("Prosecution Further Submissions").
[7] *See* Decision, paras.5-6, 11. *See further* ICC-01/09-01/11-1184 ("GoK Submissions"); ICC-01/09-01/11-T-86 and ICC-01/09-01/11-T-87 (oral submissions).
[8] ICC-01/09-01/11-1313, paras.40, 54. *See also* ICC-01/09-01/11-1313-Anx-Corr.

10. On 10 June 2014, the Appeals Chamber granted the GoK leave to file observations as *amicus curiae* on the Second Issue only.[11]

11. On 17 June 2014, the Appeals Chamber denied the application of the Ruto Defence for suspensive effect of the appeal.[12]

Submissions

First Issue: the Court has the power to compel the testimony (in the sense of the appearance) of witnesses[13]

12. The Trial Chamber did not err in law in concluding that it may require the attendance of witnesses to testify by requesting the GoK to serve and enforce a summons issued by the Court.[14] Notwithstanding its election to provide a 'fuller analysis', the Trial Chamber correctly found that the Statute itself permits recourse to enforceable summonses[15] of this kind.

13. In particular, the Trial Chamber correctly analysed Article 64(6)(b), and its relationship with Part 9 governing the cooperation of States (especially Article 93). Nor is this conclusion altered by reference to Articles 21-23, 70 or 93(7) of the Statute, or to the previous case law of the Court. Far from undermining the Decision, the

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[9] ICC-01/09-01/11-1345 OA8 ("Mr. Ruto's Appeal"); ICC-01/09-01/11-1344 OA7 ("Mr. Sang's Appeal") [ICC-01/09-01/11-1344-Corr OA7 ("Mr. Sang's Corrigendum")].
[10] ICC-01/09-01/11-1335 OA7 OA8 ("Page Limit Extension Decision"), para.5. *See also* ICC-01/09-01/11-1346 OA7 OA8 (extending the time limit for the Prosecution's consolidated response to Mr. Ruto's Appeal and Mr. Sang's Appeal).
[11] ICC-01/09-01/11-1350 OA7 OA8, paras.7-8.
[12] ICC-01/09-01/11-1370 OA7 OA8. In responding, the Sang Defence joined the Ruto Defence's request.
[13] Notwithstanding the terms in which the Trial Chamber characterised the First Issue (whether the Court has the power "to compel the testimony" of witnesses), it is clear from the Decision (and relevant submissions) that the First Issue relates to the compellability of witness *appearance*, not the separate issue of the compellability of any subsequent testimony. *See below* para.20.
[14] *Contra* Mr. Ruto's Appeal, para.4; Mr. Sang's Appeal, para.7 [Mr. Sang's Corrigendum, para.70]. *See* ICC-02/05-03/09-295 OA, para.20 ("the Appeals Chamber will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision"). *See also e.g. Prosecutor v. D.Milošević*, IT-98-29/1-A, Judgement, 12 November 2009, paras.13-14; *Rutaganda v. the Prosecutor*, ICTR-96-3-A, Judgement, 26 May 2003, para.20.
[15] *See below* para.19.

drafting history of these provisions further shows that the Trial Chamber's analysis was correct.

14. In addition to Articles 93(1)(d) and (l) as a means of giving effect to Article 64(6)(b), the Prosecution also recalls the alternative applicability of Article 93(1)(b), further validating the correctness of the outcome of the Decision.

> *Article 64(6)(b) of the Statute, read with Part 9, provides for the Court to compel the appearance of witnesses through summonses enforced by State Parties*
>
> i.) Article 64(6)(b) demonstrates the Court's power to issue enforceable summonses

15. Article 64(6)(b) is the bedrock of the Court's power to request the service and enforcement of witness summonses, to be given effect through Part 9 of the Statute. The Defence arguments, both at trial and on appeal, rest on an artificial interpretation of this provision, and its relation with other provisions in the Statute.

16. The Trial Chamber correctly—and unanimously[16]—found that, "as regards the specific power to compel the attendance of witnesses, the States Parties did not leave the power merely to the process of implication. The intention was indicated in explicit language".[17] Article 64(6)(b) states that 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[18]

[16] *See* Dissent, para.8 (agreeing that Article 64(6)(b) permits the issue of summonses "*vis-à-vis* witnesses who are not willing to testify in court voluntarily").
[17] Decision, para.95. *See also* para.111.
[18] Statute, Art.64(6)(b) (emphasis added). Article 64(6)(b) is based, without significant variation, on draft article 38(5) of the International Law Commission's (ILC) 1994 draft statute: *see Report of the International Law Commission on its work on its forty-sixth session*, 49 UN GAOR, Supp. No. 10, A/49/10 (1994), pp.54-55. Use of the term "require" rather than, for example, "request", indicates that from the outset it was clear that for a criminal process to succeed it is necessary to secure witness appearance. This common sense assumption was not challenged.

17. All the equally authentic texts of the Rome Statute,[19] in Article 64(6)(b), use a term which denotes the giving of a judicial order requiring fulfilment: 'ordenar' (to order) in Spanish; 'الأمر' (to order) in Arabic; 'требовать' (to require) in Russian; '传唤' (to summon/subpoena) in Chinese; 'require' in English; 'ordonner' (to order) in French. The Trial Chamber was therefore correct to reject the Defence argument that the term 'require' means something less than a mandatory obligation, and to find instead that it denotes a compulsory measure.[20]

18. The Decision correctly relied upon the express inter-connection between Article 64(6)(b) and Part 9 to determine the proper scope of the Trial Chamber's authority under the Statute to secure compelled witness attendance.

19. Although the Trial Chamber used the term "summons" and "subpoena" interchangeably,[21] the Decision correctly makes no finding that the Court itself may compel the personal appearance of witnesses who are not physically present on the Court's premises or in its custody by directly applying sanctions to them. Rather, consistent with the plain terms of Article 64(6)(b), the Trial Chamber referred only to a power to require witness appearance, which is given effect through State cooperation and domestic law. Accordingly, the Prosecution adopts the term "summons" or "enforceable summons" for this purpose. Further, since the Decision properly concerns the use of enforceable summonses through State Party cooperation, and not a "subpoena",[22] many Defence arguments are misdirected.[23]

[19] *See* Statute, Art.128.
[20] *Contra* Mr. Ruto's Appeal, para.15; Mr. Sang's Appeal, para.10 [Mr. Sang's Corrigendum, para.6]. *See* Decision, paras.95-96, 100.
[21] Decision, para.60 (referring to "subpoena" and "summons" alike to mean "commanding the appearance of a witness who refuses to appear voluntarily"). *But see* Dissent, para.11, fn.13.
[22] *Contra* Mr. Sang's Appeal, para.9 [Mr. Sang's Corrigendum, para.5].
[23] *See below*, *e.g.*, paras.23, 54.

20. The Ruto Defence is incorrect that Rule 65 is the Court's "single power of compulsion […] in respect of witness testimony".[24] To the contrary, Rule 65(1) makes clear that it addresses "[a] witness who appears before the Court", and is therefore a narrower provision than Article 64(6)(b). Thus, Rule 65 does not deal with the *means* by which a witness's attendance at the Court may be secured, but rather with the subject matters on which they may be compelled to testify once they do appear.

21. The Sang Defence is likewise incorrect that the Court's powers under Article 64(6)(b) apply only to witnesses already before the Court, such that they are only directed to the Parties or have "internal" effect.[25] This interpretation fails for two reasons. First, it would make redundant Article 64(6)(d), which serves the very function the Sang Defence proposes for Article 64(6)(b).[26] Second, it would be inconsistent with Article 64(6)(b)'s plain terms, referring to "obtaining, if necessary, the assistance of States as provided in this Statute".

22. The Prosecution agrees with the Sang Defence that, when interpreting the Statute, it may be appropriate "to consider a provision in the context of the treaty as a whole".[27] It is precisely the plain text of the relevant provisions of the Statute, read in context with one another, that validates the correctness of the Decision. The Sang Defence fails to show that the Trial Chamber's interpretative method—notwithstanding its fuller analysis[28]—reveals an error that "materially affects"[29] (*i.e.*, invalidates) the Decision.[30]

[24] *Contra* Mr. Ruto's Appeal, para.4.
[25] *Contra* Mr. Sang's Appeal, para.11 ("Article 64(6)(b) […] applies when the parties have no intention of calling one or more witnesses the Chamber would like to hear") [No relevant reference in Mr. Sang's Corrigendum].
[26] *See* Statute, Art.64(6)(d) (referring to the Trial Chamber's power to "[o]rder the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties").
[27] Mr. Sang's Appeal, para.12 [Mr. Sang's Corrigendum, para.8].
[28] *See below* paras.49-53.
[29] *See above* fn.14.
[30] *Contra* Mr. Sang's Appeal, paras.12-13, 43-53 [Mr. Sang's Corrigendum, paras.8-9, 38-48].

