

1 International Criminal Court
2 Trial Chamber V(a) - Courtroom 1
3 Situation: Republic of Kenya
4 In the case of the Prosecutor v. William Samoei Ruto and Joshua Arap
5 Sang - ICC-01/09-01/11
6 Presiding Judge Chile Eboe-Osuji, Judge Olga Herrera Carbuccion and Judge Robert
7 Fremr
8 Status Conference
9 Monday, 17 February 2014
10 (The status conference starts in open session at 9.36 a.m.)
11 THE COURT USHER: All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE EBOE-OSUJI: Thank you.
15 Court officer, please call the case.
16 THE COURT OFFICER: Thank you, Mr President. The Situation in the Republic
17 of Kenya in the case of The Prosecutor versus William Samoei Ruto and Joshua Arap
18 Sang, ICC-01/09-01/11, and we're in open session, your Honours.
19 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
20 Appearances, please.
21 MR STEWART: Good morning, Mr President, your Honours, counsel opposite,
22 counsel for the victims. My name is James Stewart, Deputy Prosecutor, appearing
23 for the Prosecutor, along with Anton Steynberg, senior trial lawyer, Counsel Rod
24 Rastan and Thomas Bifwoli, and our case manager Jasmina Suljanovich.
25 PRESIDING JUDGE EBOE-OSUJI: Mr Nderitu.

1 MR NDERITU: May it please, Mr President, your Honours, I am assisted in this
2 case by Mr Orchlon Narantsetseg, who is from the OPCV, and Mr James Mawira, my
3 case manager. Thank you.

4 MR KHAN: Good morning, Mr President, your Honours. Mr Ruto is represented
5 by Mr David Hooper of Queen's Counsel, Ms Leigh Lawrie, legal assistant, and Ms
6 Shalini Jayaraj and Ms Grace Sullivan, who sits behind. Your Honours, my name is
7 Karim Khan.

8 MR KIGEN-KATWA: Good morning, your Honours. Mr Sang is represented by
9 myself, Katwa-Kigen, Caroline Buisman, Logan Hambrick and Honor Lanham.
10 Mr President, may I mention that we had requested to dispense with Mr Sang's
11 presence in the status conference and he should be available after one hour that the
12 status conference would last. Thank you, Mr President.

13 PRESIDING JUDGE EBOE-OSUJI: Fair enough.

14 Now, we will finish the status conference we started on Friday. We want to be
15 done with it by 10.30 this morning. We would like to hear from Mr Nderitu.

16 Before you begin so that we can focus the discussion, there are two issues although
17 related but can also be seen in their separate elements, one is whether the Chamber
18 has the power to compel a witness to appear as a general proposition.

19 The second question is whether, assuming the Chamber has the power to compel the
20 witness to appear as a general proposition, whether the Chamber can create either a
21 duty or a legitimate expectation on the Government of Kenya in particular, not any
22 other State at large, the Government of Kenya to assist with compellability in the
23 circumstances of the Prosecutor's request in this case.

24 In order to focus the attention, let us forget about the first part of the question,
25 whether or not there is a duty to compel the witness to appear as a general

1 proposition. Let's not waste time with that. The Attorney General was quite wise
2 to concede the point. So let's focus on the second one. Thank you.

3 MR NDERITU: Thank you, Mr President, your Honours. With regard to the
4 second question, that is, whether assuming the Chamber has the power to compel a
5 witness to appear as a general proposition, whether it can create a duty or a
6 legitimate expectation on the Government of Kenya in particular, this is what I
7 would have to say, that first and foremost it is very clear under Section 86 of the
8 International Crimes Act and also Section 108 of the International Crimes Act that it
9 is more than just a discretion that arises on the part of the Attorney General once the
10 provisions of Article 64(6)(b) have been invoked, and it is very interesting to note
11 that the --

12 PRESIDING JUDGE EBOE-OSUJI: When you say "It is more than a discretion," do
13 you mean it is a duty on the Attorney General?

14 MR NDERITU: Yes, absolutely, my Lord. Under Section 86, and permit me please
15 to read out 86(1) says "Where the ICC requests assistance under paragraph 8 of
16 Article 19, Article 56, paragraph 7 of Article 58, Article 64 or paragraph (1)(d) of
17 Article 93 of the Rome Statute in arranging for the service of a document in Kenya,
18 the Attorney General shall give authority for the request to proceed if he is satisfied
19 that (a) the request relates to an investigation being conducted by the Prosecutor or
20 any proceedings before the ICC; and (b) the person or body to be served is or may be
21 in Kenya.

22 So what we're saying here, your Honour, is that as long as the two conditions, that
23 is, having a relation to proceedings before the ICC in this case, and the person or
24 body being served being or perhaps being in Kenya, then the Attorney General has a
25 duty to, has a duty to accede to a request by the Court.

1 It's very interesting that what I hold here before you, Mr President and your
2 Honours, is the copy of the International Crimes Act as printed by the government
3 printers. And for the first time I see that the initial wording was "may" instead of
4 "The Attorney General shall give," it was "The Attorney General may give authority."
5 And then that was cancelled into a "shall, which is not just a "shall, but a "shall" in
6 bold.

7 And I have also taken time to look at the electronic version of the act from the official
8 law reporting institution of government, and, again, it also has a "shall" in bold. It's
9 very telling.

10 PRESIDING JUDGE EBOE-OSUJI: Wait a minute. Did you say that both "may"
11 and "shall" do appear, but "may" is cancelled out in the version you have as in
12 stricken out?

13 MR NDERITU: Precisely, precisely. It's stricken out, and then "shall" does not just
14 appear in ordinary print but in bold print, for which --

15 PRESIDING JUDGE EBOE-OSUJI: Right. Can you kindly make available a copy
16 of what you are referring to, because the version --

17 MR NDERITU: Yes, I will.

18 PRESIDING JUDGE EBOE-OSUJI: -- the version I have, which is it looks like it may
19 have been downloaded from the Internet, I don't know who was kind enough to
20 compile this for us.

21 PRESIDING JUDGE EBOE-OSUJI: The one downloaded from the Internet, your
22 Honour, is still, it has "shall," it does not have "may," but it has "shall" in bold still,
23 which is very interesting.

24 PRESIDING JUDGE EBOE-OSUJI: What I'm looking at here actually, there may be
25 different versions, the one I'm looking at has "may" not stricken out, but "shall" in

1 bold.

2 MR NDERITU: Very well.

3 PRESIDING JUDGE EBOE-OSUJI: Precisely this may not be the authoritative
4 version. It looks like the one you have looks like the authoritative version
5 published in the Gazette, you said.

6 MR NDERITU: Yes, I will make this available.

7 If we look again at Section 108, we find an elaborate procedure again in connection
8 with requests for other types of assistance. And this is under Article 93(1) of the
9 Rome Statute. And, again, the two main conditions to be satisfied are the request
10 relates to an investigation being conducted by the Prosecutor or any proceedings
11 before the ICC and the assistance sought is in accordance with Kenyan law.

12 And it is noteworthy that under Subsection 3, if the Attorney General considers that
13 the assistance sought cannot lawfully be provided, he shall before refusing the
14 request and in accordance with paragraph 5 of Article 93 of the Rome Statute (a)
15 consult with the ICC and (b) consider whether the assistance can be provided subject
16 to conditions or whether it can be provided at a later date or in an alternative
17 manner.

