Cour
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International
Criminal
Court

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Date: **4 March 2014**

TRIAL CHAMBER V(A)

Before: **Judge Chile Eboe-Osuji, Presiding**
Judge Olga Herrera Carbuccia
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR
v.
WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG

Public

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

Source: **Wilfred Nderitu, Common Legal Representative for Victims**

Document to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

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I. SUPPORT FOR THE LEGAL SOUNDNESS OF THE PROSECUTOR'S REQUEST

a. The International Law Commission

1. From the outset and as submitted by on 17th February 2014, the Common Legal Representative for Victims ("the CLR") submits that he takes the position that the Prosecutor's request 'under Article 64 (6) (b) and Article 93 to Summon Witnesses is legally sound. The CLR makes this submission by considering, below, the history of the drafting of the Rome Statute, commencing with the 1993 Draft Statute for an International Criminal Court (the "1993 Draft Statute")[1].

2. During the 1993 session of the International Law Commission (the "ILC"), the matter of the attendance of witnesses before the Court was discussed. Article 30 on investigation and preparation of the indictment in the Draft Statute envisaged that the Prosecutor in carrying out his or her tasks in, *inter alia*, requesting the presence of and to question witnesses, may, as appropriate, "*seek the cooperation of any State in a position to provide assistance and shall have the authority to request the Court to issue such subpoenas and warrants as may be required* […]".[2]

3. The Working Group in July 1994, deliberated further on the said matter in Article 26 concerning investigation with regard to alleged crimes, and provided in its report that "[t]*he Presidency may, at the request of the Prosecutor, issue such subpoenas and warrants as may be required for the purpose of an investigation* […]".[3] This provision was also included in its 1994 Draft Statute for an International Criminal Court (the "1994 ILC Draft").[4] In this regard, the importance of cooperation and judicial assistance with States was addressed as well. It was noted in particular that "*in conducting the investigation, the Prosecutor should have the power to question suspects, victims and witnesses, to collect evidence, to conduct on-site investigations* [...]. *The Prosecutor may seek the cooperation of any State and request the Court to issue orders to facilitate the investigation.*" In fact, "[d]*uring the investigation, the Prosecutor may request the Presidency to issue subpoenas and warrants, since a Chamber will not be convened until a later stage* [...]".[5] Furthermore, a mention was made that

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[1] See the Report of the International Law Commission on its Forty-Fifth Session, Draft Statute For An International Criminal Court, 3 May–23 July, 1993, UN doc. A/48/10, September 1993.
[2] *Idem*, p. 113.
[3] See the Report of the Working Group in A Draft Statute for an International Criminal Court, UN doc. A/CN.4/L.491/Rev.1, 8 July 1994, p. 18.
[4] See the Report of the International Law Commission on its Forty-Sixth Session, Draft Statute for an International Criminal Court, 2 May-22 July, 1994, UN doc. A/49/10(SUPP), September 1994, p. 91. This provision was supported by various non-governmental organisations which suggested that the, on rights related to pre-trial preparation and the trial itself, the defence and the Prosecutor should have an equal right to present evidence and to summon, examine, and cross-examine all witnesses. See the International Commission of Jurists, The International Criminal Court, Third ICJ Position Paper, August 1995, pp. 45-46 and p. 64 and the quest for international justice, Amnesty International, AI Index: IOR 40/04/95, July 1995, p. 20.
[5] *Idem*, see Commentary under (2), p. 92.

"[q]*uestions of cooperation on the part of States with the execution of subpoenas and warrants are dealt with in Part 7* [regarding international cooperation and judicial assistance] *of the Statute*".[6]

4. In this regard, Article 51 in the 1994 ILC Draft regarding international cooperation and judicial assistance, provided that "[s]*tates parties shall cooperate with the Court in connection with criminal investigations and proceedings under the Statute*.[7] Furthermore, it provided that "[t]*he Registrar may transmit to any State a request for cooperation and judicial assistance with respect to a crime, including, but not limited to:* […] *(b) the taking of testimony and the production of evidence* […].[8] In its commentary to article 51, the ILC emphasized that the effective functioning of the Court would depend upon the international cooperation and judicial assistance of States. States Parties to the Statute should, therefore, cooperate for the purpose of criminal investigations conducted by the Prosecutor and respond without undue delay to *any request* from the Court regarding, for instance, the taking of testimony and the production of evidence.[9] This general obligation to cooperate should be understood to mean that issues of implementation will be worked out between the Court and the requested State.[10]

b. The Preparatory Committee

5. During the August session in 1996 of the Preparatory Committee on the Establishment of an International Criminal Court (the "Preparatory Committee"), various proposals were submitted, and of particular note is Rule 55 in their working paper which envisaged providing the Prosecutor with the power to seek orders, subpoenas and warrants, stating that "[t]*he Prosecutor may apply to the Presidency for the following orders, subpoenas and warrants in the course of his or her investigation* […]."[11] The list of possible instances where the Prosecutor could use this power, was yet to be inserted. However, Australia and the Netherlands recognized the importance of such a power for the proper conduct of investigation. Their working paper also addressed the power of the Trial Chamber to order production of additional evidence and provided that the Chamber itself could summons witnesses and order their attendance.[12]

6. Argentina, while acknowledging the importance summoning witnesses *vis-à-vis* the investigation, suggested possible limitations on this matter, including (i) that the spouse and close relatives of the accused are entitled to refuse to testify. The rationale for this was to avoid placing those witnesses in the difficult position of having to decide between testifying against