23. Both the Ruto and Sang Defence mistake the relevance of Article 70, and hence draw an erroneous conclusion from the absence of any prescribed criminal penalty which may be directly imposed by the Court on a non-appearing witness.[31] Yet as is clear from its plain text, Article 64(6)(b) envisages that *States* will provide the necessary assistance to secure witnesses' attendance. It is left to the relevant State—not the Court—to enforce compliance. Thus, Articles 64(6)(b) and 70 are entirely consistent, based on the Trial Chamber's evident understanding that it is "*domestic* law" which is to be respected and applied "on questions of compellability."[32] Article 70 would only be engaged if the Decision purported to establish a direct "subpoena" power for the Court,[33] and not—as it did—a power to require the attendance of witnesses by requesting the service and enforcement of a witness summons through State Party cooperation.

24. The Ruto Defence and Sang Defence also mistake the relevance of Article 93(7)—which permits the temporary transfer of a detained person in order to testify, contingent upon that person's informed consent—again erroneously concluding that there is an inconsistency with the Court's power to issue enforceable summonses.[34] As explained in detail below,[35] the drafting history of Article 93 reflects concern not about the compulsion of witnesses to appear in order to testify generally, but about the compulsion of witnesses or other persons *to travel across international borders*.[36] Understood in this context, the requirement of consent in Article 93(7), like the reference to voluntariness in Article 93(1)(e),[37] does not support the conclusion that "compelled appearance was deliberately excluded from the Statute."[38] Rather, since it

[31] *Contra* Mr. Ruto's Appeal, para.37; Mr. Sang's Appeal, paras.14, 16 [Mr. Sang's Corrigendum, paras.10, 12].
[32] *See* Decision, para.154 (emphasis added). *See also below* para.57.
[33] *See above* para.19.
[34] *Contra* Mr. Ruto's Appeal, paras.13-14, 18; Mr. Sang's Appeal, paras.19-21 [Mr. Sang's Corrigendum, paras.15-16].
[35] *See below* paras.32-43.
[36] *Contra* Mr. Ruto's Appeal, para.14 (referring simply to "State sovereignty considerations" underpinning Article 93(7)).
[37] *See below* paras.28-30.
[38] *Contra* Mr. Ruto's Appeal, para.13.

is clear from Article 93(7)(b) that the transfer envisioned in Article 93(7) is an international transfer,[39] the requirement for consent is related to consent to cross an international border. This view is further strengthened by Rule 193 which, as noted by the Ruto and Sang Defence, does not require the detainee's consent because "[t]he subject of Rule 193 is a detained individual under this Court's jurisdiction rather than a detained individual under the jurisdiction of a State Party".[40] Correspondingly, a detained person could likewise be compelled to appear to testify under the other provisions of Article 93 *within* the country in which they are detained, just as they would under domestic law.[41] Properly understood, rather than providing "for […] disparate treatment between detained and non-detained persons",[42] there is an appropriate distinction between witnesses who voluntarily agree to cross international borders to provide testimony, and witnesses who do not consent to crossing an international border but who may nonetheless still be compelled to testify within their own country.

25. The appellants' reliance on three previous decisions of this Court to show that the Trial Chamber erred in its analysis of Article 64(6)(b) is likewise misplaced.[43] The Ruto Defence alone correctly recognises that these decisions are not binding either on other Trial Chambers or upon this Chamber.[44] However, these authorities do not in any event assist the Appeals Chamber in deciding this appeal, and the relevant passages are no more than *obiter dicta*. They were made without the benefit of focused submissions from the Parties on the question of compellability,[45] and should

[39] *E.g.* Statute, Art.93(7)(b) ("[…] When the purposes of the transfer have been fulfilled, the Court shall *return the person without delay to the requested State*", emphasis added). *See also* Rule 192(1) (distinguishing between the "national authorities concerned" and the "authorities of the host State").
[40] Mr. Ruto's Appeal, para.14. *See also* Mr. Sang's Appeal, para.20 [No relevant reference in Mr. Sang's Corrigendum].
[41] *See, e.g.*, Criminal Code (R.S.C., 1985, c. C-46) [Canada], s.527. *See also* ss.697, 700.1 (assistance with respect to a foreign request).
[42] *Contra* Dissent, para.14; Mr. Sang's Appeal, para.19 [Mr. Sang's Corrigendum, para.15].
[43] Mr. Ruto's Appeal, para.21; Mr. Sang's Appeal, para.25 [Mr. Sang's Corrigendum, para.20]. The appellants refer to ICC-01/09-39, ICC-01/09-01/11-449-Anx, and ICC-01/04-01/06-T-355-ENG.
[44] Mr. Ruto's Appeal, para.21.
[45] *See* ICC-01/09-39, para.20 (observing in passing that "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

be given minimal weight, if any. Moreover, the Sang Defence wrongly argues that the Prosecution "accepted" in *Lubanga* that the Court has no power to compel witnesses to appear.[46] To the contrary, the Presiding Judge expressly noted that the Prosecution had indicated "that it does not press the Chamber to take further steps to try to secure the testimony of this witness."[47]

26. Finally, in showing that the Decision is incorrect,[48] the Sang Defence is not greatly assisted by "scholarly opinion" since opinion on the novel issue at the heart of these appeals is clearly divided.[49]

ii.) Part 9 of the Statute gives effect to Article 64(6)(b), and does not detract from it

27. The Decision correctly found that the provisions of Part 9, which deals with international cooperation and judicial assistance, give effect to the Court's power under Article 64(6)(b) and do not detract from it.[50] The Defence arguments to the contrary—arguing that Part 9 must limit Article 64(6)(b)—are unconvincing both

authorities of that State", but noting that this view was reached in the context of "the understanding of all concerned […] that any possible questioning be made on a voluntary basis"); ICC-01/09-01/11-449-Anx, para.1 (defining a witness as a person who "has consented" to being a witness—*but see* ICC-01/09-01/11-449, para.6).

[46] *Contra* Mr. Sang's Appeal, para.25 [Mr. Sang's Corrigendum, para.20].

[47] ICC-01/04-01/06-T-355-ENG, p.5, lines 7-9.

[48] Mr. Sang's Appeal, paras.22-24 [Mr. Sang's Corrigendum, paras.17-19].

[49] For contrary authorities to those cited in support of the appeals, *see*, *e.g.*, Kress, C. and Prost, K., 'Article 93', in Triffterer, O. (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2008) ("Triffterer" and "Kress and Prost", respectively), pp.1576-1577, 1579; Bitti, G., 'Article 64', in Triffterer ("Bitti"), p.1213; Friman, H., 'Sweden', in Kress et al (eds.), *The Rome Statue and Domestic Legal Orders Vol II* (2004), p.409; Terrier, F., 'Powers of the Trial Chamber', in Cassese et al (eds.), *The Rome Statute of the International Criminal Court* (2002), pp.1271-1273; Broomhall, B., and Kress, C., 'Implementing Cooperation Duties under the Rome Statute: A Comparative Synthesis', in Kress et al (eds.), *The Rome Statute and Domestic Legal Orders Vol.II* (2004), p.529; Rastan, R., 'Testing Co-operation: The International Criminal Court and National Authorities', 21 *Leiden Jrnl Int'l Law* (2008), 435-437. For contrary authorities, *see* Prosecution Request, para.8, fns.66-67.

[50] Decision, paras.103, 112-119. Moreover, Article 86 specifies that "States Parties shall, *in accordance with the provisions of this Statute*, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court" (emphasis added), the emphasised text ensuring that the Court can rely on State Party assistance for all the forms of assistance provided for throughout the various provisions of the Statute which are necessary to fulfil its mandate and not just those particular measures specified in Part 9: *see* Kress, C. and Prost, K., 'Article 86', in Triffterer, pp.1514-1515.

because they depend on a strained reading of Part 9, and because they would entirely defeat the plain intention of the Statute's drafters set out in Article 64(6)(b).[51]

28. The Ruto and Sang Defence claim that the Court's power under Article 64(6)(b) must be limited to voluntary appearance because the express terms of Article 93(1)(e) refer only to "the voluntary appearance of persons as witnesses."[52] As a result, they argue, it is improper for the Court to rely on other provisions of Part 9, such as Articles 91(1)(d) and (l), to issue an enforceable summons. Supporting this argument, the Sang Defence stresses that the reference to "any other type of assistance" in Article 93(1)(l) may not be read to include assistance in securing the appearance of witnesses, as this is governed by Article 93(1)(e).[53]

29. The Defence arguments lack merit. Their overly broad reading of Article 93(1)(e) is inconsistent with the plain text of the Statute, as well as its drafting history (described below[54]). It would also frustrate the clear intention of Article 64(6)(b). Moreover, the Defence interpretation of the Statute depends on the absurdity that, although the drafters of the Statute required State Parties to act to resolve any conflicts between domestic law and their obligations under the Statute,[55] they were content themselves to permit a readily apparent conflict between Parts 6 and 9 of the Statute itself. The Defence cannot overcome this obvious conflict by arguing that the Court, when requiring witness attendance via State assistance, will be able to request

[51] Rule 82(3) provides further support for the Trial Chamber's interpretation of Article 64(6)(b). It states: "If the Prosecutor introduces material or information protected under article 54, paragraph 3 (e), into evidence, a Chamber may not order the production of additional evidence received from the provider of the initial material or information, *nor may a Chamber for the purpose of obtaining such additional evidence itself summon the provider or a representative of the provider as a witness or order their attendance*" (emphasis added). Although crafted in the negative, the inclusion of this express limiting clause indicates that the Chamber otherwise possesses such a power, since if not there would be no need for the restriction.
[52] Mr. Ruto's Appeal, paras.6-8, 12; Mr. Sang's Appeal, paras.17, 26-29 [Mr. Sang's Corrigendum, paras.13, 21-24].
[53] *E.g.* Mr. Sang's Appeal, para.29 [Mr. Sang's Corrigendum, para.24].
[54] *See below* paras.32-43.
[55] *See* Statute, Art.88.

cooperation with respect to voluntary appearance,[56] since this would render wholly meaningless the term "require".