18 The sum total of Section 86 and Section 108 is to make it very, very clear that the
19 legislative intent is to give power to this Court to make an order, to make an order
20 for the issuance of summonses, and that if there is any practical difficulty, then the
21 Attorney General will have an obligation to consult with the Court.

22 PRESIDING JUDGE EBOE-OSUJI: Mr Nderitu, hold that thought, please. For the
23 completeness of the record, I'm bound to observe in relation to my last observation
24 about what 86(1) says, I'm also looking at yet another version of 86(1), again that was
25 made available, and it only has the word "shall" in bold and the "may" is not in it, it

1 does not appear in this other version. So there are different versions of the ICA. I
2 just thought I should complete the record on that. Please proceed.

3 MR NDERITU: Yes, thank you, Mr President. Yes. I have seen three versions
4 myself, one electronic, which is a mirror image of the hard copy that I have; then the
5 hard copy that I have; and then the one that does not have the word "may" but has
6 the word "shall" in bold. Thank you.

7 Mr President, your Honours, it is a fundamental principle of statutory interpretation
8 that a legislative body does not act in vain. And, therefore, we must go back and
9 ask ourselves why there would have to be paragraph B of subsection 6 of Article 64
10 of the Rome Statute if there was no intent to have the ability, for the Court to have
11 the ability to issue summonses.

12 We must also go to article 93 and look not only at the marginal notes, which talk
13 about other forms of assistance, but also draw a distinction between 93(1)(e) and
14 93(1)(l). And 93(1)(l), which is the catch-all provision must then be looked at
15 distinctly from 93(1)(e). And it is my submission, Mr President, your Honours, that
16 the Rome Statute in Article 93, it does recognise both voluntary appearance and
17 compelled appearance.

18 PRESIDING JUDGE EBOE-OSUJI: On that note, looking at 93(1)(b), article 93(1)(b)
19 I mean -- are you there?

20 MR NDERITU: Yes, I am.

21 PRESIDING JUDGE EBOE-OSUJI: Article 93(1)(b), which contemplates assistance
22 in the form of the taking of evidence, including testimony under oath. As far as
23 you're aware as a Kenyan lawyer, what we're thinking about here, is it not, where a
24 request is made for perhaps a judge in Kenya to assist with that process, is that what
25 we're looking at?

1 MR NDERITU: Yes, that is correct.

2 PRESIDING JUDGE EBOE-OSUJI: All right. In that event, can that judge, the
3 High Court judge in Kenya who is assisting with the taking of the evidence, can he
4 or she compel the witness to appear before him or her?

5 MR NDERITU: Yes, your Honour. I have no doubt about that, because in the first
6 place under Kenyan law in respect of criminal proceedings, with the fewest of
7 exceptions, witnesses are generally compellable.

8 PRESIDING JUDGE EBOE-OSUJI: All right. Now, if that is the case that a Kenyan
9 judge taking evidence on behalf of the ICC can compel a witness to appear before
10 her or him, do we see then any material distinction, any material reason, material
11 reason for a distinction that would prevent the ICC while convened in Kenya to
12 require the attendance of a witness and having Kenya assist in making that happen?

13 MR NDERITU: Mr President, your Honours, the only situations that I would see
14 would be the same same situations that would avail to a witness in a criminal case in
15 Kenya. For example, if we are talking about spousal immunity, then obviously in a
16 situation where the Court seeks to compel the wife, say, of an accused person, the
17 policy position goes against that generally, but in the ordinary situation there is no
18 material distinction between the ICC operating in Kenya through a Kenyan judge
19 and the ICC operating here.

20 I do not know if I have made myself clear.

21 PRESIDING JUDGE EBOE-OSUJI: All right. What about ICC operating while
22 either convened in Kenya or a witness situated in Kenya and being piped in, the
23 testimony being piped in through video conference, do you see a material difference
24 there as well or not, or is it the same?

25 MR NDERITU: Again, your Honours, I do not see that there would be any

1 distinction whatsoever. So far as I'm aware, there is no law that disallows the
2 taking of such evidence in Kenya.

3 PRESIDING JUDGE EBOE-OSUJI: We move now to the question of
4 complementarity, the angle of it. Do we expect that the notion of complementarity
5 would, as the doctrine is understood to operate, would put the ICC in a lesser
6 position to compel the attendance of a witness, a Kenyan witness when the ICC is
7 exercising jurisdiction and seized of the matter, would it be in a lesser position to
8 compel attendance of a Kenyan witness than a Kenyan court actually trying an
9 international crimes case would be in compelling the attendance of the witness
10 before the Kenyan judge or the Kenyan court trying a case within the jurisdiction of
11 the ICC?

12 MR NDERITU: Thank you, Mr President, your Honours. As I understand it, and
13 adopting a very broad approach to the principle of complementarity, the Court,
14 that's the ICC, and the national criminal jurisdictions are appendages of each other.
15 They are, so to speak, two organs which are part of one body. And the basis upon
16 which I say that is that under our Article 26 of the constitution, we recognise that
17 every treaty that has been ratified by Kenya forms part of the laws of Kenya.
18 But more importantly in the case of the Rome Statute, we have domesticated the
19 Rome Statute through the International Crimes Act. So from that point of
20 departure, while it may be said from a factual point of view that the ICC could play
21 a lesser role, when it plays a lesser role, then the Kenyan legal system must play a
22 greater role. That is the way I would look at it. That's the concept of
23 complementarity.
24 So that if we're saying that the ICC will play 10 per cent, the Kenyan judicial system
25 must play 90 per cent or the Kenyan legal system in general must play 90 per cent;

1 where the ICC plays 40 per cent, the Kenya legal system must play 60 per cent,
2 because the idea is to assist the doing of those acts that Kenya as a state party would
3 not either be able to do or would be unwilling to do. That's the way I would look at
4 it.

5 PRESIDING JUDGE EBOE-OSUJI: But when the ICC does play its own role, seized
6 of the case because the test for admissibility has been passed, would it be in a lesser
7 position to do justice in the case in terms of the powers the ICC must have than
8 would the Kenyan court seized of the case generally? If you don't understand the
9 question, I can rephrase it.

10 MR NDERITU: Yes, I would appreciate it. I would appreciate it.

11 PRESIDING JUDGE EBOE-OSUJI: All right. My question is this, so that we clear
12 up the matter, complementarity gives the primary jurisdiction to the state. So if in
13 the best world, the case, the State is trying the case. The courts of that State would
14 have power to compel the attendance of witnesses, is that not the case?

15 MR NDERITU: That is so, Mr President.

16 PRESIDING JUDGE EBOE-OSUJI: If the case, the State is not trying the case and
17 ICC is trying that case that the State ought to have tried, would the ICC not also
18 have the power to compel the witness to appear just like the state court would have
19 had if it was trying the case?

20 MR NDERITU: Precisely, Mr President. That is what I was saying, that it's
21 something akin to the principle agency relationship or what in the law of torts and
22 that we call in Latin *qui facit per alium facit per se*, that is, he who does an act
23 through another does it himself.

