

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 Carbuccia and Judge Robert  
7 Fremr  
8 Status Conference  
9 Friday, 14 February 2014  
10 (The status conference starts in open session at 9.35 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 very much.  
15 Court officer, please call the case.  
16 THE COURT OFFICER: Thank you, Mr President. Situation in the Republic of  
17 Kenya, in the case of The Prosecutor versus William Samoei Ruto and Joshua Arap  
18 Sang, ICC-01/09-01/11.  
19 PRESIDING JUDGE EBOE-OSUJI: Thank you. Please, appearances.  
20 MR STEWART: Good morning, Mr President, your Honours, counsel for the  
21 Defence, Mr Attorney, counsel for the victims, counsel for the Defence. I'm  
22 appearing on behalf of the Prosecutor, James Stewart, Deputy Prosecutor. I'm with  
23 Anton Steynberg, senior trial attorney, and Counsel Lorenzo Pugliatti, Rod Rastan  
24 and Thomas Bifwoli, and our case manager Jasmina Suljanovic.  
25 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.

1 MR NDERITU: May it please -- may it please, Mr President, your Honours, Wilfred  
2 Nderitu appearing for the victims, assisted by Mr Orchlon Narantsetseg from the  
3 OPCV, and also we have a new person, Mr James Mawira, my case manager.  
4 Thank you.

5 PRESIDING JUDGE EBOE-OSUJI: Thank you.

6 Mr Khan?

7 MR KHAN: Good morning, Mr President, your Honours. Mr Ruto is represented  
8 by Ms Shyamala Alagendra of counsel, Ms Leigh Lawrie and Mr Anand Shah, our  
9 legal assistants, Ms Shalini Jayaraj and Ms Grace Sullivan, trial support. Your  
10 Honours, my name is Karim Khan.

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

12 Mr Kigen-Katwa, you're at the back.

13 MR KIGEN-KATWA: Good morning, Mr President and everybody else. For  
14 Mr Sang is Katwa-Kigen, Caroline Buisman, Logan Hambrick and Honor Lanham.  
15 Thank you, Mr President and your Honours.

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

17 MR MUIGAI: Mr President, my name is Githu Muigai, Senior Counsel of the  
18 Kenyan Bar and Attorney General of the Republic of Kenya. I appear here amicus  
19 curiae at your invitation, Mr President, and I want to thank you. I appear with my  
20 assistants, Mr Dan Ochieng, Ms Caroline Wamaitha and Mr Tom Odede.

21 PRESIDING JUDGE EBOE-OSUJI: Thank you, Mr Muigai. We're happy to have  
22 you with us. It would have been my preference for you to sit on neutral grounds  
23 since you're not a party in the case, but I was told shortly before we came in that  
24 your preference is to sit where you are and I thought that amongst legal friends we  
25 shouldn't quibble about where we sit. Welcome.

1 We are here today to discuss the matter of the Prosecution request for summons,  
2 compulsory summons to certain witnesses that once were on the list but no  
3 longer -- well, they're having difficulties with. We thought it is a matter that  
4 required some discussion in light of the novelty of the issue -- or the issues, rather,  
5 involved. And it is for that reason that we thought we should invite the  
6 Government of Kenya represented by the attorney general.

7 And I wish to note that it's extremely rare to find a lawyer inside or outside the  
8 courtroom with the credentials of Mr Muigai. I say that advisedly and I'll tell you  
9 why in a minute.

10 I know that in addition to being the law -- chief law officer of a state party, he is also  
11 a senior counsel. He's a doctor of laws. He was the UN special rapporteur for I  
12 think racism, racial discrimination or contemporary forms of them, xenophobia and  
13 related intolerances. So we expect that -- we must presume, of course, that he's here  
14 to help us a lot in trying to figure out the laws of Kenya on this thing and related  
15 aspects of international law. We're not bound by his views, of course. But we're  
16 happy to have you.