30. The Trial Chamber did not err in finding that Article 93(1)(e)—which only regulates one specific form of cooperation—does not and cannot limit the express open-ended formulation of Article 93(1)(l), which permits the Court to request other forms of assistance, including in relation to witness attendance, beyond facilitation of voluntary appearance.[57] The Ruto Defence relies on an entry in Triffterer's commentary written by Claus Kress and Kimberly Prost to assert that States have no duty to enforce the obligation to cooperate *vis-à-vis* requests under Article 93(1)(l).[58] However, the Ruto Defence takes this reference out of context. Properly understood, the opinion of Kress and Prost[59] supports the correctness of the Decision by agreeing that States *are* obliged to cooperate with requests submitted to them under Article 93(1)(l).[60]

- First, Kress and Prost reject the idea that Article 93(1)(e) restricts the power of the Trial Chamber under Article 64(6)(b), or that Article 93(7) establishes a general rule against involuntary appearance.[61]

[56] *Cf.* Mr. Ruto's Appeal, paras.6-7; Mr. Sang's Appeal, para.10 [Mr. Sang's Corrigendum, para.6].
[57] Decision, paras.115-116, especially para.115 ("It is very clear that article 93(1) does not provide an exhaustive list of the types of requests that the ICC may make of States Parties, in order to enable the Court to carry out its essential functions. Article 93(1)(l) makes that very clear."). Article 93(1) is structured into (i) a list of minimum measures that all State Parties must provide for (including by having national procedures available for each specified form pursuant to Article 88); and (ii) a catch-all, open ended proviso that enables the Court to request of States "any other type of assistance". Since the latter is potentially limitless and to avoid placing on States obligations to execute measures that might potentially be illegal in the requested State, the formulation stipulated is that the requested State is not obliged to provide something that is prohibited under national law.
[58] Mr. Ruto's Appeal, para.16 (citing *inter alia* Kress and Prost, pp.1576-1577).
[59] Both Kress and Prost directly participated in the Rome negotiations.
[60] In its discussion of the Second Issue, the Sang Defence also refers to the principle of complementarity, and asserts that the language used in the context of State cooperation "is more one of requesting, than imposing on States a duty, to cooperate" because "States are not obligated to ratify the Rome Statute and they can withdraw". However, this does not alter a State's duty to cooperate while it is a State Party, as the Sang Defence itself recognises: "[a]s long as States are members of the ICC, they have certain obligations under the Statute, most notably those set out in Part 9". *See* Mr. Sang's Appeal, para.61 [Mr. Sang's Corrigendum, para.56].
[61] Kress and Prost, p.1576.

- Second, in the passage quoted by the Ruto Defence, Kress and Prost are properly addressing whether State Parties can be obliged to force witnesses under compulsion to travel to the seat of the Court—stating that no such duty exists, but State Parties may choose to so provide under their domestic implementing law.[62] While it is not initially apparent from this passage whether the authors refer to appearance abroad (at the seat of the Court) or appearance before the Court more generally, their meaning is made clear when they subscribe "this view" (that there is no such duty) to Gilbert Bitti, whose entry under 'Article 64' in the same commentary is cross-referenced. Bitti observes that State Parties are under no obligation according to Article 93 to compel a witness to appear before the Court—but clarifies that he means enforced travel to the seat of the Court.[63] Thus, what is rejected by all three commentators is the duty on State Parties to compel witnesses to travel to attend hearings at the seat of the Court,[64] an outcome the Decision does not propose.

- Third, in a related section of the commentary, Kress and Prost in fact emphasise the *obligation* of State Parties to enforce requests made pursuant to Article 93(1)(l), including in relation to securing witness testimony: "[i]n addition to the listed types of assistance, State Parties are *obliged* to grant any type of assistance to the ICC that is not prohibited by their national law. This 'catch all' provision was included to accommodate emerging or varied types of assistance which might be required in any particular case."[65]

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[62] *See* Kress and Prost, p.1577 (citing examples of some State Parties that have chosen to do so).
[63] Bitti, p.1213 ("[t]hus, if a witness, whose attendance and testimony is required by the Trial Chamber, *doesn't want to travel to the seat of the Court* one solution could be for the Trial Chamber to obtain the assistance of the State Party for the testimony to be given before the national authority or by means of video-conference", emphasis added). Bitti continues: "[i]ndeed, even if States Parties are not under an obligation to force the appearance of witnesses before the ICC, they should be under an obligation to comply with an order of the Trial Chamber requiring the attendance and testimony of a witness and summon that witness to appear before a national Court."
[64] *See further below* paras.33-41.
[65] Kress and Prost, p.1579 (emphasis added).

- Finally, Kress and Prost distinguish between the expressly listed obligations to cooperate with requests for assistance from the Court under Article 93(1)(a) to (k) and the obligation of State Parties under Article 93(1)(l).[66] They note the "less stringent character of the obligation to cooperate in *littera l*", since the extent of that obligation is not circumscribed by the Statute but rather by national law.[67] However, in discussing the use of video-link from a State's territory,[68] Kress and Prost specifically observe that this type of request under Article 93(1)(l) would in fact carry a "more stringent obligation" to cooperate given the explicit recognition of this kind of assistance in Article 69(2) and Rule 67.[69] Such a request to a State Party pursuant to Article 93(1)(l), they conclude, would include "the duty to compel the witness to appear and to testify before the Court through use of the technique in question".[70]

31. The obligation of a State to comply with requests under Article 93(1)(l)[71] is also evident from the wording of Article 93(3), which requires the requested State to "promptly consult with the Court" in the event that it cannot comply with a request due to "an existing fundamental legal principle of general application". In such a case, the requested State is required to "try to resolve the matter", including by considering "whether the assistance can be rendered in another manner or subject to conditions." No distinction is made for requests under different sub-paragraphs of Article 93(1). Evidently, if State Parties were under no duty to comply with requests

[66] Kress and Prost, p.1579. This arises from the structure of Part 9, which provides in Article 88 that "States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation *which are specified* under this Part" (emphasis added). As it is only in subparagraphs (a)-(k) of article 93(1) that forms of cooperation are specified, it is in relation to these measures that State Parties must ensure the existence of national procedures—as States cannot be requested to ensure something that is not specified.
[67] Kress and Prost, p.1579.
[68] Kress and Prost, p.1579.
[69] Kress and Prost, p.1579 (referring to "the establishment of a video-link from the Hague to the location of the witness"). Kress and Prost continue: "State Parties can hardly be allowed to first recognise in Part 6 the importance and desirability of video-conferences in Part 6 and then deny cooperation upon being requested accordingly".
[70] Kress and Prost, p.1579. Such a request could also fall within the scope of Article 93(1)(b) combined with Article 99(1).
[71] *Contra* Mr Ruto's Appeal, para.16.

under Article 93(1)(l), such consultations or modalities would not be stipulated as necessary.[72]

iii.) The drafting history of the Statute further confirms the correctness of the Decision

32. In support of their argument concerning the alleged limitation of Article 64(6)(b) by Part 9, and especially Article 93(1)(e), the Ruto and Sang Defence incorrectly argue that the drafting history of the Statute further demonstrates the intention to exclude the compelled appearance of witnesses.[73] Although in its Decision the Trial Chamber cautioned against recourse to the *travaux préparatoires*,[74] it nonetheless considered—and ultimately rejected—this Defence argument.[75] It was correct to do so.

33. Contrary to the Defence submissions, nothing in the drafting history of the Statute undermines the Decision, or establishes an express legislative intent to bar compelled witness attendance before the Court.[76] Rather, the drafting history confirms both that States sought to ensure the Court had the necessary tools to obtain witness attendance, including by compulsion if necessary, and sought only to prevent imposing obligations on State Parties to force witnesses physically to travel to the seat of the Court.