[6] *Ibid.*, see Commentary under (4).
[7] *Ibid.*, article 51(1), p. 129.
[8] *Ibid*, article 51(2)(b).
[9] *Ibid.*, see Commentary on article 51, pp. 129-130
[10] *Ibid.* The general obligation was borrowed from article 29 of the Statute of the International Tribunal for the former Yugoslavia (as amended on 17 May 2002), 25 May 1993.
[11] *Idem*, rule 55. Furthermore, rule 56 provided also the suspect with the possibility to seek orders and subpoenas.
[12] *Ibid.*, rule 116.

someone to whom they have an emotional tie and committing the crime if giving false testimony; and (ii) that persons required to keep a professional or personal secret should not be admitted. However, it was suggested that in case the Trial Chamber found that the witness had no grounds for invoking the right to refuse testify or the need to keep a secret, the Trial Chamber could order him or her to testify.[13] In the final report of the informal groups on procedural questions in relation to fair trial and the rights of the accused at the end of the session in August 1996, the States agreed that the Prosecutor could apply to the Presidency for various orders, subpoenas and warrants in the course of his or her investigation.[14]

7. Proposals were also made during the 1996 August session on the 1994 ILC Draft regarding Article 51 on cooperation and judicial assistance. During the debates on this matter it was suggested that States Parties shall afford to the Court the widest possible measures of judicial (mutual) assistance and/or that States had the obligation to provide assistance to the Court in connection with any investigations and proceedings under the Statute. It was emphasized that States Parties should cooperate with the Court in connection with criminal investigation and proceedings under the Statute.[15] In this regard, it was noted that the success of the Court depended on the effectiveness of the provisions pertaining to cooperation by States with requests for assistance. Accordingly, the imposition of a definite obligation on States to cooperate, as opposed to the more vague provision of allowing a discretion on whether to cooperate, ought to be a matter of paramount consideration. The argument for the former option is that a rigid and absolute obligation, allowing for no discretion to States Parties which accept the jurisdiction of the Court, would be crucial to, and strengthen, the principle of complementarity.

8. Another input was that States Parties should honour and comply with requests for assistance through proceedings according to their national laws.[16] Subsequently, the obligation to cooperate provided for in Article 60 (which deals with the general obligation to cooperate with the Court) should take precedence over all the legal obstacles which the State Party to which the request for judicial assistance is made invokes against the Court pursuant to its national law or the treaties to which it is a party.[17] In this regard, different positions were taken on whether the cooperation regime of the Court should include an exhaustive or non-exhaustive list of assistance types or categories. It was described that the Court's requests for judicial assistance

[13] See the Working Paper submitted by Argentina, UN doc. A/AC.249/L.6, 13 August 1996, pp. 12-13, rule 106.
[14] See the Report of the Informal Group on Procedural Questions, Fair Trial and the Rights of the Accused, UN doc. A/AC.249/CRP.14, 27 August 1996, article 26(6)(9), p. 8. This same privilege was given to the suspect with respect of gathering evidence: see article 26(7), pp. 8-9.
[15] See the Report of the Preparatory Committee on the Establishment of an International Criminal Court: Volume II, Compilation of Proposals, UN doc. A/51/22[VOL.II](SUPP.), 13 September 1996, Proposals, A. Obligation to provide judicial [mutual] assistance, pp. 251-252.
[16] *Ibid.*, p. 252.
[17] *Ibid*.

may concern, without being limited thereto the hearing of witnesses.[18] The solution was therefore to provide for an enumerated list of assistance types that must be provided by all States Parties, and a non-exhaustive final provision that enabled the Court to request any other type of assistance.[19]

9. In addition, it was recognized that States Parties would, in accordance with the provisions under the said Article, comply with requests for legal assistance by the Court or Prosecutor with respect to the investigation or prosecution of a crime under the Court's jurisdiction, which assistance would include, *inter alia*, (i) the taking of testimony and the production of evidence[20] or the taking and production of testimony or other evidence and statements of persons; (ii) assisting in the making available/transfer of other persons not in custody, in order to provide testimony or other assistance to the Court.[21] However, it was acknowledged that the problem of the arrest and forcible transfer of recalcitrant witnesses to the Court was problematic for many States, and that provision could be made in the legal texts to allow the Court to accept testimony recorded by the requested State in alternative ways, for instance, by way of video recordings. Another alternative would be to allow the Prosecutor and/or the 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 took the deposition;[22] and (iii) any other assistance, not prohibited by the law of the requested State, which the Court could require.[23]

10. In the fourth session of the Preparatory Committee in August of 1997, Japan proposed that "[i]*n order to determine the truth, the Trial Chamber may, at the request of the Prosecutor or the defence, or on its own initiative, collect evidence which it deems necessary for the decision, including such subpoenas and warrants as may be required for the purposes of a trial.*"[24] The United States delegation also suggested potential functions for the Chamber in this regard, including the Pre-Trial Chamber involvement in the investigative activities under Article 26 (regarding orders, warrants and subpoenas) of the Statute and possession of the power to issue pre-indictment orders needed by the Prosecutor under Article 26.[25]

c. Negotiations Leading to Adoption of Rule 65 of the Rules of Procedure and Evidence

[18] *Ibid.*, B. Types/categories of assistance (exhaustive or non-exhaustive), 2(c).
[19] *Ibid.* Also see the Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I: Proceedings of the Preparatory Committee during March-April and August 1996, UN doc. A/51/22 [VOL.I](SUPP), 13 September 1996.
[20] *Idem*, p. 253.
[21] *Ibid.*, see (d)*bis*.
[22] *Ibid.*, see footnote 95.
[23] *Ibid*, p. 254, see (k).
[24] See the Japanese proposal on Evidence, Non-paper/WG.4/No.13, 12 August 1997, article 44, paragraph 1.
[25] See the proposal made by the Delegation of the United States, 13 August 1997, under Pre-Trial Chamber.

