Cour
Pénale
Internationale

International
Criminal
Court

Original: English

No. ICC-01/09-01/11 OA 7 OA 8
Date: 9 October 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 document

Judgment

on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation"

Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for Mr William Samoei Ruto
Mr Karim A. A. Khan
Mr David Hooper

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

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation" of 17 April 2014 (ICC-01/09-01/11-1274-Corr2),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

1. The "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation" is confirmed. The appeals are dismissed.
2. "The Government of the Republic of Kenya's Observations under Rule 103 in relation to the Defence Appeal against the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation" are accepted.
3. The "Clarification to the Government of the Republic of Kenya's Observations under Rule 103 in relation to the Defence Appeal against the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation" is rejected.

REASONS

I. KEY FINDINGS

1. Article 64 (6) (b) of the Statute gives Trial Chambers the power to compel witnesses to appear before it, thereby creating a legal obligation for the individuals concerned.

2. Under article 93 (1) (b) of the Statute the Court may request a State Party to compel witnesses to appear before the Court sitting *in situ* in the State Party's territory or by way of video-link.

II. PROCEDURAL HISTORY

A. Proceedings before the Trial Chamber

3. On 29 November 2013, the Prosecutor filed the "Prosecution's request under article 64(6)(b) and article 93 to summon witnesses".[1] A corrected and amended version of the Prosecutor's request was filed on 5 December 2013[2] (hereinafter: "Request for Summonses"). On 8 January 2014, Mr William Samoei Ruto (hereinafter: "Mr Ruto") and Mr Joshua Arap Sang (hereinafter: "Mr Sang") filed their respective responses to the Request for Summonses.[3]

4. Having been granted leave by Trial Chamber V (A) (hereinafter: "Trial Chamber") to do so,[4] on 10 February 2014, the Prosecutor filed her reply to Mr Ruto's and Mr Sang's responses,[5] and on 11 February 2014, the Republic of Kenya (hereinafter: "Kenya") filed its submissions on the Request for Summonses.[6]

---

[1] ICC-01/09-01/11-1120-Conf-Exp, with confidential annexes A-H, dated 28 November 2013 and registered on 29 November 2013. A confidential redacted version of this filing was registered on 29 November 2013, ICC-01/09-01/11-1120-Conf-Red; a corrigendum was filed on 2 December 2013, ICC-01/09-01/11-1120-Conf-Red-Corr; a public redacted version dated 29 November 2013 was registered on 2 December 2013, ICC-01/09-01/11-1120-Red2. In the present judgment, references are to the public redacted version.

[2] "Corrected and amended version of 'Prosecution's request under article 64(6)(b) and article 93 to summon witnesses' (ICC-01/09-01/11-1120-Conf-Exp)", ICC-01/09-01/11-1120-Red2-Corr. Trial Chamber V (A) used this version in its decision.

[3] Mr Ruto: "Defence response to the corrected and amended version of 'Prosecution's request under article 64(6)(b) and article 93 to summon witnesses'", ICC-01/09-01/11-1136-Conf-Exp, with confidential annexes A and B and confidential *ex parte* annexes C and D; a confidential redacted and public redacted versions were filed on the same day, ICC-01/09-01/11-1136-Conf-Red; ICC-01/09-01/11-1136-Red2. Mr Sang: "Sang Defence Response to the Prosecution's Request under Article 64(6)(b) and Article 93 to Summon Witnesses", ICC-01/09-01/11-1138-Conf; a public redacted version was filed on 10 January 2014, ICC-01/09-01/11-1138-Red.

[4] "Decision on status conference and additional submissions related to 'Prosecution's request under article 64(6)(b) and article 93 to summon witnesses'", 29 January 2014, ICC-01/09-01/11-1165, p. 6. *See also* "Prosecution request for leave to reply to the Ruto Defence's 8 January 2014 and the Sang Defence's 8 January 2014 response to the Prosecution's request under Article 64(6)(b) and Article 93 to summon witnesses and variation of time limits under Regulation 35(2)", 16 January 2014, ICC-01/09-01/11-1148-Conf.

[5] "Prosecution reply to the Ruto Defence's 8 January 2014 and the Sang Defence's 8 January 2014 responses to the Prosecution's request under article 64(6)(b) and article 93 to summon witnesses and variation of time limits under Rule [*sic*] 35(2)", ICC-01/09-01/11-1183-Conf. A public redacted version was filed on 11 February 2014, ICC-01/09-01/11-1183-Red.

[6] "The Government of the Republic of Kenya's Submissions on the 'Prosecution's Request under Article 64 (6) (b) and Article 93 to Summon Witnesses'", dated 10 February 2014 and registered on 11 February 2014, ICC-01/09-01/11-1184.

5. On 14 and 17 February 2014, the Trial Chamber held a status conference in which matters related to the Request for Summonses were discussed.[7]

6. On 20 February 2014, the Prosecutor filed the "Prosecution's supplementary request under article 64(6)(b) and article 93 to summon a further witness"[8] (hereinafter: "Supplementary Request").

7. On 4 March 2014, Mr Ruto and Mr Sang,[9] the Legal Representative of Victims,[10] and the Prosecutor[11] filed further submissions on the Request for Summonses.

8. On 8 April 2014, Mr Ruto filed the "Additional Defence Submissions concerning the Prosecution's request under Articles 64(6)(b) and 93 to summon witnesses and Prosecution Witness P-0015".[12] On 14 April 2014, the Legal Representative,[13] the Prosecutor[14] and Mr Sang[15] responded thereto.

9. On 17 April 2014, the Trial Chamber rendered the "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation"[16] (hereinafter: "Impugned Decision") and, by majority, Judge Herrera

---

[7] Transcript of 17 February 2014, ICC-01/09-01/11-T-88-CONF-ENG (ET).
[8] ICC-01/09-01/11-1188-Conf-Exp with six confidential annexes, dated 19 February 2014 and registered on 20 February 2014. A confidential redacted version dated 19 February 2014 was filed on 20 February 2014, ICC-01/09-01/11-1188-Conf-Red.
[9] "Additional Defence submissions on the corrected and amended version of 'Prosecution's request under article 64(6)(b) and article 93 to summon witnesses'", ICC-01/09-01/11-1200-Conf; a public redacted version was filed on 5 March 2014, ICC-01/09-01/11-1200-Red.
[10] "Common Legal Representative for Victims' Response to the Prosecution's Request and Supplementary Request under Article 64(6)(b) and Article 93 to Summons Witnesses", ICC-01/09-01/11-1201.
[11] "Prosecution's further submissions pursuant to the Prosecution's request under article 64(6)(b) and article 93 to summon witnesses", dated 4 March 2014 and registered on 5 March 2014, ICC-01/09-01/11-1202 (hereinafter: "Prosecution's Further Submissions").
[12] ICC-01/09-01/11-1262-Conf with confidential annex A.
[13] "Response of the Common Legal Representative for Victims to the additional Defence Submissions Concerning the Prosecution's Request Under Article [*sic*] 64(6)(b) and 93 of the Rome Statute to Summon Witnesses and Prosecution Witness P-0015", ICC-01/09-01/11-1270-Conf.
[14] "Prosecution Response to 'Additional Defence Submissions concerning the Prosecution's request under Articles 64(6)(b) and 93 to summon witnesses and Prosecution Witness P-0015', ICC-01/09-01/11-1262-Conf", ICC-01/09-01/11-1271-Conf.
[15] "Sang Defence Response to Urgent Additional Ruto Defence Submissions concerning the Prosecution's request under Articles 64(6)(b) and 93 to summon witnesses and Prosecution Witness P-0015", ICC-01/09-01/11-1272-Conf.
[16] 17 April 2014, ICC-01/09-01/11-1274-Corr2.

Carbuccia dissenting,[17] requiring the appearance of eight witnesses "as a matter of obligation on them, to testify before this Trial Chamber by video-link or at a location in Kenya and on such dates and times as the Prosecutor or the Registrar [...] shall communicate to them" and requesting Kenya, *inter alia*, "to facilitate, by way of compulsory measure as necessary, the appearance of the indicated witnesses for testimony before the Trial Chamber by video-link or at a location in Kenya on such dates and times as the Prosecutor or the Registrar [...] shall indicate".[18]

10. On 5 May 2014, Mr Ruto and Mr Sang filed their respective applications for leave to appeal the Impugned Decision,[19] to which the Prosecutor responded on 16 May 2014.[20]

11. On 23 May 2014, the Trial Chamber rendered the "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"[21] (hereinafter: "Leave to Appeal Decision"), *inter alia* granting, by majority, Judge Chile Eboe-Osuji partly dissenting,[22] Mr Ruto's and Mr Sang's applications for leave to appeal the Impugned Decision on two issues, namely: (i) "[w]hether a chamber has the power to compel the testimony of witnesses"; and (ii) "[w]hether [...] Kenya, a State party to the Rome Statute, is under an obligation to cooperate with the Court to serve summonses and assist in compelling the appearance of witnesses subject to a subpoena".[23]

---

[17] "Dissenting Opinion of Judge Herrera Carbuccia on the 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation'", 29 April 2014, ICC-01/09-01/11-1274-Anx annexed to the Impugned Decision.
[18] Impugned Decision, pp. 77-78.
[19] "Defence application for leave to appeal the 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation'", ICC-01/09-01/11-1291; "Sang Defence Request for Leave to Appeal the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", ICC-01/09-01/11-1293.
[20] "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 Rule 103(1) to join as *amicus curiae*", 16 May 2014, ICC-01/09-01/11-1309.
[21] ICC-01/09-01/11-1313.
[22] "Partly dissenting opinion of Judge Eboe-Osuji", 28 May 2014, ICC-01/09-01/11-1313-Anx-Corr annexed to Leave to Appeal Decision.
[23] Leave to Appeal Decision, para. 40, pp. 23-24.

B. Proceedings before the Appeals Chamber

12. On 3 June 2014, further to requests submitted by Mr Sang,[24] Mr Ruto,[25] and the Prosecutor,[26] the Appeals Chamber rendered the "Decision on requests of Mr William Samoei Ruto and Mr Joshua Arap Sang for extension of page limit for their documents in support of the appeal"[27] (hereinafter: "Decision on Extension of Page Limit"), in which it granted an extension by five pages to 25 pages for Mr Sang's and Mr Ruto's respective documents in support of the appeals and decided that the Prosecutor may file a consolidated response of 45 pages to the documents in support of the appeals.[28]

13. Also on 3 June, Kenya requested the Appeals Chamber to grant leave to make submissions on the appeals under rule 103 of the Rules of Procedure and Evidence[29] (hereinafter: "Rule 103 Request").

14. On 5 June 2014, the Appeals Chamber rendered the "Decision on the request of the Prosecutor for an extension of the time limit for her consolidated response to the

---

[24] "Urgent Sang Defence Application for an Extension of the Page Limit for the Defence's Appeal against the 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation'", 29 May 2014, ICC-01/09-01/11-1320 (OA 7).
[25] "Ruto Defence application to join the Urgent Sang Defence Application for an Extension of the Page Limit for the Defence's Appeal against the 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation'", 30 May 2014, ICC-01/09-01/11-1322 (OA 8).
[26] "Prosecution Response to the Defence Requests for an Extension of the Page Limit for the Defence Appeals against the 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation' and Prosecution Request for an Extension of the Page Limit and the Time Limit", 2 June 2014, ICC-01/09-01/11-1328 (OA 7 OA 8).
[27] ICC-01/09-01/11-1335 (OA 7 OA 8). *See also* "Order for response to requests of Mr William Samoei Ruto and Mr Joshua Arap Sang for extension of page limit for their documents in support of the appeal", 30 May 2014, ICC-01/09-01/11-1325 (OA 7 OA 8).
[28] Decision on Extension of Page Limit, paras 5-6.
[29] "The Government of the Republic of Kenya's Request to File Amicus Submissions in the Appeal against the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", 3 June 2014, ICC-01/09-01/11-1333 (OA 7 OA 8); *see also* "Order for responses to the Republic of Kenya's request for leave to make observations under rule 103 of the Rules of Procedure and Evidence", 4 June 2014, ICC-01/09-01/11-1338 (OA 7 OA 8); "Prosecution Response to the Government of the Republic of Kenya's Request to File Amicus Submissions in the Appeal against the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", 5 June 2014, ICC-01/09-01/11-1342 (OA 7 OA 8); "Defence response to the 'Government of the Republic of Kenya's Request to File Amicus Submissions in the Appeal against the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation'", 5 June 2014, ICC-01/09-01/11-1339 (OA 7 OA 8); "Sang Defence response to the Government of the Republic of Kenya's request to file amicus submissions in the appeal against the Decision on Prosecutor's application for witness summonses and resulting request for State party cooperation", 5 June 2014, ICC-01/09-01/11-1341 (OA 7 OA 8).