17 Now, Prosecutor, could you please -- I will have you go first, but as usual, we will  
18 operate under the time limits regime. We will take submissions in rounds and see  
19 how we go with them. How much time do you think you would have to make your  
20 oral submissions on hopefully the highlights or your -- the high points of your  
21 submissions in addition to any updates that you feel may need to come in that may  
22 not have been captured adequately in your written submissions? How much time  
23 do you think you will need?

24 MR STEWART: Mr President, I'll take whatever time you'll accord me, but if you  
25 ask for an estimate, I would say 45 minutes at the outside.

1 PRESIDING JUDGE EBOE-OSUJI: Why don't we begin with 15 minutes for the  
2 high points and any updates. We'll begin with that and then we'll take 15 minutes  
3 all around. Please.

4 MR STEWART: Mr President, your Honours, the fundamental question for  
5 decision in the matter before you is whether a Trial Chamber has the means, with the  
6 assistance of a state party, to obtain the evidence it needs to determine the truth.  
7 Specifically, the question is whether the power of the Trial Chamber to require the  
8 attendance and testimony of witnesses residing in the territory of the state party has  
9 any real substance.

10 In our submission, the Trial Chamber does indeed have the means under the Rome  
11 Statute necessary to secure the evidence it requires. It was never intended that a  
12 Trial Chamber of the International Criminal Court dealing with the most serious  
13 crimes of concern to humanity would be denied this ability. It's an ability any  
14 criminal court in any jurisdiction must have.

15 Now, my plan this morning was to state succinctly what relief the Prosecution is  
16 seeking and why; secondly, to explain the legal basis for granting the relief, which is  
17 the heart of the submission I'd like to make; and finally, to sum up our position in  
18 conclusion.

19 Of course, we rely on our written filings. I'm just going to touch the highlights, as  
20 you've indicated, Mr President.

21 The relief we seek is a request from the Trial Chamber to the Government of Kenya  
22 for assistance to summons witnesses before the Trial Chamber to testify in Kenya  
23 and, if necessary, to compel their appearance.

24 Now, the witnesses would testify not at the seat of the Court in The Hague, but  
25 either via video link from Kenya or before the Trial Chamber sitting in Kenya.

1 The need for this assistance arises because the witnesses will no longer attend  
2 voluntarily in The Hague to testify. They have recanted the statements they gave to  
3 the Prosecution and have withdrawn their co-operation. The evidence of these  
4 witnesses is necessary, however, to the ability of the Trial Chamber to determine the  
5 truth, and thus the objective of our request is to secure relevant evidence bearing on  
6 central issues in the trial by means of the compelled attendance of unwilling  
7 witnesses at a location in Kenya.

8 PRESIDING JUDGE EBOE-OSUJI: Mr Stewart, just on the point of the relief, I've  
9 noted too you've indicated video link --

10 MR STEWART: Yes.

11 PRESIDING JUDGE EBOE-OSUJI: -- while the witness is in Kenya or the court  
12 sitting in Kenya.

13 MR STEWART: Yes.

14 PRESIDING JUDGE EBOE-OSUJI: What about a third possibility, that is the  
15 possibility of a rogatory commission, as it were, is that something you would not at  
16 all contemplate in your relief?

17 MR STEWART: If the rogatory commission, if I understand your question  
18 correctly, Mr President, involved a member of the Chamber and the participation of  
19 the parties and participants, it's not something that we have articulated in our  
20 application, but it's certainly something worth considering.

21 I should say right away that we're not seeking the taking of evidence by the high  
22 court of Kenya, which is a mechanism available under the Statute and under the  
23 International Crimes Act 2008 of Kenya.

24 PRESIDING JUDGE EBOE-OSUJI: That is -- that is what I'm thinking.

25 MR STEWART: All right. We're not seeking that. We're not seeking it for several

1 reasons, the principal one being that there is still in force in Kenya today an  
2 injunction preventing a high court judge from engaging in such an activity. That's  
3 referred to in our written materials. And if need be, we can provide you with  
4 the -- with the decision of the judge. I believe that's been in place for about three  
5 years.