11. During the July 1996 Preparatory Committee, Australia and the Netherlands submitted proposed the possibility to compel witnesses to testify before the Court was addressed as well. For example, rule 87 governing matters which are not subject to disclosure provided that "[i]*f the Prosecutor calls as a witness the person providing, or a representative of the entity providing, information under this Rule, the Trial Chamber may not compel the witness to answer any question the witness declines to answer on grounds of confidentiality*."[26] The possibility to compel witnesses was also addressed in rule 106 governing the testimony of witnesses. In particular, paragraph (E) provided that "[a] *witness may object to taking any statements which might tend to incriminate him or her. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than perjury*."[27] It was noted in the joint working paper that there was a need to fully list the grounds on which a witness could refuse to give evidence, for example, where a witness is the spouse of an accused.[28]

12. During the first session in February 1999 of the Preparatory Commission for the International Criminal Court (the "Preparatory Commission"), the Working Group of the American Bar Association submitted a working paper containing 'Draft Rules of Evidence and Procedure for the Proposed International Criminal Court'.[29] It also provided draft rules which addressed the possibility to compel witnesses, however, it reiterated the provision under rule 87(D), which was proposed in the joint working paper of Australia and the Netherlands during the 1996 session of the Preparatory Committee. Said provision was inserted under rule 64 on the 'Work Product and Confidential Matters'.[30] The Working Group of the American Bar Association also reiterated the provision contained in rule 106 of the joint working paper.[31] However, it added some amendments. The amendments can be found in rule 86 under (G) which provided that "[…] T*estimony compelled in this way shall not be used, DIRECTLY OR INDIRECTLY, as evidence in a subsequent prosecution against the witness for any offence other* than GIVING FALSE TESTIMONY, WITHIN THE MEANING OF ARTICLE 70."[32] The said provision remained unchanged in the working paper submitted by the American Bar Association during the second session of the Preparatory Commission in June 1999.[33] However, a comment was made regarding said

[26] See the Draft Set of Rules of Procedure and Evidence for the International Criminal Court: Working Paper submitted by Australia and the Netherlands, *supra* note **Error! Bookmark not defined.**, rule 87 under (D).
[27] *Idem*, rule 106 under (E).
[28] *Ibid*.
[29] See the Draft Rules of Procedure and Evidence For The International Criminal Court, prepared by a Working Group of the American Bar Association, Section of International Law and Practice, 10 February 1999.
[30] *Idem*, rule 64(D).
[31] See the Draft Set of Rules of Procedure and Evidence for the International Criminal Court: Working Paper submitted by Australia and the Netherlands, *supra* note **Error! Bookmark not defined.**, rule 106.
[32] See the Draft Rules of Procedure and Evidence For The International Criminal Court, prepared by a Working Group of the American Bar Association, Section of International Law and Practice, *supra* note 29, rule 86 under (G).
[33] See the Draft Rules of Procedure and Evidence of the International Criminal Court: Parts 7 (Evidence) and 10 (Offences Against the Administration of Justice), 1st June 1999, rule 98(G).

provision, emphasizing that *"(G) ensures that compelled testimony may not be used against a witness (other than in cases of perjury). The sanction if a witness refuses to answer despite an order from the Court is provided in Rule 126* bis *of this draft*."[34]

d. International Jurisprudence

13. In the *Charles Taylor* case, the Prosecution requested the Trial Chamber to issue a subpoena for Naomi Campbell.[35] In response to the Prosecution's issuance of the subpoena, the Defence argued, *inter alia*, that "[i]*t is highly likely that a subpoena issued by the Trial Chamber may not be enforced, given the fact that the Special Court lacks the institutional arrangements and so-called Chapter VII powers under the United Nations Charter for enforcement* [….]".[36] In response to said argument by the Defence, the Trial Chamber found that as regards its power and the legal standard for the issuance of a subpoena under rule 54 of the Rules of Procedure and Evidence of the SCSL, the Appeals Chamber has held that:[37]

> "*The determination of whether a subpoena should be issued is in the discretion of the Trial Chamber*[38]*… The Court will grant a subpoena if it is 'necessary' to bring to court an unwilling, but important, witness. The phrase in Rule 54 'necessary for the purposes of* […] *preparation or conduct of the trial' requires the applicant to show that it is necessary to issue a subpoena or other order so as to bring evidence to the Court. That is satisfied if the applicant shows that the subpoena is likely to elicit evidence material to an issue in the case which cannot be obtained without judicial intervention. The key question is whether the effect that the subpoena will have is necessary to try the case fairly.*[39]*…* [i]*n order to satisfy Rule 54, the Chamber should consider whether the applicant has demonstrated a 'legitimate forensic purpose' by showing a reasonable basis for the belief that the information to be provided by a prospective witness is likely to be of material assistance to the applicant's case, in relation to clearly identified issues relevant to the* […] *trial.*[40]*… It is incumbent on the party seeking to compel a reluctant witness to testify to satisfy the Chamber that a subpoena should be issued. The Trial Chamber is entitled to look carefully at the proposed evidence and may decline to issue a subpoena if the proposed evidence fails to address a sufficiently material issue. In so doing, the Trial Chamber does not conduct a 'premature evaluation' of the probative value of the evidence … Rather, the Trial Chamber assesses whether issuing a subpoena to compel a reluctant*