24 So we are saying here that if the State does not do something which is required by
25 the Rome Statute to be done, then the Court can do it, or if the State does not do

1 something that is required by the International Crimes Act to be done in respect of a
2 matter that is pending before the ICC, then the ICC can do it.

3 PRESIDING JUDGE EBOE-OSUJI: And the ICC would have the powers to do it,
4 the full powers to do it then as the State would have had to do it, the State court
5 would have had, is that what you are saying?

6 MR NDERITU: Absolutely, absolutely, absolutely.

7 PRESIDING JUDGE EBOE-OSUJI: Another question for you is this, moving away
8 from complementarity now, in a case of theft in Kenya, for instance, a criminal case
9 of theft, from what you said, it would seem that with the exception of the spousal
10 privilege and things like that, a criminal court sitting in Kenya would have the
11 powers to compel a witness to attend in a case of theft, is that correct?

12 MR NDERITU: Yes, that is so, Mr President. And in fact, my argument is that if in
13 a case of simple theft the criminal court sitting in Kenya would have powers to
14 compel, then --

15 PRESIDING JUDGE EBOE-OSUJI: Now, now, if that is the case, do we see any
16 reasoning by which it could be that in the same court, if a court in Kenya is sitting in
17 a genocide trial or a trial of crimes against humanity, it would not have the power to
18 compel a witness to attend. Do you see any theory by which we can arrive at that
19 conclusion reasonably?

20 MR NDERITU: Not at all, Mr President, your Honours. As a matter of fact, the
21 Rome Statute is very, very clear in its preamble as to the purpose for which the ICC
22 was established, and that is to end impunity. And there would be no logical
23 reasoning in law if it were possible to compel in respect of, to compel a witness in
24 respect of very, very light offences and not be able to compel in respect of offences
25 which as they say shock the conscience of man.

1 PRESIDING JUDGE EBOE-OSUJI: Those are my questions. You have two
2 minutes if you want to make any more additions, two minutes.

3 MR NDERITU: Thank you, Mr President, your Honours. It was suggested that it
4 is only the Office of the Attorney General, and this, I'm looking at the submissions
5 made by the Attorney General of the Republic of Kenya, that it is his office that is
6 entitled to get an interpretation for the purpose of this Court. And with due
7 respect, the position that obtains is not that only the Attorney General can give an
8 interpretation. In fact, the interpretation of the Attorney General with regard to
9 what the state of the law is is subject to a judicial determination.

10 As a matter of fact, the Attorney General in matters that relate to interpretation of
11 the law more often than not finds himself in the same position as any other litigant,
12 and then the courts determine what the position is in case there is any dispute.

13 But having said that, my respectful submission is that with regard to Article 64(6)(b)
14 and the whole of Article 93(1), I do not find that there are sufficient grounds upon
15 which to say that there is serious dispute with regard to what is required of this
16 Court and what this Court has power to do, what duties obtain vis-à-vis the
17 Attorney General in a situation where this Court may grant a request by a party for
18 the summoning of witnesses.

19 I think that is what I would want to say for now. Thank you.

20 (Trial Chamber confers)

21 PRESIDING JUDGE EBOE-OSUJI: I've consulted with my colleagues. We may be
22 able to continue until 11:00. We had indicated earlier that we would stop at 10.30.
23 That being the case, is there anything more you would like to add at this stage? If
24 not, we can proceed with other counsel and if need be revert back to you.

25 MR NDERITU: Thank you, Mr President, your Honours. I think if I were to add

1 anything, I would want to just recapitulate what Section 4 of the International
2 Crimes Act says in terms of the Rome Statute having force of law in Kenya. And I
3 think it's very, very clear in terms of the applicability of part 6 of the Rome Statute in
4 which Article 64 finds itself, yes, in connection with conduct of trials. That's one of
5 the things that I would want to really bring out.

6 And I perhaps should also want to highlight the provisions of Sections 10 and 11 of
7 the International Crimes Act. Section 10(1) says that a person who wilfully attempts
8 in any manner to obstruct, pervert, or defeat the cause of justice of the ICC is guilty
9 of an offence and liable on conviction to imprisonment for a term of not more than
10 five years.

11 And then the opening words of subsection (2) are important, and it says, "Without
12 limiting the generality of subsection (1), a person shall be deemed wilfully to attempt
13 to obstruct, pervert, or defeat the course of justice if in any existing or proposed
14 proceedings of the ICC he (a) dissuades or attempts to dissuade a person by threats,
15 bribes, or other corrupt means from giving evidence; or (b) accepts, obtains, agrees
16 to accept or attempts to obtain a bribe or other corrupt consideration to abstain from
17 giving evidence."

18 Then article -- sorry, Section 11 then says that "A person who resists or wilfully
19 obstructs an official of the ICC in the execution of his duty or any person lawfully
20 acting in aid of such an official is guilty of an offence and liable on conviction to
21 imprisonment for a term of not more than two years."

22 What am I saying here, Mr President, your Honours? What I am saying is that
23 under Article 64(1)(b), if this Court were to find it necessary to issue summonses
24 against the witnesses in question --

25 PRESIDING JUDGE EBOE-OSUJI: 64(6)(b) you mean?

1 MR NDERITU: 64(6)(b), yes. Then thereupon that becomes under Section 11
2 something that is capable of being or it becomes part of the execution of a duty of an
3 ICC official or ICC officials, in this case the three judges before us, and that then if
4 any person obstructs that, that is, if one does not then invoke the provisions of
5 Section 86 and the subsequent sections and Section 108 and the subsequent sections,
6 then that person becomes guilty of an offence and is liable to punishment upon
7 conviction. That's the point that I am making.

8 PRESIDING JUDGE EBOE-OSUJI: Thank you, Mr Nderitu.

9 MR NDERITU: Thank you.

10 PRESIDING JUDGE EBOE-OSUJI: We will now leave it there with you for now,
11 and we will go back to the Defence. And after your reactions the Prosecutor will --

12 MR KHAN: I'm grateful.

13 PRESIDING JUDGE EBOE-OSUJI: -- reply, and we will bring the proceeding to an
14 end.

15 MR KHAN: I'm grateful.

16 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, how much time are we looking at?

17 MR KHAN: Your Honour, my learned friend was given I think about 30
18 minutes/34 minutes. I would say I will try to do it, well, it depends, I would ideally
19 like half an hour, but I know --

20 PRESIDING JUDGE EBOE-OSUJI: No, no, you will not get half an hour.

21 MR KHAN: I understand that, your Honour. I will try to do it --

22 PRESIDING JUDGE EBOE-OSUJI: Your learned friend hadn't spoken before. This
23 is the first time he had spoken. You mean Mr Nderitu, right?

24 MR KHAN: No, your Honour. I think he spoke at the outset. In total --

25 PRESIDING JUDGE EBOE-OSUJI: No. It is the first time he spoke.

1 MR KHAN: Well, your Honour, he's had 34 minutes. Your Honour, if I could
2 have 15 minutes, I would be grateful. And I'll try to motor. If I finish before, of
3 course, I will endeavour to do so.

