

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: **5 March 2014**

TRIAL CHAMBER V(A)

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

***THE PROSECUTOR v.
WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG***

Public

Public Redacted Version of "Additional Defence submissions on the corrected and amended version of 'Prosecution's request under article 64(6)(b) and article 93 to summon witnesses'"

Sources: Defence for Mr. William Samoei Ruto and Mr. Joshua arap Sang

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

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I. Introduction

1. The trial against William Samoei Ruto and Joshua Arap Sang is on-going. Twelve witnesses have testified and the testimony of a thirteenth witness commenced today. Eight Prosecution witnesses have, however, either refused to communicate with the Prosecution or refuse to testify.¹ In the *Corrected and amended version of "Prosecution's request under article 64(6)(b) and article 93 to summon witnesses"* (ICC-01/09-01/11-1120-Conf-Exp) ("Request"),² the Prosecution asks the Trial Chamber to read into the Rome Statute ("Statute") via a broad "catch-all" provision a power which will permit the Chamber to compel the appearance of these witnesses before it with the assistance of the Government of Kenya ("GoK").
2. The respective defence teams for Mr. Ruto and Mr. Sang (jointly the "Defence") submit that the simple fact is that the Statute expressly and comprehensively deals with the appearance of witnesses before the Court in Article 93(1)(e). This article provides that attendance must be "voluntary". To find otherwise and to grant the relief requested by the Prosecution would be to see the triumph of judge-made law (even if considered at this juncture *lex ferenda*) over the law carefully and deliberately drafted, negotiated and agreed by States Parties at the Rome Conference (*lex lata*). If there are perceived deficiencies in the existing statutory regime, then, as recently recognised by His Honour Judge Eboe-Osuji, while "*Judges will do their best in good faith to fill in gaps through reasonable construction...it remains the prerogative of the legislature to fill any gaps they see a need to fill, regardless of the interpretations offered by judges.*"³
3. In addition and as more fully argued below, the relief requested by the Prosecution cannot be granted by the Trial Chamber exercising inherent powers

¹ ICC-01/09-01/11-1120-Conf-Red-Corr2 identifies 7 of the witnesses (P-0015, P-0016, P-0336, P-0397, P-0495, P-0516, P-0524) and ICC-01/09-011-1188-Conf-Red adds P-0323.

² ICC-01/09-01/11-1120-Conf-Red-Corr2.

³ ICC-01/09-01/11-1186-Anx, para. 15.

or powers that lie in the penumbra of the Statute because it offends against two internationally recognised human rights standards - the principle of legality and the prohibition against retroactive penalties.

4. The only relevant relief that the Trial Chamber has the power to grant, and which the Prosecution has not requested, is that set out in the Response of the Ruto Defence – namely, the issuance of non-enforceable summons inviting the eight witnesses to appear before the Court.⁴
5. If, *arguendo*, the Trial Chamber finds that it has the power to grant the Request, the Defence submit that this power should not be exercised in this instance because none of the eight witnesses satisfy the evidentiary threshold which must be met before a court may resort to coercive powers.
6. These additional submissions are filed confidentially because they refer to confidential Prosecution evidence. A public redacted version will be filed shortly thereafter.

II. Submissions

A. The Request is without legal basis

(i) Preliminary issues

7. Much has been made, both in oral and written submissions, that, in order to be effective, this Court should be placed on a par with and have available the same powers exercised by the *ad hoc* tribunals and domestic courts.⁵ This notion overlaps with other issues – such as when recourse may properly be made to inherent powers – addressed below. However, some preliminary remarks are warranted.

⁴ ICC-01/09-01/11-1136-Red2, para. 29.

⁵ See, e.g., Request, para. 65 and ICC-01/09-01/11-T-86-CONF-ENG ET 14-02-2014 (“14-02-2014 Transcript”), p. 3, lines 10-14; p. 10, lines 3-8; p. 23, lines 20-24; p. 25, lines 11-16.

8. Courts can function effectively at the international level without of necessity having “the most basic powers enjoyed by any domestic criminal court”.⁶ The Special Court for Sierra Leone (“SCSL”) is a case in point. It successfully prosecuted nine accused on the basis of, *inter alia*, the testimony of witnesses not all of whom resided in Sierra Leone, and without claiming the types of powers and concomitant state obligations that the Prosecution submits exist within the ICC legal framework.⁷ In particular, when ordering that a subpoena *ad testificandum* be served upon Naomi Campbell, the SCSL’s Trial Chamber II recognised the limits of its powers by requesting the authorities of the State in which Ms. Campbell resided to assist with enforcement.⁸ The absence of any mandatory powers to enforce the subpoena was not considered problematic to its nomenclature⁹ nor was there any attempt to ascribe same to the subpoena through recourse to inherent powers.¹⁰
9. While trite, international courts are not national courts and the powers which a State can exercise over its own citizens or individuals who commit crimes within its territory are clearly not comparable. An international court does not have a police force and, in any event, cannot, without the assistance and authorisation of State authorities, send any force to enter the territory of a State where an unwilling witness is residing to arrest such witness and bring them before the court – whether appearing in person or by electronic means. To do so would be in clear violation of State sovereignty. Instead, an international court must

⁶ 14-02-2014 Transcript, p. 10, lines 7-8.

⁷ The only country bound to comply with orders of the SCSL was Sierra Leone. See Agreement between the United Nations and the Government for Sierra Leone on the Establishment of a Special Court for Sierra Leone, Article 17.

⁸ *Prosecutor v. Charles Taylor*, SCSL-03-01-T-996, Decision on Prosecution Motion for the Issuance of a Subpoena to Naomi Campbell, 30 June 2010 (“Naomi Campbell Subpoena Decision”). See, in particular, p. 7 where the Trial Chamber “RESPECTFULLY REQUESTS the authorities of the state in which Ms. Campbell is residing to assist in the enforcement of this Order”.

⁹ See preliminary issue addressed *infra*, para. 12.