[34] *Idem,* see Commentary, rule 98 *bis* (G).
[35] See SCSL, *The Prosecutor v. Charles Ghankay Taylor*, Trial Chamber, Case No. SCSL-03-01-T-961, Prosecution Motion for the Issuance of a Subpoena to Naomi Campbell, 20 May 2010.
[36] See SCSL, *The Prosecutor v. Charles Ghankay Taylor*, Defence response to Prosecution Motion for the Issuance of a Subpoena to Naomi Campbell, Case No. SCSL-03-01-T-968, 31 May 2010, para. 17.
[37] See SCSL, *The Prosecutor v. Charles Ghankay Taylor*, Decision on Prosecution Motion for the Issuance of a Subpoena to Naomi Campbell, Case No. SCSL-03-01-T-996, 30 June 2010, p. 4.
[38] See SCSL, *The Prosecutor v. Norman, Fofana and Kondewa*, Appeals Chamber, Case No. SCSL-04-14-T-688, Decision on Interlocutory Appeals against Trial Chamber Decision refusing to Subpoena the President of Sierra Leone, 11 September 2006, para. 8.
[39] *Idem*, para. 9.
[40] *Ibid*., para. 10.

> *witness to testify may be necessary for the purposes of an investigation for the preparation or conduct of the trial*[41]*…when the applicant has been unable to interview the prospective witness, the test will ha veto be applied in a reasonably liberal way.*[42]*…* [t]*he availability of the evidence from other sources is a relevant inquiry in the exercise of the Trial Chamber's discretion, where other sources may be available without resort to the coercive powers of the Court."*[43]

The Trial Chamber granted the Prosecution's request to subpoena Campbell, who was at the time a resident of the United Kingdom.[44]

II. RESPONSES TO THE SUBMISSIONS OF THE GOVERNMENT OF THE REPUBLIC OF KENYA

14. Turning now to the submissions by the Government of the Republic of Kenya, the CLR sets out below the reasons why the Chamber ought to disregard the said submissions in preference for those of the Prosecutor. In the first place, it ought to be borne in mind that witnesses are generally compellable under Kenya's Criminal Procedure Code. Kenya also makes provision in its domestic legislation for the enforcement of witness summonses issued by courts of certain countries and for matters incidental thereto and connected therewith, through the Witness Summonses (Reciprocal Enforcement) Act.

a. The Attorney General Under an Obligation to Give Authority for an ICC Request for Assistance to Proceed

15. Apart from this, Section 86 of the International Crimes Act, 2008 ("the Act") is in terms that allow little room for speculation as to whether or not it is mandatory for the Attorney General to act upon such a request, and does not bear out the submissions of the Government of the Republic of Kenya[45] to the effect that "a witness cannot be compelled to appear and testify before the Court regardless of where the Court is sitting."

16. It is to be noted that under Section 86 of the Act, it is **mandatory** for the Attorney General to give authority for the request by the Court for assistance in, *inter alia*, requiring the attendance and testimony of witnesses <u>so long as he is satisfied that the request relates to an investigation being conducted by the Prosecutor of the Court or to any proceedings before the Court, and that the person to be served is or may be in Kenya</u>. The CLR submits that the necessary criteria for the

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[41] *Ibid.*, para. 21.
[42] *Ibid.*, para. 23.
[43] *Ibid.*, para. 28.
[44] See SCSL, *The Prosecutor v. Charles Ghankay Taylor*, Decision on Prosecution Motion for the Issuance of a Subpoena to Naomi Campbell, Case No. SCSL-03-01-T-996, 30 June 2010, p. 6.
[45] ICC-01/09-01/11-1184, para.

Attorney General to perform his statutory duty under Section 86 of the Act have been met in the particular circumstances of this case.

17. In addition to the foregoing, the submission that "a witness cannot be compelled to appear and testify before the Court regardless of where the Court is sitting" in not in keeping with Kenya's own prosecutorial policy and law, which makes witnesses general compellable.

b. Both Voluntary and Compelled Processes of Appearance by Witnesses Contemplated by the International Crimes Act

18. It has been submitted by the Government that the Rome Statute employs "the principle of voluntary appearance of witnesses to testify before the Court" and that the Court therefore "has no power to request the Government… to compel unwilling witnesses to appear and testify before the Court."[46] The CLR submits that by the very wording of the legal provision in the Act, the logical inference is that both voluntary and compelled processes were contemplated by the Act in relation to various actions under Articles 19(8), 56, 58(7), 64 and 93(1)(d) of the Statute.

c. International Crimes Act (Including Part 4, and Article 64 of the Rome Statute in Particular) has Force of Law in Kenya

19. Section 4(1) of the Act provides that certain provisions of the Rome Statute shall have the force of law in Kenya in relation to the making of requests by the ICC to Kenya for assistance, the method of dealing with those requests, the conduct of an investigation by the Prosecutor or the ICC, the bringing and determination of proceedings before the ICC, the enforcement in Kenya of sentences of imprisonment or other measures imposed by the ICC, and any related matters, and the making of requests by Kenya to the ICC for assistance and the method of dealing with those requests.

20. The relevant provisions of the Rome Statute in this regard are—
    (a) Part 2 (which relates to jurisdiction, admissibility, and applicable law);
    (b) Part 3 (which relates to general principles of criminal law);
    (c) articles 51 and 52 (which relate respectively to the Rules of Procedure and Evidence, and Regulations of the Court);
    (d) Part 5 (which relates to the investigation and prosecution of crimes within the jurisdiction of the ICC);
    (e) Part 6 (which relates to the conduct of trials);
    (f) Part 7 (which relates to penalties);
    (g) Part 8 which relates to appeals and revision of acquittals, convictions, or sentences);

[46] Para. 6

(h) Part 9 (which relates to international co-operation and judicial assistance);
(i) Part 10 (which relates to the enforcement of sentences and other measures imposed by the ICC).