documents in support of the appeals"[30] (hereinafter: "Decision on Extension of Time Limit"), extending the time limit for the filing of the Prosecutor's consolidated response to 20 June 2014.[31]

15. On the same day, Mr Ruto filed the "Defence appeal against the 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation'"[32] (hereinafter: "Mr Ruto's Document in Support of the Appeal"), requesting suspensive effect of his appeal and that the Appeals Chamber reverse the Impugned Decision.[33] Mr Sang filed the "Sang Defence appeal against the *Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation*".[34]

16. On 10 June 2014, the Appeals Chamber rendered the "Decision on the Republic of Kenya's request for leave to make observations under rule 103 of the Rules of Procedure and Evidence"[35] (hereinafter: "Rule 103 Decision") in which it granted the Rule 103 Request.[36]

17. On 17 June 2014, the Appeals Chamber rendered the "Decision on Mr William Samoei Ruto's request for suspensive effect", rejecting the request for suspensive effect.[37]

18. On 20 June 2014, the Prosecutor filed the "Prosecution consolidated response to Mr. Ruto and Mr. Sang's appeals against the 'Decision on the Prosecutor's

---

[30] ICC-01/09-01/11-1346 (OA 7 OA 8). *See also* "Order for responses to the request of the Prosecutor for an extension of the time limit for her response to the documents in support of the appeal", 2 June 2014, ICC-01/09-01/11-1331 (OA 7 OA 8) and "Sang Defence response to the request of the Prosecutor for an extension of the time limit for her response to the document in support of the appeal", 3 June 2014, ICC-01/09-01/11-1332 (OA 7 OA 8).
[31] Decision on Extension of Time Limit, p. 6.
[32] ICC-01/09-01/11-1345 (OA 8).
[33] Mr Ruto's Document in Support of the Appeal, para. 54.
[34] ICC-01/09-01/11-1344 (OA 7).
[35] ICC-01/09-01/11-1350 (OA 7 OA 8).
[36] Rule 103 Decision, para. 7.
[37] ICC-01/09-01/11-1370 (OA 7 OA 8). *See also* "Order on the filing of a response to request for suspensive effect", 6 June 2014, ICC-01/09-01/11-1348 (OA 7 OA 8); "Sang Defence Response to Ruto Defence Request for Suspensive Effect of 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", 10 June 2014, ICC-01/09-01/11-1354 (OA 7 OA 8); "Prosecution Response to Mr Ruto's Request for Suspensive Effect", 10 June 2013, ICC-01/09-01/11-1355 (OA 7 OA 8).

Application for Witness Summonses and resulting Request for State Party Cooperation'".[38]

19. On 25 June 2014, Kenya submitted its observations in relation to the appeals[39] (hereinafter: "Kenya's Observations").

20. On 26 June 2014, Mr Sang filed the "Corrigendum to Sang Defence appeal against the *Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation*"[40] (hereinafter: "Mr Sang's Document in Support of the Appeal"), requesting that the Appeals Chamber "intervene to rectify the Majority's errors".[41]

21. On 30 June 2014, the Prosecutor[42] (hereinafter: "Prosecutor's Response to Kenya's Observations"), Mr Sang[43] (hereinafter: "Mr Sang's Response to Kenya's Observations") and Mr Ruto[44] (hereinafter: "Mr Ruto's Response to Kenya's Observations") filed responses to Kenya's Observations.

22. On 4 July 2014, the Appeals Chamber rendered the "Decision on Mr William Samoei Ruto's and Mr Joshua Arap Sang's applications for leave to make further submissions and on Mr Joshua Arap Sang's corrigendum of 26 June 2014"[45] (hereinafter: "Decision of 4 July 2014"), rejecting the requests advanced by Mr Sang and Mr Ruto to make further submissions[46] and inviting the Prosecutor to file a

---

[38] ICC-01/09-01/11-1380 (OA 7 OA 8).
[39] "The Government of the Republic of Kenya's Observations under Rule 103 in relation to the Defence Appeal against the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", ICC-01/09-01/11-1406 (OA 7 OA 8).
[40] ICC-01/09-01/11-1344-Corr (OA 7 OA 8) with annex.
[41] Mr Sang's Document in Support of the Appeal, para. 70.
[42] "Prosecution response to the Government of the Republic of Kenya's observations on the Appeals against the 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation'", ICC-01/09-01/11-1412 (OA 7 OA 8) with a public annex.
[43] "Sang Defence Response to *Government of the Republic of Kenya's Observations under Rule 103 in relation to the Defence Appeal against the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation*", ICC-01/09-01/11-1413 (OA 7 OA 8).
[44] "Defence response to 'The Government of the Republic of Kenya's Observations under Rule 103 in relation to the Defence Appeal against the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation'", ICC-01/09-01/11-1414 (OA 7 OA 8).
[45] ICC-01/09-01/11-1417 (OA 7 OA 8).
[46] *See* "Defence application for leave to address specific issues raised in the 'Prosecution consolidated response to Mr. Ruto and Mr. Sang's appeals against the 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation'", 25 June 2014, ICC-01/09-01/11-1404 (OA 7 OA 8); "Sang Defence Request for an order by the Appeals Chamber to permit the appellant to address specific issues raised in the 'Consolidated response to Mr. Ruto and Mr. Sang's appeals against the "Decision on the Prosecutor's Application for Witness Summonses and resulting

revised version of her consolidated response, given that Mr Sang had, on 26 June 2014, filed a corrigendum to the document in support of the appeal he had filed on 5 June 2014 and to which the Prosecutor had responded on 20 June 2014.[47]

23. On 8 July 2014, the Prosecutor filed the "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"[48] (hereinafter: "Consolidated Response to the Documents in Support of the Appeals").

24. On 14 July 2014, the "Clarification to the Government of the Republic of Kenya's Observations under Rule 103 in relation to the Defence Appeal against the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation"[49], dated 11 July 2014, was registered (hereinafter: "Kenya's Clarification"). The Prosecution responded thereto on 15 July 2014.[50]

III. PRELIMINARY ISSUES

A. Excess of page and word limits of Kenya's Observations

25. The Prosecutor recalls that the Appeals Chamber in its Rule 103 Decision had set a limit of ten pages for Kenya's Observations.[51] She recalls that pursuant to regulation 36 (3) of the Regulations of the Court, an average page shall not exceed 300 words.[52] She recalls furthermore that the Appeals Chamber has previously held that "the page limit under Regulation 37(1) 'has to be read as including both the cover and notification pages'",[53] and submits that Kenya's Observations "exceed these

---

Request for State Party Cooperation'"", 26 June 2014, ICC-01/09-01/11-1409 (OA 7 OA 8). *See also* "Prosecution response to Mr. Sang's application under Regulation 28(2) for leave to address 'specific issues' arising from the appeals against the 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation'", 27 June 2014, ICC-01/09-01/11-1410 (OA 7 OA 8).

[47] Decision of 4 July 2014, paras 14, 17.

[48] ICC-01/09-01/11-1380-Corr (OA 7 OA 8).

[49] ICC-01/09-01/11-1431 (OA 7 OA 8).

[50] "Prosecution response to the Government of Kenya's 'Clarification' to its Observations on the appeals against the 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation', and request for dismissal *in limine*", ICC-01/09-01/11-1435 (OA 7 OA 8) (hereinafter: "Request for Dismissal *In Limine*").

[51] Prosecutor's Response to Kenya's Observations, para. 2 referring to Rule 103 Decision, para. 8.

[52] Prosecutor's Response to Kenya's Observations, para. 2.

[53] Prosecutor's Response to Kenya's Observations, footnote 6, citing *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the 'Prosecution's request to strike Thomas Lubanga's Reply or, alternatively, for leave to respond to its new argument'", 26 March 2013, ICC-01/04-01/06-3002 (A5 A6), para. 7

restrictions, being 11 pages in length and averaging approximately 328 words per page".[54]

26. The Appeals Chamber notes that Kenya's Observations indeed do not comply with the page limit set in the Rule 103 Decision and appear to exceed the average number of words per page, as stipulated in regulation 36 (3) of the Regulations of the Court. Under regulation 29 (1) of the Regulations of the Court, in case of non-compliance with the provisions of any of the Regulations of the Court or an order a Chamber made thereunder, "the Chamber may issue any order that is deemed necessary in the interests of justice". The Appeals Chamber notes in this regard that the page limit was exceeded by one page only, which contains the signature of the Attorney General of Kenya, while the excess of words per page appears to be relatively limited. For that reason, the Appeals Chamber considers that it is in the interests of justice to accept Kenya's Observations on an exceptional basis, also in light of the overall short length of the document. Nevertheless, the Appeals Chamber recalls that the parties and participants to appeals proceedings are required "to add to the end of their filling a short, signed statement" certifying the total number of words and its compliance with the requirements of regulation 36 of the Regulations of the Court.[55]

B. Kenya's Clarification

27. The Appeals Chamber notes that Kenya's Clarification contain "clarified observations" in relation to section 80 of its International Crime Act[56] (hereinafter: "ICA").[57] Kenya argues that this is the first time it has been required to interpret this provision and recalls that pursuant to regulation 28 of the Regulations of the Court, the Appeals Chamber has the discretion to accept clarifications or additional details on any document.[58] Kenya argues further that the Appeals Chamber may also be moved to do so in the interests of justice.[59]

---

[54] Prosecutor's Response to Kenya's Observations, para. 2.
[55] *See* "Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi'", 24 July 2014, ICC-01/11-01/11-565 (OA 6), para. 32.
[56] Kenya, International Crimes Act, Act No.16 of 2008.
[57] Kenya's Clarification, para. 3.
[58] Kenya's Clarification, paras 2-3.
[59] Kenya's Clarification, para. 2.

28. The Prosecutor requests that the Appeals Chamber dismiss Kenya's Clarification *in limine* because, in her view, "it amounts to an impermissible reply in support of [Kenya's Observations]".[60] The Prosecutor argues further that Kenya mischaracterises the Court's discretion under regulation 28 of the Regulations of the Court to "order" clarifications or further submissions as a general discretion to "receive" additional filings.[61] This mischaracterisation, she argues, "frustrates the very judicial economy which [r]egulation 28 is intended to promote".[62] In the Prosecutor's view, the approach taken by Kenya which amounts to "enabling the Parties to file speculative additional filings in the hope that the Court may choose to receive them [...] should be firmly discouraged".[63] Moreover, the Prosecutor contends that by not clearly seeking leave from the Appeals Chamber to file its clarification, Kenya's approach "disregards the Appeals Chamber's specific admonition to the Parties not to use [Kenya's Observations] as a covert means 'to reply to each other'".[64]

29. The Appeals Chamber recalls that, in the Rule 103 Decision, Kenya was invited, pursuant to rule 103 of the Rules of Procedure and Evidence, to make its observations on the appeal within a set time limit. The Rule 103 Decision did not provide for any further submissions by Kenya. The Appeals Chamber notes that regulation 28 (1) of the Regulations of the Court provides that "[a] Chamber may order the participants to clarify or to provide additional details on any document within a time limit specified by the Chamber". It is clear from this provision that a participant may file a clarification only once the relevant Chamber has ordered him or her to do so. The Appeals Chamber notes that Kenya's Clarification was filed without prior authorisation by the Appeals Chamber.

30. In these circumstances, the Appeals Chamber considers that Kenya's Clarification must be rejected. In that regard, the Appeals Chamber notes further that the additional submissions on section 80 (4) of the ICA exceed the specific question that Kenya was permitted to make observations on, namely, whether it has the obligation "to cooperate with the Court to serve summonses and assist in compelling

---

[60] Request for Dismissal *In Limine*, paras 1-2, 7.
[61] Request for Dismissal *In Limine*, para. 3.
[62] Request for Dismissal *In Limine*, para. 3.
[63] Request for Dismissal *In Limine*, para. 3.
[64] Request for Dismissal *In Limine*, para. 4.

the appearance of witnesses".[65] Furthermore, the Appeals Chamber is of the view that, given Kenya's substantial submissions before the Trial Chamber and the Appeals Chamber, the proposed "clarified observations" do not assist the Appeals Chamber in the proper determination of the issue on appeal.

IV. MERITS

31. The present appeals arise from requests by the Prosecutor that the Trial Chamber order witnesses to appear to give testimony in Kenya, either before the Trial Chamber sitting *in situ* or by way of video-link.[66] In the Impugned Decision, the Trial Chamber ordered the witnesses concerned to appear before the Court in the manner sought by the Prosecutor and requested Kenya to facilitate their appearance, "by way of compulsory measure as necessary".[67] In making these orders, the Trial Chamber primarily relied on the doctrine of implied powers,[68] principles of customary international criminal procedural law,[69] and the rule of good faith.[70] The Trial Chamber also referred to the applicable provisions of the Statute: (i) article 64 (6) (b) of the Statute regarding the power to compel a witness to appear before the Court,[71] and (ii) article 93 (1) (e) and (l) of the Statute regarding Kenya's obligation to cooperate in respect of enforcement of summons.[72] The Appeals Chamber notes that some of the Trial Chamber's statements in the Impugned Decision could give rise to the understanding that such powers could also be used to oblige a State Party generally in respect of compelling witnesses to appear before the Court. The Appeals Chamber recalls that the issues on appeal are limited to the specific questions arising in the case at hand, namely witness appearance before the Trial Chamber sitting *in situ* or by way of videolink. Accordingly, the Appeals Chamber's judgment is limited to those questions.