¹⁰ Despite the terms of Rule 54 of the SCSL’s Rules of Procedure and Evidence, the Trial Chamber noted that its enforcement powers were limited because, while acting under Chapter VII, Security Council Resolution 1688 (2006) only encouraged “all States...to ensure that any evidence or witnesses are, upon the request of the Special Court, promptly made available to the Special Court”. See Naomi Campbell Subpoena Decision, p. 4.

address itself to the State in question and request its cooperation. The State, in turn, will cooperate within the terms of the applicable international agreement establishing the court and the terms of any national implementing legislation.

10. Each international court or tribunal is different and is constrained by its own unique origins and the terms of its founding instruments.¹¹ In this regard, it is worth briefly noting that the principal drafters of the ICTY Rules of Procedure and Evidence were the Tribunal's judges, in co-operation with States and organisations from all over the world.¹² Judges remain in charge of adopting amendments to the Rules, which can be proposed by a Judge, the Prosecutor or the Registrar.¹³
11. In contrast, when drafting this Court's Statute and Rules of Procedure and Evidence ("Rules"), the drafters carefully examined the legal provisions adopted by the ICTY and ICTR.¹⁴ While in essence and nature, the ICC legal provisions are similar to those of the *ad hoc* tribunals and are clearly influenced by them,¹⁵ in other areas, the ICC legal framework clearly and deliberately departed from the template provided by the ICTY and ICTR. One such area is the reduced legislative power of judges. At the ICC, it is for the Assembly of States Parties ("ASP"), not the judges, to adopt amendments to the Rules if a two-thirds majority of its members agrees.¹⁶ Thus, it can be seen that the States Parties intended that legislative power remain primarily with States.

¹¹ These differences and limits were respected by the SCSL. See *supra*, para. 8.

¹² Morris & Scharf, *The International Criminal Tribunal for Rwanda*, (Volume II) (Transnational Publishers, 1998), 414.

¹³ See Rule 6 (Amendment of the Rules) of the Rules of Procedure and Evidence of the ICTY and ICTR.

¹⁴ D. Piragoff, Article 69, in O. Triffterer (Ed.), *Commentary on the Rome Statute of the International Criminal Court*, Observers' Notes. Article-by-Article (2nd Ed) (Hart Publishing, 2008), 1318; Friman. H., Inspiration from the International Criminal Tribunals When Developing Law on Evidence for the International Criminal Court, 2 *Law and Practice of International Courts and Tribunals* 373 (2003), 377-379.

¹⁵ *Ibid.*

¹⁶ See Article 51, which states in relevant part that:

1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Rules of Procedure and Evidence may be proposed by:

(a) Any State Party;

12. Finally, the question of whether the term “summons” must by definition include enforcement powers was raised by the learned Presiding Judge.¹⁷ In short, the Defence submit that the answer is no. Various examples are available at the international and domestic level where the term “summons” is properly and deliberately used but without any enforcement powers.¹⁸

(ii) The Trial Chamber cannot go “beyond” the express terms of the Statute

13. At the status conference on 14 February 2014, the Presiding Judge observed:

“We’re beyond that. We’re now in the stage where there is no question of voluntary appearance any more. The question is: Can a witness be compelled? That is the question?”¹⁹

14. The question posed goes to the heart of the issue. During discussion, the learned Presiding Judge probed whether other possible legal avenues might legitimately provide a basis on which to grant the Request such as the Court’s inherent powers²⁰ and Article 64(6)(b),²¹ particularly when there is no provision in the Statute expressly prohibiting the relief requested by the Prosecution.²² However, it is respectfully submitted that these avenues cannot properly be relied upon. Despite the difficulty noted by the Presiding Judge in paragraph 13 above, the Chamber cannot go “beyond” the plain wording of Articles 93(1)(e) and 93(1)(l).

(b) The judges acting by an absolute majority; or

(c) The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

[...]

¹⁷ 14-02-2014 Transcript, pp. 61-65.

¹⁸ See, e.g., (i) the European Convention on Mutual Assistance in Criminal Matters, 1959, Article 8 (“A witness or expert who has failed to answer a summons to appear, service of which has been requested, shall not, even if the summons contains a notice of penalty, be subjected to any punishment or measure of restraint, unless subsequently he voluntarily enters the territory of the requesting Party and is there again duly summoned.”); (ii) the SCSL Rules of Procedure and Evidence, Rule 54 (“At the request of either party or of its own motion, a Judge or a Trial Chamber may issue such orders, summonses, [...]”); and (iii) Austria’s implementing legislation, Federal Law No. 135: Cooperation with the International Criminal Court 2002, Section 2, para. 16.

¹⁹ 14-02-2014 Transcript, p. 91, lines 19-22.

²⁰ See, e.g., 14-02-2014 Transcript, p. 24, lines 13-25; p. 25, lines 11-16.

²¹ See, e.g., 14-02-2014 Transcript, p. 34, line 25 to p. 35, line 13; p. 52, lines 10-20.

²² See, e.g., 14-02-2014 Transcript, p. 79, line 10 to p. 80, line 5.

While the Defence rely on their previous submissions on this issue, the following additional arguments can be made.²³

15. Dealing first with Article 93(1)(e), to discard this provision as inapplicable because it only deals with voluntary appearance and is based on a State's reluctance to transfer individuals across international boundaries would contravene Article 31(1) of the Vienna Convention on the Law of Treaties 1969 which requires that a treaty "*be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of their object and purpose.*" Article 93(1)(e) is not constrained by any "ordinary" language which refers to "*travel*" or appearance for testimony at the seat of the Court. Further, Article 93(1)(e) is part of an article the object and purpose of which is to provide a comprehensive and effective cooperation regime between the Court and States Parties. To argue that Article 93(1)(e) can be read so narrowly as to assert that States deliberately decided to expressly address only one form of witness appearance ("voluntary" appearance) and, thus, to entrust a fundamental element of cooperation – compelled appearance – to the broadly worded Article 93(1)(l) is implausible.
16. The implausibility of the argument is further highlighted when it is recalled (as noted above) that the Statute was drafted against the experience of the *ad hoc* tribunals. States were clearly cognisant of the issue of witness compellability and the issuance of subpoenas, particularly given the seminal *Blaškić* Appeals Chamber decision.²⁴ Nevertheless, States expressly chose to legislate for voluntary appearance "before the Court" no matter where or how that appearance might take place.

²³ See ICC-01/09-01/11-1136-Red2, in particular paras. 5-9, and ICC-01/09-01/11-1138-Red, in particular paras. 50-63.