34. All the earlier draft texts that led to Article 93(1)(e), and their associated records, indicate that States were focused on the issue of witness appearance at "the seat of the Court"—in other words, compelling witnesses to "travel" to the Court—rather

[72] The obligation to consult to resolve apparent difficulties arising from requests under Part 9 is also found in Article 97.
[73] Mr. Ruto's Appeal, paras.8-11, 19-20; Mr. Sang's Appeal, paras.18, 33, 35 [Mr. Sang's Corrigendum, paras.14, 28, 30].
[74] *See* Decision, paras.141-144.
[75] Decision, paras.117-118, 147. Although the *travaux préparatoires* do not bind the Court in its independent interpretation and application of the Statute, the Prosecution agrees with the general proposition that they may be capable of offering persuasive guidance in some circumstances, depending on the quality and clarity of opinion contained within them.
[76] *See* Decision, paras.117-118, 147.

than witness appearance more generally. Thus, the 1995 *Ad Hoc* Committee Report notes:

> The delegations that commented on the issue of witnesses noted that, in relation to an international criminal court, the problem arose whether attendance of witnesses could be compelled directly or through State authorities. *It was noted that, in many countries, it was not constitutionally possible to force a citizen to leave the country to attend judicial proceedings in another country*.[77]

35. The 1996 Preparatory Committee Report notes:

> Witnesses or experts may not be compelled to testify *at the seat of the Court*. If they do not wish to *travel to the seat of the Court*, their testimony *shall* be taken in the country in which they reside or in some other place which they may determine by common accord with the Court.[78]

36. The 1998 Preparatory Committee Report recalls the previous observation, this time in bracketed text:

> [7. (a) Witnesses or experts may not be compelled to testify *at the seat of the Court*. [(b) If they do not wish *to travel* to the seat of the Court, their evidence *shall* be taken in the country in which they reside or in such other place as they may agree upon with the Court [in accordance with national requirements [and in compliance with international law standards]]…].[79]

37. The Report of the Working Group on International Cooperation and Judicial Assistance, contained in the same 1998 report, observes in a footnote to the text on the facilitation of voluntary witness appearance as ultimately adopted as current

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[77] *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, A/50/22 (1995) ("1995 PrepComm Report"), para.233 (emphasis added).
[78] *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, A/51/22 (1996) ("1996 PrepComm Report"), Vol.II, p.284 (emphasis added). *See also* p.253, fn.95 (referring to "The problem of the arrest and *forcible transfer* of recalcitrant witnesses to the Court creates problems for many States", emphasis added).
[79] *Official Records, Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, A/CONF.183/13 (Vol. III), p.75 (emphasis added). Consideration of the exact formulation of this draft provision was linked—according to the accompanying footnote (fn.266)—to the formulation adopted for Article 69, demonstrating awareness of the relationship between different parts of the Statute.

Article 93(1)(e): "[t]his includes the notion that witnesses or experts may not be compelled *to travel* to appear before the Court".[80]

38. The concern States had with the notion of compelling witnesses to cross international boundaries to travel to the seat of the Court led them to focus on the duty to facilitate the appearance of witnesses before the Court (*i.e.* at its seat) if such witnesses were willing to attend. This is why Article 93(1)(e) refers to the notion of "facilitation" of "voluntary" attendance. Although neither the terms "seat of the Court" nor "travel" appear in the final adopted text, all of the proposals and explanatory notes leading up to Rome were drafted in that context. As noted above, even the final proposal by the Working Group assigned to Part 9 in Rome attaches an explanatory footnote that specifies that the text should be understood to exclude the notion that witness could be compelled *to travel* to appear before the Court.

39. Further confirming this analysis, the drafting history makes clear that States believed that the Court should have the power to ensure witness appearance through means other than forcible witness transfer, including via State cooperation. The approach adopted in the Decision is entirely consistent with these early discussions.[81] Thus, the report of the 1995 *Ad Hoc* Committee, in response to the problem of forcing citizens to leave their home country to attend judicial proceedings abroad, refers to suggested solutions whereby:

> to obtain the testimony by way of a request for assistance to the State of residence of the witness; the *requested State would use the means of compulsion allowed under its internal law and provide the international criminal court with a transcript of the examination and cross-examination* […] Other solutions that were mentioned included *testimony by way of a live video link hooked up with the court or*, subject to the agreement of the State concerned, the *hearing of evidence, by the court, on the territory of the said State*" (emphasis added).[82]

[80] *Ibid.*, p.329, fn.221 (emphasis added).
[81] To the contrary, it would be illogical if the drafters, despite expressing concerns with respect to compelled witness attendance abroad and therefore contemplating other mechanisms for compelled appearance, meant to bar the exercise of such powers under any circumstance.
[82] 1995 PrepComm Report, para.233 (emphasis added).

40. Similarly, draft Article 56 in the Report of the 1996 Preparatory Committee when stating that "witnesses or experts may not be compelled to testify at the seat of the Court", continues:

> [i]f they do not wish to travel to the seat of the court, their testimony *shall be taken* in the Country in which they reside or in some other place which they determine by common accord with the Court.[83]

41. With respect to the concern that "the arrest and forcible transfer of recalcitrant witnesses to the Court creates problems for many States",[84] the 1996 records note:

> Provision could be made in the rules of the Court for the Court to accept testimony recorded by the requested State in alternative ways, for instance by way of video recordings (see footnote 106 below). Another alternative would be to allow the Prosecutor/ Court to take a deposition from such a witness within the territory of the requested State, provided of course that the [D]efence would also be allowed to cross-examine the witness if the Prosecutor takes the deposition.[85]

42. These considerations shaped the drafting of both the Statute and the Rules as reflected *inter alia* in Articles 64(6)(b), 69(2), 93(1)(b), 93(1)(d), 93(1)(l), as well as Rules 67 and 68.

43. In summary, taking into account the drafting history of the Statute, the Decision is consistent with both the functions and powers of the Trial Chamber under Part 6, and the provisions on judicial cooperation under Part 9. The Trial Chamber's analysis of Article 93(1) gives effect to Article 64(6)(b), recognising the mechanism by which witnesses may be required to testify yet not required to travel abroad. The Decision correctly determined that the Court, with the cooperation of the GoK, may ensure the

[83] 1996 PrepComm Report, p.284 (emphasis added).
[84] 1996 PrepComm Report, p.253, fn.95.
[85] 1996 PrepComm Report, p.253, fn.95. Footnote 106, to which reference is made, notes that it is conceivable that testimony could be recorded electronically and made available to the Court. *See* 1996 PrepComm Report, p.257, fn.106.

presence of witnesses on Kenyan territory in order to hear their testimony via video-link or *in situ* proceedings, measures which are foreseen both in the Statute and in Kenya's own laws.

Read with Article 64(6)(b), Article 93(1)(b) is an alternative basis to Articles 93(1)(d) and (l) on which the Court may issue enforceable summonses

44. In its Decision, the Trial Chamber considered that the Court's mechanism to ensure the service and enforcement of witness summonses via State Party cooperation found its best expression through Articles 93(1)(d) and (l) of the Statute, as a means to give effect to the Court's general power in Article 64(6)(b).[86] This analysis is correct. Nonetheless, the Prosecution observes that such summonses may also be served and enforced by means of Article 93(1)(b), which allows for the taking of evidence, including testimony under oath, through State cooperation.[87] This forms an alternative basis on which to uphold the correctness of the Decision and provides further support for its statutory soundness. For this reason, a brief explanation follows.

45. Article 93(1)(b) provides that the Court may request State Party cooperation in the taking of evidence from a witness under oath. This will typically be executed by the State before its competent authorities following national procedures and the State will then produce that evidence to the Court. In this well-established practice under inter-State mutual legal assistance regimes,[88] States apply relevant domestic legislation for the compelled appearance and taking of evidence at the national level.[89] For example, a State may execute a rogatory letter or receive a rogatory

[86] *E.g.* Decision, paras.113, 115.
[87] The Prosecution previously made submissions before the Trial Chamber concerning the availability of Article 93(1)(b) as an alternative basis to arrive at the same result: *see* Prosecution Further Submissions, paras.22-25; and ICC-01/09-01/11-T-86-Red-ENG, p.7, lines 1-3 (referring properly to *Article* 93(1)(b)).
[88] *See also* Mr. Ruto's Appeal, paras.2, 10, 31 (not contesting the availability of Article 93(1)(b) to secure witness attendance, which it characterises as more amenable to the "horizontal approach generally found in treaties dealing with inter-State assistance in criminal matters", but limiting this form of assistance to testimony before national courts as opposed to before the Court).
[89] Indeed, this is exactly how the ICA implements Article 93(1)(b)—*see* ICA, ss.78-80; *see also below* para.74.

commission for the taking of a person's statement within its territory using the normal mechanisms of domestic law enforcement.[90] States may also compel a witness to appear on their territory for testimony by means of video-link for a foreign process, even though the same witness would be free to decline to travel abroad to attend the same hearing in the foreign jurisdiction.[91] This is standard practice at the inter-State level and, as noted above, negotiating States sought to ensure that the Court would be empowered at least to this extent.

46. If the drafters of the Statute were content to allow the compelled appearance of witnesses before a national judge for the purpose of giving evidence to this Court under Article 93(1)(b), it strains credulity to argue that the same drafters would have wished to exclude that same compulsory process for witnesses appearing before the Court itself in some manner. Indeed, to the contrary, the records of the drafting history suggest that States were careful to ensure the Court could exercise such powers at least within the witness's country, including by means of video-link or *in situ* proceedings.