4 PRESIDING JUDGE EBOE-OSUJI: All right. One second.

5 Mr Kigen-Katwa, you had also requested some time.

6 MR KIGEN-KATWA: About 15 minutes, Mr President, please.

7 PRESIDING JUDGE EBOE-OSUJI: And, Mr Stewart, how much time will you
8 need?

9 MR STEWART: Well, 15 minutes will do. I might just say that Mr Steynberg
10 assures me that given the challenges that the team is facing with respect to
11 witnesses, we needn't rush through the morning, if I can put it that way. There is
12 some, there is some time. We have a witness, I understand, for today that will take
13 several days. But in terms of your whole session, there are some difficulties.
14 So if you are concerned about getting through the evidence that you're scheduled to
15 hear, we can entirely in your hands be a little bit more relaxed if you wish.

16 PRESIDING JUDGE EBOE-OSUJI: Well, we have all kinds of other work we must
17 do when we're not sitting here.

18 MR STEWART: All right.

19 PRESIDING JUDGE EBOE-OSUJI: Ten minutes each. Mr Khan, ten minutes.

20 MR KHAN: Your Honour, I'll do my best. Your Honour, the old adage needs no
21 repetition that hard cases make bad law. It's our submission that the Prosecution's
22 postulations ride a coach and horses through the provisions of Article 93 rendering
23 redundant as they do all other sub-articles of 93 except (l).

24 Your Honours, in relation to the question about legitimate expectation, it's our
25 submission that this concept does not come to the aid of the Prosecution. The

1 concept of legitimate expectation, of course, is principally a private law concept from
2 English law. It's developed into the public sphere. But, your Honour, it can't -- it's
3 a doctrine that finds its foundations in the rule of law, and that as part of the rule of
4 law certainty and predictability are necessary for the citizens of a democratic society.
5 Your Honours, rather than assisting the Prosecution, if the concept was to have any
6 force at all, it would assist those individuals that refuse to cooperate with the
7 Prosecution opposite, because the public --

8 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, legitimate expectation, the question
9 was framed in terms of either a duty or legitimate expectation. A duty or legitimate
10 expectation as you may well see, a legitimate expectation is the softer of the two.
11 And let's not take it beyond meaning simply an expectation that is legitimately
12 founded. If we can accept that definition, then you can proceed.

13 MR KHAN: Well, your Honour, it's always, and we know that from the whole
14 Blaskic subpoena issue dangerous to transplant mechanically terms that have
15 connotations domestically. But in relation to the concept of legitimate expectation,
16 there is the International Crimes Act which expressly states that individuals will
17 only have to attend voluntarily.

18 PRESIDING JUDGE EBOE-OSUJI: And that could be the basis to argue that there is
19 no legitimate expectation, if you can point to provisions of International Crimes Act
20 that forbid any expectation in that regard.

21 MR KHAN: Your Honour, I won't repeat what the Attorney General says. The
22 principle that everything is permitted that is not prohibited does not come to the
23 assistance of a State. It is primarily a right that pertains to the individual. And an
24 individual has a right not to be arbitrarily arrested, except through a regular law
25 already in force. And I won't deal with non-retroactivity either in the time allowed.

1 Your Honours, the Prosecution have repeated in all their interviews, and the
2 transcripts are there, I won't go into them, they have told all their witnesses
3 appearance is voluntary. Yet what they -- and indeed, your Honours, they have
4 even told domestic authorities, like the Kingdom of the Netherlands, and I refer to
5 Prosecution's tab E at KEN-OTP-0116-0247, and I quote, "The father does not have to
6 testify anymore." That's what the Prosecution have told the Kingdom of the
7 Netherlands. Yet, despite that legitimate expectation, despite that undertaking,
8 they come here and change their position.

9 PRESIDING JUDGE EBOE-OSUJI: Speak slowly.

10 MR KHAN: Your Honour, in relation to the appropriateness of a subpoena, it
11 would not have escaped the Bench's attention that Witness 15 indeed has given an
12 affidavit in which he said he is willing to co-operate, but what he says in Annex B is
13 that he was willing to attend by video link from Kenya.

14 The Prosecution haven't apparently chased this affidavit. Their endeavours it
15 appears are restricted to bringing him as a witness before the Court. And so, your
16 Honour, on the principles of subpoena even from the ad hoc tribunals, the
17 Prosecution have not made out a legitimate forensic interest.

18 Your Honours, they settled jurisprudence. We've heard a bit in the filing about
19 academic opinion. But we have, and it can't be cast aside, because in the hierarchy
20 of persuasive authority, it's the highest. There are six judges of this Court elected
21 by the ASP making decisions not academically, but pursuant to their oath of office
22 that have unanimously said that there is no power of coercion. Witnesses must
23 attend voluntarily. The Prosecution are seeking --

24 PRESIDING JUDGE EBOE-OSUJI: What authority is this?

25 MR KHAN: Your Honour, it's the Lubanga case, which appears at paragraph 20 of

1 the Sang filing. And, your Honour, it's the Kenyatta case situation decision of the
2 31 January 2011.

3 PRESIDING JUDGE EBOE-OSUJI: No, no, no. What chambers are we talking
4 about in any of those?

5 MR KHAN: Judge, Pre-Trial Chamber II.

6 PRESIDING JUDGE EBOE-OSUJI: In what, in Lubanga?

7 MR KHAN: In Katanga -- I'm sorry, in Kenya.

8 PRESIDING JUDGE EBOE-OSUJI: And in Lubanga?

9 MR KHAN: And in Lubanga, it's the Lubanga Trial Chamber, Trial Chamber I.
10 Your Honour, the Prosecution did not seek to appeal those decisions. Paragraph 20
11 of the Pre-Trial Chamber II's decision, ICC-01/09 page 19 paragraph 20, makes it
12 very clear that according to the statute, and I quote, "The Court may request a State
13 Party to facilitate voluntary appearance but not to compel a witness to testify before
14 the national authorities of a State."

15 Your Honour, these jurisprudence from judges of this Court cannot be cast aside
16 simply because --

17 PRESIDING JUDGE EBOE-OSUJI: Slow down. You're speaking much too fast.

18 MR KHAN: Well, your Honour, it's very difficult to deal with an important issue in
19 15 minutes. So I'll endeavour to slow down, but I am also trying to rush to cover
20 the areas in an important issue.

21 Your Honour, the Prosecution have made some play --

22 PRESIDING JUDGE EBOE-OSUJI: In those cases, Mr Khan, was there any
23 discussion of the ICJ judgment in the reparation case? You remember the ICJ
24 judgment in the reparation case, reparation concerning staff members of United
25 Nations.

1 MR KHAN: Your Honour, there wasn't to my knowledge. The judges were
2 simply looking at the language of the statute in the first place in accordance with
3 Article 21.

4 PRESIDING JUDGE EBOE-OSUJI: All right. Was there a discussion of the nuclear
5 tests case?

6 MR KHAN: Your Honour, no reference to the ICJ at all.

7 PRESIDING JUDGE EBOE-OSUJI: All right.

8 MR KHAN: Reference to the statute, which according to Article 21 of course must
9 be applied in the first place.

10 PRESIDING JUDGE EBOE-OSUJI: Do you remember what those cases said, the
11 reparation case and the nuclear test case in particular?