²⁴ *Prosecutor v. Blaškić*, IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997 ("*Blaškić* Subpoena Appeal Decision").

17. Indeed, in respect of the means of securing a witness' testimony, the Prosecution's argument that "*testimony by video link in the territory of the requested State...is a completely different type of assistance to the other forms that are foreseen*"²⁵ should be rejected because, first, the possibility of giving such testimony was known at the time the Statute was drafted, as is evidenced by Article 69(2). Therefore, this form of assistance cannot credibly be considered either unforeseen or "unpredictable"²⁶ and could easily have been included in Article 93. Tellingly it was not. Second, and building on the notion that compelled appearance should be a form of cooperation actively agreed to by States, is the May 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union referred to by the Prosecution.²⁷ Article 10 (Hearing by Videoconference) of this Convention which includes provision for the compellability of witnesses was expressly agreed to by States and, bearing in mind Article 8 of the related 1959 Convention,²⁸ did not emerge from any residual or catch all provision.

18. Given the foregoing, the Defence submit that the GoK (along with many other States) was entitled to proceed in good faith on the basis that the Statute only provides for the voluntary appearance of witnesses before the Court and that Article 93(1)(l) only extends to cooperation not otherwise dealt with in Articles 93(1)(a) to (k).

(iii) Correct interpretation of the relevant provisions in the Statute

19. Separate to Article 93(1)(e), the Defence submit that Article 64(6)(b) of the Statute does not provide a legal launch pad for the provision of the relief requested by

²⁵ 14-02-2014 Transcript, p. 16, lines 19-22.

²⁶ The Prosecution describes the type of assistance which might fall under Article 93(1)(l) as "as yet unpredictable types of assistance" (see Request, para. 82).

²⁷ ICC-01/09-01/11-1183-Conf, fn. 21; 14-02-2014 Transcript, p. 16, line 1 to p. 17, line 21.

²⁸ *Supra*, fn. 18.

the Prosecution either alone or in combination with any other statutory or inherent power. The limits of Article 64(6)(b) are evident on its face.

20. First, as argued by the Sang Defence, significance must be placed on the fact that the Trial Chamber can only “*require*” and not “*order*” the attendance and testimony of witnesses.²⁹ As part of the discussion during the Status Conference, the learned Presiding Judge referred to the synonyms of “*require*” provided in the Oxford Thesaurus, such as “*order*” and “*command*”.³⁰ However, it is to be noted that other less forceful terms such as “*ask for*” and “*call for*” are also included.³¹ Accordingly, the term “*require*” encompasses both coercive and non-coercive terms and its precise meaning is, therefore, less clear than “*order*”. Indeed, whilst the Statute’s drafters could have used the clearly coercive term “*order*”, they chose instead to use the less forceful term “*require*”. Of further note in this regard is that Article 64(6)(b) is the only instance where “*require*” rather than “*order*” is used in the English text of the Statute as the equivalent of the French term “[o]rdonner”.
21. Second, the limits of the Trial Chamber’s powers are demonstrated by the absence of any legal basis upon which the Chamber can detain individuals other than suspects awaiting trial and sentenced persons awaiting transfer to the State where their sentence will be served. Thus, this Court is in a different position to the *ad hoc* tribunals and domestic courts as it would be unable to coerce an individual at the door of the Court to testify.³²
22. Third, the terms of Article 64(6)(b) direct that “*the assistance of States as provided in this Statute*” should be used “*if necessary*”. This reinforces the fact that the Chamber is dependent on State cooperation to give effect to this provision.

²⁹ 14-02-2014 Transcript, p. 35, line 14 to p. 37, line 2. See also submissions for the Ruto Defence at p. 40, line 18 to p. 41, line 17.

³⁰ 14-02-2014 Transcript, p. 36, lines 3-7.

³¹ 14-02-2014 Transcript, p. 36, line 5.

³² See also *infra*, paras. 29-30.

However, that cooperation cannot go beyond what is comprehensively provided for in Part 9.

23. Finally, while the Statutes of the ICTY and ICTR do not include a provision similar to Article 64(6)(b),³³ they also do not contain provisions equivalent to Articles 93(1)(e) and 93(7) which enshrine the principle of voluntary appearance.
24. The Prosecution asserts that Article 93(7) does not establish an absolute principle and rely upon the terms of Rule 193 in support of this argument.³⁴ The Prosecution contend that the meaning and purport of Rule 193 are clear: *“the Chamber may seek the compelled appearance of a sentenced person for his/her testimony before it”*.³⁵ Accordingly, the Prosecution asserts, *“[t]he import of rule 193 is significant, as it shatters the argument that as a matter of principle the Rome Statute prohibits the compelled appearance of witnesses”*.³⁶ In its initial response to the Request, and relying on Schabas, the Sang Defence argued that *“it is not clear whether this exception to article 93(7) as described under rule 193 removes only the requirement of consent by the State of enforcement, or whether it also removes the requirement of consent by the prisoner”*.³⁷ To the Prosecution it is clear that Rule 193 removes the consent of both the State and the prisoner.³⁸
25. This position is, however, less clear for academics, like Kress and Prost, who are heavily relied upon by the Prosecution elsewhere in its filings.³⁹ According to Kress and Prost:

“Rule 193 fills in a gap that was left in the Statute in that no provision had been made for the transfer of witnesses who may be in a State but serving a sentence imposed by the Court. Under rule 193 it is made clear that article 93 para. 7 does not apply. Rather the Chamber dealing with the case is authorized to order the transfer

³³ 14-02-2014 Transcript, p. 52, lines 10-20.

³⁴ Request, para. 94.

³⁵ ICC-01/09-01/11-1183-Conf, para. 22.

³⁶ ICC-01/09-01/11-1183-Conf, para. 23.

³⁷ ICC-01/09-01/11-1138-Red, para. 25.

³⁸ ICC-01/09-01/11-1183-Conf, para. 22.