---

[65] Rule 103 Decision, para. 7.
[66] Request for Summonses, para. 100, B; Supplementary Request, para. 20, B; Prosecution's Further Submissions, para. 35; Consolidated Response to the Documents in Support of the Appeals, para. 2.
[67] Impugned Decision, p. 77.
[68] Impugned Decision, paras 65-87, 104-119.
[69] Impugned Decision, paras 88-93.
[70] Impugned Decision, paras 120-133.
[71] Impugned Decision, paras 95-101.
[72] Impugned Decision, paras 146-156.

A. Standard of review

32. Mr Ruto and Mr Sang essentially allege that the Impugned Decision is tainted by errors of law. In relation to errors of law, the Appeals Chamber has previously held that it "will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law".[73] The Appeals Chamber has also stated that "[i]f the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision".[74]

B. Relevant Part of the Impugned Decision

33. In the Impugned Decision, the Trial Chamber first considered whether, generally speaking, it had the power to compel witnesses to appear before it. It stated that the objects and purpose of the Court need to be considered for the proper determination of the issue under litigation, in particular the States Party's commitment to put an end to impunity and guarantee the enforcement of international justice.[75]

(a) The Trial Chamber generally has the power to compel the appearance of witnesses

(i) The resort to the doctrines of "implied" powers and "customary international criminal procedure"

34. The Trial Chamber referred to the doctrine of implied powers according to which "[i]f the power [...] under consideration is such that the functions [...] 'could not be effectively discharged' without the power [...] in question, the international body or institution '*must* be deemed to have [that power]'" (emphasis in original).[76] It found that article 4 (1) of the Statute codifies this doctrine[77] by providing that "[t]he Court shall have international legal personality. It shall *also* have *such legal capacity*

---

[73] *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation'", 17 February 2012, ICC-02/05-03/09-295 (OA 2), para. 20.
[74] *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation'", 17 February 2012, ICC-02/05-03/09-295 (OA 2), para. 20.
[75] Impugned Decision, paras 63-64.
[76] Impugned Decision, para. 74. *See generally* Impugned Decision paras 65-82.
[77] Impugned Decision, paras 83, 94.

as may be necessary for the exercise of its functions and the fulfilment of its purposes" (emphasis in original).[78]

35. The Trial Chamber found that "the power to compel the attendance of witnesses is an incidental power that is critical for the performance of the essential functions of the Court".[79] The Trial Chamber further referred to the legal framework of several other international tribunals to conclude that "it is also a matter of customary international criminal procedural law that a Trial Chamber of an international criminal court has traditionally been given the power to subpoena the attendance of witnesses".[80]

(ii) Article 64 (6) (b) of the Statute

36. The Trial Chamber considered that "[o]n the basis of the principle of implied powers [...] article 4 (1) would be an ample basis to imply any reasonable power necessary for the effective discharge of the mandate of the [Court]",[81] and found that:

> But, as regards the specific power to compel the attendance of witnesses, the States Parties did not leave the power merely to the process of implication. The intention was indicated in explicit language. That intention is immediately apparent in the French, the Spanish and the Arabic texts of article 64(6)(b) of the Statute–which are no less authoritative than the English text. The French version provides as follows: 'Dans l'exercise de ses fonctions avant ou pendant un procès, la Chambre de première instance peut, si besoin est...*Ordonner la comparution des témoins*...'. The Spanish version says this: 'Al desempeñar sus funciones antes del juicio o en el curso de éste, la Sala de Primera Instancia podrá, de ser necesario...*Ordenar la comparecencia y la declaración de testigos*...'. 'Ordonner' in French and 'ordenar' in Spanish translate into 'to order' in English. The equivalent word in the Arabic text is [*al amr*], meaning to issue an order or a command. [Emphasis in original.][82]

37. The Trial Chamber noted that the word 'require' means, according to the Oxford Thesaurus, 'order' and 'command' and has the same meaning as 'coerce' and 'force'.[83]

38. The Trial Chamber continued as follows:

---

[78] Impugned Decision, para. 94.
[79] Impugned Decision, para. 86.
[80] Impugned Decision, para. 88. *See generally* Impugned Decision, paras 88-93.
[81] Impugned Decision, para. 94.
[82] Impugned Decision, para. 95.
[83] Impugned Decision, para. 98.

> In light of the above, there is no doubt at all in the Chamber's view that when article 64(6)(b) says that the Chamber may 'require the attendance of witnesses', the provision means that the Chamber may–as a compulsory measure–*order* or subpoena the appearance of witnesses as the Arabic, the French and the Spanish texts so clearly say. [Emphasis in original.][84]

(b) Kenya is under an obligation to cooperate with the Court to serve summonses and assist in compelling the appearance of witnesses before the Court

39. In relation to the question of whether Kenya is under an obligation to cooperate with the Court to serve summonses and assist in compelling the appearance of witnesses before the Court, the Trial Chamber first recalled the doctrine of implied powers as a general principle of international law.[85] The Trial Chamber further reiterated that in light of such principle, "article 4(2) will recognise the power to subpoena witnesses in Kenya to appear before the Chamber, in the absence of any other provision of the [...] Statute that clearly excludes that power".[86]

40. The Trial Chamber stated:

> 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 [*sic*] carry out its essential functions. Article 93(1)(l) makes that very clear. But, care was taken to show sensitivity to national laws in the provision of article 93(1)(l). It is then up to the State on whom a request has been made to specify how national law *prohibits* –in good faith- the type of the request that was made. Notably, the prohibition must be seen to be in good faith, because article 93(3) states that the prohibition needs to be 'on the basis of an existing fundamental legal principle of general application'. *Ad hominem* prohibitions patently or latently directed against the ICC for no good reason will be insufficient.
>
> 116. The indication in article 93(1)(e) of 'voluntary appearance' of witnesses among types of assistance listed in article 93(1) does not readily preclude a State Party from rendering assistance in the manner of compelling the appearance of witnesses under the subpoena of a Trial Chamber.
>
> 117. That the drafters of the Statute saw fit to indicate assistance in the nature of facilitating 'voluntary appearance' of witnesses as an assistance that a State Party shall give, when requested, will always have the value of ensuring not only that a State Party has an obligation to assist such witnesses to appear voluntarily (rather than leave them to their own devices); but it also obligates a

---

[84] Impugned Decision, para. 100.
[85] Impugned Decision, para. 104. *See generally* Impugned Decision, paras 105-108.
[86] Impugned Decision, para. 110.

State Party to refrain from impeding the voluntary appearance of a witness. [...][Emphasis in original.][87]

41. The Trial Chamber decided that "[i]t does not follow, then, that there could not be an obligation upon the State to render assistance to the [Court] by compelling a witness, in accordance with national law, to appear before a Trial Chamber, at the request of the Chamber",[88] and concluded that "[t]he latter kind of assistance clearly falls under the rubric of '[a]ny other type of assistance which is not prohibited by the law of the requested State'".[89]

42. In relation to the arguments advanced by Mr Sang, Mr Ruto and Kenya regarding canons of interpretations such as *generalia non specialibus derogant* and *expression unius est exclusion alterius,* the Trial Chamber held that "no 'canon' of interpretation of legal texts is ever exclusive in its control over the process of interpretation".[90] The Trial Chamber recalled article 31 (1) of the *Vienna Convention on the Law of Treaties* (hereinafter: "*Vienna Convention*"), requiring that the 'ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose', and concluded that "[t]his directive, then, does override the role of any canon that urges a meaning to be given to the provisions of any treaty regardless of its context and object and purpose".[91]

43. The Trial Chamber further held that, based on the rule of good faith as a principle of international law in the interpretation and implementation of treaties, "'the spirit' of a treaty [...] that ought to prevail over its imperfect letter, will doubtless comprise what [...] are powers of an international organisation that derive from 'necessary implication as being essential to the performance of its duties'".[92] Particularly with reference to the Court, it concluded that "it will include the power to require States Parties to lend necessary assistance in compelling the attendance of witnesses, using compulsory measures, without which the [Court] will be unable to discharge its essential function[s]".[93]

---

[87] Impugned Decision, paras 115-117.
[88] Impugned Decision, para. 117.
[89] Impugned Decision, para. 117.
[90] Impugned Decision, para. 119.
[91] Impugned Decision, para. 119.
[92] Impugned Decision, para. 129.
[93] Impugned Decision, para. 129.

44. On the basis of the principle of complementarity, the Trial Chamber considered that since "a genuine international crimes trial in a domestic court must comprise the power of the domestic court to compel witnesses to appear",[94] the Court cannot be put in a "weaker stead to conduct such trials before it".[95] The Trial Chamber further stated that pursuant to article 21 (1) (c) of the Statute, which "allows national legal systems [...] to supply powers and remedies not clearly or expressly provided for in the [Statute] and related instruments",[96] the Court subrogates "into the position of a national criminal court that is exercising jurisdiction genuinely and in good faith in the search for the truth".[97]

45. Also noting the limited value of the *travaux préparatoires* of the Rome Statute,[98] the Trial Chamber found unpersuasive the parties' submissions that the late addition in the drafting history of the word 'voluntary' to article 93 (1) (e) of the Statute meant that the drafters intended to limit the assistance that States Parties are required to render as regards appearance of witnesses to only voluntary assistance.[99] According to the Trial Chamber, this is not a reasonable construction of the provision.[100]

46. As regards the interaction between article 93 (1) (e) and 93 (1) (l) of the Statute, the Trial Chamber stated that "the better construction of article 93(1)(e) is a construction that makes sense of it in its very own context –which must recognise the necessary interaction of that provision with article 93(1)(l), in a manner that gives each its proper value".[101] Accordingly, a reading of the two provisions together "makes eminent sense, given the nature of the jurisdiction of the [Court] as complementary to the jurisdiction of the State".[102]

47. In the Trial Chamber's view, this is because:

---

[94] Impugned Decision, para. 138.
[95] Impugned Decision, para. 138.
[96] Impugned Decision, para. 138.
[97] Impugned Decision, para. 138.
[98] Impugned Decision, paras 141-145.
[99] Impugned Decision, para. 146.
[100] Impugned Decision, para. 147.
[101] Impugned Decision, para. 148.
[102] Impugned Decision, para. 148.

> 149. [...] The [Court], being a court that exercises jurisdiction that is complementary to the jurisdiction of national courts, is not given powers of primacy that are inconsistent with the domestic legal order, on matters of compellability of witnesses located within the particular domestic forum. That being the case, when a witness indicates a wish to appear voluntarily, the State Party is obliged to realise that wish without further condition –pursuant to article 93(1)(e).
>
> [...]
>
> 151. Compelled appearance, on the other hand, involves, by definition, essential legal antagonism between the unwilling witness and any person (including the police) or entity (including a State) that seeks to compel the witness into something that s(h)e does not wish to do. The essence of the rule of law in the average law-abiding State is that each State Party would have organised its internal affairs in such manner that adversarial relationships between the State (or its agents) and the subject are to be governed by the law. Since the laws that govern such adversarial relations vary in their detail and complexity from one State to the other in each State's relationship with its own subjects, it is sensible that the Rome Statute had refrained from imposing on all States Parties –in the stroke of any provision in the Statute-a standard obligation to facilitate compelled appearance (foreseeably to be resisted by the witness) at the request of the [Court]. But, this does not mean that article 93(1) eschews every obligation on States Parties to facilitate compelled appearance. It means only that it is to be done in accordance with article 93(1)(l) –i.e. if *bona fide* domestic law does not forbid it. [...] [103]

48. With regard to the question of whether Kenyan law precludes an obligation on Kenya to assist the Court in the facilitation of compelled appearance of a witness, the Trial Chamber recalled that "the Attorney-General and the Defence avoided giving an answer to that question".[104] The Trial Chamber held that "no one has brought to the attention of the [Trial] Chamber any *bona fide* law of Kenya that specially precludes an obligation on Kenya to assist the [Court] in the facilitation of compelled appearance of a witness".[105]

49. As to the ICA, the Trial Chamber held that no provision therein prevents Kenya from complying with a request to facilitate the compulsory appearance of witnesses pursuant to a request issued under article 93 (1) (l) of the Statute.[106] The Trial Chamber noted section 20 (2) of the ICA, providing that "[n]othing in this section- (a) limits the type of assistance that the [Court] may request under the [Statute] or the

---

[103] Impugned Decision, paras 149, 151.
[104] Impugned Decision, para. 158.
[105] Impugned Decision, para. 160.
[106] Impugned Decision, para. 162-164.