12 MR KHAN: On what issue, your Honour, in relation to implied powers or --

13 PRESIDING JUDGE EBOE-OSUJI: One second. On the question of implied
14 powers of an international body or institution.

15 MR KHAN: Your Honour, I'm familiar with that. They were not discussed. As I
16 mentioned I can't possibly do justice to ICJ jurisprudence in the time allowed. I'm
17 very delighted to brief you on it. It's inapplicable in this case. In our respectful
18 submission under Article 21 those authorities in any event must be applied in the
19 second or the third place.

20 Your Honour, the third issue I'll deal with is the prosecution seek to imbue Article
21 93(1)(l) with greater powers.

22 PRESIDING JUDGE EBOE-OSUJI: Before you proceed, when you get a chance to
23 think about it, you might also want to speak to it, in the reparation case, the ICJ said
24 that an international body or institution has implied powers that are essential for the
25 execution of its mandate. That was the reparations case speaking generally about

1 international institutions.

2 And in the nuclear tests case the ICJ also said that a court speaking in that sense the

3 ICJ --

4 MR KHAN: Your Honour --

5 PRESIDING JUDGE EBOE-OSUJI: -- has implied powers to execute its jurisdiction

6 as a court of law.

7 MR KHAN: Your Honour, I'm familiar with those cases.

8 PRESIDING JUDGE EBOE-OSUJI: All right.

9 MR KHAN: But there is also the Vienna Convention and the law of treaties talking

10 about the plain language in good faith. In our respectful submission, of course an

11 argument can be put forward that would contrive, we say, to get the result the

12 Prosecution wish. But that would be to contort the plain language of the statute in

13 bad faith, because it would be reflective of a results-oriented approach, not one

14 based upon honest assessment of the statute and the travaux preparatoires and the

15 objectives of the instrument.

16 PRESIDING JUDGE EBOE-OSUJI: Now, can you focus your attention now on

17 whether the ICA or any provision of the Rome Statute says that the Chamber may

18 not either respect or create a duty on the Government of Kenya to compel a witness

19 to attend in Kenya --

20 MR KHAN: Your Honour --

21 PRESIDING JUDGE EBOE-OSUJI: -- in Kenya, with the Court convened in Kenya,

22 or the witness situated in Kenya and the testimony is taking through video link.

23 MR KHAN: Your Honour, 93(1)(e), we say, forbids the Court requiring anything

24 other than voluntary attendance whether the Court is sitting in Kenya or whether

25 the Court is sitting in The Hague or indeed in Timbuktu. It's a difference without a

1 legal distinction. And that would be to fall into or to be seduced, we would say, by
2 the false dichotomy the Prosecution present between transportation and travel and
3 the provisions of the Rome Statute. That is not one -- that is not borne out by the
4 statute or indeed Article 3, which makes it clear that the Court can sit in other
5 locations.

6 Your Honours, if I could go back to Article 93(1)(l), the Prosecution say in paragraph
7 3 of their filing that that provision is to deal with as yet unpredictable types of
8 assistance. Well, appearance of witnesses cannot by any stretch of the imagination
9 and however desperate ones they may be by any contortion of understanding can be
10 deemed unanticipated. Indeed, there are express provisions dealing with
11 appearance, but it's voluntary, so it's inconvenient. And there is express provisions
12 dealing with video link testimony, so that was clearly in the mind of the drafters of
13 the Rome Statute.

14 To suddenly use Article 93(1)(l) as I said in the manner put forward by the
15 Prosecution would be to ride a coach and horses through the provisions of the Rome
16 Statute. And, your Honour, it's paragraph 82, I should say, of the Prosecution
17 filing.

18 Your Honours, states of course can go further. States can go further. And that's
19 what Germany has done. Germany has done further than that. It's exceeded its
20 Rome Statute obligations. So where as an exercise of democratic will a country
21 wishes to include provisions where an individual can be compelled by the sending
22 States to attend, that's a matter of sovereignty in accordance with normal principles
23 of international law.

24 But, your Honour, that's not what Sweden has done, because Sweden states that a
25 summons may be binding, may be binding. But they make it clear in their laws that

1 an individual may not be compelled to attend.

2 Your Honour, that's not novel, because that's precisely what happened in the Special
3 Court for Sierra Leone in the Naomi Campbell case. That court was created under
4 article -- Chapter 6 of the UN Charter. The Secretary General's report made it clear
5 that unlike the ICTY and ICTR, there was no power to compel third States. It's
6 addressed to the Republic of Sierra Leone, and yet the Court issued a summons.
7 The summons was directed at Naomi Campbell, and she -- in mandatory language.
8 But of course it was up to -- there was no enforcement power in the United Kingdom
9 that could compel her attendance.

10 We say the exact same principle applies here. And it's in our filing that we rely
11 upon. The Court can require an individual to attend, but cannot enforce it unless
12 there is legislation and Parliaments agree to it. Now your Honours --

13 PRESIDING JUDGE EBOE-OSUJI: Wait one second. Did you say that a court
14 actually ordered Naomi Campbell to appear as a witness?

15 MR KHAN: Your Honour, the language is at page 7. It's a decision of the 30 June
16 2012. And what it did, it went through a lot of individual, a lot of -- well, not a lot
17 actually. I should be accurate. The conclusive paragraph is at the end. And it
18 requests, respectfully requests the authorities of the State in which Ms Campbell is
19 residing to assist in the enforcement of this order.

20 Now, your Honours, the judges in this case did make clear that there had been a
21 Chapter 7 resolution which encouraged States to assist the Special Court for Sierra
22 Leone. That didn't change the Chapter 7 basis upon which the Court was created.
23 It was simply encouraging States to assist. But there is no international law
24 obligation that came from that. There is no international obligation that came from
25 that. Your Honours --

1 PRESIDING JUDGE EBOE-OSUJI: And what happened in that case?

2 MR KHAN: Your Honour, there had been clearly communication between the
3 lawyers for Naomi Campbell and the Prosecution. The lawyers before the decision
4 was promulgated had indicated that they would accept service. Once they were
5 serviced, the individual voluntarily came -- well, came before the Court, but was not
6 physically arrested.

7 And, your Honour, this comes to your Honours' question to the Attorney General.

8 And I with respect part company a little bit. I would underline that the Attorney
9 General did not give a complete concession. He said "I will concede to the question
10 posed about an individual being in The Hague," because it's irrelevant. It wasn't
11 really a considered concession.

12 But, your Honour, I would go further. If a witness is in this courtroom, if a
13 witness --

14 PRESIDING JUDGE EBOE-OSUJI: No, no. The Attorney General did not say it
15 was irrelevant. The question to the Attorney General was if a witness on the theory
16 of the general argument made that there is no power to compel the witness at all, the
17 question was if the witness chose not to come to court, having been brought to The
18 Hague by the Court, can the Court not have the power? And the Attorney General
19 considered that point. So let's move on.

20 MR KHAN: Well, your Honour, he said "I will concede it because it's immaterial."
21 But, your Honour, I would go further, if a witness today is in the witness room, and
22 the witness declines to come to court, your Honours do not have the power to bring
23 that witness by force to this seat. You do not have the power. There is no statutory
24 article. There is no penalty. There is no power of arrest. Even on these inviolable
25 premises with ICC security, if such a witness was strong-armed, that would be an

1 assault, or it would be false arrest.