³⁹ See, e.g., Request and ICC-01/09-1/11-1183-Conf.

with the Registrar again empowered to oversee all the arrangements for the transfer.”⁴⁰

26. What is clear from this citation is that the Chamber rather than the State in question makes such orders. However, it is much less clear that the consent of the prisoner is irrelevant. Be that as it may, as the Ruto Defence points out, *“the subject of Rule 193 is a detained individual who is under the Court’s jurisdiction rather than a detained individual who is under the jurisdiction of a State Party, as is the case in Article 93(7). The State sovereignty considerations which underpin Article 93(7), thus, do not arise.”*⁴¹ Therefore, the principle of consent set out in Article 93(7) is not undermined by the existence of Rule 193, even without declaring the latter *ultra vires*.
27. Accordingly, Articles 93(1)(e) and 93(7) both clearly and explicitly incorporate the principle of voluntary appearance. In order to give effect to their ordinary meaning and purpose, and also to avoid inherent contradictions, the Defence submit that these provisions also exclude any possibility of reading into Articles 64(6)(b) and 93(1)(l) a power to compel witnesses to testify.
28. When considering the correct interpretation to be ascribed to the terms of the Statute, of relevance is that many States Parties have interpreted the Statute as allowing voluntary testimony only. The Prosecution cites the following as examples of such States: Austria, Switzerland, Lichtenstein, Czech Republic, Portugal, Bulgaria, Slovakia, and the Netherlands.⁴²
29. Bearing in mind one of the scenarios posited at the Status Conference, it is interesting to note that the Netherlands is one of the countries where compelled testimony is not permitted. At the Status Conference, the learned Presiding

⁴⁰ Kress, C. and Prost, K., ‘Article 93’ in Triffterer, O. (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd Ed, 2008), p. 1584.

⁴¹ ICC-01/09-01/11-1136-Red2, para. 15.

⁴² Request, para. 77(3), fn 54.

Judge used as an example a witness who was in The Hague but refused to appear before the court. The question was whether such a witness would be compellable.⁴³ The Attorney General stated that this was “*immaterial to our own case*” and it “*would not be the headache of the Kenya government*”.⁴⁴

30. The Defence reiterate that such a witness cannot be forced to appear before the Court against his or her will.⁴⁵ The only power the Court has is to compel a witness who appears before it to answer questions. However, given that Dutch legislation allows for the voluntary appearance of witnesses only, if a witness is under Dutch jurisdiction, such a witness cannot be compelled to testify before the Court irrespective of what interpretation will be given to Article 93(1)(e) of the Statute.⁴⁶ Accordingly, if the witness changes his or her mind about testifying while not before the Court, the Court can only request the Dutch authorities to facilitate the voluntary appearance of the witness. If the witness refuses, neither the Dutch, nor a Trial Chamber have any power to compel him or her to appear.
31. This is also the view of the International Bar Association (“IBA”). An IBA report notes that, “*even if a compellable witness is initially cooperative, once they physically leave the ICC building, they may refuse to return the next day or might simply disappear. In this situation, the Court would need to ask for assistance from the Netherlands, as the Host State, or other relevant national authorities to facilitate their return. In such cases, the witnesses’ ‘voluntariness’ would apply, meaning the witnesses would need to agree to appear even though they are technically compellable*”.⁴⁷
32. According to the Prosecution, the Netherlands, as well as the other States mentioned above, are permitted to limit their cooperation with the Court to

⁴³ 14-02-2014 Transcript, p. 57, lines 1-25.

⁴⁴ 14-02-2014 Transcript, p. 59, lines 17-18 and 25 respectively.

⁴⁵ The same argument was made by counsel for Mr. Sang at the Status Conference. See ICC-01/09-01/11-T-87-ENG ET WT 17-02-2014 (“17-02-2014 Transcript”), p. 25 line 3 to p. 26 line 5.

⁴⁶ The International Criminal Court Implementation Act 2002, Introduction, p. 5, available at http://www.legal-tools.org/uploads/tx_ltpdb/Netherlands_ICC_Implementation_Act_2002_04.pdf.

⁴⁷ See IBA Report, “Witnesses before the International Criminal Court” (July 2013), p. 17.

voluntary testimony and the Prosecution does not propose to impose any duty upon them to compel witnesses to testify. On the other hand, the Prosecution asserts that States which have not taken a clear position on the issue of compellability – or have simply faithfully followed the wording of the Statute – are under an obligation to compel witnesses to testify even without an explicit basis either in the Statute or in their domestic legislation. It is submitted that it is not fair to treat States in such a fundamentally different manner, in particular where the State itself, like Kenya, maintains that it does not have the power to compel witnesses to testify before the Court and that the domestic legislation requires the consent of the witnesses concerned. If States are allowed to adopt legislation which excludes compelled testimony before the Court, then surely States cannot be barred from interpreting in good faith their own constitutions and relevant subsidiary legislation – in the normal manner permitted by the legal system of a State – which may result in a finding that national law prohibits compelled testimony before the Court. It is not for the Chamber to interpret a State's domestic legislation in the manner most desirable to the Court. It is for relevant national government authorities, and if necessary and appropriate national courts, to interpret their legislation, a task which cannot be overridden by the Chamber.

(iv) Recourse cannot be made to the Court's inherent powers

33. This is also not a situation where recourse can be made to the Court's inherent powers.⁴⁸ According to the jurisprudence, inherent jurisdiction arises where “*an international body or organisation ‘must be deemed to have those powers which, though not expressly provided in the [constitutive instrument], are conferred upon it by*

⁴⁸ See, e.g., the Presiding Judge's question: “What has that got to do with intrinsic power of a court or the inherent ability of a court to be a court where that should be effective in the search for the truth, whether it is at the high court or the magistrate's court? If a court that is empowered to investigate, why should it not have the power to be effective?” (14-02-2014 Transcript, p. 25, lines 12-16).