21. The Act is therefore clear that the provisions of the Statute **"shall have force of law in Kenya…"** (emphasis added), and it is the CLR's submission that Article 64, which falls under Part 6 of the Statute (and relates to the conduct of trials) therefore ***has force of law*** in Kenya. Article 64 itself provides that:

> *"[i]n performing its functions… during the course of a trial, the Trial Chamber may, as necessary… [r]equire 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."*[47]

It is submitted, on this account alone, that the Court has power to seek the assistance of the Government to compel witnesses.

d. Prosecutor's Request is Within the Contemplation of Kenya's Obligations as a State Party to the Rome Statute

22. Based on the reasoning above, it is incorrect for the Government to suggest that the Prosecutor is imposing obligations on Kenya as a State Party that go beyond the obligations which the Statute imposes on the States Parties. Indeed, the Prosecutor's request to the Court under Articles 64(6)(b) and 93 of the Statute falls squarely within what is required in order to give effect to the provisions of both the Statute and the Act (as noted above). In other words, the assistance by Kenya that is requested by the Prosecutor is within Kenya's treaty obligations under the Statute.

e. Court has Power to Solicit Kenya's Assistance as a State Party Under Article 64

23. The CLR submits that while the Court does not have direct powers to summons witnesses for the purpose of testifying at the trial, the Court nevertheless has power to solicit the assistance of a State Party, which in turn has an obligation to accede to such a request in connection with the summonsing of such witnesses unless the conditions set out in Section 86 of the Act have not been met. This appears to be the true intention of Article 64 of the Statute.

f. "Voluntariness" Contemplated by Article 93(1)(e) not the Only Factor to Consider; Article 93 is About "Other Forms of Assistance"

24. The Government suggests that by reason of the fact that Article 93(1)(e) and (l) and Article 93(7) of the Statute do not compel or order States to provide the set out form of cooperation, but

[47] Article 64(6)(b), Rome Statute

instead, are forms of assistance on witness attendance and testimony which States are requested to provide under procedures of national law, it then follows that the Statute contemplated voluntary appearances of witnesses. Respectfully, it is submitted that this is an incorrect interpretation of the provisions of the Statute.

25. In the first place, there is nothing in the Statute to suggest that the principle of voluntariness that may be brought forth by Article 93(1)(e) is the only (or even an overriding) principle or factor with regard to assistance in relation to all aspects of investigations or prosecutions. Secondly, the marginal notes to Article 93 suggest that the article sets out "other forms" of cooperation, and such forms of cooperation are therefore to be viewed as cumulative to other forms of cooperation and assistance set out elsewhere in the Statute, including the forms of assistance set out in Article 64(6)(b). The language of Article 96(1) also fairly expressly envisages that the forms of assistance under Article 93 are "other forms". The very first sentence of Article 96(1) states that "a request for other forms of assistance referred to in Article 93 shall be made in writing." It is submitted that this provision is so worded in order to differentiate the Article 93 forms of assistance from other forms of assistance.

g. Sanction for Non-compliance with Request by the Court Under Article 64 is Provided for in Article 87(7)

26. The Government argues in its submissions that no sanctions have been set out in case of non-compliance with the authorization of the Court "to compel witness attendance and testimony"[48] and concludes therefore that the Court has no power to compel such attendance. As submitted above, the Trial Chamber's power to compel attendance is indirect, and is directed towards the State Party in furtherance of its treaty obligations. Non-compliance with a request for cooperation makes it open for the Court to proceed under Article 87(7) of the Statute and to make a finding of non-cooperation, and thereupon refer the matter to the Assembly of States Parties. It is therefore a fallacy to state that there is no sanction available for non-compliance[49].

h. While Giving of Evidence is Generally Voluntary, a State Party has an Overriding Obligation to Facilitate the Giving of Evidence by Witnesses on its Territory

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[48] Para 9

[49] In addition to the foregoing, the CLR argues that a person who resists an attempt to compel him to appear and testify before the Court, or a person who obstructs such compulsion, can be punished for offences recognized under Sections 11 and 12 of the International Crimes Act. Section 10 makes is an offence for any person to wilfully attempt "in any manner to obstruct, pervert or defeat the course of justice of the ICC", while Section 11 makes it unlawful to obstruct "an official of the ICC in the execution of his duty, or any person lawfully acting in aid of such an official". Thus, once the Court issues a summons against a witness for him to appear and testify, it can be said that any act of commission or omission that has the effect of making it impossible for such a witness to appear and testify before the Court in answer to the summons would amount to the offence of either obstructing, perverting or defeating the course of justice of the ICC", or obstructing "an official of the ICC in the execution of his duty, or any person lawfully acting in aid of such an official".

27. It is further submitted that while the giving of evidence before the Court is generally voluntary, certain rights and obligations accrue in relation to a person who declares an intention to testify before the Court by making a statement for use by the Court. In such situations, Kenya as a State Party to the Statute and in keeping with its obligations under the Statute and under (Section 86 of) the Act has an overriding obligation in terms of cooperating under the Statute to facilitate the giving of such evidence. This obligation extends to assisting in the compulsion of such a witness. It is submitted that this indeed is the true purport of Section 86(1)(b) of the Act as read with Article 64(6)(d) of the Statute.

i. A Broad Approach to the Principle of Complementarity

28. Again, based on a broad approach to the principle of complementarity- that the Court and the national criminal jurisdictions play a complementary role vis-à-vis each other- it is submitted that if a witness were compellable by the national authorities of a State Party in respect of the giving of evidence within its courts, then such a witness is, by extension, compellable to give evidence at the Court through the assistance of the State Party. Failure to enforce summonses against witnesses required by the Prosecutor to testify in a case would then, *prima facie*, be taken to be unwillingness on the part of the State Party to cooperate with or provide assistance to the Court so long as the executive and judicial systems of the State party can be said to be substantially functioning, or unless the conditions in Section 86(1) of the Act are not applicable.