2 So, your Honours, if the Court does not have the power to do that, upon what basis
3 can the Prosecution say it can compel a third State to do something which is not
4 required under its own domestic law?

5 Your Honour, it goes back to the principle of treaties being interpreted in good faith.

6 It would be a regrettable day and its impact is much greater than this one case and
7 indeed greater than this Court and the Rome Statute if countries have a reason to
8 show great reticence to sign up to international agreements because a subparagraph
9 of a sub-article is used to ride roughshod over what was anticipated in the
10 preparatory conferences. Nobody would have confidence that they would know
11 what they're signing up to, particularly as in this case, the issue of coercive methods
12 and powers to compel were considered and discussed in the preparatory
13 commissions and at Rome and were excluded.

14 So, your Honours, we say all those arguments are important. Your Honour --

15 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, in the Blaskic case, did the Appeals
16 Chamber not separate enforceability, the power to enforce an order, from the ability
17 to make the order itself in the first place? Was that not done in Blaskic?

18 MR KHAN: Indeed, your Honour, in our filing what we're saying is there is
19 nothing to prevent the Court issuing a summons to an individual and requiring
20 Kenya to serve it. So let me be clear, nothing to stop the Court requiring Mr X to
21 attend the Court and requesting or requiring Kenya to serve the document. The
22 articles mentioned by the legal representative deal with --

23 PRESIDING JUDGE EBOE-OSUJI: So you do concede that much?

24 MR KHAN: I concede that much.

25 PRESIDING JUDGE EBOE-OSUJI: That an order can be made?

1 MR KHAN: It can be made.

2 PRESIDING JUDGE EBOE-OSUJI: All right.

3 MR KHAN: But, your Honour, there is no power in the Statute allowing the Court
4 to require Kenya to coercively physically hustle or bustle or arrest and put in the
5 back of a van such a witness when there is no such law.

6 PRESIDING JUDGE EBOE-OSUJI: All right.

7 MR KHAN: Your Honour, important in that regard, if I can say two things, there is
8 other things to say, but two things, the 1959 act on mutual assistance makes it
9 absolutely clear in Article 8 that in cases where an individual does not voluntarily
10 wish to answer a summons, that witness may not be forced to surrender to that
11 summons until and unless that individual enters foot in the jurisdiction of the
12 requesting State.

13 Your Honour, my learned friend has mentioned the 2000 act. But, indeed, that in
14 my respectful submission supports the Defence position. Firstly, of course, it's not
15 acceded to anywhere nearly as widely as the '59 act.

16 But more importantly, if one could simply say these are implied powers, and it's
17 inherent in the powers of a court, why were they expressly mentioned in the 2000
18 act? The fact that they have been expressly agreed by like-minded countries in a
19 unique situation like the European Union trying to get an ever closer union, cannot,
20 one cannot sensibly, we say, extrapolate from that a principle of wider application
21 allowing this Court to require another sovereign state, not part of a European Union
22 or trade agreement, to compel one of its citizens absent a law to attend any premises
23 whatsoever.

24 Your Honour, I think I've taken your time, unless I have a few more minutes?

25 PRESIDING JUDGE EBOE-OSUJI: Yes, I was coming to that. Why don't we leave

1 it at that and hear from Mr Kigen-Katwa.

2 MR KHAN: I'm grateful.

3 MR KIGEN-KATWA: Mr President, on our part, we wish to state that our position
4 is that the Attorney General did not consider that this Court has powers to compel a
5 witness to come and testify, even if he were in the -- even if he was in the hands of
6 our Victims' Unit. What he said --

7 PRESIDING JUDGE EBOE-OSUJI: All right. Let's get this straight, Mr
8 Kigen-Katwa. Let's again --

9 MR KIGEN-KATWA: If you could clarify, Mr President?

10 PRESIDING JUDGE EBOE-OSUJI: Let us restate the proposition. You're saying
11 the witness who has been brought to The Hague by the VWU arrives and on the day
12 of the testimony for which the testimony has been brought the witness decides,
13 "Well, it's -- there's sunshine today in the Netherlands, so I'm going to Scheveningen
14 beach to catch some sunshine. I'm not coming to court," and you're saying this
15 Court cannot have VWU go and tell the witness that we are ordering him to attend
16 the Court? Is that what you're saying?

17 MR KIGEN-KATWA: That's what I'm saying, Mr President. And, Mr President, I
18 wish to proceed and say this: That assuming the Court was insistent that that
19 witness must come and the witness insisted he's not coming, this Court can do
20 nothing about it unless it invokes an assistance of the Dutch government. And that
21 is the point we are making, Mr President, that this Court has no powers to compel a
22 witness to come and testify.

23 We also wish to go on and state, as Mr Khan has said, that if a witness is here and he
24 chooses not to testify, to the extent to which the Statute does not give you any
25 consequential powers, what will you do with a witness who chooses not to testify?

1 You have no powers over him.

2 And so if you -- even if the witness were in this courtroom and chooses not to testify
3 and he's allowed to go home and says the next day he's not coming, Mr President it
4 is our submission that in view of the provisions of Article 93(1)(e) there is nothing
5 that this Court can do.

6 And it is on those premises, Mr President, that we are saying that any interpretation
7 that will be made by this Court to say that the Kenyan government is compellable to
8 procure the attendance and the adduction of evidence by a witness would be an
9 interpretation that has not been done in good faith and, considering the provisions
10 of Article 22, subsection -- Article 21, subsection (3) that the evidence has to be
11 voluntary, the -- Article 21(3), your Honours, is to this effect, "The application and
12 interpretation of law pursuant to this article must be consistent with the
13 internationally recognised human rights and be without any adverse distinction
14 founded on grounds such as gender, as defined in Article 7, paragraph 3, age, race,
15 colour, religion, belief, political opinion, national, ethnic or social origin." And, Mr
16 President, it proceeds to say that the interpretation must be made in favour of the
17 accused persons.

18 Mr President, if you were to insist that you have powers to compel a witness, it
19 would require you to struggle and explain away the use of the word "require" and
20 replace it with the word "order." And, Mr President, we maintain our submissions
21 that we made originally that, when the drafters used the word "require," they
22 deliberately chose not to use the word "order" and it cannot be read that or implied
23 that it was lack of consciousness that they used the word "require" as opposed to
24 "order."

25 PRESIDING JUDGE EBOE-OSUJI: And, Mr Kigen-Katwa, you sitting there, or

1 standing there, are saying that the word "require" means request? Is that what
2 you're saying?

3 MR KIGEN-KATWA: I would say this for myself, Mr President: That the word
4 "require" must be derived from the word "request."

5 PRESIDING JUDGE EBOE-OSUJI: All right. Go on.

6 MR KIGEN-KATWA: Mr President, if you were to say that the Kenyan government
7 is compellable to procure the attendance of the witness, you'd also have to struggle,
8 and we must say, Mr President, it is our submission that it would be an artificial
9 argument to say that Article 93(1)(e) using the word "voluntary" is redundant, or is
10 useless, or can be overlooked.