*necessary implication as being essential to the performance of its duties.”*⁴⁹ As argued by the Defence, witness appearance is expressly dealt with in the Statute and, therefore, the question of whether the power to issue compellable summons is a “*necessary implication*” is not appropriate to ask, let alone answer, and would constitute the overriding of an express agreement by the States Parties.⁵⁰

34. Similarly, the Defence submit that any invocation of *Blaškić* and attempts to rely on powers which the ICTY Appeals Chamber derived from “*the general object and purpose of the [ICTY] Statute, as well as the role the International Tribunal is called to play thereunder*”⁵¹ in support of the Request is misplaced and cannot be imported into this Court’s regime.⁵²
35. The ICTY’s origins – the UN Security Council acting under Chapter VII – and the fact that it is an international tribunal with primacy over national courts are of fundamental importance because these factors determine the source, and thus, extent of the tribunal’s powers, including its inherent powers. The Defence respectfully submit that these factors cannot be dismissed “*as a matter of ranking of courts*”.⁵³ Indeed, the ICTY Appeals Chamber noted that the inherent powers of the ICTY include the power “*to make all those judicial determinations that are necessary for the exercise of its primary jurisdiction. This inherent power inures to the benefit of the International Tribunal in order that its basic judicial function may be fully discharged and its judicial role safeguarded.*”⁵⁴

⁴⁹ ICC-02/05-03/09-410, Decision on the defence request for a temporary stay of proceedings, 26 October 2012 (“*Banda Stay Decision*”), para. 77 quoting to the International Court of Justice, Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations (1949), ICJ Reports 174, page 182. Emphasis added.

⁵⁰ Pertinent to this point is also Trial Chamber V’s finding that “inherent powers or incidental jurisdiction may only be invoked in a restrictive manner in the context of the ICC”. This caveat is important for the reason, among others, that its proceedings are governed by an extensive legal framework of instruments in which the States Parties have spelt out the powers of the Court to a great degree of detail.” See *Banda Stay Decision*, para. 78 (emphasis added).

⁵¹ *Blaškić Subpoena Appeal Decision*, para. 47.

⁵² See, e.g., the Presiding Judge’s comments on the ICTY at 14-02-2014 Transcript, p. 52, lines 19-20 (“Why do we say that this Court is in a worse position than the ad hoc tribunals?”). Also 14-02-2014 Transcript, p. 97, line 20 to p. 98, line 22.

⁵³ 14-02-2014 Transcript, p. 25, line 12.

⁵⁴ *Blaškić Subpoena Appeal Decision*, para. 33 (emphasis added).

36. It was on the basis of its primary jurisdiction that the ICTY Appeals Chamber determined that the tribunal has the power to summon, subpoena or address other binding orders directly to individuals, including witnesses, and, in the event of non-compliance, that either the relevant State could take enforcement action as provided in its legislation or the tribunal could instigate contempt proceedings.⁵⁵ This inherent power of the *ad hoc* tribunals to issue summons directly and, if necessary, enforce them against individuals is one which even the Prosecution do not claim in the Request.
37. That such inherent power does not exist under the Statute is clear from Article 64(6)(b) which links a Trial Chamber's power to require the attendance of witnesses to State cooperation. By contrast, Article 19(2) of the ICTY Statute, which is the source of the ICTY's power to order an individual to appear before it, provides that "[a] judge may...issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial". This provision makes no reference to State cooperation in executing such orders, thereby leaving open the possibility that such order be made directly to the individual.
38. The power of the Tribunal to order individuals, including witnesses, to appear before it is further enforced by Rule 98 of the ICTY Rules of Procedure and Evidence, which provides that "[a] Trial Chamber may order either party to produce additional evidence. It may proprio motu summon witnesses and order their attendance." In addition, Rule 54 states that a Trial Chamber can "issue such orders, summonses, subpoenas, warrants...as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial." The States Parties did not incorporate similar provisions into the ICC legislative framework.

⁵⁵ *Blaškić* Subpoena Appeal Decision, Disposition, para. 3.

39. It is also the opinion of Rod Rastan, a current Prosecution staff member, that *"[t]he Rome Statute does not authorize the issuance of orders or subpoenas to private individuals in the absence of enabling domestic legislation where a state has obstructed co-operation"*.⁵⁶
40. Thus, with respect to witnesses, the Trial Chamber only has as much power as it has vis-à-vis States – it can request, but not order cooperation. Again Rod Rastan acknowledges that *"the ICC cannot issue binding orders to states: it can only request their co-operation. The authority of the Tribunals to do so in both instances rests on the exercise of delegated Chapter VII powers, which serves as an exception to the principle under customary international law that a sovereign state cannot be ordered by another state or international organization"*.⁵⁷ The difference between the powers available to the *ad hoc* tribunals and this Court is, therefore, clear and stems from their different origins.
41. Accordingly, the Trial Chamber cannot rely on inherent powers to require States to enforce summonses against witnesses. Even the ICTY did not rely on its inherent powers to impose such an obligation on States. The ICTY only relied on its inherent powers to enforce its primary jurisdiction over individuals. Its power to issue binding orders to States was based on the explicit powers with which the Security Council imbued it via Article 29 of the ICTY Statute. The ICTY Appeals Chamber addressed this issue as follows:

The Prosecutor has submitted that Article 29 expressly grants the International Tribunal 'ancillary jurisdiction over States'. However, care must be taken when using the term "jurisdiction" for two different sets of actions by the International Tribunal. As stated above, the primary jurisdiction of the International Tribunal, namely its power to exercise judicial functions, relates to natural persons only. The International Tribunal can prosecute and try those persons who are allegedly responsible for the crimes defined in Articles 2 to 5 of the Statute. With regard to States affected by Article 29, the International Tribunal does not, of course, exercise

⁵⁶ Rastan, R., Testing Co-operation: The International Criminal Court and National Authorities, in Leiden Journal of International Law (2008), p. 436.

⁵⁷ Rastan, R., *supra*, p. 436.

*the same judicial functions; it only possesses the power to issue binding orders or requests. To avoid any confusion in terminology that would also result in a conceptual confusion, when considering Article 29 it is probably more accurate simply to speak of the International Tribunal's ancillary (or incidental) mandatory powers vis-à-vis States.*⁵⁸

42. The Defence also submit that the jurisprudence of the International Court of Justice ("ICJ") concerning inherent powers is of limited relevance to the matter at hand.⁵⁹ The "inherent powers" of the *ad hoc* tribunals differ from those of the ICJ from which this term was derived;⁶⁰ the reason being that they have a different basis and nature of jurisdiction. Thus, "[e]ven though elements of the judicial process will be the same, the differing nature of their jurisdictions must have some effect on what kinds of 'inherent powers' each Court will be competent to exercise".⁶¹ Indeed, "the scope of powers that may be said to be 'inherent' differ according to the basis of jurisdiction of the judicial institution in question."⁶²

43. The ICC, of course, fundamentally differs both from the *ad hoc* tribunals and the ICJ. It, therefore, follows that the scope and application of its "inherent powers" also differs from them. Whilst the ICC, similar to the *ad hoc* tribunals, is an international criminal court with jurisdiction over individuals, the ICC does not have a similar relationship with the Security Council. The Security Council cannot delegate any "ancillary (or incidental) mandatory powers" to the ICC to issue binding orders on States. Nor can this Court's "inherent powers" extend to issuing binding orders on States.