29. The submission by the Government to the effect that "the obligation of Kenya as a State Party is to facilitate the voluntary appearance of witnesses to testify before the Court" is, respectfully, lacking in substratum. Right from its preamble, the Statute shows that the States Parties agreed to enact the Statute (and thereby establish a permanent court in order "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes" and also to ensure "their effective prosecution by taking measures at the national level and by enhancing international cooperation". It was envisaged that this permanent court would be "complementary to national criminal jurisdictions" and thus would only come into play where judicial systems had totally or substantially collapsed, or where they were ineffective.

30. The CLR submits that the Government has a choice to decide whether it would want to assist the Court in "putting an end to impunity" by assisting in the summonsing of the witnesses in question, as was contemplated by the Statute when it drafted. By ratifying the Statute on 15 March 2005, Kenya was in effect saying that it was committed to putting an end to impunity and was willing to cooperate with the Court in the exercise of its (the Court's) functions. Any contrary position, absence exceptional reasons, would in effect mean that the Government does not intend to end impunity.

31. In emphasizing the principle of complementarity in the preamble to the Statute, States Parties were in effect emphasizing State sovereignty, which requires every State "to exercise its criminal jurisdiction over those responsible for international crimes". It would therefore be an affront to State sovereignty for the Government to refuse to assist the Court in performing its functions to the broader end of the complementarity principle. The simple reason for this is the fact that witnesses in respect of whom the Prosecutor wishes to have Kenya's assistance in their being summonsed would be compellable under Kenya's own laws, hence any refusal to assist in their being compelled would on first impressions be a contradiction in terms and an abdication of State sovereignty. It is submitted that such a failure would in fact be an attempt to abridge State powers and duties, rather than "an attempt to expand the powers of the Court and obligations of States Parties beyond that which the treaty sets out, and [thus constitute] a breach of treaty" as contended by the Government.[50]

III. COOPERATION UNDER NATIONAL LAWS

32. It is clear from Article 93(1)(e) States Parties are under no obligation to compel witnesses to appear before the Court. It is a matter of controversy, however, whether States Parties *may* compel witnesses to appear before the Court in recognition of the provisions under Articles 69(2) and 64(6)(b), or Article 93(1)(l) of the Statute. Only few States Parties have expressed a view on this controversy when drafting their implementing legislation. In fact, some of said States rejected the idea of an individual right not to appear before the Court. Instead, said States recognized the mandatory nature of a Court summons to appear as a witness before it.

33. Finland, for example, has been made compulsory for witnesses to comply with corresponding requests to appear before the Court. In particular, it is provided in Section 5 of the *Implementing Act* that a witness, on whom a summons to appear issued by the Court has been served in Finland for the purpose of a hearing before the Court, shall be under an obligation to comply with the summons, and the Finnish authorities must take the necessary measures in order to facilitate the possibility of a witness complying with the summons. However, the *Implementing Act* does not allow authorities to use any coercive measures against a witness who is not willing to cooperate and travel abroad to be heard before the Court.[51] Furthermore, Finland had also taken the view that it would not be contrary to the Statute to compel the appearance of a summoned witness by the imposition of a fine.[52]

34. On the other hand, Sweden was of the view that a State Party may want to take a step further in order to give the Court the best possible assistance *vis-à-vis* article 93(1)(e) of the Statute and, therefore, introducing an obligation for witnesses to appear before the Court. Sweden

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[50] Para 14

[51] See KRESS (C.), BROOMHALL (B.), LATTANZI (F.), SANTORI (V.) (eds.), The Rome Statute and Domestic Legal Orders, Volume II, p. 87.

[52] *Idem.*

recognized that the Court might request this form of assistance in accordance with article 93(1)(l) of the Statute, unless it is prohibited by the law of the requested State. Although recognizing the importance to envisage the possibility to compel witnesses to testify for the efficiency of the Court, the Swedish authorities did not propose however the introduction of an obligation for witnesses in Sweden to appear before the Court, based on the principle that a persons who is not deprived of his or her liberty may not be transferred against his or her will to a foreign country. Instead, the Court can request legal assistance with the taking of evidence by a Swedish court, before which the witness may be compelled to appear and – to the same extent as in Swedish criminal proceedings – give evidence. Sweden suggested as an alternative, that the Court could take the testimony of witnesses who is in Sweden by way of telephone conference or video conference, however requiring that the witness consents to the hearing.[53]

35. As to Switzerland, domestic law gives the Court the ability to directly serve the Court documents upon recipients in Switzerland, including summonses to appear in Court. As there is no obligation for the requested State to enforce the duty of witness to appear before the Court, article 37(2) of the *Federal Law on cooperation with the ICC* accordingly makes clear that there will be no coercive measure taken to ensure the appearance of a person before the Court. However, the same article also states that, upon requests of the person summoned to appear, the Central authority, an administrative unit of the federal office of justice, will obtain written assurance from the Court guaranteeing the safe-conduct of the witness or expert.[54] However, the German *Law on Cooperation with the ICC* does not contain a specific provision on the voluntary appearance of a witness before the Court. Instead, Germany has provided for the possibility to compel the witness to appear before the Court, exceeding its obligation under article 93(1)(e) of the Statute. Section 53(1) empowers the German authorities to enforce the appearance of an unwilling witness before the Court. Hereby, Germany has adopted the view that the Court is not precluded under the Statute from accepting such voluntary cooperation in securing the appearance of a witness before the Court. Section 53(2) captures the situation where the witness had to testify before the Court notwithstanding the fact that he or she could have relied on a privilege under German procedural law.[55]