6 But also we would suggest that, given the nature of the witnesses that we're dealing  
7 with, recanting witnesses, it may be a challenge for a Kenyan judge to take such  
8 evidence, unless there was permitted full participation by the Prosecution and the  
9 Defence and counsel for the victims.

10 So there are -- there are difficulties in the way of that potential route of remedy. So  
11 that's why we focused on the particular relief that we are seeking.

12 PRESIDING JUDGE EBOE-OSUJI: But what if right of audience were granted to a  
13 member of the counsel from the Office of the Prosecutor to attend? We know that  
14 victims' counsel is already a member of the Kenyan Bar, so he wouldn't have  
15 difficulty appearing before a Kenyan judge, but assuming all that's left of it is for  
16 right of audience for a member of the OTP to attend, would that satisfy things,  
17 assuming that Mr Muigai when he speaks is able to tell us that the injunction that  
18 you talked about is not an issue or that it is an issue that can easily be overcome?

19 MR STEWART: Well, I'll be cautious in my response and say that we would  
20 certainly consider that. The advantage that this Trial Chamber has over a Kenyan  
21 judge -- and, of course, I recognise that this is a Kenyan court for all intents and  
22 purposes, but the advantage that this Trial Chamber has is its familiarity with the  
23 case. It will be much easier and alive, if you will, by video link or in actual physical  
24 presence, consideration of the evidence for you as Judges to assess credibility issues  
25 rather than having something packaged up and sent to you by the mechanism that

1 you have mentioned, which I suppose would be Rule 93(1)(b), Rule 93(1)(b) may  
2 have an application but if you are sitting as a Chamber in Kenya. I'll come to that, if  
3 I get a chance, later.

4 PRESIDING JUDGE EBOE-OSUJI: Please proceed.

5 MR STEWART: Thank you. Mr President, I don't intend to go through the matters  
6 that are covered in the early part of our application, namely, the general nature of  
7 the evidence of the witnesses in question, its relevance, the basis for believing that  
8 they won't attend voluntarily, and the grounds for believing that they are currently  
9 residing in Kenya. I rely on our written submissions, and I won't take up time here,  
10 and there are other reasons why I probably shouldn't speak about them in a public  
11 setting.

12 I might add, however, that the matter is one of urgency. Only a week ago yet  
13 another witness on the Prosecution witness list recanted in a very public fashion and  
14 did not turn up at the appointed time to come here to The Hague. This is a witness  
15 who was expected to testify very shortly.

16 PRESIDING JUDGE EBOE-OSUJI: On that, we've read your written matter, and  
17 you've now also indicated that another witness has recanted in a public fashion.  
18 That is a theme that appears to recur in your written submissions, witnesses  
19 recanting in public fashion.

20 MR STEWART: Yes.

21 PRESIDING JUDGE EBOE-OSUJI: What does that do for continued masking of the  
22 witness's identity as it were? Have you given thought to that?

23 MR STEWART: Well, it may, but I certainly wouldn't invite the Chamber to remove  
24 any of the protections at this stage for any of them.

25 I'll come now, if I may, to the basis for granting the relief that we're seeking. The

1 basis for the relief we're seeking rests primarily on two provisions of the Rome

2 Statute, namely, Articles 64(6)(b) and 93(1)(l).

3 Under these provisions we submit the Trial Chamber may require the attendance

4 and testimony of witnesses and to this end may request the assistance from a State

5 Party to compel the attendance of the witnesses at a time and place within, within

6 the requested state. And the State Party must comply with this request for

7 assistance unless it is prohibited from doing so by a national law.

8 This relief is embedded within a broader range of provisions in the Rome Statute,

9 which I need not detail, Mr President, unless you ask me to. These provisions

10 empower the Court to require the full co-operation of States Parties in the

11 achievement of its mandate.

12 There are certain issues which I feel I should address right away in relation to the

13 provisions that I've mentioned. Article 64(6)(b), as you know, empowers the Trial

14 Chamber in performing its functions during the course of a trial as necessary to

15 require the attendance and testimony of witnesses by obtaining, if necessary, the

16 assistance of States as provided in the Statute.