47. Lending further support to the correctness of the Decision, the Prosecution therefore considers that—in addition to requesting competent national authorities to hear evidence and transmit it to the Court—Article 93(1)(b) also permits the Court to request State Party assistance by:

- "the taking of evidence" by a Trial Chamber sitting *in situ*, with recourse to domestic powers to compel witness attendance as necessary; and

[90] Under such arrangements the statement may be taken by a national magistrate on the foreign State's behalf or by representatives of the foreign State taking the statement *in situ*, including mechanisms to compel attendance. *See*, *e.g.*, Canada Evidence Act, (R.S.C., 1985, c. C-5), ss.46-47; Mutual Legal Assistance in Criminal Matters Act, (R.S.C., 1985, c. 30 (4th Supp.)) [Canada], s.22.2; Criminal Code (R.S.C., 1985, c. C-46) [Canada], ss.700.1(1)-(2); Mutual Assistance in Criminal Matters Act 1987 (Act No. 85) [Australia], s.13; Crime (International Co-operation) Act 2003 (c.32) [UK], s.15 and Sch.1; 18 United States Code Section 3512—Foreign requests for assistance in criminal investigations and prosecutions.

[91] *Compare*, *e.g.*, European Convention on Mutual Assistance in Criminal Matters (ETS No. 30, 1959), Arts.7-8, *with* European Union Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ C 197/00, 29 May 2000), Art.10.

- compelling the appearance of a witness at a location on the requested State's territory for the purpose of taking their testimony via video-link.

48. Either measure could be implemented via a request under Article 93(1)(b) that is executed in the manner prescribed by the Court pursuant to Article 99(1)—*i.e.* "in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein".

The Trial Chamber did not err in its approach to implied powers, even though resort to them was unnecessary in this case

49. The Decision is clear that the Statute directly provides the Court with the power to issue summonses and to request State Parties, such as the GoK, to enforce them. Accordingly, although the Prosecution does not consider the Trial Chamber's discussion of implied powers erroneous,[92] it is not the basis on which the Decision was ultimately decided. The Defence complaints about the implied powers analysis therefore does not materially affect the Decision, and cannot invalidate it.[93]

50. The Ruto Defence criticises the manner in which the Decision was framed, but fails to show error in the Trial Chamber's approach to the interpretation of the Statute.[94] The Trial Chamber did not "presume[]" a statutory *lacuna*[95] but, rather, framed its Decision to address the Defence's trial arguments that: (i) no provision of the Statute *in so many words* provides for the issue of enforceable summonses; and, (ii) the Statute *excludes* such a power.[96] In this context, the Trial Chamber elected to

[92] To the extent that the Trial Chamber reasoned that the Court must possess a power, within the framework of the Statute and the Rules, to request States to enforce summonses. Should this power not have been expressly conferred—although indeed it was—then it must be implied. *See* Decision, paras.86-87, 92-93.
[93] ICC-01/04-01/07-2259 OA10, para.34, ICC-02/04-01/05-408 OA3, para.80; ICC-01/09-01/11-307 OA, para.89; ICC-01/09-02/11-274 OA, para.87.
[94] *Contra* Mr. Ruto's Appeal, para.22.
[95] *Contra* Mr. Ruto's Appeal, para.22.
[96] *See e.g.* Decision, paras.92, 118, 146-147.

provide a "fuller analysis" in its Decision.[97] It considered not only that the Statute permitted the issue of enforceable summonses by the Court[98] but that such a view is additionally "justif[ied]" by the Court's implied powers (or inherent jurisdiction),[99] considered in the context of principles of international law and general principles of law derived by the Court from national laws of legal systems of the world.[100] Although not essential for the determination of the matter before it, nothing in the Trial Chamber's approach is inconsistent with Article 21 of the Statute. The Ruto Defence's preference for the Decision to be structured or written differently is irrelevant. Nor does the Sang Defence show that the Trial Chamber erred in its contextual assessment of principles of international law, or in any event that this invalidated the Decision given that its reasoning was solidly founded in the Statute itself.[101]

51. The Ruto and Sang Defence do not argue that the Trial Chamber substantially misdirected itself on the relevant law,[102] but only contend that the Trial Chamber wrongly applied the law in this concrete situation.[103] Indeed, the Sang Defence expressly (and correctly) concedes that the Court—"like any other Court"—may resort to implied powers "to fill a vacuum in the Court's legal provisions".[104] This contradicts its earlier comment that "courts with[] such intrusive powers as criminal courts" may not do so.[105] The practice of the other international criminal tribunals—

[97] *See e.g.* Decision, para.87. Of itself, even "an extensive, but wholly unnecessary" analysis in a decision is not erroneous, provided that the Decision does contain what is necessary: *contra* Mr. Ruto's Appeal, para.23.
[98] *See* Decision, paras.63-64, 87, 93-103, 111-119, 128, 146-156.
[99] *See* Decision, para.87 ("this principle of implied powers […] is ample to justify incidental competence […] to compel the appearance of witnesses").
[100] *See* Decision, paras.65-66, 88, 91-92, 103, 138.
[101] *Contra* Mr. Sang's Appeal, paras.54-60 [Mr. Sang's Corrigendum, paras.49-55].
[102] This is notwithstanding the Sang Defence's doubt that Article 4 of the Statute is the true basis for the Court's resort to its inherent jurisdiction or implied powers: *see* Mr. Sang's Appeal, para.31 [Mr. Sang's Corrigendum, para.26].
[103] *See* Mr. Ruto's Appeal, para.23; Mr Sang's Appeal, paras.30-32, 35 [Mr. Sang's Corrigendum, paras.25-27, 30]. *Compare further, e.g.* Mr. Ruto's Appeal, para.23, *with* Decision, paras.74, 81.
[104] Mr. Sang's Appeal, para.32 [Mr. Sang's Corrigendum, para.27]. *See also* Mr. Ruto's Appeal, para.23.
[105] Mr. Sang's Appeal, para.31 [No relevant reference in Mr. Sang's Corrigendum].

such as the ICTY in relation to its subpoena powers[106]—further demonstrates that resort may be had, in appropriate circumstances, to implied powers.

52. Since nothing in the Statute expressly and plainly divests the Court of the power to issue enforceable summonses,[107] the Trial Chamber did not err in principle in considering implied powers, in addition to its powers that squarely derive from the Statute. Neither the Sang Defence nor the Ruto Defence can substantiate the claim that "the States Parties comprehensively legislated" the question of enforceable summonses "through Article 93(1)(e)."[108] The Sang Defence is again inconsistent when it asserts that, to preclude resort to implied powers, "it is not necessary for the Statute to clearly exclude a […] power" but "sufficient" that such a power "has been omitted from the Statute."[109] Yet it is precisely to address "a vacuum in the Court's legal provisions" that recourse to implied powers may be justified.[110]

53. The Ruto Defence's rhetorical assertion that the Decision "is a clear example of improper judicial law-making", resulting in "the triumph of judge-made law over treaty-made law", is undeveloped and should be rejected.[111] Regulation 29(2) of the Regulations of the Court expressly refers to the "inherent powers" of the Court.[112] Provided a Chamber correctly determines the necessity of resort to implied or inherent powers, the fact that the relevant issue is significant to the Court's work is not an argument against such resort. Indeed, it is precisely for significant issues when resort to implied powers might genuinely be required. In its Decision, the Trial Chamber was manifestly aware of its duty to realise the jurisdiction given to it but

[106] *See Prosecutor v. Blaškić*, IT-95-14-AR108*bis*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997 ("*Blaškić* Decision"), para.59.
[107] *See above* paras.28-30.
[108] Mr. Sang's Appeal, para.35 [Mr. Sang's Corrigendum, para.30]. *See also* Mr. Ruto's Appeal, paras.23 ("witness appearance is expressly and comprehensively dealt with in the Statute"), 29.
[109] Mr. Sang's Appeal, para.35 [Mr. Sang's Corrigendum, para.30].
[110] *See* Mr. Sang's Appeal, para.32 [Mr. Sang's Corrigendum, para.27].
[111] *See* Mr. Ruto's Appeal, para.24 (referring only to similar undeveloped submissions at trial).
[112] For an example of the Court's exercise of such inherent powers, *see* ICC-02/05-01/07-57, p.6.

also to maintain its "judicial character" by observing the "inherent limitations on the exercise of the judicial function" of the Court.[113]

The principle of legality, as given effect by Articles 22 and 23 of the Statute, does not bar the issue of enforceable summonses

54. The Ruto and Sang Defence incorrectly argue, relying upon Articles 22 and 23 of the Statute, that the Court may not request the service and enforcement of witness summonses through State Party cooperation, because the Court cannot directly penalise a summonsed witness's failure to appear.[114] These arguments fail to show any error in the Decision, since these provisions neither directly control procedural matters, nor does the approach of the Trial Chamber raise any issue with which they might engage. Again, these arguments confuse the clear distinction between a subpoena and an enforceable summons.[115]

i.) By its nature, requesting the service and enforcement of a witness summons through State Party cooperation does not engage Article 22 or 23 of the Statute

55. The specific nature of the enforceable summonses prescribed by the Statute does not engage Article 22 or 23 of the Statute.