11 Mr President, Article 93(1)(l), which has been invoked by the Prosecution to tell you
12 that you have those powers, uses the word "other," and very specifically, Mr
13 President, this is how the words are used at Article 93(1), "... any other type of
14 assistance which is not prohibited by the law of the requester state with a view to
15 facilitating investigations ...", and so on and so forth."

16 PRESIDING JUDGE EBOE-OSUJI: All right. Now, would – why would summons
17 to a witness and requesting a State Party to enforce summons to a witness not
18 qualify as any other request?

19 MR KIGEN-KATWA: Mr President, that is a point which is already considered,
20 and we concede also that the powers of this Court to request the Kenyan
21 government to serve summons is not contested. That request can be made. We,
22 however, draw the distinction between the mere act of serving the summons from
23 compellability of a witness to testify.

24 PRESIDING JUDGE EBOE-OSUJI: That's the point. The point is why would
25 requesting a State to compel the attendance of a witness who -- to whom summons

1 have been served, why would that not qualify as any other request of a State that
2 may be made and that should be honoured by the State?

3 MR KIGEN-KATWA: It is actually our argument that it is not other, because it is
4 provided for. The service of the summons does not fall here in terms of other. It
5 is --

6 PRESIDING JUDGE EBOE-OSUJI: And having that request executed, as in, "State
7 A, we require this witness to attend. It is our view that 'require' means order. We
8 want you to make sure this witness attends using your local processes," why can that
9 not be something that falls within Article 93(1)(l) in terms of any other request?

10 MR KIGEN-KATWA: Mr President, the issue starts from the question you posed to
11 the Attorney General and which you would also want to ask on our part, as to the
12 extent and the scope of the purpose and the import of the word "summons."

13 Mr President you had asked the Attorney General whether summons does not in
14 itself incorporate a compulsive power, a compulsive obligation on the person to
15 whom the summons are addressed to attend. It is our argument, Mr President - it is
16 our submission - that summons is a mere notice to an individual that he's required
17 on a given day at a certain address.

18 If that individual chooses not to attend, there are separate processes which will
19 determine, first of all, the viability and the legitimacy of those summons and
20 whether in fact the act of that individual amounts to violation or disobedience of an
21 order.

22 And so, Mr President and your Honours, we submit that the mere service of a
23 document indicating to an individual that he is required at a certain address does
24 not necessarily amount in itself, or in other words does not in itself incorporate the
25 obligation that he must attend, Mr President.

1 It is -- and when the government -- may I explain, Mr President and your Honours,
2 that it is our understanding that when Kenyan government is serving the summons,
3 it is merely telling the individual that, "We have received a request from the ICC
4 saying you are required at this address on a given date." That is the end of that
5 issue. It is for the witness to determine whether he wants to come or not.

6 PRESIDING JUDGE EBOE-OSUJI: Does that also relate to -- is that the case as well
7 if we are operating under Article 93(1)(b) where the request is for a judge in a
8 national jurisdiction to take the evidence on behalf of the ICC?

9 MR KIGEN-KATWA: That is our position, Mr President, because Article 93(1)(e)
10 says that that testimony has to be voluntary. Mr President, we insist, we maintain,
11 we submit that 93(1)(e) has to be given meaning.

12 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, can you also explain one --
13 give your own answer to a question that Mr Nderitu had answered? The question
14 was this, or the point was this: In Kenya, a court sitting in a theft case can compel a
15 witness to attend the criminal case involving common theft, but from your argument
16 it would seem that that court may not be able to - if I'm wrong, correct me - compel a
17 witness to appear in a genocide trial. Is that your point?

18 MR KIGEN-KATWA: Mr President, if the trial were being conducted in Kenya and
19 by a Kenyan court under the Criminal Procedure Code, with a few exceptions it is
20 possible for the witness to be compelled. And even that law itself is not absolute.
21 It's not like every witness is compellable.

22 Mr President, we insist that there is a distinction between the International Criminal
23 Court conducting proceedings under the Rome Statute and under the ICA as
24 domesticating the ICC, the Rome Statute in Kenya, there is a distinction on one part
25 from that as opposed to a Kenyan court conducting proceedings under the Criminal

1 Procedure Code, and there is a very definite barrier when the ICA at Section 86 to 91
2 says that the witness has to adduce his evidence voluntarily, Mr President.

3 Mr President, at this point --

4 PRESIDING JUDGE EBOE-OSUJI: What I am saying is this: Are you saying that a
5 criminal case being conducted - a genocide case being conducted - before a Kenyan
6 court, a Kenyan court, can that court not compel the witness to appear? Is that what
7 you are saying? In a genocide case, being conducted before a Kenyan court, can the
8 court or not compel a witness to appear?

9 MR KIGEN-KATWA: Mr President, I would prefer to answer my question not so
10 much as to the physical or the geographical location where the proceedings are
11 conducted. I would rather answer the question as to which regime of the law is
12 being --

13 PRESIDING JUDGE EBOE-OSUJI: That's how you need to answer it then. Can
14 you? Let's say under what regime would a court be able to in that sort of -- in a
15 genocide trial compel the attendance of a witness and under what regime may the
16 same court, a Kenyan court, not be able to compel a witness to appear in a genocide
17 trial?

18 MR KIGEN-KATWA: Mr President, if the proceedings are being conducted under
19 the Criminal Procedure Code of Kenya, then the witness is compellable unless he
20 falls under the exceptions that are provided for.

21 However if the proceedings are being conducted, even if it is in Kenya or by video
22 link, and the proceedings are being conducted under the Rome Statute --

23 PRESIDING JUDGE EBOE-OSUJI: No, no, no, by a Kenyan court. Forget about
24 the ICC now.

25 MR KIGEN-KATWA: Even if it is by Kenyan court, but using the Rome Statute,

1 assuming one of three of you were a Kenyan Judge, you would not be in a position
2 to compel a witness to come and testify because you are prohibited by the State
3 Parties through the provisions of Article 93(1)(e). It is an absolute barrier, Mr
4 President and your Honours. That's our submission.

5 And, Mr President, the Kenyan parliament very consciously and deliberately said
6 that, if a Kenyan citizen is to come and testify before this Court, it has to be
7 voluntary. It goes on to say, Mr President, that the Attorney General must satisfy
8 himself that that witness is coming to testify voluntarily.

9 Mr President, we submit that that in itself creates some rights for that individual,
10 which are not being discussed in this Court. That individual has a right to exercise
11 his choice whether to come here voluntarily or not, Mr President.

12 And that informs the issue that surrounds both the ICA and the Rome Statute, Mr
13 President. Nobody is discussing the questions of, if that witness doesn't come here,
14 what will you do? What will this Court do? What will the Attorney General do?
15 The law does not say what consequences will follow such individual if he chooses
16 not to come, Mr President. We submit, therefore, that the coming is a question that
17 is voluntary, Mr President.

18 Mr President, in -- we would want still to insist that, before you come to the
19 questions of whether or not as posed by yourself, the question first of all is whether
20 this Court can compel the attendance of the witness and secondly whether this Court
21 can create either a duty or a legitimate expectation on Kenya to procure the
22 attendance of the witnesses, Mr President we pray that the Court keeps in mind that
23 it has to identify some criteria which the Prosecution has to satisfy before coming to
24 the point of saying, "We need to procure the attendance of this witness. "

25 And, Mr President, we resubmit that the criteria used in ICTY and ICTR may be

1 relevant. The first one is that that evidence is necessary, the second one is that that
2 evidence is material, the third one is that it is not obtainable otherwise and lastly, Mr
3 President, that reasonable attempts have been made by the Prosecution.