[Rules of Procedure and Evidence]; or, (b) prevents the provision of assistance to the [Court] otherwise than under this Act, including assistance of an informal nature".[107]

50. The Trial Chamber finally noted that, in light of section 2 (6) of the Constitution of Kenya, section 4 (1) of the ICA and recent jurisprudence of the High Court of Kenya, article 93 (1) (l) of the Statute has direct force of law in Kenya.[108] In light of the foregoing, the Trial Chamber held that articles 93 (1) (l), 64 (6) (b) and 93 (1) (e) of the Statute do affect rights and obligations of both the citizens and Kenya.[109]

C. Submissions of the Parties and Kenya

1. Mr Sang's and Mr Ruto's submissions

(a) Does the Trial Chamber have the power to compel the appearance of witnesses?

(i) The resort to the doctrines of "inherent" or "implied" powers and "customary international criminal procedure"

51. In light of the legal framework governing the functioning of the Court, Mr Sang and Mr Ruto aver that the Trial Chamber erred in assuming a "statutory lacuna" or uncertainty in relation to the issue of summons and therefore in resorting to article 4 of the Statute to support the doctrine of implied powers of the Chamber in addition to customary international criminal procedural law.[110] In their opinion, the question of compelling the appearance of a witness is "expressly and comprehensively dealt with"[111] in the Statute and Rules of Procedure and Evidence. Contrary to the Trial Chamber's finding, Mr Sang submits that no norm vesting international criminal tribunals with the power to compel witnesses to testify exists in customary international criminal procedure.[112] According to him, State practice in terms of compulsory subpoena powers is not uniform but inconsistent.[113]

---

[107] Impugned Decision, para. 163.
[108] Impugned Decision, paras 173-179 referring to Kenya, High Court, *Barasa v Cabinet Secretary of the Ministry of Interior and National Coordination & Ors,* Petition No 288 of 2013, 31 January 2014.
[109] Impugned Decision, para. 173.
[110] Mr Sang's Document in Support of the Appeal, paras 25, 30. *See also* Mr Sang's Document in Support of the Appeal, paras 26-27, 29, 50-51.
[111] Mr Sang's Document in Support of the Appeal, paras 28, 30; Mr Ruto's Document in Support of the Appeal, paras 22-25.
[112] Mr Sang's Document in Support of the Appeal, paras 52-53.
[113] Mr Sang's Document in Support of the Appeal, para. 54.

52. Mr Sang submits further that the Court's situation differs from the situation at the International Criminal Tribunal for former Yugoslavia (hereinafter: "ICTY") and the International Criminal Tribunal for Rwanda (hereinafter: "ICTR"), where Chambers are vested with the "power [...] to prosecute witnesses who refuse to comply with a subpoena".[114] Mr Sang argues that, while being aware of the ICTY and ICTR's position, the drafters of the Statute and the Rules of Procedure and Evidence deliberately excluded any such power despite a proposal made to that effect, which goes to show that the drafters "had no intention of compelling witnesses to appear before the Court".[115]

53. Mr Sang submits that the Trial Chamber's reliance on the principle of "good faith" to conclude that States Parties intended "to create an effective Court – not one at the mercy of witnesses" is misplaced.[116] Mr Sang argues that the 'good faith' argument is untenable because it "must be consistent with the spirit and object of the text and cannot circumvent the intention of the drafters" of the Statute, which considered that "the pursuit of international justice was possible without a compulsory subpoena power".[117]

(ii) Article 64 (6) (b) of the Statute

54. With respect to the scope of article 64 (6) (b) of the Statute, Mr Sang avers that the term 'require' is "less forceful" than 'order' and that the provision does not refer specifically to a power to compel witnesses to testify or indicate that witnesses required to attend trial "*must* appear" (emphasis in original).[118] Consequently, he contends that an obligation upon witnesses to appear cannot be inferred from this provision.[119]

55. Mr Ruto contends that, contrary to the Trial Chamber's finding, the term 'require' used in article 64 (6) (b) of the Statute "cannot be divorced from the other terms of the Statute and equate to compulsory 'order'".[120] In that connection, he

---

[114] Mr Sang's Document in Support of the Appeal, para. 11.
[115] Mr Sang's Document in Support of the Appeal, para. 12.
[116] Mr Sang's Document in Support of the Appeal, paras 38-39.
[117] Mr Sang's Document in Support of the Appeal, paras 41-42. *See also* Mr Sang's Document in Support of the Appeal, paras 43-48.
[118] Mr Sang's Document in Support of the Appeal, para. 6
[119] Mr Sang's Document in Support of the Appeal, para. 6.
[120] Mr Ruto's Document in Support of the Appeal, para. 15.

argues that Trial Chambers have no power to issue binding orders to States but can only request their cooperation.[121]

(iii) The principle of legality

56. Mr Sang and Mr Ruto submit that pursuant to rule 65 of the Rules of Procedure and Evidence only witnesses who appear before the court can be compelled to testify and subsequently sanctioned under rule 171 of the Rules of Procedure and Evidence if they refuse to do so.[122] However, Mr Ruto underlines, the issue at hand does not concern rule 65 of the Rules of Procedure and Evidence.[123] With regards to the sanctions provided for in article 71 of the Statute, Mr Sang avers that they are applicable only to persons present before the Court.[124] In this connection, Mr Sang and Mr Ruto contend further that the inability to issue compellable summonses is further supported by the fact that the Court's legal framework as well as Kenya domestic legislation do not establish the offence that an unwilling witness may commit or the penalty that would be applicable where he/she refuses to comply with a summons to appear.[125] Mr Sang argues that the sanctioning of witnesses refusing to appear before the Court violates the principle *nullum crimen sine lege* enshrined in article 22 (1) of the Statute because there is no clear and unambiguous legal provision establishing such a penalty.[126] Mr Ruto adds that "no offence and resulting penalty can be read into the Statute because this would be contrary to [a]rticles 21(3), 22 and 23 of the Statute".[127]

57. Mr Ruto submits further that the Trial Chamber erred by "assuming that national law considerations are the only bar to the types of request that a Trial Chamber might properly make of a State Party under [a]rticle 93(1)(l)" of the Statute.[128] In his view, "the relief ordered contravenes basic internationally recognised human rights standards and guarantees of due process" because "[n]either the Statute

---

[121] Mr Ruto's Document in Support of the Appeal, para. 15.
[122] Mr Sang's Document in Support of the Appeal, para. 10; Mr Ruto's Document in Support of the Appeal, para. 4.
[123] Mr Ruto's Document in Support of the Appeal, para. 4.
[124] Mr Sang's Document in Support of the Appeal, para. 10.
[125] Mr Sang's Document in Support of the Appeal, paras 31-36; Mr Ruto's Document in Support of the Appeal, paras 16, 32-37.
[126] Mr Sang's Document in Support of the Appeal, paras 31-36.
[127] Mr Ruto's Document in Support of the Appeal, para. 16 referring to Mr Ruto's Document in Support of the Appeal, paras. 32-37.
[128] Mr Ruto's Document in Support of the Appeal, para. 32.

nor any of the Court's other legal instruments articulate in sufficiently precise terms that individuals who no longer wish to testify may be summoned to appear on penalty of arrest and/or fine".[129]

58. Mr Sang contends that article 64 (6) (b) of the Statute "does not grant the Court with a *subpoena* power compelling any witness to be called or re-called against his or her will".[130] Mr Sang argues that this is because this provision "must be read with the limitations of [a]rticle 64(1)" of the Statute, which stipulates that the power and functions of the Trial Chamber under article 64 of the Statute must be exercised in accordance with the Statute and the Rules of Procedure and Evidence, but these legal texts do not provide for the compulsory testimony of a witness.[131] Mr Sang stresses that when interpreting article 64 (6) (b) of the Statute in the context of the Statute as a whole, it is clear that such provision does not establish "a basis for compelling witnesses to testify".[132]

59. Mr Ruto submits that the significance of article 64 (6) (b) of the Statute is its "direction that '*the assistance of States as provided in* [*the*] *Statute*' should be used '*if necessary*'", indicating, in his view, that the Trial Chamber lacks the power to compel attendance of witnesses (emphasis in original).[133] In this context, Mr Ruto avers that article 64 (6) (b) of the Statute should be considered in conjunction with Part 9 of the Statute.[134]

(b) Is Kenya under an obligation to cooperate with the Court to serve summonses and assist in compelling the appearance of witnesses before the Court?

60. Mr Sang avers that the reference made in article 64 (6) (b) of the Statute to Chapter 9 on cooperation with States indicates that the Chamber has to rely on State cooperation to give effect to it.[135] In his view, article 93 (1) (e) of the Statute, which provides that States are under an obligation to facilitate the voluntary appearance of witnesses, is the most relevant provision in Chapter 9 and cannot be ignored by

---

[129] Mr Ruto's Document in Support of the Appeal, paras 32, 37.
[130] Mr Sang's Document in Support of the Appeal, para. 7.
[131] Mr Sang's Document in Support of the Appeal, para. 7.
[132] Mr Sang's Document in Support of the Appeal, para. 9.
[133] Mr Ruto's Document in Support of the Appeal, para. 6.
[134] Mr Ruto's Document in Support of the Appeal, para. 6.
[135] Mr Sang's Document in Support of the Appeal, para. 13.

analysing article 64 (6) (b) of the Statute in isolation.[136] Similarly, Mr Ruto argues that article 64 (6) (b) of the Statute cannot be considered as a stand-alone provision; rather it must be read in conjunction with article 93 (1) (b), 93 (1) (e), 93 (7) of the Statute and rule 193 of the Rules of Procedure and Evidence as these provisions establish the applicable regime regarding the appearance of witnesses.[137] He adds that there is nothing in the Statute, either under Part 6 or 9 that provides for the compellability of the appearance of witnesses.[138]

61. With respect to article 93 (1) (e) of the Statute, Mr Sang submits that "no distinction is to be made between the physical appearance of a witness in The Hague, appearance elsewhere, or testimony by video-conference".[139] He argues that pursuant to article 93 (1) (e) of the Statute the appearance of a witness before the court must always be voluntary.[140] Mr Sang argues that article 93 (1) (e) of the Statute is the "*lex specialis*" and therefore it "displaces the application of more general procedures" pursuant to "the principle of *lex specialis derogate legi generali*".[141]

62. Mr Ruto argues that, with the exception of the specific situation covered by rule 193 of the Rules of Procedure and Evidence, the appearance of witnesses before the Court under article 93 (1) (e) of the Statute can only be voluntary, regardless of the location or the medium used to secure the appearance.[142] Consequently, Mr Ruto avers, the Trial Chamber lacks the authority to seek cooperation from a State to compel the appearance of unwilling witnesses.[143]

63. Mr Ruto further refers to the drafting history of article 93 of the Statute to conclude that although the approach adopted was vertical in nature, "the scheme governing witness appearance followed a horizontal approach generally found in treaties dealing with inter-State assistance in criminal matters" (footnote omitted).[144] Mr Ruto maintains that "[s]uch treaties generally do not include mechanisms to compel a witness to comply with a summons issued by a State in which the individual

---

[136] Mr Sang's Document in Support of the Appeal, para. 13.
[137] Mr Ruto's Document in Support of the Appeal, paras 17-18.
[138] Mr Ruto's Document in Support of the Appeal, para. 43.
[139] Mr Sang's Document in Support of the Appeal, para. 22.
[140] Mr Sang's Document in Support of the Appeal, para. 22.
[141] Mr Sang's Document in Support of the Appeal, para. 24.
[142] Mr Ruto's Document in Support of the Appeal, paras 7-8, footnote 18.
[143] Mr Ruto's Document in Support of the Appeal, para. 7.
[144] Mr Ruto's Document in Support of the Appeal, para. 10.

does not reside" but allow for evidence to be taken in the requested State (footnotes omitted).[145] In his view, such mechanism is illustrated in article 93 (1) (b) of the Statute.[146]

64. In relation to article 93 (1) (l) of the Statute, Mr Sang and Mr Ruto submit that the expression "any other type of assistance" contemplated in article 93 (1) (l) of the Statute indicates that such provision covers types of assistance not specifically dealt with in article 93 (1) (a) to (k) of the Statute.[147] Mr Ruto argues that the Trial Chamber erred in law when it determined that Kenya was obligated pursuant to article 93 (1) (l) of the Statute "*to assist in compelling the attendance* [...] *of the witnesses*" (emphasis in original).[148] In that regard, Mr Ruto contends that the Impugned Decision "fail[ed] to apply the correct principles of statutory interpretation" by improperly invoking "concepts such as the principle of implied powers, as well as the 'rule of good faith' and 'considerations of complementarity" rather than to "give effect to the ordinary meaning of both [a]rticles 93(1)(e) and 93(1)(l)" of the Statute.[149] In this connection, Mr Ruto avers that witness appearance, which must be '*voluntary*', is comprehensively dealt with in article 93 (1) (e) of the Statute rather than article 93 (1) (l) of the Statute (emphasis in original).[150]