56. Both the Ruto Defence and the Sang Defence overlook the fact that a summonsed witness who fails to appear will not be sanctioned *by the Court*, but by the GoK.[116] Accordingly, such a person would neither be "criminally responsible under this

[113] *See* Decision, paras.78-80. In this sense, notwithstanding the Trial Chamber's use of the term "implied powers" rather than "inherent jurisdiction", it followed the approach of the ICTY Appeals Chamber: *see Blaškić* Decision, para.25, fn.27.
[114] *See* Mr. Ruto's Appeal, para.16; Mr. Sang's Appeal, paras.36-38 [Mr. Sang's Corrigendum, paras.31-33].
[115] *See above* para.19.
[116] *See* Mr. Ruto's Appeal, paras.16, 32-33, 35-37; Mr. Sang's Appeal, paras.37-38 [Mr. Sang's Corrigendum, paras.32-33]. This does not amount to an assertion that "the ICC is a Kenyan Court"; rather, the Court may expect the GoK to discharge its obligation of cooperation by the means available to it, including the imposition of sanctions upon individuals who fail to appear in answer to an ICC summons: *contra* Mr. Ruto's Appeal, para.49.

Statute", as required to trigger the protection of Article 22, nor would they be "[a] person convicted by the Court" who must be punished only in accordance with the Statute, as required by Article 23. Whereas any sanction imposed on a non-appearing witness in the future by the GoK may well touch on substantive criminal law under the law of Kenya (as addressed in detail below),[117] the only question before the Court now is the antecedent determination whether to summons the witness in the first place. Such a determination of itself does not impose any criminal responsibility, at least not in this international jurisdiction, and accordingly is not controlled by Articles 22 and 23.

57. Existing international criminal practice underscores that the issue of an enforceable summons does not engage the *nullum crimen sine lege* principle, to which other tribunals are equally bound (albeit under customary international law). For example, in *Blaškić*, the ICTY Appeals Chamber emphasised that, "*normally*", an international court "should turn to the relevant *national authorities* to seek remedies or sanctions for non-compliance by an individual with a subpoena or order".[118] It expressly contemplated the fact that "[l]egal remedies or sanctions put in place by the national authorities themselves are more likely to work effectively and expeditiously",[119] having observed that "most States, whether of common-law or civil-law persuasion, generally provide for the enforcement of summonses or subpoenas issued by national courts".[120] In this context, the ICTY Appeals Chamber expressed no concern as to compliance of this approach with the principle of legality.

ii.) Articles 22 and 23 of the Statute control the prosecution and punishment of substantive crimes, not procedural law

[117] *See below* paras.74-76.
[118] *Blaškić* Decision, para.58 (emphasis added). *See also* para.60 (contemplating that "national authorities" will "assist the International Tribunal by enforcing the orders in case of non-compliance", even where such orders are issued directly by "a Judge or a Chamber" of the international court or tribunal).
[119] *Blaškić* Decision, para.58.
[120] *Blaškić* Decision, para.57.

58. Since an enforceable summons—in the sense of a witness summons coupled with a request to a State to enforce the summons—does not entail the imposition of any sanction by the Court, it is a purely procedural matter. As a result, it is not governed by Articles 22 and 23 of the Statute,[121] which protect against prosecution or punishment for substantive crimes which were not proscribed by the Statute at the time they were committed. This is apparent from their plain language.[122]

59. The Sang Defence invites the Appeals Chamber to refer to the practice of the European Court of Human Rights ("ECtHR"),[123] but confuses the applicable provisions and jurisprudence.[124] Article 5(1) of the European Convention on Human Rights ("ECHR")—to which the Sang Defence expressly refers[125]—requires that a deprivation of liberty must be "in accordance with a procedure prescribed by law." One such procedure, according to Article 5(1)(b) of the ECHR, is:

> the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law.

60. The Sang Defence is correct that even procedural law must possess the necessary quality of law for the purpose of Article 5(1). Yet the Sang Defence is incorrect in implying that Article 5(1) therefore undermines the approach of the Trial Chamber concerning enforceable summonses. For the reasons which follow,[126] there is no doubt that any sanction imposed by the GoK upon a witness summonsed to appear before the Court would meet this test, having a "sufficient basis in domestic law" in so far as it is "prescribed by" a law "meeting the requirements of Article 5(1)".[127]

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[121] *See* Kress, C, '*Nulla poena nullum crimen sine lege*' in *Max Planck Encyclopaedia of Public International Law* (OUP: article updated February 2010) ("[t]he legality principle does not apply to rules of criminal procedure"); Trechsel, S,. *Human Rights in Criminal Proceedings* (OUP: 2005), p.111.
[122] *See* Statute, Arts.22(1) (referring to a person being "criminally responsible under this Statute"), 22(2) (referring to the "definition of a crime"), 23 (referring to a person "convicted by the Court").
[123] Mr. Sang's Appeal, para.41 [Mr. Sang's Corrigendum, para.36]. *See also* Mr. Ruto's Appeal, paras.16, 32, 34.
[124] *See* Mr. Sang's Appeal, paras.39-41 [Mr. Sang's Corrigendum, paras.34-36].
[125] Mr. Sang's Appeal, para.39 [Mr. Sang's Corrigendum, para.34].
[126] *See below* paras.74-76.
[127] *Creanga v. Romania*, 29226/03, 23 February 2012, para.120. *See also Medvedyev v France*, 3394/03, 29 March 2010, para.80 ("a standard which requires that all law be sufficiently precise to avoid all risk of

61. Conversely, it is Article 7(1) of the ECHR—not expressly cited by the Sang Defence—which is most analogous to Articles 22 and 23 of the Statute. This does not apply to procedural law. Hence, in the *Scoppola* case, the Grand Chamber of the ECtHR:

> reiterate[d] that the rules on retrospectiveness set out in Article 7 of the Convention apply only to provisions defining offences and the penalties for them; on the other hand, in other cases, the Court has held that it is reasonable for domestic courts to apply the *tempus regit actum* principle with regard to procedural laws.[128]

Second Issue: 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 to assist in compelling the appearance of witnesses subject to a subpoena

62. The Trial Chamber did not err in law in concluding that the GoK is obliged to cooperate in the service and enforcement of witness summonses in order to ensure their appearance before the Court in Kenya.[129] The Decision correctly observed that Kenya's laws do not preclude such an obligation, bearing in mind the stipulation in Article 93(1)(l) that the Court may request any type of assistance that is not prohibited under the laws of the requested State. In particular, the Decision correctly analysed the relevant provisions of Kenya's ICA, and rightly concluded that nothing in the ICA prohibits the GoK from cooperating with the Court in the manner requested.[130] To the contrary, the ICA gives direct force of law in Kenya to, *inter alia*, Articles 64(6)(b), 93(l)(d) and 93(1)(l) of the Statute, meaning that they operate to affect the rights and obligations both of Kenyan citizens and the GoK.[131] As noted in

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arbitrariness and to allow the citizen—if need be, with appropriate advice—to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail").

[128] *Scoppola v. Italy (No.2)*, 10249/03, 17 September 2009 ("*Scoppola v Italy*"), para.110. The case cited by the Sang Defence—*Martirosyan v. Armenia*, 23341/06, 5 February 2013, para.56—expressly follows *Scoppola*: *see* Mr. Sang's Appeal, para.39, fn.57 [Mr. Sang's Corrigendum, para.34, fn.47].

[129] *Contra* Mr. Ruto's Appeal, para.27; Mr. Sang's Appeal, para.64 [Mr. Sang's Corrigendum, para.59].

[130] Decision, paras.157-161, 164.

[131] Decision, paras.173-177.

the Decision, this analysis is amply supported by a recent domestic ruling before the High Court of Kenya.[132]

63. The Sang Defence and Ruto Defence show no error in the Decision. Nothing in Part 9 of the Statute is unfair or improper in obliging the GoK to serve and enforce summonses compelling witnesses to appear before the Court through video-link or *in situ* proceedings conducted in Kenya. The GoK is not relieved of this obligation by any express prohibition in Kenyan law, which must be positively established.[133] Likewise, any sanctions applied by the GoK to summonsed witnesses who fail to appear would be consistent with Kenyan law.[134]

Part 9 of the Statute enables the Court to request the GoK to serve and enforce witness summonses

64. The Trial Chamber correctly observed that the combined effect of Article 93(1)(d) governing "the service of documents" and Article 93(1)(l) permitting the Court to request "[a]ny other type of assistance which is not prohibited by the law of the requested State" enables the Court to request the GoK to serve the witness summonses and facilitate the compelled appearance of witnesses in the manner contemplated by the Decision. Likewise, it correctly observed that reliance on Article 93(1)(l) requires due respect to relevant domestic laws.[135] The Trial Chamber was thus correct to focus its analysis on whether Kenyan law prohibits performance of the request.

i.) <u>The Trial Chamber's interpretation of Article 93(1)(l) is not unfair or impractical</u>

[132] Decision, para.178.
[133] *Contra* Mr. Sang's Appeal, paras.64-65 [Mr. Sang's Corrigendum, paras.59-60]; Mr. Ruto's Appeal, paras.29-31, 38.
[134] *Contra* Mr. Ruto's Appeal, paras.48-49; *see also* paras.32-37.
[135] *See* Decision, para.152.