⁵⁸ *Blaškić* Subpoena Appeal Decision, para. 28 (emphasis added). Indeed, as noted by one commentator: "The [ICTY] Appeals Chamber thus based the Tribunal's power to issue binding orders to States on article 29 of the statute, in terms of a delegation of power from the Council, rather than some form of an 'inherent power' of a judicial Tribunal. Put differently, the Tribunal, not having a jurisdiction over States, could not found the power to issue binding orders to States on its inherent judicial powers." See Sarooshi, D., *The Powers of the United Nations International Criminal Tribunals*, in (1998) 2 Max Planck Yearbook of UN Law, 141 at 153.

⁵⁹ 17-02-2014 Transcript, p. 18, line 4 to p. 19, line 15. Note, in particular, counsel for the Ruto Defence's submission that inherent powers are not applicable and instead the plain wording of the Statute is operative in the first instance.

⁶⁰ See *Nuclear Tests Case*, ICJ Reports 1974, 253 et seq., para. 23, as cited in the *Blaškić* Subpoena Appeal Decision, para. 27.

⁶¹ Sarooshi, D., *supra*, 153.

⁶² Sarooshi, D., *supra*, 154.

44. In the ICC system, it is the States Parties that fill the role of the Security Council. But, unlike the Security Council, States Parties did not provide this Court with additional “*mandatory*” powers to require States to enforce summons, compelling individuals to testify before the Court.
45. Moreover, Article 103 of the United Nations Charter provides that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” Accordingly, any obligation on a United Nations Member State under the Charter has priority over a conflicting treaty obligation of that State.⁶³ Accordingly, the *ad hoc* tribunals – through the powers delegated by the Security Council - have the power to impose binding obligations on Member States which will prevail over any other obligation of these States. The ICC States Parties do not have a similar power.

(v) *The relief requested by the Prosecution contravenes internationally recognised human rights standards*

46. Whether resort is made to the combination of Articles 64(6)(b), 93(1)(d) and 93(1)(l) per the Prosecution, or the Court’s inherent powers, the fundamental flaw in the Request is that it offends against the principle of legal certainty and the prohibition against the imposition of retroactive penalties.⁶⁴
47. If the summonses are to be enforced, then the available penalties are arrest and/or fine. Where deprivation of liberty is concerned, it is well established in human rights standards applicable worldwide that the general principle of legal certainty be satisfied. For instance, Article 5 of the European Convention on

⁶³ Sarooshi, D., *supra*, 150 and fn 24.

⁶⁴ Any interpretation of the Statute must be consistent with human rights principles. Article 21(3) of the Statute provides that “[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights”.

Human Rights states:⁶⁵

1. *Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*
 - a. *the lawful detention of a person after conviction by a competent court;*
 - b. *the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;*

[...]

48. The Guidance produced by the European Court of Human Rights on Article 5 states:⁶⁶

It is...essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

49. Similarly, the International Covenant of Civil and Political Rights prohibits the deprivation of liberty without an explicit legal basis. Articles 9. 1. and 9. 5. provide:⁶⁷

1. *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*
[...]
5. *Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.*

50. Crucially, neither the Statute, nor Kenyan law, provide in sufficiently precise terms that individuals who no longer wish to involve themselves in the ICC process or testify for the Prosecution will be subject to arrest and detention. As discussed above, in terms of the Statute, the Prosecution relies in part on the "catch-all" provision, Article 93(1)(l). This provision can hardly be described as

⁶⁵ Available at http://www.echr.coe.int/Documents/Convention_ENG.pdf.

⁶⁶ See http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf, para. 22, referring to, among recent authorities, Creangă v. Romania, § 120; and Medvedyev and Others v. France [GC], § 80 (emphasis added).

⁶⁷ Available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

providing reasonable notice to an individual of the consequences of non-compliance with an ICC summons.⁶⁸ Further, the Prosecution acknowledges in the Request that the Kenyan International Crimes Act 2008 (“ICA”) is silent on a power to compel witnesses to appear before the Court, let alone to imprison them in the event they refuse.⁶⁹ The Attorney General explained to the Court that,

[w]here the coercive powers of the State may be used against a subject, a citizen of Kenya, it must be on the basis of a clear law, clearly set out by the legislature, empowering that organ or that officer of the State to do so. Under Kenyan law, we cannot compromise. And whenever you take the liberty of any person, even so that he may testify in the tribunal, any tribunal, you have taken his liberty away from him. You have taken the right for him to be where he would have been otherwise. It cannot be by inference that we shall do that.⁷⁰

51. Of additional note when considering whether the witnesses were suitably informed of the consequences of a given action, such as a decision not to involve themselves in the ICC process or testify for the Prosecution, is that all the witnesses’ interactions with the Prosecution underlined that the process is voluntary.⁷¹ In these circumstances, the Defence submit that the Chamber would act contrary to fundamental human rights principles should it find that Kenya is obligated to enforce summonses issued by the Court to these particular individuals.

52. In addition, the prohibition against the imposition of retroactive penalties is widely recognized in international human rights conventions as well as in the

⁶⁸ Indeed, the lack of clarity on the issue is underlined by the protracted litigation and debate borne out of the Request. If international lawyers can differ so drastically on the interpretation of various provisions, then it begs the question as to how the eight ordinary witnesses at issue could be expected to interpret them and plan their actions accordingly.

⁶⁹ Request, para. 77(2).

⁷⁰ 14-02-2014 Transcript, p. 84, lines 1-7. See also the Constitution of Kenya, 2010, Article 29 (Freedom and Security of the Person). The constitution is available at <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010>.