65. Mr Sang and Mr Ruto submit that article 93 (7) (a) of the Statute reinforces the conclusion that the Statute does not provide for the compellability of the appearance of a witness.[151] Mr Ruto submits that article 93 (7) of the Statute is also relevant in the analysis of whether witnesses can be compelled to testify insofar as it prohibits the transfer of detained witnesses without their consent.[152] According to Mr Sang and Mr Ruto, it is senseless to affirm that detained witnesses cannot be compelled to testify while non-detained witnesses can.[153] Mr Ruto further argues that rule 193 of the Rules of Procedure and Evidence, which allows the transfer of a detained person sentenced

---

[145] Mr Ruto's Document in Support of the Appeal, para. 10.
[146] Mr Ruto's Document in Support of the Appeal, para. 10.
[147] Mr Sang's Document in Support of the Appeal, para. 24; Mr Ruto's Document in Support of the Appeal, para. 30.
[148] Mr Ruto's Document in Support of the Appeal, para. 28.
[149] Mr Ruto's Document in Support of the Appeal, para. 29.
[150] Mr Ruto's Document in Support of the Appeal, paras 30-31.
[151] Mr Sang's Document in Support of the Appeal, para. 15; Mr Ruto's Document in Support of the Appeal, para. 13.
[152] Mr Ruto's Document in Support of the Appeal, para. 13.
[153] Mr Sang's Document in Support of the Appeal, para. 15; Mr Ruto's Document in Support of the Appeal, para. 13.

by the Court without his or her consent, does not undermine this argument as it refers to detained persons under the Court's jurisdiction and not under the jurisdiction of a State Party, which is not the case with article 93 (7) of the Statute.[154]

66. Mr Sang submits further that Kenya is under no obligation to compel unwilling witnesses to appear before the Court, irrespective of where the appearance may take place on the basis that (i) it would create unequal treatment between different States Parties; (ii) the ICA explicitly prohibits the compellability of witnesses; and (iii) there is no explicit legal basis for compellability.[155]

67. With respect to unequal treatment between States Parties, Mr Sang argues that if, as the Trial Chamber found, only States that have explicitly excluded powers to compel witnesses to testify by means of subpoena are entitled to limit their cooperation to facilitate voluntary appearance, whereas States that did not do so would have "to enforce a summons through sanctions, even without an explicit legal basis for such either in the [...] Statute or domestic legislation",[156] this differential treatment would not be practical because "the result is that the ball is in the hands of the States, rather than the [Court]".[157] He adds that it would not be fair to do so as this would require the Court to interpret domestic legislation on jurisdiction on a "case-by-case evaluation", to establish whether a State has the obligation to compel the appearance of a witness before the Court.[158] Mr Sang argues in that regard that "[i]t is not for the Court to interpret a State's domestic legislation in a manner most desirable to it, nor to impose on a State an obligation to compel witnesses to testify, against the explicit will of the State" (footnote omitted).[159]

68. Mr Sang and Mr Ruto submit that due to its lack of enforcement mechanism, the Court does not have the power to compel witnesses to testify or to impose penalties on a recalcitrant witness, and therefore it can only persuade witnesses to appear before it and testify voluntarily.[160] They argue that the principle of the voluntary appearance

---

[154] Mr Ruto's Document in Support of the Appeal, para. 14.
[155] Mr Sang's Document in Support of the Appeal, paras 61-68.
[156] Mr Sang's Document in Support of the Appeal, para. 61.
[157] Mr Sang's Document in Support of the Appeal, para. 62.
[158] Mr Sang's Document in Support of the Appeal, para. 63.
[159] Mr Sang's Document in Support of the Appeal, para. 63.
[160] Mr Sang's Document in Support of the Appeal, paras 5, 31-36; Mr Ruto's Document in Support of the Appeal, paras 1, 4, 16, 32-37.

finds support in the Court's jurisprudence as well as, according to Mr Sang, in the scholarly opinion.[161]

69. In conclusion, Mr Ruto maintains that "*the Trial Chamber may well, pursuant to article 64 para. 6(b) create an international obligation of persons to appear before the Court, but that States are under no duty to enforce that obligation*" (emphasis in original).[162]

70. Regarding the ICA, Mr Sang contends that it "explicitly prohibits compellability of witnesses".[163] Mr Ruto avers that contrary to the Trial Chamber's finding, "Kenyan domestic law does prohibit the request to facilitate the compelled appearance of a witness".[164] Mr Sang stresses that section 86 (3) of the ICA contemplates the issuance of summonses but does not include "a power to impose sanctions in a case of non-compliance", and, therefore, "persons are not compellable to appear as witnesses" under that section.[165] He argues also that section 86 (3) read together with sections 87-92 of the ICA establish the requirement "that any prospective witness consents to giving evidence or assisting the Court".[166] Mr Sang avers further that contrary to the standard applied in the Impugned Decision, it is sufficient for Kenya "to demonstrate that its relevant legal provisions do not provide for an explicit basis allowing it to compel involuntary witnesses to appear before the [Court] irrespective of the location".[167] He adds that "[w]hether [a]rticle 93(1)(l) of the [...] Statute is directly or indirectly applicable in Kenya is irrelevant, as such unspecified catch-all provision cannot override [...] the constitution of a country", and therefore Kenya does not have to demonstrate an explicit prohibition against the power to compel a witness.[168]

71. Mr Ruto submits that a review of sections 86, 87-89 and 108 of the ICA shows that these provisions follow the wording of Part 9 of the Statute; therefore Kenya "is only required to serve Court issued summonses and facilitate the voluntary

---

[161] Mr Sang's Document in Support of the Appeal, paras 17-20; Mr Ruto's Document in Support of the Appeal, para. 21.
[162] Mr Ruto's Document in Support of the Appeal, para. 16.
[163] Mr Sang's Document in Support of the Appeal, para. 64.
[164] Mr Ruto's Document in Support of the Appeal, para. 38.
[165] Mr Sang's Document in Support of the Appeal, para. 65.
[166] Mr Sang's Document in Support of the Appeal, para. 65.
[167] Mr Sang's Document in Support of the Appeal, paras 67.
[168] Mr Sang's Document in Support of the Appeal, para. 68.

appearance of witnesses".[169] He argues that section 86 of the ICA, which implements article 93 (1) (d) of the Statute, only grants the Chamber the power to request States the service of documents, including summonses to witnesses rather than their enforcement.[170] In his view, sections 87 to 89, which implement article 93 (1) (e) of the Statute ensure that witnesses consented to giving evidence, which "demonstrates that the regime accepted by the Kenyan Parliament [...] is predicated on voluntary appearance".[171] Mr Ruto submits that in the absence of any provision authorising Kenyan authorities to "independently" sanction or compel unwilling witnesses, "such action by the State would be *ultra vires* and in breach of the [Kenyan] Constitution".[172]

72. Mr Ruto further agrees with the Attorney General's argument that "Kenya is not a nation where simply because something is not expressly prohibited under [domestic law] means it is permitted".[173] On the contrary, in his view, "Kenya can only coerce or impose penalties on its citizens in accordance with the law" and therefore Kenya "cannot be ordered to go beyond [its] obligations [under the Statute] save in circumstances where it has deliberately decided to provide enhanced cooperation to the Court and has enacted the relevant domestic legislation" (footnote omitted).[174] Mr Ruto stresses that "the existing fundamental legal principles of general application enshrined in the Kenyan Constitution and African Charter prevent Kenya from [compelling the] appearance of witnesses before [the] Court".[175] Mr Sang and Mr Ruto submit further that there is no legislative link either between the ICA or the Statute and sections 144-149 of the Criminal Procedure Code and therefore there is no such thing as a power to enforce summonses in Kenyan proceedings by domestic courts.[176]

---

[169] Mr Ruto's Document in Support of the Appeal, paras 39-42.
[170] Mr Ruto's Document in Support of the Appeal, para. 40.
[171] Mr Ruto's Document in Support of the Appeal, para. 42.
[172] Mr Ruto's Document in Support of the Appeal, para. 42.
[173] Mr Ruto's Document in Support of the Appeal, para. 44.
[174] Mr Ruto's Document in Support of the Appeal, para. 44. *See also* Mr Ruto's Document in Support of the Appeal, paras 45-47.
[175] Mr Ruto's Document in Support of the Appeal, para. 48.
[176] Mr Sang's Document in Support of the Appeal, para. 65; Mr Ruto's Document in Support of the Appeal, para. 49.

2. Prosecutor's submissions

(a) Does the Trial Chamber generally have the power to compel the appearance of witnesses?

(i) The resort to the doctrines of "inherent" or "implied" powers and "customary international criminal procedure"

73. The Prosecutor submits that resorting to the implied powers doctrine was not an error that materially affected the Impugned Decision,[177] because "it is not the basis on which the [Impugned] Decision was ultimately decided".[178]

(ii) Article 64 (6) (b) of the Statute

74. The Prosecutor submits that article 64 (6) (b) of the Statute provides the Court with the "power to request the service and enforcement of witness summonses, to be given effect through Part 9 of the Statute",[179] as other official language versions of the Statute clearly would confirm.[180]

75. The Prosecutor stresses that contrary to Mr Sang's contention, the Impugned Decision does not refer to a 'subpoena' power but rather to the use of enforceable summons through State Party cooperation.[181] She argues in that regard that the Trial Chamber was correct in interpreting article 64 (6) (b) of the Statute as giving it "a power to require witness appearance, which is given effect through State cooperation and domestic law".[182]

(iii) Principle of legality

76. The Prosecutor contends that articles 70 and 64 (6) (b) of the Statute are consistent insofar as domestic law would be applicable in relation to the issue of compellability of witnesses.[183]

77. The Prosecutor further argues that rule 65 of the Rules of Procedure and Evidence only addresses the situation of witnesses who appear before the Court and,

---

[177] Consolidated Response to the Documents in Support of the Appeals, paras 49.
[178] Consolidated Response to the Documents in Support of the Appeals, para. 49.
[179] Consolidated Response to the Documents in Support of the Appeals, para. 15.
[180] Consolidated Response to the Documents in Support of the Appeals, para. 17.
[181] Consolidated Response to the Documents in Support of the Appeals, para. 19. *See also* Consolidated Response to the Documents in Support of the Appeals, paras 23, 54.
[182] Consolidated Response to the Documents in Support of the Appeals, para. 19.
[183] Consolidated Response to the Documents in Support of the Appeals, para. 23.

as such, is a "narrower provision than [a]rticle 64(6)(b)" of the Statute.[184] In her view, article 64 (6) (b) of the Statute does not apply only to witnesses already before the Court because it would make article 64 (6) (d) of the Statute redundant and would be inconsistent with the plain terms of article 64 (6) (b) of the Statute, which refers to 'obtaining, if necessary, the assistance of States as provided in this Statute'.[185]

78. The Prosecutor further submits that "[the issue of enforceable summonses] is not governed by [a]rticles 22 and 23 of the Statute, which protect against the prosecution or punishment for substantive crimes [...] not proscribed by the Statute at the time they were committed".[186]

(b) Is Kenya under an obligation to cooperate with the Court to serve summonses and assist in compelling the appearance of witnesses before it?