36. The case of Austria: Although Austria emphasized that there is no obligation under the Statute to arrest persons for the purpose of transferring them to the Court on the basis of a request for service of summons, it does contain a provision with regard to the questioning of witnesses by national authorities on the basis of article 93(1)(b) of the Statute. Furthermore, upon the request of the Court, the testimony of a witness who refuses to appear before the Court can be taken by video-conference.[56]

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[53] *Ibid*.
[54] *Ibid*., p. 449.
[55] *Ibid*., pp. 141-142.
[56] *Ibid*., p. 45.

37. The case of Canada and Georgia: Canadian legislation regarding the provision under article 93(1)(e) of the Statute was not needed to provide this form of cooperation. In the face of such a request, Canadian police or prosecution authorities would be asked to approach the witness with a view to encourage his or her attendance.[57] On the other hand, in Georgia, pursuant to article 38(2) of the *Law*, a summoned person is obliged to appear before the Court provided that his transportation expenses will be covered by the Court.[58]

38. The Netherlands: Article 93(1)(e) has not received separate attention in the Dutch *Cooperation Act*, but this is not to say that the Netherlands will not give effect to a request to "facilitate" the voluntary appearance of witnesses. In this respect, attention needs to be drawn to article 45(1) of the *Cooperation Act*, containing a general obligation to provide the forms of assistance set out in article 93 of the Statute.[59]

39. New Zealand: If the Court requests assistance on the basis of article 93(1)(e) of the Statute, the Attorney-General may authorise enforcement of the request if satisfied that the witness is, or may be, in New Zealand. The request is then forwarded to the appropriate New Zealand agency which must first ascertain whether the prospective witness consents to giving evidenced or assistance.[60]

40. Norway: Norwegian courts and other authorities may on request provide the Court with the assistance mentioned in article 93 of the Statute. Such request shall be dealt with and enforced in accordance with Norwegian law in so far as it is appropriate. If the Court has requested that a particular procedure be followed, this shall be complied with, unless the procedure is prohibited by Norwegian law.[61]

41. South Africa: Section 14(e) of the *Act* provides that the relevant competent authorities in the Republic must, subject to the domestic law of the Republic and the Statute, cooperate with, and render assistance to the Court in facilitating the voluntary appearance of a witness before the Court.[62]

42. Spain: Article 21.1 of the *Organic Law 18/2003 of 10 December 2003 on the Cooperation with the ICC* which regulates the execution of the Court's requests to facilitate the appearance of persons as witnesses before the Court, establishes that such appearance will be voluntary. The only exception to the voluntary appearance of witnesses before the Court is in cases where the

[57] *Ibid.*, p. 65.
[58] *Ibid.*, p. 126.
[59] *Ibid.*, p. 218.
[60] *Ibid.*, p. 262.
[61] *Ibid.*, p. 287.
[62] *Ibid.*, p. 339.

witness is a person serving in Spain a sentence imposed by the Court. However, if the testimony or statement is to be given in Spain before the competent *Juez de Instrucción*, witnesses and experts can be compelled or forced to testify. However, they cannot be compelled if the testimony is to be given in The Hague. The Spanish legislator has shown its intention actively to facilitate the voluntary appearance of witnesses and experts before the Court by unilaterally undertaking two obligations: (i) the Ministry of Justice's duty to request information from the Court on assurances provided for the witness or expert in question; (ii) the Ministry of Justice's duty to anticipate expenses related to the appearance of witnesses before the Court.[63]

IV. DOCTRINE

43. Discussion among public international law scholars merged regarding the relationship between articles 64(6)(b) and 93(1) of the Statute. According to some of them, there seemed to be an inconsistency between the power giving to the Trial Chamber to require the attendance and testimony of witnesses, and at the same time to comply with the request by the Court to provide the assistance in relation to investigations or prosecution under article 93(1)(e) facilitating the voluntary appearance of persons as witnesses or experts before the Court".[64] This does not mean that the Trial Chamber cannot summon a witness but simply that a State Party is under no obligation to compel a witness to appear before the Court. It, however, may provide for such a procedure in its implementing legislation if it so wishes.[65] In the event that a witness, whose attendance and testimony are required by the Trial Chamber, does not want to travel to the seat of the Court, it is opted that the Trial Chamber could obtain the assistance of the State Party for the testimony to be given before the national authority or by means of video conference.[66] Even if States Parties are not under an obligation to force the appearance of witnesses before the Court, they should be under an obligation to comply with an order of the Trial Chamber requiring the attendance and testimony of a witness and summon that witness to appear before a national court.[67]

44. Regarding subparagraph 1(e) of article 93 of the Statute, which covers facilitating the voluntary appearance, it was viewed that the term "to facilitate" implies voluntariness and excludes an obligation on the part of the State Party to provide sanctions according to its national law, if a

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[63] *Ibid*., p. 372.
[64] See the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June - 17 July 1998. Official Records, Volume I, Final Documents, UN doc. A/CONF.183/13(Vol.I). The document provides that witnesses or experts may not be compelled to travel to appear before the Court.
[65] See BITTI (G.), "Article 64", in TRIFFTERER (O.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, Second Edition, 2008, p. 1213.
[66] *Idem*.
[67] *Ibid*.

witness or an expert refuses to appear before the Court.[68] This forms a crucial weakness within the international criminal justice system, wherein the Court lacks direct enforcement power, while being built upon the aspiration that the testimony of a witness a trial shall be given in person (article 69(2)).[69] However, by virtue of article 93(1)(b) of the Statute, the evidence would still be available to the Court, which permits the taking of the evidence in the requested State.