17 The equivalent language in the French text of Article 64(6)(b) reads in its relevant

18 parts as follows, (Interpretation) "In discharging its functions, its duties, the Trial

19 Chamber may, if necessary, order or require the appearance of witnesses in the

20 hearing and require the assistance of the States Parties under the Statute."

21 (Speaks English) The reason I've read that text to you is to demonstrate that there is

22 no significance to be attached to the use of the verb "require" rather than "order". In

23 the English text of the provision, they come to the same thing, it's a distinction

24 without a difference. This is obvious when the French text employs the verb

25 "ordonner", to order. Both texts are equally authoritative by virtue of Article 128 of



1 the Statute.

2 I would note too that Article 67(1)(e) of the Statute protects the right of the accused  
3 to obtain the attendance and examination of witnesses on his or her behalf under the  
4 same conditions as witnesses against him or her.

5 Mr President, one way for the Trial Chamber to require the attendance and  
6 testimony of a witness is through the issuance of a summons to the witness to  
7 appear at a time and place indicated in the summons to testify. Article 93(1) obliges  
8 States Parties in accordance with part 9 and under procedures of national law to  
9 comply with requests by the Court to provide certain specified assistance.

10 And that phrase under procedures of national law is designed, in our submission, to  
11 facilitate compliance, not obstruct or impede it. Article 93(1)(d) specifies  
12 co-operation respecting the service of documents, including judicial documents.

13 Now, Kenya, as you know, has domesticated the Rome Statute through passage of  
14 the International Crimes Act 2008 or ICA. The ICA mirrors the relevant provisions  
15 of the Rome Statute and provides for implementation of Kenya's obligations as a  
16 State Party.

17 The ICA thus makes provision for the response to request for assistance from the  
18 Court, and these provisions include assistance in relation to the service of  
19 documents, including judicial documents, with "document" in the Kenyan legislation  
20 being defined to include, "a summons requiring a person to appear as a witness."

21 Now, we have distributed a rather bulky book of references. And I'm not going to  
22 take you to the tabs in the time I've got, but I'll just note that the ICA is at tab 1, and  
23 the provisions I'm referring to, which are entirely uncontroversial are to be found in  
24 Section 20 and Section 86. This relates to the service of documents including a  
25 summons requiring a person to appear as a witness. That definition is found in

1 Section 86(3)(a).  
2 The question then is whether it is entirely up to the witness to appear in compliance  
3 with the summons or not. Is attendance as a witness merely voluntary in all  
4 circumstances under the Rome Statute? If so, this would mean that the Trial  
5 Chamber would be denied one of the most basic means any criminal court must  
6 have to acquire the evidence it needs to ensure a fair trial and determine the truth.  
7 Did the framers of the Statute really intend the Court to be denied the most basic  
8 powers enjoyed by any domestic criminal court? Mr President, the answer to the  
9 question whether witness attendance is voluntary involves the interplay between the  
10 powers conferred upon the Trial Chamber by the Rome Statute and the purposes to  
11 be achieved by the exercise of those powers on the one hand and the obligations  
12 assumed by States Parties in the operation of national law on the other hand.  
13 I would like to examine briefly the legislative provisions relating to State Party  
14 obligations. I already noted Article 93(1).  
15 Thus with respect to the attendance of witnesses, States Parties are obliged to  
16 facilitate the voluntary appearance of persons as witnesses or experts before the  
17 Court pursuant to Article 93(1)(e). That's right there in the Statute. And Kenya, of  
18 course, has made provision for this in its ICA.  
19 However, it's our submission that it is clear from its legislative history that Article  
20 93(1)(a) was drafted in the way it was in order to address the concern of certain  
21 states not to be compelled to send their witnesses outside the country to appear as  
22 witnesses or experts. And without going into detail, just to save time, as a matter of  
23 horizontal state to state mutual legal assistance in criminal matters, States are not  
24 generally required to compel witnesses without their consent to attend before a court  
25 in a jurisdiction outside the territory of the requested state.