79. The Prosecutor submits that the Trial Chamber correctly found that the provisions under Part 9 of the Statute regarding international cooperation and judicial assistance "give effect to the Court's power under [a]rticle 64(6)(b) and do not detract from it" (footnote omitted).[187] In the Prosecutor's view, the argument advanced by Mr Sang and Mr Ruto that witness appearance at the Court must be voluntary under article 93 (1) (e) of the Statute is inconsistent with the plain text of the Statute, as well as with its drafting history.[188] She maintains that such a reading of article 93 (1) (e) of the Statute would frustrate the intention of article 64 (6) (b) of the Statute by rendering the term "require" in that provision meaningless.[189]

80. According to the Prosecutor, the drafting history of article 93 (1) (e) of the Statute in particular demonstrates that States "sought only to prevent imposing obligations on State Parties to force witnesses physically to travel to the seat of the Court".[190] In her view, it also indicates that "States believed that the Court should have the power to ensure witness appearance through means other than forcible

---

[184] Consolidated Response to the Documents in Support of the Appeals, para. 20.
[185] Consolidated Response to the Documents in Support of the Appeals, para. 21.
[186] Consolidated Response to the Documents in Support of the Appeals, para. 58.
[187] Consolidated Response to the Documents in Support of the Appeals, para. 27.
[188] Consolidated Response to the Documents in Support of the Appeals, para. 29.
[189] Consolidated Response to the Documents in Support of the Appeals, para. 29.
[190] Consolidated Response to the Documents in Support of the Appeals, para. 33. *See also* Consolidated Response to the Documents in Support of the Appeals, paras 34-38.

witness transfer, including via State cooperation", which supports the approach adopted in the Impugned Decision.[191]

81. The Prosecutor contends that the scholarly article referred to by Mr Ruto in order to bolster his argument that "States have no duty to enforce the obligation to cooperate *vis-à-vis* requests under [a]rticle 93(1)(l)" of the Statute was taken out of context.[192] According to the Prosecutor, this academic work actually supports the Impugned Decision finding that "States *are* obliged to cooperate with requests submitted to them under [a]rticle 93(1)(l)" (footnote omitted, emphasis in original).[193]

82. The Prosecutor further submits that "[t]he obligation of a State to comply with requests under article 93(1)(l) 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 [such] a request".[194] The Prosecutor argues that "[n]o distinction is made for requests under different sub-paragraphs of [a]rticle 93(1)" of the Statute and, therefore, if States would not be under an obligation to comply with requests under article 93 (1) (l) of the Statute, the "consultations or modalities would not be stipulated as necessary".[195]

83. The Prosecutor submits further that the interpretation that the Trial Chamber made of article 93 (1) (l) of the Statute is not "unfair or impractical".[196] In relation to the argument advanced by Mr Sang that "the Court's reliance on [a]rticle 93(1)(l) would be impractical, as it leaves it to different States to establish the extent of their cooperation with the Court", the Prosecutor submits that no error is shown in the Impugned Decision on the basis of this policy argument "because it is contrary to the express statutory provision".[197] In relation to Mr Sang's argument that "it would be unfair to States Parties and contrary to their sovereignty for the Trial Chamber to interpret a State's own law differently from its own understanding", the Prosecutor

---

[191] Consolidated Response to the Documents in Support of the Appeals, para. 39. *See also* Consolidated Response to the Documents in Support of the Appeals, para. 42 referring to the Report of the Ad Hoc Committee, para. 233; Report of the Preparatory Committee, Vol. II, pp. 284, 253, footnote 95.
[192] Consolidated Response to the Documents in Support of the Appeals, para. 30 referring to Mr Ruto's Document in Support of the Appeal, para. 16 referring to Kreß Article 93, pp. 1576-1577.
[193] Consolidated Response to the Documents in Support of the Appeals, para. 30.
[194] Consolidated Response to the Documents in Support of the Appeals, para. 31.
[195] Consolidated Response to the Documents in Support of the Appeals, para. 31.
[196] Consolidated Response to the Documents in Support of the Appeals, paras 65-67.
[197] Consolidated Response to the Documents in Support of the Appeals, para. 66 referring to Mr Sang's Document in Support of the Appeal, para. 62.

contends that the Trial Chamber "did not seek to make a dispositive interpretation of relevant Kenyan law" but merely limited itself to "verify[ing] the existence or non-existence" of a legal provision within Kenya's domestic law "prohibiting the requested assistance".[198]

84. The Prosecution submits that article 93 (1) (b) of the Statute could also constitute an alternative basis for the taking of evidence from a witness under oath, including testimony, through State cooperation.[199] The Prosecution considers that the aforementioned provision empowers the Court to request State cooperation for the implementation of the following two measures: "'the taking of evidence' by a Trial Chamber sitting *in situ*, with recourse to domestic powers to compel witness attendance as necessary; and 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".[200] In support of her argument, the Prosecutor refers to the standard practice at the inter-State level of compelling a witness to appear on the territory of the requested State 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" (footnote omitted).[201] She avers that the implementation of both measures could be done through a request under article 93 (1) (b) of the Statute "that is executed in the manner prescribed by the Court pursuant to [a]rticle 99(1)" of the Statute.[202]

85. The Prosecutor maintains further that article 93 (7) of the Statute is not inconsistent with the Court's power to issue enforceable summonses as the drafting history of article 93 of the Statute does not reflect concern over the compulsion of witnesses to appear to testify, "but about the compulsion of witnesses [...] *to travel across international borders*" (emphasis in original).[203] In this context, the Prosecutor contends that the required consent in article 93 (7) of the Statute and the reference to voluntariness in article 93 (1) (e) of the Statute does not equate to the deliberate

---

[198] Consolidated Response to the Documents in Support of the Appeals, para. 67 referring to Mr Sang's Document in Support of the Appeal, para. 63.
[199] Consolidated Response to the Documents in Support of the Appeals, paras 44-45.
[200] Consolidated Response to the Documents in Support of the Appeals, para. 47.
[201] Consolidated Response to the Documents in Support of the Appeals, para. 45.
[202] Consolidated Response to the Documents in Support of the Appeals, para. 48.
[203] Consolidated Response to the Documents in Support of the Appeals, para. 24.

exclusion of compelled appearance from the Statute.[204] She avers that "it is clear from [a]rticle 93(7)(b) that the transfer envisioned in [a]rticle 93(7) is an international transfer, the requirement of consent is related to consent to cross an international border" (footnote omitted).[205] In that regard, the Prosecutor argues that rule 193 of the Rules of Procedure and Evidence, which does not require the consent of a detained person under the jurisdiction of the Court, further supports this argument because it implies that a detained person could be "compelled to appear to testify under the other provisions of [a]rticle 93 *within* the country in which they are detained, just as they would under domestic law" (footnote omitted, emphasis in original).[206] The Prosecutor submits that previous decisions from the Court relied upon by Mr Ruto and Mr Sang are "misplaced" because these decisions are not binding on other Trial Chambers or upon the Appeals Chamber.[207] The Prosecutor further contends that, contrary to Mr Sang's contention, she did not accept that "the Court has no power to compel witnesses to appear" in the *Prosecutor v. Thomas Lubanga Dyilo* case.[208] Rather, as the Trial Chamber correctly noted, the Prosecutor did not want "to press the Chamber to take further steps to try to secure the testimony of [a] witness".[209]

86. The Prosecutor maintains that contrary to Mr Sang's and Mr Ruto's contention regarding the voluntariness of witness participation in proceedings, the witnesses are made "aware [that] an *interview* is voluntary", and that she "also routinely informs them that they may be subsequently called to testify".[210] She argues that the fact that if called to testify, the witness is invited to indicate whether they will do so on a voluntary basis, "does not amount to a positive assurance that their appearance will in fact be voluntary".[211]

87. Regarding Kenya's domestic law, the Prosecutor contends that the Trial Chamber correctly found that "nothing in the ICA prohibits [Kenya] from cooperating with the Court in the manner requested" (footnote omitted).[212] To that effect, she

---

[204] Consolidated Response to the Documents in Support of the Appeals, para. 24.
[205] Consolidated Response to the Documents in Support of the Appeals, para. 24.
[206] Consolidated Response to the Documents in Support of the Appeals, para. 24.
[207] Consolidated Response to the Documents in Support of the Appeals, para. 25.
[208] Consolidated Response to the Documents in Support of the Appeals, para. 25.
[209] Consolidated Response to the Documents in Support of the Appeals, para. 25.
[210] Consolidated Response to the Documents in Support of the Appeals, para. 76.
[211] Consolidated Response to the Documents in Support of the Appeals, para. 76.
[212] Consolidated Response to the Documents in Support of the Appeals, para. 62.

argues that "the ICA gives direct force of law to, *inter alia*, [a]rticles 64(6)(b), article 93(1)(d) and article 93(1)(l) of the Statute".[213] The Prosecutor adds that, contrary to Mr Ruto's argument, "any sanctions applied by [Kenya] to summonsed witnesses who fail to appear would be consistent with Kenyan law" (footnote omitted).[214]

88. The Prosecutor also argues that Mr Ruto's interpretation of the ICA, which is premised on the "complete isolation of the ICA from the remainder of Kenyan criminal law" contradicts the "object and purpose of the ICA, which must have been intended to enable cooperation with the Court and not to frustrate it".[215] In support of her argument, the Prosecutor refers to sections 4, 20, 20 (1), 23, 80, 86 (3), 108 and 162 to 163 of the ICA.[216] She stresses in particular that sections 23, 80 and 162-163 of the ICA demonstrate 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 [Kenyan] Criminal Procedure Code".[217]

89. The Prosecutor avers that Mr Sang and Mr Ruto fail to show that there is a legal provision under Kenya's domestic law explicitly prohibiting the service and enforcement of witness summonses.[218] In the Prosecutor's view, "[s]ections 87-89 of the ICA do not establish a general rule for voluntary appearance before the Court" but instead these sections only implement article 93 (1) (e) of the Statute.[219] The Prosecutor argues therefore, that there is nothing in these sections which indicates that the consent requirements of these sections apply to witnesses summonsed pursuant to articles 64 (6) (b), 93 (1) (b), 93 (1) (d), and/or 93 (1) (l) of the Statute nor to witnesses that "may be heard before the Court *in situ* pursuant to [a]rticle 3 and [r]ule 100".[220] She adds that, in a similar fashion, "no reference to sections 87-89 of the ICA is found in sections 78-80, 86, 108 and 161, which implement these other forms of assistance established in the Statute".[221]

---

[213] Consolidated Response to the Documents in Support of the Appeals, para. 62.
[214] Consolidated Response to the Documents in Support of the Appeals, para. 63.
[215] Consolidated Response to the Documents in Support of the Appeals, para. 74.
[216] Consolidated Response to the Documents in Support of the Appeals, para. 74.
[217] Consolidated Response to the Documents in Support of the Appeals, para. 75.
[218] Consolidated Response to the Documents in Support of the Appeals, para. 68.
[219] Consolidated Response to the Documents in Support of the Appeals, para. 69.
[220] Consolidated Response to the Documents in Support of the Appeals, para. 69.
[221] Consolidated Response to the Documents in Support of the Appeals, para. 69.

90. The Prosecutor submits further that Mr Ruto's argument that the "silence in section 86 of the ICA as to the enforceability of a witness summons deprives it of any compellability is [...] misplaced" because that provision "is perforce focused on the *service* of a summons" (emphasis in original).[222] Similarly, in the Prosecutor's view, Mr Ruto's argument that "nothing in section 108 of the ICA, implementing [a]rticle 93(1)(l) of the Statute, indicates that it may be used to enforce documents served under section 86" of the ICA is unsubstantiated as to the reasons for the necessity of an express reference or "why the absence of such an express reference constitutes a prohibited extension of the law" (footnote omitted).[223]

91. In addition, in the Prosecutor's view, the absence of an express provision in Kenya's relevant domestic law enabling the requested assistance in the compellability of unwilling witnesses is not sufficient to bar requests under article 93 (1) (l) of the Statute because "a prohibition in national law cannot be presumed from silence, but must be express" (footnote omitted).[224] The Prosecutor adds that it would contradict the object of article 93 (1) (l) of the Statute as a 'catch all' provision.[225]

3. Kenya's Observations

92. Kenya submits that the Trial Chamber erred in holding that Kenya had a duty to compel the appearance of unwilling witnesses requested to testify, based on the following three main reasons:

> (i) it contradicts the plain language of Kenya's domestic implementing legislation, the [ICA] and its drafting history, (ii) it is contrary to the Constitution of Kenya, it would unfairly and retroactively impose a criminal sanction on witnesses who thought they were participating in a voluntary process, and (iii) it is contrary to the [...] Statute and controverts the understanding of other States Parties who have ratified the [...] Statute.[226]

93. In Kenya's view, enforcing summons issued by the Court would controvert multiple provisions of the Kenyan Constitution, in particular article 50 (2) (n) which provides for the right of Kenyan citizens not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya or a crime

---

[222] Consolidated Response to the Documents in Support of the Appeals, para. 70.
[223] Consolidated Response to the Documents in Support of the Appeals, para. 71.
[224] Consolidated Response to the Documents in Support of the Appeals, paras 72-73.
[225] Consolidated Response to the Documents in Support of the Appeals, para. 73.
[226] Kenya's Observations, para. 2.

under international law.[227] Kenya submits that it is prepared to serve the witness summons called to testify; however, given its legislative framework, it has no obligation to assist in compelling the appearance of unwilling witnesses "subject to a subpoena".[228] Kenya argues that while the Constitution of Kenya provides for the direct force of law of the Statute in Kenya, the ICA's provisions are more specific and detailed, and therefore resorting to the Statute "is not necessary and the ICA provisions take precedence".[229] For instance, Kenya argues that sections 87 to 89 of the ICA are the "*lex specialis* for the implementation of article 93(1)(e)" of the Statute.[230] In that regard, Kenya contends that the ICA "sets out the process by which Kenya cooperates with the Court, including the manner, the procedures and the modalities of cooperation that Kenya is to provide under the [...] Statute [a]rticle 93(1)".[231] Since section 23 (1) of the ICA provides that requests for assistance must be in accordance with the domestic procedure "*as provided under this Act*", Kenya argues that, contrary to the Prosecutor's contention, the ICA limits what Kenya is permitted to do and therefore it cannot rely on other domestic legislation unless provided by the ICA (emphasis in original).[232] In this respect, Kenya contends that section 23 (b) of the ICA, which pertains to "the execution of a request in a particular manner, or by using a particular procedure that is not prohibited by Kenyan law", does not undermine the limitation provided for under section 23 (1) because a "'procedure' does not include the substantive punishment of witnesses who fail to honour a subpoena from the Court".[233]

94. Kenya indicates that section 86 of the ICA regulates the service of documents and appearance of witnesses as set out in article 93 (1) (d) of the Statute.[234] It argues that although this section provides that "Kenyan agencies should use their best endeavours to have the process served, in accordance with procedures specified in the request or in accordance with the law of Kenya [...] the ICA is silent as to how a document or summons served pursuant to this provision could be enforced".[235] In

---

[227] Kenya's Observations, para. 17.
[228] Kenya's Observations, para. 4.
[229] Kenya's Observations, paras 6-7, 17.
[230] Kenya's Observations, para. 8.
[231] Kenya's Observations, para. 8.
[232] Kenya's Observations, para. 9.
[233] Kenya's Observations, para. 9.
[234] Kenya's Observations, para. 10.
[235] Kenya's Observations, para. 10.