4 Mr President, may I say when I'm on my feet that the Prosecution have completely
5 not satisfied those criteria.

6 PRESIDING JUDGE EBOE-OSUJI: Thank you.

7 Now, let's go back to the Prosecutor and, Prosecutor, if you can take us to the end,
8 'til the morning break, and we'll end it there.

9 Can you please begin with the question -- the last point raised by Mr Kigen-Katwa,
10 which also I had flagged to you earlier when Mr Khan made his submissions on
11 Friday about the reason why we must do this in practical terms, quite apart from the
12 law of it. Is this an academic exercise when we compel a witness to attend, a
13 witness who not only -- their point is not, "Sorry, I'm not coming any more. I don't
14 want to come. I don't like lawyers and judges," but the witness's position is, "Well, I
15 lied when I spoke before. I recant it," why should we bother?

16 MR STEWART: Mr President, I fear you won't hear much from me then. I had
17 hoped to tidy up issues that have been canvassed over hours on Friday and again
18 this morning. However, I will follow your indication and mention just very briefly
19 certain cases, certain judgments from the ICTY, and then I will defer to Mr Steynberg
20 who can give you a much better picture of why it is indeed very worthwhile to
21 consider what we are asking.

22 Now, if I have a moment after that to deal with the other issues that I had hoped to
23 address with you, I'll be grateful for the opportunity, but I'm in your hands.

24 The ICTY Appeals Chamber in its judgment in Popovic, and I can give the citation
25 later, accepted the flexible approach taken by the Trial Chamber in Krajisnik – and

1 once again I can give the reference later, rather than take up time doing it now - in
2 which the Trial Chamber was disposed to take a more flexible approach than that
3 which might obtain in purely common law jurisdictions and determine on a
4 case-by-case basis whether to allow the Prosecution to put questions in a more
5 leading way to a witness and on which issues. And the Trial Chamber's ruling
6 arose in the context of the Prosecution's notification that it was calling witnesses who
7 could be potentially adverse to its case.

8 Mr Steynberg, however, can explain in general terms, realising that we're in public
9 setting, why in the view of the Prosecution it is entirely worthwhile to pursue this
10 remedy. Thank you.

11 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, can you do that in five minutes?

12 MR STEYNBERG: I believe I can, your Honours.

13 Your Honours, my learned friend, Mr Khan, raised essentially two objections
14 regarding the forensic utility of calling, or following the procedure requested by the
15 Prosecution. The first relates to the ethical issue of calling evidence which the
16 calling party knows to be false and the second is relating to the utility of calling a
17 witness who may be expected to recant his version, and I refer to real-time transcript
18 87 from page 28, line 17, onwards.

19 In relation to the first issue, your Honours, I can categorically state that the
20 Prosecution has a good-faith basis for its belief that the original statements deposited
21 to by these witnesses represent truthful accounts and that any subsequent denials or
22 recantations are false.

23 The original statements were all given voluntarily by the witness, having been
24 properly cautioned and interviewed over several hours or days. In addition, in the
25 case of five of the seven relevant witnesses, these statements were also audio

1 recorded giving further safeguards against any improper influence.

2 On the other side of the equation, the Prosecution has evidence in the case of each of
3 these seven witnesses of intimidation, bribery or other improper influence which has
4 in the Prosecution's submission been the proximate cause of their ceasing to
5 co-operate with the Office of the Prosecutor. This has been set out in some detail in
6 the ex parte version of the Prosecution's original request.

7 In relation to the second objection, my first response is that it is entirely speculative.

8 At the outset, it should be noticed that only three of the seven witnesses have in fact
9 recanted their earlier statements. In regard -- that is Witnesses P-15, P-16 and P-336.

10 In respect of the remaining four witnesses, they have simply refused to testify but
11 have not disavowed their prior statements. Thus there is no reason to believe that,
12 if their attendance may be secured, they will not confirm their earlier statements.

13 Even, however, with respect to the remaining three witnesses, as your Honour
14 pointed out on Friday, Mr President, one cannot simply assume they will maintain
15 this position if their attendance may be secured. It may well be that in the solemn
16 atmosphere of this courtroom, removed from any undue influence and under peril
17 of prosecution for perjury, they may well decide to say -- to tell what we say is the
18 truth and confirm their original statements. One might say that recantations made
19 in the media are cheap. To do so under peril or under pain of perjury is a different
20 matter altogether.

21 However, even assuming that these witnesses will recant, there are at least still --
22 still at least two legitimate forensic purposes for calling them. The first is that their
23 evidence will assist this Chamber one way or another to resolve what is becoming a
24 central issue in this case; namely whether, as the Defence alleges, several important
25 Prosecution witnesses are part of a deliberate and concerted scheme to cook

1 evidence against the accused, or on the contrary whether there exists a deliberate
2 and concerted scheme to intimidate or corrupt Prosecution witnesses to recant or
3 otherwise withdraw their testimony.

4 The allegedly colluding witnesses are said to include three of the seven witnesses
5 relevant to this Prosecution request; again Witnesses P-15, 16 and 336.

6 I note that the Defence for Mr Ruto argued in filing number 818 that it was in the
7 interests of justice to call these witnesses at the earliest possible opportunity in order
8 to get to the bottom of these allegations. This request was also joined by the Sang
9 Defence team, who additionally requested the calling of Witness 524, also relevant to
10 this request.

11 This is despite the fact, I might point out, that one of these witnesses, P-15, had
12 already deposed to an affidavit recanting his original statement, which appeared to
13 cause the Defence no disquiet at that time.

14 Secondly, your Honours, the Rules of Procedure and Evidence provide another
15 important forensic purpose for calling these witnesses, even if they're expected to
16 recant, in circumstances where their change of testimony may have been materially
17 influenced by improper interference, as the Prosecution alleges.

18 I refer your Honours to Rule 68(2)(d), which permits subject to certain conditions the
19 introduction of prior recorded testimony of a witness who has been subject to
20 interference and who either fails to attend, or having attended fails to give evidence
21 with respect to material aspect of his or her prior recorded testimony.

22 The Prosecution submits that, should any of the witnesses indeed fail to confirm
23 their prior statements, they may be questioned as to the reasons for this which
24 would put the Chamber in our submission in a far better position.

25 Thus, your Honours, to sum-up, the Defence objection is with respect both

1 speculative and misguided and should not prevent the Court from granting the
2 request.

3 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.

4 MR KHAN: Mr President, with your --

5 (Trial Chamber confers)

6 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, no more from you. We're done. We
7 will hear -- we will rise now. We've heard you and Mr Kigen-Katwa. We will end
8 this debate, and when we come back Mr Stewart will have five minutes to round up
9 what he said he needed to round up and we will leave it at that. Then we will --
10 yes, why don't we leave it at that for now. There has to be an end to litigation.
11 We will rise now and come back at 11.30.

12 THE COURT USHER: All rise.

13 (The status conference ends in open session at 11.01 a.m.)