1 An example of that is Kenya's own Mutual Legal Assistance Act 2011, which I would  
2 refer to -- you to in section 15. That's at tab 4. States of course can provide  
3 otherwise, and Kenya appears to have done so in its Witness Summonses Reciprocal  
4 Enforcement Act, which is at tab 5. There, there is an ability to -- for enforcement of  
5 summonses where the requesting State has agreed to do the same thing for Kenya.  
6 All of this relates to the attendance of a witness outside of the territory of the  
7 requested state. And we are not seeking this form of co-operation. We're not  
8 asking for the witnesses to be sent out of Kenya to The Hague.

9 As well, the temporary transfer of persons in custody is provided for in Articles  
10 93(1)(f) and 93(7) of the Rome Statute, and it requires the consent of the prisoner and  
11 the agreement of the requested State.

12 But my submission is that this requirement relates to concerns about prisoners'  
13 welfare and treatment. Again, it comes from traditional horizontal state to state  
14 relations. And Kenya of course has made provision for this in its ICA.

15 And we're not seeking this form of co-operation. If I may, Mr President, what I'd  
16 like to do in what time you give me now is simply to summarise what I understand  
17 to be the contrary argument in order to explain to you in a few words why we say it  
18 doesn't work.

19 PRESIDING JUDGE EBOE-OSUJI: Before you do that, Mr Stewart, you say that  
20 Article 93(1)(e) was inspired by the reticence of some States to send -- to compel their  
21 citizens to appear in a court outside their territory. First I ask do we have evidence  
22 of that reticence in the travaux?

23 MR STEWART: Yes.

24 PRESIDING JUDGE EBOE-OSUJI: Well, that's one question.

25 MR STEWART: Oh, sorry.

1 PRESIDING JUDGE EBOE-OSUJI: And the second question would be, in light of a  
2 notion of complementarity, is this Court in the same position as the court of another  
3 State for whom the State might worry about sending their citizens to go and appear  
4 before, noting that the Court is a complementary institution to which the enabling  
5 instrument of which the States Parties are parties to?

6 MR STEWART: I'm sorry, Mr President. I wanted to say the evidence for the  
7 submission I made about the reticence of States is cited in our original submission.  
8 I'm going to ask Mr Rastan just to refer me to that. And I'll give -- I'll give you the  
9 reference.

10 And with respect to the second question, my submission will be of course that this  
11 Court is not in the same -- in the same position as another State in a horizontal  
12 relationship. As one of the comments on the Rome Statute, the one I think written  
13 by Kress and Prost, Prost, suggests it's a blend of the horizontal and the vertical, if  
14 you will, in terms of complementarity.

15 My position is that with respect to the powers that the Chamber has, the exercise of  
16 those powers is completed, if you will, it's executed through the assistance of the  
17 States Parties. That's where the concept of complementarity, but also a level of  
18 verticality enters into it. That's my basic -- my basic thesis.

19 With respect to your first question, I think you'll find the answers are on  
20 footnotes -- in our original submission to you footnotes 48, 49 and 50. That's  
21 paragraph 75, 76. I believe that's the area. I won't read it to you now, but it's there.  
22 What I was going to suggest is that the argument that's put against the position  
23 we're advancing, Mr President, is that what is said in Article 93(1)(e) and (f) really  
24 exhausts the powers or should I say the obligations of States to comply with requests  
25 from a Trial Chamber in relation to the requirement for the attendance and

1 testimony of witnesses. And so what's expressly said in Article 93 exhausts the  
2 power according to the argument, and that means exhausts the power under Article  
3 64(6)(b). The ability to require witnesses to attend thus depends upon their  
4 willingness to attend. State Parties are only obligated to facilitate the voluntary  
5 attendance of witnesses. There's no power of compulsion under the Rome Statute  
6 and therefore no obligation by States Parties to compel.