Kenya's view, this is so because "the ICA does not empower [Kenya] to take any action against a summoned witness who then does not comply with the Court's request".[236]

95. Therefore, Kenya contends, the next logical step after the issuance of a summons is the facilitation of the voluntary appearance of witnesses before the Court regulated by section 87 of the ICA, which implements article 93 (1) (e) of the Statute.[237] Kenya argues "that there is no distinction drawn between witnesses who appear before the [Court] at the seat of the Court" and those who appear before the Court via video-link or *in situ*.[238] Kenya avers that section 88 of the ICA, which regulates the facilitation of the appearance of witnesses, sets out the specific procedure to be followed in terms of witness appearance before the Court, yet no procedure or sanctions are provided for in cases where witnesses refuse to attend voluntarily.[239]

96. In relation to article 93 (1) (l) of the Statute and section 108 of the ICA implementing such provision, Kenya contends that the State concerned is in the best position to determine what is permitted and prohibited under its domestic law, either expressly or by omission.[240] Kenya argues that if a mechanism of compelling witness to testify against their will is not provided in the ICA, then Kenya cannot do so.[241]

97. Kenya submits that, contrary to the Prosecutor's contention, section 80 of the ICA, which implements article 93 (1) (b) of the Statute is inapplicable to the instant case since it concerns the taking of evidence before Kenyan courts and not the compellability of witnesses to testify before the Court sitting in Kenya.[242] In this connection, Kenya argues that pursuant to its domestic legislation it can assist in the taking of evidence by compelling witnesses to appear before its own courts; however,

---

[236] Kenya's Observations, para. 10.
[237] Kenya's Observations, para. 11. *See also* para. 8.
[238] Kenya's Observations, para. 11.
[239] Kenya's Observations, para. 11.
[240] Kenya's Observations, para. 14.
[241] Kenya's Observations, para. 14.
[242] Kenya's Observations, para. 16.

under the same domestic legislation, it cannot compel these witnesses to appear unwillingly to testify before the Court *in situ*.[243]

98. Finally, Kenya argues that its position regarding the non-enforcement of compulsory summons is in line with other States Parties, and more importantly with the "Model Law to Implement the Rome Statute of the International Criminal Court".[244] It contends there is nothing is this model law that "suggests a state is obliged to enforce subpoenas for a witness to testify before the [Court]".[245]

4. Mr Sang and Mr Ruto's responses to Kenya's Observations

99. Mr Sang and Mr Ruto agree with all the arguments made in Kenya's Observations.[246] They support Kenya's position regarding the enforcement of compulsory summonses in light of its interpretation of the relevant sections of the ICA.[247]

5. Prosecutor's response to Kenya's Observations

100. The Prosecutor submits that Kenya's observations are "of limited assistance to the Appeals Chamber" as they "misapprehend the nature of the [Impugned] Decision, add little to the submissions of the [p]arties, and do not demonstrate any error by the Trial Chamber" (footnote omitted).[248] In support of her contention, the Prosecutor argues that Kenya's duty to assist "by enforcing the Court's summons is consistent with the ICA",[249] with Kenya's Constitution[250] and the Statute.[251]

---

[243] Kenya's Observations, para. 16.
[244] Kenya's Observations, para. 18.
[245] Kenya's Observations, paras 19-20.
[246] Mr Sang's Response to Kenya's Observations, paras 2-9; Mr Ruto's Response to Kenya's Observations, paras 2-12.
[247] Mr Sang's Response to Kenya's Observations, para. 10; Mr Ruto's Response to Kenya's Observations, para. 13.
[248] Prosecutor's Response to Kenya's Observations, paras 1, 16.
[249] Prosecutor's Response to Kenya's Observations, paras 4-9.
[250] Prosecutor's Response to Kenya's Observations, paras 10-12.
[251] Prosecutor's Response to Kenya's Observations, paras 13-15.

D. DETERMINATION BY THE APPEALS CHAMBER

1. Does a Trial Chamber generally have the power to compel the appearance of witnesses?

(a) The resort to "implied" powers and "customary international criminal procedure"

101. The Appeals Chamber recalls that, to support its finding that it may compel witnesses to appear before it, the Trial Chamber relied on its purported "implied powers" and on "customary international criminal procedure".[252] Mr Ruto and Mr Sang argue that this approach was incorrect in law for a variety of reasons.[253]

102. The Trial Chamber found, at paragraph 87 of the Impugned Decision:

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

103. On the face of it, this suggests that "implied powers" were at least the primary basis for the Trial Chamber's finding that it may compel witnesses to appear before it. In contrast, at paragraph 95 of the Impugned Decision, the Trial Chamber stated 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", then entering into an interpretation of article 64 (6) (b) of the Statute as a basis for the Trial Chamber's power. The Trial Chamber concluded:

> In light of the above, there is no doubt at all in the Chamber's view that when article 64(6)(b) says that the Chamber may 'require the attendance of witnesses', the provision means that the Chamber may—as a compulsory measure—*order* or subpoena the appearance of witnesses as the Arabic, the French and the Spanish texts so clearly say.[254]

104. In relation to "customary international criminal procedure", the Trial Chamber does not appear to have applied any rules stemming therefrom, but merely concluded, at paragraph 92 of the Impugned Decision:

---

[252] *See supra* paras 34-36.
[253] *See supra* para. 51.
[254] Impugned Decision, para. 100.

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

105. The Appeals Chamber considers that exploring the import of the concept of "implied powers" or "customary international criminal procedure" on the question of whether the Trial Chamber is empowered to compel a witness to appear before the Court would be incorrect in circumstances where the Court's legal framework provides for a conclusive legal basis. This is because, as previously held by the Appeals Chamber, pursuant to article 21 (1) of the Statute, recourse to other sources of law is possible only if there is a lacuna in the Statute or Rules of Procedure and Evidence.[255] Accordingly, the Appeals Chamber will first consider the Statute and the Rules of Procedure and Evidence, interpreting its provisions in accordance with the rules applicable to the interpretation of treaties provided for in the *Vienna Convention*.[256] As explained below, the Appeals Chamber is of the view that that there is no lacuna in the interpretation of the issues under appeal. Thus, the Appeals Chamber will not address any further the question of "implied powers" and "international criminal procedure".

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

106. Article 64 (6) (b) of the Statute provides as follows:

> In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:
>
> [...]
>
> (b) 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;

---

[255] Appeals Chamber, *Situation in the Democratic Republic of the Congo*, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168 (OA 3), para. 23.
[256] Signed on 23 May 1969 and entered into force on 27 January 1980, 1155 United Nations Series 18232.

107. The Appeals Chamber notes that the plain wording of article 64 (6) (b) of the Statute indicates that the Trial Chambers have the power to compel the appearance of witnesses before the Court, in the sense of creating a legal obligation for the individual concerned. The Appeals Chamber finds that the term 'require' denotes something more than a voluntary action expected from someone else.[257] The Oxford Dictionary defines 'require' as: "(of someone in authority) instruct or expect (someone) to do something" and "regard an action, ability, or quality as due from (someone) by virtue of their position".[258]

108. The Appeals Chamber also notes that (i) there is no evidence in the drafting history of article 64 (6) (b) of the Statute that would suggest that the drafters intended that the Court should not have the power to order witnesses to appear before it (leaving aside the question of State cooperation in that regard, which is further addressed below); and that (ii) the provision did not substantially change during the drafting process, nor does it appear to have been the subject of discussions.[259]

(c) Principle of legality

109. The Appeals Chamber notes the arguments advanced by Mr Ruto and Mr Sang that the principle of legality would be contravened if the Court had the power to compel witnesses to appear before the Court because the penalties in case of non-compliance are not set out in the Court's legal texts. The Appeals Chamber recalls that article 22 of the Statute refers to *conduct constituting a crime within the jurisdiction of the Court*. The Appeals Chamber finds that a witness's refusal to comply with an order to appear before the Court would constitute, at most, misconduct within the meaning of article 71 of the Statute. Accordingly, the Appeals

---

[257] *See also* Impugned Decision, para. 98.
[258] "Oxford Dictionaries", accessed at http://www.oxforddictionaries.com/definition/english/require
[259] United Nations General Assembly, *International Law Commission, Draft Statute for an International Criminal Court*, 1994, pp. 54-55; United Nations General Assembly, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, 6 September 1995, (A/50/22) (hereinafter: "Report of the Ad Hoc Committee"), para. 169; United Nations General Assembly, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, 13 September 1998, (A/51/22) (hereinafter: "Report of the Preparatory Committee"), Vol I, para. 268; Report of the Preparatory Committee, Vol II, pp. 172-173, 184-185, 187; United Nations General Assembly, *Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands*, 4 February 1998, A/AC.249/1998/L.13, pp. 111-112; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June-17 July 1998, Official Records Volume I, A/CONF.183/13 (hereinafter: "Rome Conference Official Records"), Vol. I, pp. 35-36.

Chamber considers that the arguments relating to article 22 of the Statute are misplaced and rejects them.

110. The Appeals Chamber is not persuaded by the argument that the absence in the Statute of any sanction in case of non-compliance shows that the Court has no power to compel witnesses to appear before it. This is because this argument disregards that it would be for the State enforcing a request to stipulate such sanctions in its domestic law. In fact, in the view of the Appeals Chamber, this further indicates that the arguments relating to the principle of legality are unpersuasive: any sanction would be provided for in domestic law, which would give sufficient notice to the individual concerned.

111. Furthermore, the Appeals Chamber recalls that, once a witness is brought before the Court in accordance with the relevant provisions under domestic law, the Court would take over the exercise of jurisdiction and therefore rules 65 and 171 of the Rules of Procedure and Evidence would become applicable. Pursuant to rule 171, the sanction in case of refusal to comply with the Court's order to provide testimony could be, in particular, the imposition of a fine.

(d) Overall conclusion

112. The Appeals Chamber notes that several of the arguments raised by Mr Sang and Mr Ruto as to why the Trial Chamber lacks the power to compel the appearance of witnesses are premised on the submission that States are not obliged to cooperate with the Court in compelling witnesses to appear before it. In the view of the Appeals Chamber, these arguments are not persuasive. This is because Part 9 of the Statute generally and article 93 (1) of the Statute in particular, establish primarily *minimum* obligations of cooperation that States Parties have *vis-à-vis* the Court. However, States Parties are at liberty to cooperate more extensively with the Court, if they so wish (so-called "enhanced cooperation"). It follows that, even if States Parties were not obliged to provide cooperation in relation to orders compelling a witness to appear before the Court, this does not necessarily mean that the Court does not have the power to make such an order, as some States may decide to cooperate with the Court,

even in the absence of an obligation to do so.[260] Thus, even if the Appeals Chamber were to find that States Parties are not *obliged* to provide assistance in compelling witnesses to appear before the Court in the manner contemplated in the Impugned Decision, this would not mean, by implication, that the Trial Chamber lacks the power to compel witnesses to appear before it, in the sense of creating a legal obligation for the individuals concerned. In any event, for the reasons that follow, the Appeals Chamber considers that States Parties are under an obligation to provide such assistance in compelling witnesses to appear before the Court.

113. In light of the above, the Appeals Chamber finds that article 64 (6) (b) of the Statute gives Trial Chambers the power to compel a witness to appear before it, thereby creating a legal obligation for the individual concerned. Accordingly, the Trial Chamber did not err when it concluded that it was vested with such a power and the first ground of appeal is rejected.