65. Contrary to the Defence arguments, there is nothing unfair or impractical in the way in which Article 93(1)(l) is responsive to established national law.[136] As previously explained,[137] the Trial Chamber correctly interpreted Article 93(1)(l), in the context of Articles 69(2) and 93(1)(a)-(k).[138]

66. The Sang Defence wrongly claims that the Court's reliance on Article 93(1)(l) would be impractical, as it leaves it to different States to establish the extent of their cooperation with the Court.[139] However, this policy argument cannot show any error in the Decision because it is contrary to the express statutory provision. Article 93(1)(l) leaves it to the State—and necessarily in good faith—to show that its national law prohibits the type of request made.[140] Scope for divergence in the forms of assistance States provide in this fashion is thus inevitable since national law may vary from State to State. Yet this variation does not lead to the "total confusion" which the Sang Defence foreshadows.[141] Moreover, as the Trial Chamber stressed,[142] Article 93(3) of the Statute suggests that the national law precluding an Article 93(1)(l) request must amount to "an existing fundamental legal principle of general application". This high threshold would limit the extent to which the Court is "more effective in certain situations than in others". [143]

67. In relation to unfairness, the Sang Defence argues that it would be unfair to State Parties and contrary to their sovereignty for the Trial Chamber to interpret a State's own law differently from its own understanding.[144] This argument assumes an incorrect premise; the Trial Chamber did not seek to make a dispositive interpretation of relevant Kenyan law but only to verify the existence or non-

[136] *Contra* Mr. Sang's Appeal, para.67 [Mr. Sang's Corrigendum, para.62].
[137] *See above* paras.27-31.
[138] *Contra* Mr. Ruto's Appeal, paras.29-31.
[139] *See* Mr. Sang's Appeal, para.67 [Mr. Sang's Corrigendum, para.62].
[140] Decision, para.115.
[141] *Contra* Mr. Sang's Appeal, para.67. *See also* para.62. [Mr. Sang's Corrigendum, para.62; *see also* para.57.]
[142] Decision, para.115.
[143] *See* Mr. Sang's Appeal, para.67 [Mr. Sang's Corrigendum, para.62].
[144] Mr. Sang's Appeal, para.68 [Mr. Sang's Corrigendum, para.63].

existence of a Kenyan law prohibiting the requested assistance. It did so for the limited purpose of carrying out its own duty under the Statute. The Trial Chamber found no such prohibition, despite its repeated invitation to the Defence and the Attorney-General of Kenya to draw to its attention any such aspect of Kenyan law, including beyond the ICA.[145] In this context, there was no error in declining to adopt the Attorney-General's interpretation of the ICA, or preferring that of counsel for the Legal Representative of Victims (also a member of the Bar of Kenya), given the law's actual content on a plain reading of the text.

ii.) Nothing in Kenyan law expressly prohibits the service and enforcement of ICC summonses

68. The Ruto and Sang Defence both argue that the relevant Kenyan domestic law explicitly prohibits the compulsion of witnesses to appear before the ICC, contending that section 86 of the ICA, governing the service of a summons to appear before the Court, must be read in light of, *inter alia*, sections 87-89.[146] This argument fails to show, however, that Kenyan law expressly prohibits the service and enforcement of witness summonses, and therefore shows no error in the Decision.

69. Sections 87-89 of the ICA do not establish a general rule for voluntary appearance before the Court.[147] Instead, as is clear from the accompanying marginal notes in the ICA, sections 87-89 implement Article 93(1)(e) only.[148] Nothing in the text suggests that the consent requirements of sections 87-89 apply to *all* witnesses, including those summonsed pursuant to Article 93(1)(d), those called for the taking of evidence under Article 93(1)(b), those required to appear pursuant to Articles 64(6)(b) and/or 93(1)(l), nor those that may be heard before the Court sitting *in situ* pursuant to Article 3 and Rule 100. Similarly, no reference to sections 87-89 of the ICA is found in

[145] Decision, para.164.
[146] Mr. Sang's Appeal, para.70 [Mr. Sang's Corrigendum, para.65] (referring to ICA, ss.87-92); Mr. Ruto's Appeal, para.42 (referring to ICA, ss.87-89).
[147] *Contra* Mr. Ruto's Appeal, para.42; Mr. Sang's Appeal, para.70 [Mr. Sang's Corrigendum, para.65].
[148] *See further* ICA, s.20 (setting out the various forms of requests for assistance contemplated by the Act). Sections 87-89 clearly relate to requests to facilitate voluntary appearance under section 20(a)(vi).

sections 78-80, 86, 108, and 161, which implement these other forms of assistance established in the Statute. Moreover, any domestic legislation that would subject the operation of self-standing provisions of the Statute—such as Articles 64(6)(b), 93(1)(b) or 93(1)(l)—to the conditions of Article 93(1)(e), contrary to the terms of the Statute, would not reflect the cooperation duties of State Parties. The Decision was correct in identifying no such limitation in the ICA.[149]

70. The Ruto Defence's alternative argument—that the silence in section 86 as to the enforceability of a witness summons deprives it of any compellability—is also misplaced. As the Ruto Defence itself observes, this provision is perforce focused on the *service* of a summons.[150]

71. The Ruto Defence's further argument that nothing in section 108 of the ICA, implementing Article 93(1)(l) of the Statute, indicates that it may be used to enforce documents served under section 86[151] fails either to explain why such express reference is necessary (given the open-ended formulation of Article 93(1)(l) and section 108 of the ICA) or why the absence of such an express reference constitutes a prohibited extension of the law.[152]

iii.) The absence of an express enabling clause in Kenyan law is insufficient to bar Article 93(1)(l) requests

72. Rather than identifying an express prohibition under national law, the Sang Defence argues, in the alternative, that it is sufficient for a 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.[153] This argument shows no error, however, and should be dismissed. The Trial Chamber's approach, requiring

[149] Decision, paras.158-161, 164.
[150] *See* Mr. Ruto's Appeal, para.40.
[151] Mr. Ruto's Appeal, para.41.
[152] *See also below* paras.72-73.
[153] Mr. Sang's Appeal, para.72 [Mr. Sang's Corrigendum, para.67].

an express prohibition in Kenyan law, was derived from the express terms of Article 93(1)(l) of the Statute. The Sang Defence's proposed test would in fact reverse the condition clearly set out in Article 93(1)(l) from one that depends on the absence of contrary domestic law to one that requires express enabling legislation.

73. Such a reading would also contradict the object of Article 93(1)(l) which was drafted to serve as a 'catch all' provision to enable the Court to request from State Parties any other type of assistance, "with a view to facilitating investigation and prosecution of crimes within the jurisdiction of the Court".[154] This includes measures which, even though not present in a State's implementing legislation, can nonetheless be made available to the Court at its request, since it is "not prohibited by the law of the requested State". Thus, for a request under Article 93(1)(l), a prohibition in national law cannot be presumed from silence, but must be express.[155] The Decision correctly analysed the conditions and requirements of Article 93(1)(l) as well as its overall scope within the context of the Statute and committed no error in refusing to incorporate limitations on a provision that is clear in its own terms.[156]

Any sanctions applied to summonsed witnesses by the GoK to compel their appearance are fully effective under Kenyan law, and would conflict neither with international human rights law or the Constitution of Kenya

74. The Ruto Defence and Sang Defence are incorrect to suggest that a sanction imposed by the GoK on a summonsed witness who fails to appear would conflict either with international human rights law or the Constitution of Kenya.[157]

[154] *See* Kress and Prost, p.1579; Decision, para.115.
[155] Such an approach is also not alien to Kenya's legal system. For example, in *Livingstone Maina Ngare v. Republic*, the High Court of Kenya held that despite the absence of a specific provision in the Kenyan law of evidence or procedure, the taking the evidence of witnesses in a criminal trial in Kenya by video-link was not prohibited. Thus he concurred that what is not expressly prohibited is permitted—provided it serves the ends of justice: *see Livingstone Maina Ngare v Republic*, [2011] eKLR, 28 July 2011. *See also Equity Bank Limited v Capital Construction Limited and Three Others*, [2012] eKLR (interpreting the provisions of the new Kenyan constitution, granting Kenyans access to justice over undue observance of procedural technicalities).
[156] Decision, paras.115, 117, 147-156.
[157] *Contra* Mr. Ruto's Appeal, paras.16, 37, 48-49; Mr. Sang's Appeal, paras.72-73 [Mr. Sang's Corrigendum, paras.67-68].

Examination of the ICA itself demonstrates the GoK's intention to give effect to its duty of cooperation with the Court through the ordinary and well-established mechanisms of Kenyan criminal law, as explained in detail in the following summary.[158] These mechanisms provide reasonable notice to all relevant individuals of the "consequences of non-compliance with an ICC summons including the penalties which [a summonsed witness] might face", and meet the requirements both of the Constitution of Kenya and international human rights law.[159] The interpretation of the ICA advanced by the Ruto Defence—which posits the complete isolation of the ICA from the remainder of Kenyan criminal law—is not only untenable but also contradictory to the object and purpose of the ICA, which must have been intended to enable cooperation with the Court and not to frustrate it. Hence:

- Section 20(1) of the ICA—which identifies possible requests that may be made of the GoK by the Court—expressly recognises requests pertaining to Article 64 of the Statute.[160] Furthermore, "[n]othing" in section 20 "limits the type of assistance that the ICC may request under the Rome Statute or […] prevents the provision of assistance to the ICC otherwise than under this Act".[161]

- Section 86(3) of the ICA requires the GoK to serve summonses issued by the Court "requiring a person to appear as a witness".[162] The obligation to serve a summons must necessarily assume an obligation to enforce the requirement that the summonsed person appear. Otherwise, a summons would be more than an invitation for which the Court requires no assistance.