7 There is thus an unfortunate, even lamentable, disconnect between the power  
8 conferred upon a Trial Chamber by Article 64(6)(b) on the one hand and the  
9 obligations imposed on States Parties by Article 93(1) on the other hand.

10 PRESIDING JUDGE EBOE-OSUJI: Mr Stewart, let me stop you. The reason I say  
11 that, you've now gone into anticipating, which of course is an intelligent anticipation  
12 of the case against your application. I think it might be better if you waited and  
13 dealt with that in reply. And I will give you also more time to deal with it instead  
14 of being squeezed in time to do that.

15 But before that, my one question for you on the significance of 93(7).

16 MR STEWART: Right.

17 PRESIDING JUDGE EBOE-OSUJI: Article 93(7). In paragraph 23 I believe of your  
18 reply, your written reply, you -- in looking at it, you try to distinguish the jural value  
19 of Rule 193 and contrast it with the regime indicated by Article 93(7).

20 MR STEWART: Right.

21 PRESIDING JUDGE EBOE-OSUJI: And you say this, I quote: "The import of Rule  
22 193 is significant as it shatters the argument that as a matter of principle the Rome  
23 Statute prohibits the compelled appearance of witnesses. There is no reason why  
24 this rule should be held to conflict with the Statute under Article 51(5), except if the  
25 highly specific and narrow regime created by Article 93(7) is artificially extended to

1 apply to all potential ICC witnesses. As the Prosecution has submitted, Article 93(7)  
2 creates the exception, not the rule."

3 It is that I'm concerned with now, the exception, not the rule, exception to what I  
4 think you mean, exception from compelled appearance.

5 MR STEWART: Yes.

6 PRESIDING JUDGE EBOE-OSUJI: But you tell me also.

7 MR STEWART: Yes.

8 PRESIDING JUDGE EBOE-OSUJI: But why the exception?

9 MR STEWART: Well --

10 PRESIDING JUDGE EBOE-OSUJI: Something that would be helpful to hear further  
11 argument upon, why that exception.

12 MR STEWART: Right. You understood perfectly, Mr President. Our position is  
13 that the rule is compelled testimony. Of course it can't be compelled testimony  
14 before here. We can't -- we can't -- you can't, I should say, the Trial Chamber can't  
15 compel a State to send someone who doesn't want to come, but we say that the rule  
16 is that the State can be compelled to compel a witness to come before you in the  
17 requested State.

18 But with respect to the matter of prisoners, it's my understanding that this was a  
19 long-standing rule, if you will, to protect prisoners in terms of were they -- were they  
20 close to their families? What were their conditions of detention? What  
21 programmes were they involved with? In other words, issues relating to prisoner  
22 welfare is my understanding of it. So this was an exception carved out where you  
23 needed not only the agreement of the State, but the consent of the person in custody.  
24 And Rule 193 we suggest isn't inconsistent with that, because you're dealing not  
25 with a prisoner in a requested State, you're dealing in effect with your prisoner,

1 someone serving sentence under a judgment of the Trial Chamber or of the Court.

2 I think that's the best I can do.

3 PRESIDING JUDGE EBOE-OSUJI: The argument, of course, against you is under  
4 Rule -- under Article 93(7). We're dealing with somebody who's already in a  
5 compelled loss of freedom.

6 MR STEWART: Yes.

7 PRESIDING JUDGE EBOE-OSUJI: In custody.

8 MR STEWART: Right.

9 PRESIDING JUDGE EBOE-OSUJI: And I imagine the argument would be, well, if  
10 you cannot compel that person who is already in a state of compelled loss of  
11 freedom to appear, how can you compel somebody who has enjoyed full right of  
12 freedom in society, how can you compel them to appear? That would be the  
13 argument, isn't it?

14 MR STEWART: I'm sure I could answer your question, but I think you'll get -- I  
15 submit you'll probably get a better and clearer, more succinct response if I -- if I can  
16 deflect the question to my colleague, Mr Rastan.