2. *Is Kenya under an obligation to cooperate with the Court to serve summonses and assist in compelling the appearance of witnesses before the Court?*

114. The Appeals Chamber notes that the second issue under appeal comprises two separate questions, namely: (i) whether Kenya is under an obligation to cooperate with the Court to serve summonses; and (ii) whether Kenya is under an obligation to assist in compelling the appearance of witnesses before the Court sitting *in situ* or by way of video-link. The Appeals Chamber is of the view that the first question is directly addressed by article 93 (1) (d) of the Statute and section 86 of the ICA and the parties seem to agree that Kenya indeed has an obligation to serve the summonses upon the witnesses. Accordingly, no further consideration of this question is required. For that reason, the Appeals Chamber will limit the analysis below to the question of whether Kenya is under an obligation to compel the witnesses to appear before the Court in the way contemplated in the Impugned Decision if they do not wish to do so voluntarily.

---

[260] *See* G. Bitti, "Article 64", in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (Nomos Verlag: Baden-Baden, 2008) (hereinafter: "Bitti, Article 64"), pp. 1199, 1213, marginal number 21.

(a) Principle of voluntary appearance

115. Mr Ruto and Mr Sang argue that, under the Statute, States Parties are obliged to cooperate with the Court only in respect to *voluntary* appearance of witnesses before the Court. Their principal argument for this is based on article 93 (1) (e) of the Statute, which provides that:

> 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. [Emphasis added.]

116. Mr Ruto and Mr Sang submit that on the basis of this provision and in light of its drafting history, it is clear that the Court cannot request a State Party to *compel* a witness to appear before it, in particular not by relying on the 'catch all' clause of article 93 (1) (l) of the Statute or by relying on purported 'implied powers' of the Trial Chamber.[261]

117. For the reasons that follow, the Appeals Chamber considers that article 93 (1) (e) of the Statute does not limit State cooperation in the sense that the Court cannot request the cooperation contemplated in the Impugned Decision, namely compelling witnesses to appear *in Kenya* to give evidence before the Trial Chamber either sitting *in situ* or by video-link.

118. The Appeals Chamber notes that the drafting history of article 93 of the Statute shows that the insertion of the word 'voluntary' in article 93 (1) (e) of the Statute was based on the concern of States regarding the forcible transfer of witnesses *to the seat of the Court* – involving international travel. For instance, in the Report of the Ad Hoc Committee, it was stated in relation to the compellability of witnesses:

> 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 through State authorities. It was noted that, in many countries, it was not constitutionally possible to force a citizen *to*

---

[261] *See supra* paras 61-64.

leave the country to attend judicial proceedings *in another country*. [Emphasis added.] [262]

119. Similarly, in the Report of the Preparatory Committee, it was noted that "[t]he problem of the arrest and *forcible transfer of recalcitrant witnesses to the Court* creates problems for many States" (emphasis added)[263] and that "[w]itnesses 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 place which they may determine by common accord with the Court" (emphasis added).[264] In the "Report of the Working Group on International Cooperation and Judicial Assistance",[265] it was noted in relation to article 93 (1) (e) of the Statute that "[t]his includes the notion that witnesses or experts may not be *compelled to travel* to appear before the Court" (emphasis added)[266] and that if witnesses refused 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".[267] Thus, it is evident that at issue in the negotiations in relation to what should become article 93 (1) (e) of the Statute was whether the Court should have the power to request State cooperation in relation to compelling a witness to *travel internationally* to the seat of the Court.

120. There is no indication that the drafters discarded the idea that the Court may request a State Party to compel a witness to appear before the Court when such appearance does *not* involve international travel was discarded. To the contrary, the drafting history shows that, during the negotiations, alternative ways of receiving the testimony of witnesses who refused to travel to the Court were discussed. It was contemplated that their testimony could be obtained through cooperation provided by 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".[268] The possibility of receiving the testimony of a recalcitrant witness by way of video-link was also

---

[262] Report of the Ad Hoc Committee, para. 233
[263] Report of the Preparatory Committee, Vol. II, p. 253, footnote 95.
[264] Report of the Preparatory Committee, Vol. II, p. 284.
[265] Rome Conference Official Records, Vol. III, pp. 325 *et seq.*
[266] Rome Conference Official Records, Vol III, p. 329, footnote 221.
[267] Rome Conference Official Records, Vol. III, p. 75.
[268] Report of Ad Hoc Committee, para. 233.

specifically mentioned as an alternative to the forcible transfer of witnesses to the Court.[269] A further suggestion referred to the hearing of evidence by the Court on the territory of the State of residence of the witness.[270]

121. The Appeals Chamber is not persuaded by the argument that a 'principle of voluntary appearance' can be derived from article 93 (7) of the Statute, which provides as follows:

> (a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:
>
> (i) The person freely gives his or her informed consent to the transfer; and
>
> (ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.
>
> (b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.

122. As mentioned, the drafting history of article 93[271] indicates that the concern of States was related to the forcible *international transfer* of persons under their jurisdiction. This explains why article 93 (7) of the Statute requires the consent of persons in custody when the Court requests that they be transferred *to the Court* to appear before it to testify, as such transfer would involve *international travel*. In addition, the Appeals Chamber considers that article 93 (7) of the Statute addresses a very specific situation from which no general 'principle of voluntary appearance' can be derived.[272]

---

[269] Report of Ad Hoc Committee, para. 233: "[o]ther solutions that were mentioned included testimony by way of a live video link hooked up with the court [...]"; Report of the Preparatory Committee, Vol. II, footnote 95: "[p]rovision 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 [...]".

[270] Report of Ad Hoc Committee, para. 233: "[o]ther solutions that were mentioned included [...] subject to the agreement of the State concerned, the hearing of evidence, by the court, on the territory of the said State"; Report of the Preparatory Committee, Vol. II, p. 253, footnote 95: "[a]nother 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 defence would also be allowed to cross-examine the witness if the Prosecutor takes the deposition".

[271] *See supra* paras 118 *et seq.*

[272] *See also* C. Kreβ and K. Prost, "Article 93", in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (Nomos Verlag: Baden-Baden, 2008), p. 1576, marginal number 21, p. 1584, marginal number 49.

123. In light of the foregoing, the Appeals Chamber concludes that the scope of application of article 93 (1) (e) of the Statute is limited to the facilitation of the voluntary appearance of witnesses *at the seat of the Court,* involving international travel. Accordingly, there is no 'principle of voluntary appearance' that would bar the type of cooperation sought by the Impugned Decision, as it does not involve international travel.

124. The Appeals Chamber is equally not persuaded by the argument that previous jurisprudence of this Court confirms the existence of a principle of voluntary appearance.[273] At the outset, the Appeals Chamber notes that the parties fail to provide a comprehensive analysis of the context in which the decisions to which they refer were rendered, the reasoning underlying these decisions and the bearing that such decisions would have on the issues on appeal in the instant case.

125. The Appeals Chamber notes that, when viewed in context, the relevant jurisprudence is ambiguous and does not provide any detailed reasoning from the relevant Chamber. In this respect, on 20 May 2011, Trial Chamber I held a status conference to discuss the situation of a witness who refused to testify at the seat of the Court or by video-link unless he was paid. In finding there was nothing more the Registrar could do to secure the attendance of the witness, Presiding Judge Fulford stated that "[t]he Chamber has no power to compel the attendance of witnesses" but later clarified his position when he stated that the practical effect of the situation was that the witness was "unwilling to testify".[274] The Appeals Chamber is of the view that these statements in no way lend support to the existence of a principle of "voluntary attendance". Likewise, in proceedings relating to the *Kenya* Situation, nine witnesses requested an assurance from the Pre-Trial Chamber that they would not be compelled to testify before the designated local Judge and that the process of their testimony was voluntary. On 31 January 2011, Pre-Trial Chamber II held, in response to this request, that "[a]ccording to the Statute, the Court may request a State Party to facilitate the voluntary appearance of a witness before the Court, but not to compel a

---

[273] Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Transcript of 20 May 2011, ICC-01/04-01/06-T-355-ENG ET (hereinafter: "Trial Chamber I Decision on Witness Appearance"), p. 5, line 19; Pre-Trial Chamber II, *Situation in Kenya*, "Second Decision on Application by Nine Persons to be Questioned by the Office of the Prosecutor", 31 January 2011, ICC-01/09-39 (hereinafter: "Pre-Trial Chamber II Decision on Witness Appearance"), para. 20.
[274] Trial Chamber I Decision on Witness Appearance, p. 5, line 19, p. 6, line 5.

witness to testify before the national authorities of that State".[275] Stating that rule 65 of the Rules of Procedure and Evidence was the only provision relevant to this situation, the Pre-Trial Chamber found that the Court can only compel a witness to *testify* if they appear before it to provide testimony.[276] Without entering into the merits of the arguments put forward by Pre-Trial Chamber II in its ruling, the Appeals Chamber considers that it must be understood in its peculiar context and cannot be said to reflect a general principle of "voluntary attendance".

126. In any event, and more importantly, the Appeals Chamber recalls that, pursuant to article 21 (2) of the Statute, the Court *may*, but is not obliged to, "apply the principles and rules of law as interpreted in its previous decisions". Accordingly, even if Trial Chamber I and Pre-Trial Chamber II were of the view that there existed a general principle of "voluntary appearance", the Appeals Chamber would in no way be bound by such a finding.

(b) Legal basis for the request for cooperation

127. The Appeals Chamber notes that the Trial Chamber relied on article 93 (1) (l) of the Statute to conclude that Kenya was under an obligation to assist in compelling witnesses to testify before the Court.

128. The Appeals Chamber notes that the wording of article 93 (1) (l) of the Statute ("[a]ny other type of assistance") indicates that it serves as a residual provision, covering forms of cooperation not otherwise covered by article 93 (1) (a) to (k) of the Statute. For the reasons that follow, the Appeals Chamber finds that article 93 (1) (b) of the Statute provides the appropriate legal basis to issue a request to Kenya to compel witnesses to appear before the Trial Chamber sitting *in situ* or by way of video-link. Accordingly, resort to article 93 (1) (l) of the Statute is inapposite pursuant to the principle *lex specialis derogate legi generali.*

129. Article 93 (1) (b) of the Statute provides:

> 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:

---

[275] Pre-Trial Chamber II Decision on Witness Appearance, para. 20.
[276] Pre-Trial Chamber II Decision on Witness Appearance, para. 20.

[...]

(b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court.

130. The Appeals Chamber considers that this provision covers not only requests that a State Party itself take evidence, but also the taking of evidence on a State Party's territory, either by the Court sitting *in situ* or by way of video-link. In this regard, the Appeals Chamber notes that the wording of the provision does not limit the taking of evidence to *domestic authorities*. Accordingly, Kenya's argument that article 93 (1) (b) of the Statute refers to the taking of testimony by Kenyan domestic courts only[277] is not supported by the plain wording of the provision itself. Furthermore, as noted above,[278] the drafting history of article 93 of the Statute reflects that during the negotiations, alternative ways to receive the testimony of witnesses who did not wish to travel to the Court were considered and discussed. This included the taking of evidence in the requested State.

131. The Appeals Chamber notes that this interpretation of article 93 (1) (b) of the Statute finds support in legal writings. One commentator has argued that: "[a]lthough a witness may not be brought against his will before the [Court], this holds not true for his forced appearance in the requested State with a view to testimony by video-conference".[279] He concludes that "[o]bligations to offer this particular form of assistance follow from the broader duty to assist the Court in the taking of evidence, pursuant to article 93 (1) (b) of the [...] Statute".[280] Similarly, another commentator argues that "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".[281]

---

[277] Kenya's Observations, para. 16.
[278] *See supra* paras 118-120.
[279] G. Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States*, (Intersentia, 2002) (hereinafter: "Sluiter Book on Obligations of States"), p. 280.
[280] Sluiter Book on Obligations of States, p. 280.
[281] Bitti Article 64, p. 1213, marginal number 21.

(c) Overall conclusion

132. The Appeals Chamber therefore finds that, under article 93 (1) (b) of the Statute, Kenya is under an obligation to assist in compelling the witnesses to appear before the Court sitting *in situ* or by way of video-link. Accordingly, the Appeals Chamber finds that the Trial Chamber's order in the Impugned Decision requesting Kenya's assistance in that respect was, in the result, not erroneous, notwithstanding the fact that the Trial Chamber relied on a different provision of article 93 (1) of the Statute.

133. In relation to the arguments raised by Kenya regarding the impossibility to comply with the type of assistance concerned without infringing its own domestic law, the Appeals Chamber notes that the question before it is whether Kenya is under an obligation to assist in compelling the appearance of witnesses before the Court. In light of the foregoing and having found that article 93 (1) (b) of the Statute provides the legal basis for Kenya's obligation to compel witnesses to appear before the Trial Chamber sitting *in situ* or by way of video-link, the Appeals Chamber will not consider the arguments relating to Kenyan domestic law any further.

V. APPROPRIATE RELIEF

134. On an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case it is appropriate to confirm the Impugned Decision as no appealable errors have been identified.

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

Judge Akua Kuenyehia
Presiding Judge

Dated this 9th day of October 2014.
At The Hague, The Netherlands