⁷¹ See, e.g., KEN-OTP-0052-0003, lines 252-284 (for P-0015); KEN-OTP-0055-288 at lines 235-253 (for P-0016); KEN-OTP-0082-0187 at 0189, para.3 (for P-0336); KEN-OTP-0074-0264 at 0266, para. 3 (for P-0397); KEN-OTP-0084-0236 at 0237, para. 5 (for P-0495); KEN-OTP-0087-0031 at 0032, para. 5 (for P-0516); KEN-OTP-0087-0277 at 0279, para. 3 (for P-0524); and KEN-OTP-0072-0397, at 0398, para. 3 (for P-0323).

Statute itself.⁷² Therefore, no power to impose any financial penalties for a failure to comply with an ICC summons can be inferred without an explicit legal basis. In this regard, Article 23 of the Statute prohibits the Court from imposing any penalty unless in accordance with the Statute. According to Article 22(2), *“the definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”* A violation of a court order is usually treated as an offense against the administration of justice (ICC, Article 70) or as contempt of court (ICTY/ICTR), both of which are offences, which must be clearly defined.

53. In this regard, it is worth noting the difference between the applicable legal provisions of the ICTY and ICTR on the one hand, and the ICC on the other hand. Rule 77(A) of the ICTY/ICTR Rules of Procedure and Evidence provides that *“[t]he Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and willfully interfere with its administration of justice, including any person who....”* (emphasis added). This Rule clearly acknowledges the Tribunal’s inherent power to hold persons in contempt and then goes on to describe a non-exhaustive list of examples.

54. By contrast, Article 70 of the Statute describes ‘Offences against the administration of justice’ in a manner which does not leave any discretion upon judges to expand their jurisdiction to offences not explicitly described. Article 70(1) states that *“[t]he Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:...”* (emphasis added). Article 70 does not use terms such as *“including”* and can, thus, not provide a basis upon which judges may exercise inherent powers to judge similar offences. Article 71 and Rule 171, which allow the Court to exercise discretion in

⁷² See, e.g., Article 7 (No punishment without law) of the European Convention of Human Rights available at http://www.echr.coe.int/Documents/Convention_ENG.pdf.

sanctioning persons, are applicable only to persons present before the Court. Accordingly, there is no legal basis in this Court's Statute or Rules from which to subject witnesses who refuse to appear to a penalty in whatever shape or form.

B. The Request is without factual basis

(i) General observations

55. Even if, *arguendo*, the Trial Chamber determines that it does have the power to grant the Request, enforceable summons should not be issued in respect of the eight witnesses.
56. For the reasons set out above, the fundamental problem is that such a power can only be prospectively applied in order not to conflict with the principle of legal certainty and the prohibition against retrospective penalties.
57. Nevertheless, should the Trial Chamber find that the grant of the Request would not offend internationally recognised human rights standards, a further problem is the Prosecution's failure to satisfy the criteria for the issuance of a summons to which coercive powers are attached.⁷³ The Prosecution's submission that it is permissible to ascribe a power to the Court to seek the compelled appearance of witnesses which does not require the satisfaction of a strict test but simply one created by the Prosecution is untenable.⁷⁴ As the ICTY Appeals Chamber has observed "*[s]ubpoenas should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction.*"⁷⁵
58. The crux of the matter - and arguably the reason why it wishes to avoid the imposition of a strict test - is that the Prosecution fails to demonstrate that a

⁷³ See ICC-01/09-01/11-1138-Red, paras. 78-83.

⁷⁴ ICC-01/09-01/11-1183-Conf, paras. 36-37.

⁷⁵ *Prosecutor v. Halilović*, IT-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004, para. 6 citing to *Prosecutor v. Brđanin and Talić*, IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002, para. 31. The *Halilović* decision was cited with approval in the ICTR case *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, 23 June 2004, para. 4.

“legitimate forensic purpose” will be served by the enforced appearance of the eight witnesses before this Chamber.⁷⁶

59. First, the Prosecution’s submission in the *Kenyatta* case is equally applicable here – namely, that “*the hostile stance of these individuals makes it unlikely that they will provide information useful to a prosecution of the Accused.*”⁷⁷ This is a statement of common sense. It is also a broad statement of general application. To argue it should not apply equally to the eight witnesses in this case is clearly without merit.

60. Second, if these witnesses are hostile – and, as submitted below, the Defence have no information to the contrary – then there is not “*at least a good chance that [their evidence will] be of material assistance to the applicant’s case.*”⁷⁸ The allegations of Prosecution witnesses peddling falsehoods about the involvement of Mr. Ruto and Mr. Sang in the PEV is a core aspect of the defence in the present case. The Prosecution cannot now conveniently seek to co-opt the defence case in order to support the Request.⁷⁹ Indeed, even if – at best – the witnesses were to adopt their prior statements, the forensic utility of their evidence to the main case would be essentially neutral. The relevance of such evidence would instead be to collateral Article 70 proceedings. It is submitted that it is inappropriate, and could amount to an abuse of process, to call witnesses whose purpose is to generate evidence in collateral proceedings and not the main substantive case. In this regard, the Defence recalls that the Trial Chamber has already stated that Article 70 allegations should not be intermixed with the core case, but brought

⁷⁶ According to the Appeals Chamber of the Special Court for Sierra Leone and approving the reasoning set out in the underlying Trial Chamber decision, a 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 the prospective witness is likely to be of material assistance to the applicant’s case, or that there is at least a good chance that it would be of material assistance to the applicant’s case, in relation to clearly identified issues relevant to the forthcoming trial” (emphasis added). See *Prosecutor v. Norman et al.*, SCSL-04-01-T-688, Decision on Interlocutory Appeals against Trial Chamber Decision refusing to Subpoena the President of Sierra Leone, 11 September 2006 (“*Norman Appeal Decision*”), para. 10.

⁷⁷ ICC-01/09-02/11-892, para. 8.

⁷⁸ *Norman Appeal Decision*, para. 10.

⁷⁹ ICC-01/09-01/11-T-87-CONF-ENG ET 17-02-2014 (“17-02-2014 Transcript”), p. 34, line 22 to p. 35, line 3.

separately.