17 PRESIDING JUDGE EBOE-OSUJI: Mr Rastan, your side is already out of time, but  
18 you can answer that in two minutes.

19 MR RASTAN: Thank you, your Honour, Mr President. Very briefly, as the  
20 Deputy Prosecutor mentioned, the provision 93(7) is basically reflecting and  
21 borrowing from traditional mutual legal assistance regimes.

22 PRESIDING JUDGE EBOE-OSUJI: Let's not talk about the genesis of it. The point  
23 is if you cannot compel somebody who has already lost their freedom and is in  
24 custody somewhere, if you cannot compel them to appear before the Court, how can  
25 you compel a citizen who is enjoying full right of freedom in society to appear?

1 MR RASTAN: Sure. I'll try to respond in two minutes, but I may require just a  
2 little bit of background.

3 So as your Honour is aware, in traditional mutual legal assistance regime the  
4 principle is one of reciprocity of respect for state sovereignty and to limit the  
5 compulsory measures that may be taken in a foreign jurisdiction against your  
6 nationals without your consent or in specific cases the consent of the person who is  
7 required to appear.

8 So if one looks at either the transfer of prisoners for the purpose of testimony abroad  
9 or indeed the service of a summons on a witness in your territory to go abroad, the  
10 regime is always by consent. And this is the same way actually reflected in Kenya's  
11 mutual legal assistance regime.

12 We noted in our tabs in our submissions reference to the 2000 EU Convention as  
13 being very relevant in this regard, because the EU Convention scheme of 1959  
14 replicates exactly this scheme. It has a provision to do with prisoner transfer that  
15 requires their consent. It has a provision relating to the appearance of witnesses  
16 abroad, which again has their consent in the 1959 scheme. And then in the year  
17 2000, the convention that is adopted supplements that previous convention and  
18 creates additional types of assistance which States may agree to. And one of these  
19 additional types is called testimony by video link in the territory of the requested  
20 State.

21 Now, our argument is that this is a completely different type of assistance to the  
22 other forms that are foreseen. And this is evidenced not only by state practise, it's  
23 evidenced by the EU Convention itself. Clearly the provision on video conferencing  
24 in the 2000 convention neither replaces the earlier provision dealing with witness  
25 appearance abroad nor does it conflict with it. It's described as supplementing it,



1 and it is an additional type.

2 So the two things do not contradict each other in state practise, and we submit  
3 neither should they contradict each other here in the context of the Rome Statute.

4 PRESIDING JUDGE EBOE-OSUJI: Are you telling us that in the EU practice or  
5 conventions you're thinking about, although you may have the -- or you do have the  
6 presence of a norm that's reflected in Article 93(7), are you saying that despite that,  
7 the EU practice and convention also recognises compelled appearance of witnesses  
8 not in custody --

9 MR RASTAN: Yes.

10 PRESIDING JUDGE EBOE-OSUJI: -- before other courts?

11 MR RASTAN: Yes, your Honour. We've listed in tab 6 of the binder, it's a -- it's a  
12 specific provision. I believe it was Article 10 of that convention that deals with the  
13 specific scenario of a request for witness testimony to be taken in the territory of the  
14 state, and the regime is one of video conferencing. It's very similar to what we are  
15 describing. And it's very relevant and of assistance, because it describes a number  
16 of the issues including objections that can be raised by the State, the costs involved,  
17 the practical aspects, whose jurisdiction the witness falls under, under whose  
18 direction the witness's testimony is to be given.

19 So we're not suggesting that Kenya obviously is bound by this convention, but what  
20 we are suggesting is that the notion of testimony via video link and the ability to  
21 compel somebody is a different assistance type to requesting a witness to go abroad.

22 PRESIDING JUDGE EBOE-OSUJI: All right.

23 MR RASTAN: And in the EU context that is made perfectly clear.

24 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. Now I will invite

25 Mr Khan. I noticed that the Prosecution have quite overran their time, but because I

1 was asking them questions. So you can go.