[158] *Contra* Mr. Ruto's Appeal, paras.42, 44, 48.
[159] *Contra* Mr. Ruto's Appeal, paras.37, 48.
[160] ICA, s.20(1)(b)(iii). *See* Decision, para.162. *See also* ICA, s.20(1)(a) (detailing other possible requests).
[161] ICA, s.20(2). *See* Decision, para.163.
[162] *See also* ICA, s.86(1) (marginal note citing Article 64, *inter alia*, as the relevant legal basis).

- Sections 4, 20, and 108 of the ICA expressly link the operation of the ICA to the laws of Kenya.[163]

- Section 80 of the ICA—which regulates the taking of evidence from witnesses pursuant to Article 93(1)(b) of the Statute—provides that "[t]he applicable law with respect to compelling a person to appear"[164] before a Kenyan Judge is "*the law of Kenya* that applies to the giving of evidence or the answer of questions or the production of documents […] on the hearing of a charge against a person for an offence against the law of Kenya".[165] This is set out, *inter alia*, in sections 144-149 of the Kenyan Criminal Procedure Code,[166] and further implemented by the International Crimes (Procedures for Obtaining Evidence) Rules.[167]

- Section 23 of the ICA implements Article 99(1) of the Statute, which provides that requests for cooperation are to be executed "in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein".[168]

- Section 162 of the ICA provides that, when sitting in Kenya, the Court may "perform any of its functions" including "taking evidence". Section 163, which further affirms that the Court may exercise its functions and powers when

[163] *See* Decision, paras.162-164, 173-177 (citing ICA, ss.4, 20).
[164] ICA, s.80(1).
[165] ICA, s.80(2) (emphasis added).
[166] The Criminal Procedure Code (Cap 75), Rev.2009, Official Law Reports of the Republic of Kenya ("CPC"), at s.144(1), provides that "a court having cognizance of a criminal cause or matter may issue a summons to that person requiring his attendance before the court […]". A person who does not appear in obedience to such a summons may be arrested and thereafter detained for production at the hearing: *see* CPC, ss.145-147.
[167] International Crimes (Procedures for Obtaining Evidence) Rules, 2010, L.N. 177/2010 [Kenya]. Rule 8 provides that a summons served on a witness for this purpose shall specify "the date any intended witness is *required* to appear" (emphasis added). Rule 10 provides that "[a] witness who has been summoned to give evidence or to produce a document *shall appear*" (emphasis added).
[168] Among the relevant procedures that would be applicable for the execution of the requested measure, whether by means of implementing a video-link from the territory of Kenya or the holding of in situ hearings, thus, would be the relevant Kenyan laws that govern the taking of evidence from witnesses in Kenya: *see also above* para.48.

sitting in Kenya, is described in the marginal note to be derived from Articles 4(2) and 64 of the Statute.

75. These provisions, especially sections 23, 80 and 162-163 of the ICA, show a clear and express link between the ICA and relevant domestic law compelling the appearance of witnesses—including but not limited to "section 144 of the Criminal Procedure Code"[169]—for the purpose of cooperation under Article 93(1)(b) of the Statute. This link, which is not addressed by either the Ruto Defence or Sang Defence, must necessarily also inform the interpretation of the provisions governing cooperation under Article 93(1)(d) and (l) of the Statute – since they would represent relevant laws of Kenya that can be made operable pursuant to sections 4, 20, 23 and 108 of the ICA. Furthermore, not only may the Court equally rely on Article 93(1)(b) as an alternative basis to issue enforceable summons to the GoK, as explained above,[170] but the ICA also envisages that—in the event s/he is not satisfied that an Article 93(1)(l) cooperation request "is in accordance with Kenyan law"[171]—the Attorney-General of Kenya must "consult with the ICC" and "consider whether the assistance can be provided […] in an alternative manner",[172] such as for example via Article 93(1)(b). The Decision correctly concluded that no limitation is present in the ICA which would prevent the implementation of an enforceable summons,[173] nor would any resulting sanctions amount to impermissible retroactive criminal legislation with respect to Kenyan citizens.

76. Both the Ruto Defence and the Sang Defence also claim that the witnesses affected by the Decision have repeatedly been told that their "participation" in the proceedings before the Court is voluntary.[174] To the contrary, although the

[169] *See* Mr. Ruto's Appeal, para.49.
[170] *See above* paras.44-48.
[171] ICA, s.108(1)(b).
[172] ICA, s.108(3). *See also* Statute, Art.93(3).
[173] Decision, para.164.
[174] Mr. Ruto's Appeal, para.37; Mr. Sang's Appeal, para.42 [Mr. Sang's Corrigendum, para.37].

Prosecution routinely ensures that witnesses are aware an *interview* is voluntary,[175] it also routinely informs them that they may be subsequently called to testify. Inviting the witness to indicate whether, if they are called to testify, they will do so voluntarily does not amount to a positive assurance that their appearance will in fact be voluntary.

Mr. Sang's Appeal is oversized

77. As a final matter, the Prosecution notes that Mr. Sang's Appeal is oversized and fails to comply with the limit specified by the Appeals Chamber.[176] Although its document in support of the appeal consists of 25 pages, it significantly exceeded the word limit for those pages. The Sang Defence employs two techniques to circumvent and exceed the page limit specifically imposed by the Appeals Chamber.

78. First, the Sang Defence exceeds the permitted average of 300 words per page,[177] using an average of approximately 360 words per page.[178] Effectively, this amounts to five additional pages of substantive arguments, notwithstanding the Appeals Chamber's express determination of the length of brief allowed in this case.

79. Second, the Sang Defence exceeds the permitted page limit by incorporating sweeping references to submissions made before the Trial Chamber[179] without articulating these arguments on appeal. By so doing, the Sang Defence imports a significant additional number of pages of its arguments before the Trial Chamber

[175] *E.g.* Dissent, para.15, fn.21 (referring to records of relevant witness interviews).
[176] Page Limit Extension Decision, para.5.
[177] Page Limit Extension Decision, para.5 (recalling Regulation 36(3): "[a]n average page shall not exceed 300 words").
[178] An approximate word count of the individual pages of Mr. Sang's Appeal shows the following figures, divided by 25 pages, resulting in the calculation of the average described: page 3(324); page 4(388); page 5(411); page 6(408); page 7(430); page 8(423); page 9(436); page 10(386); page 11(413); page 12(421); page 13(397); page 14(466); page 15(390); page 16(426); page 17(445); page 18(404); page 19(401); page 20(444); page 21(356); page 22(433); page 23(417); page 24(400), page 25(86).
[179] *See* Mr. Sang's Appeal, paras.10 [Mr. Sang's Corrigendum, para.6] (reliance on previous trial submissions for the interpretation of the term "require"), 45 [Mr. Sang's Corrigendum, para.40] (reference, by example, to trial submissions in footnote 68 [Mr. Sang's Corrigendum, fn.54]), 50 [No relevant reference in Mr. Sang's Corrigendum] (reliance on trial submissions on the vertical nature and primary jurisdiction of the ICTR/Y).

and therefore unacceptably extends his submissions on appeal. This is not permitted. As the appellant, Mr. Sang is expected to demonstrate an error on appeal through specific arguments on appeal, and the mere reference to arguments set out before the Trial Chamber is insufficient as an argument on appeal.[180] Submissions incorporated in this manner should be rejected.

Conclusion

80. The appeal should be dismissed. The Statute is clear, and the outcome of the Decision confirming the Court's power to summons witnesses and to request State Parties to enforce those summonses is not only correct but also eminently reasonable. The Decision rightly gives effect to the intention of the Statute's drafters for the Court to act effectively in obtaining the appearance of witnesses, and so discharge its onerous mandate, while respecting and working with the State Parties to the Statute.

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Fatou Bensouda, Prosecutor

Dated this 8th day of July 2014

At The Hague, The Netherlands

[180] *See Uwinkindi v. the Prosecutor*, ICTR-01-75-AR11*bis*, Decision on Uwinkindi's Appeal against the Referral of his Case to Rwanda and Related Motions, 16 December 2011, para.36; *Nshogoza v. the Prosecutor*, ICTR-2007-91-A, Judgement, 15 March 2010, para.18; *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-A, Judgement, 22 April 2008, para.46; *Nahimana et al. v. the Prosecutor*, ICTR-99-52-A, Judgement, 28 November 2007, para.231; *Muhimana v. the Prosecutor*, ICTR-95-1B-A, Judgement, 21 May 2007, para.87; *Prosecutor v. Brđanin*, IT-99-36-A, Judgement, 3 April 2007, para.35. *See also Prosecutor v. Haraqija and Morina*, IT-04-84-R77.4-A, 23 July 2009, Judgement, para.26; *Prosecutor v. Galić*, IT-98-29-A, Judgement, 30 November 2006, paras.250, 273.