61. Third, the Prosecution erroneously asserts that, even if the witnesses are expected to recant, recourse can be made to Rule 68(2)(d).⁸⁰ This new sub-rule was adopted in the last Assembly of States Parties session in November 2013, during the currency of this trial.⁸¹ Therefore, the Prosecution is estopped by Rule 51(4) from using the new provision to the detriment of Mr. Ruto and Mr. Sang⁸² – in particular, by calling before the Court Prosecution witnesses, notwithstanding their hostile nature and other credibility issues, who may provide incriminatory testimony (including proof of acts and conduct) against the accused.
62. Fourth, the fact that the Ruto Defence, supported by the Sang Defence, sought to call three of the eight witnesses to testify immediately after the opening statements in this case is irrelevant to the matter at hand.⁸³ This request was made at a time when it was understood that all were willing witnesses and likely to testify at some point in proceedings. Thus, the request was made to bring that testimony before the Chamber sooner rather than later.

(ii) *Witness specific observations*

63. At the outset, it is questionable that the issuance of an enforceable summons to P-0015 would satisfy the requirement of necessity. According to his signed affidavit, [REDACTED].⁸⁴ Therefore, while the witness may no longer be in contact with the Prosecution, arguably the Court through VWU should make

⁸⁰ 17-02-2014 Transcript, p. 35, lines 6-10.

⁸¹ The Defence notes that the ASP Resolution enacting, *inter alia*, amended Rule 68, states “[f]urther decides that the following shall replace rule 68 of the Rules of Procedure and Evidence, emphasizing article 51, paragraph 4, of the Rome Statute according to which amendments to the Rules of Procedure and Evidence shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted, with the understanding that the rule as amended is without prejudice to article 67 of the Rome Statute related to the rights of the accused, and to article 68, paragraph 3, of the Rome Statute related to the protection of the victims and witnesses and their participation in the proceedings” (emphasis added). See Resolution ICC-ASP/12/Res.7.

⁸² Rule 51(4) states that: “The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.” Emphasis added.

⁸³ 17-02-2014 Transcript, p. 35, lines 6-10.

⁸⁴ ICC-01/09-01/11-1120-Conf-AnxB, p. 27.

further attempts to contact him to understand if voluntary appearance [REDACTED] may take place.

64. If voluntary appearance [REDACTED] cannot be secured, the Defence submit that compelled testimony from this individual would not serve a legitimate forensic purpose. [REDACTED].⁸⁵ In addition, it is known that P-0015 has emotional and behavioural difficulties. Indeed, he appears to have recanted on at least 3 different occasions.⁸⁶ [REDACTED].⁸⁷ [REDACTED].⁸⁸ Given this background, combined with recent developments described in the Request, it is submitted that this witness' reliability and credibility is irrevocably compromised and he cannot be held out in good faith as a witness of truth. The Defence also note the Trial Chamber's Article 68 obligations and questions whether forcing a clearly troubled individual to testify would be in the individual's best psychological interests.
65. [REDACTED].⁸⁹ Accordingly, the Defence submit that the Prosecution is estopped from seeking to compel P-0016's attendance not only by the above human rights principles but also by its own actions. In addition, the links between P-0016's public recantations of his evidence with that of P-0015 means the probative value of any compelled testimony is subject to the same criticisms made above in respect of P-0015. The inevitable conclusion is that recourse should not be had to the exceptional remedy of the issuance of an enforceable summons to secure the testimony of such an unreliable and incredible witness.

⁸⁵ [REDACTED]

⁸⁶ Request, paras. 10-14.

⁸⁷ ICC-01/09-01/11-558-Conf-Red.

⁸⁸ ICC-01/09-01/11-898-Conf-AnxB, p. 107.

⁸⁹ ICC-01/09-01/11-1120-Conf-AnxE, p. 17.

66. Contrary to the Prosecution's assertions, an analysis of P-0323's anticipated evidence establishes that it is largely irrelevant to the charges.⁹⁰ [REDACTED].⁹¹ The testimony regarding [REDACTED] is outside the temporal scope of the charges and the evidence of events in [REDACTED] is outside the geographic scope of the charges. Additionally, the fact that P-0323 implicates [REDACTED], does not elevate this witness's significance.⁹² [REDACTED] is not identified by the Prosecution as a member of the alleged "network" either in the Updated Document Containing the Charges or the Pre-Trial Brief.⁹³ Indeed, neither refers to [REDACTED] in any capacity. While the list of network members is stated to be non-exhaustive, if Mr Ruto's connection to [REDACTED] were so central to its case that the Prosecution needs to summon a witness to testify to that relationship, then at a minimum, [REDACTED] role in the network should have been expressly named.

67. Finally, the Defence note the Prosecution's submission that it *"has evidence in the case of each of [the] seven witnesses of intimidation, bribery or other improper influence which has...been the proximate cause of their ceasing to co-operate with the Office of the Prosecutor. This has been set out in some detail in the ex parte version of the [Request]"*.⁹⁴ The Defence is unaware of this evidence. In the Defence's submission, this evidence is disclosable under Article 67(2) and/or Rule 77 and immediate disclosure is requested.

III. Relief requested

68. For the reasons set out above, the Defence respectfully prays that the Trial Chamber:

⁹⁰ The Prosecution argues that P-323 is an "important witness providing unique evidence, who can materially assist the case". See ICC-01/09-01/11-1188-Conf-Red, para. 17.

⁹¹ See, e.g, ICC-01/09-01/11-1188-Conf-Red, para. 11.

⁹² *Ibid.*

⁹³ See, for example, the Updated Document Containing the Charges, ICC-01/09-01/11-533-AnxA, and the Prosecution's Second Updated Pre-Trial Brief, ICC-01/09-01/11-625-Conf-AnxA.

⁹⁴ 17-02-2014 Transcript, p. 34, lines 2-6.

- a. Reject the Request;
- b. In the event the Trial Chamber determines it is necessary and appropriate, issue non-enforceable summons inviting the eight witnesses to appear before the Court; and
- c. Order the Prosecution to disclose the evidence in its possession which shows that intimidation, bribery or other improper influence has been the proximate cause of witness non-cooperation.

Respectfully submitted,



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 Dated this 5th Day of March 2014
 At The Hague, Netherlands



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