45. According to one view, there is, besides the absence of a State duty to compel a witness to appear and to testify before the Court, an individual right for persons not to appear and testify before the Court.[70] This right is derived not from article 93(1)(e), but from article 93(7)(a)(i) of the Statute, according to which the person freely gives his or her informed consent to the transfer to the Court. If the transfer of a person in custody to the Court is dependent on that person's consent, then the same must *a fortiori* be true for all other witnesses. It is advised here that this interpretation is unconvincing and that no individual right of persons not to appear and to testify before the Court exists and that the analysis of the relevant preparatory works to the Rome Statute supports said conclusion. This would not only impede on the efficiency of the Court but could also have negative effects from a fair trial perspective if the accused cannot call witnesses.[71]

46. There was a somewhat different approach taken by some scholars how a right not to appear before the Court to testify would be inconsistent with article 64(6)(b) of the Statute which empowers the Trial Chamber to require the attendance and testimony of witnesses, implying that a subpoena power does not exist. While it cannot be denied that article 93(7)(a)(i) lends some initial support to the individual rights argument, the abovementioned argument gives by far too much prominence to a provision that deals with a very specific procedural scenario and does so in the form of a wording that was too hastily copied from tradition inter-State vocabulary.[72] The overemphasis placed on the latter provision by the proponent of the individual rights arguments results from the fact that they accept running into an inconsistency with a central provision of Part 6, article 64(6)(b), which empowers the Court to require the attendance and testimony of witnesses which is in line with the important procedural principle contained in article 69(2) that the testimony of a witness at trial shall, where possible, be given in person.[73] Such an inconsistency must be avoided. While it may be open to doubt whether judges are in a position to remedy the undeniable inconsistency between articles 64(6)(b) and 93(7)(a)(i)

[68] See KREβ (C.) and PROST (K.), "Article 93", in TRIFFTERER (O.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, Second Edition, 2008, p. 1576.
[69] *Idem*. For relevant critics, see SLUITER (G.) *International Criminal Adjudication and the Collections of Evidence: Obligations of States*, Intersentia, 2002, p. 346; also see KREβ (C.), *The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise*, 1 Journal of International Criminal Justice, 2003, p 616.
[70] See SLUITER (G.), *op. cit. supra* note 69, pp. 254 and 346.
[71] *Idem*.
[72] See KREβ (C.) and PROST (K.), *op. cit. supra* note 68, p. 1576.
[73] *Idem*.

of the Statute through a "correction" of the latter provision, the inconsistency must not be widened by drawing an (otherwise) plausible *argumentum a fortiori* from that provision.[74] Therefore, the Trial Chamber may well, pursuant to article 64(6)(b), create an international obligation of persons to appear and testify before the Court, but that States are under no duty to enforce that obligation. This interpretation would promote the purpose of article 64(6)(b) without violating articles 93(1)(e) and article 93(7)(a)(i).[75] Thus, States are not prevented from providing the Court with enhanced cooperation regarding the testimony of witnesses before it by inducing the witness to appear and testify through the imposition of a conditional fine.

47. Besides the types of assistance listed in article 93 of the Statute, the States Parties are obligated to grant any type of assistance to the Court that is not prohibited by their national laws pursuant to article 93(1)(l). This so-called "catch all" provision, as named by some scholars, was included to accommodate emerging or varied types of assistance which might be required in any particular case. However, in fairness to States Parties, as the type of assistance is not specified under said paragraph, it would not be appropriate to place a general obligation on a State to comply with such requests, when the nature of the obligation cannot be specified. Thus, the obligation is limited to that which is not prohibited under national law.[76] Although, States Parties are obliged to provide for requests under this article, the extent of that obligation is not outlined by the Statute but by domestic law.[77]

V. CONCLUSION:

48. It appears that the States Parties did not have any intention to decide to make the appearance of witnesses solely voluntary, but most of the States recognized the fact that such powers are inherent in the functional power of all criminal courts. This power was supposed to be granted, in favour, not only to the Prosecution but also to the Defence. Furthermore, the States are obliged to provide assistance to the Court by executing such subpoenas and summons. The current formulation provided in Article 64(6)(b) of the Statute expresses the consensus reached by the States, while not explicitly using the terms such as subpoena or summons. Nevertheless, the Court is still dependent on the willingness of States Parties in cooperating with their requests. Although, article 93(1)(e) of the Statute provides that States Parties should cooperate in facilitating the voluntary appearance of witnesses, Article 93(1)(l) obligates the States to grant any type of assistance to the Court with the only limitation that the kind of request is not prohibited by the domestic law of the State concerned. This "catch all" provision is something to keep in mind when facing the inconsistency of provisions concerning the obligation to cooperate.

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[74] *Ibid*.
[75] *Ibid*., p. 1577.
[76] *Ibid*., p. 1579.
[77] *Ibid*.

VI. PRAYER SOUGHT:

49. Accordingly, the Common Legal Representative supports the Prosecution's application. That said, given the possibility that the witnesses in question could turn hostile if compelled to come to the seat of the Court to testify, the CLR leaves it to the Trial Chamber to determine whether their compulsion would advance or detract from the interests of participating victims.

Respectfully submitted,

WILFRED NDERITU
Common Legal Representative for Victims

Dated this 4th day of March 2014
At Nakuru, Kenya