2 MR KHAN: I'm grateful, Mr President. And I will follow the same guidance as  
3 was given, same instruction as was given to my learned friend, that I'll try to  
4 encompass or touch a few points within 15 minutes or so. And then if there is later  
5 more detail required to flesh out, I'll do that with the Court's leave.

6 Your Honour, sometimes one cannot see the wood for the trees. It's always helpful  
7 in my respectful submission to stand back when there is a problem and look at  
8 context. And in that regard, it's somewhat ironic to think why are we here today on  
9 Valentine's Day? It's all about a failed marriage between the Prosecution and  
10 witnesses who were seduced by inducements and promises of a better life.

11 And, your Honour, the relationship has clearly irretrievably broken down. And the  
12 Prosecution in their filing is clearly, we say, alleging or inferring foul play, because  
13 that's the only reason why in the filing repeatedly the Prosecution underlined the  
14 fact that allegedly after disclosure to the Defence, witnesses withdrew.

15 Your Honour, before we get to the substance, with your leave, I suggest that  
16 narrative does not withstand scrutiny, because it is very understandable that if  
17 witnesses at the outset have been induced by benefits to give an account that they  
18 think is wanted --

19 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, let me cut in here. As I understand  
20 your argument, correct me if I'm wrong, reading your paper, you're not opposed to  
21 the idea of compelled appearance per se. Your concern is that it does not translate  
22 into requesting a State to facilitate compelled appearance as opposed to a voluntary  
23 one. Isn't that what your argument is?

24 MR KHAN: Your Honour, the argument that I've stated in court previously and  
25 I've said in Kenya recently is that all witnesses should be encouraged to speak the

1 truth. All witnesses should -- if they wish to withdraw, they should have the  
2 courage and of course the full gamut of protection from all sides from the Court is  
3 there to come and explain why they're recanting or withdrawing.

4 But, your Honour, they cannot be compelled to do so under the statutory scheme.  
5 They cannot be compelled to do so and --

6 PRESIDING JUDGE EBOE-OSUJI: Sorry, compelled to do what?

7 MR KHAN: They cannot be compelled under pain of imprisonment or a fine to  
8 come and appear at any locations. They cannot be deprived of their liberty in  
9 circumstances where there is no law in place that allows their liberty to be  
10 restrained.

11 PRESIDING JUDGE EBOE-OSUJI: So then I just wanted to understand your  
12 argument. So I think we're getting there. I had understood, maybe I was -- it was  
13 a misunderstanding on my part, that your argument in the written material was a  
14 little more subtle in the sense that I remember you in some places do speak about  
15 that the Statute might have envisaged an obligation on the witness to appear but that  
16 the witness -- that the Court may not request a State Party to compel the witness.  
17 But are you now saying in fact that your position is that a witness is not compellable  
18 to appear before an ICC Trial Chamber? Is that what you're saying so we know  
19 what you're saying?

20 MR KHAN: Your Honour, the Court can issue any orders the Court thinks is  
21 necessary and that are consistent with the Statute. And I can envisage situations  
22 where the Court can, of course, request Kenya to serve a summons requiring witness  
23 X to appear. But, your Honour, that's the end of it. There cannot be a threat that if  
24 Witness X does not accede to the requirement or the order of the Court, that the  
25 witness can be incarcerated, deprived of their liberty, bundled into a van and taken

1 to a location.

2 PRESIDING JUDGE EBOE-OSUJI: But the Statute -- neither the Statute nor the  
3 Rules say that, do they?

4 MR KHAN: Your Honour, the Statute makes it clear, we say, and that's the reason,  
5 one of the areas of wisdom by the drafting of the Statute that appearance must be  
6 voluntary, the appearance must be voluntary. I mean that's the nub of it, because  
7 we get into a Pandora's Box. I'll deal later with issues of modalities and where it  
8 could all lead. It will be a complete mess.

9 And, your Honours, before I move on, sometimes, not always, when a legal  
10 argument is so complex that one ties oneself up in knots, it's not the right argument.  
11 We say that the statutory regime, contrary to what my learned friend states, does not  
12 present a lamentable disconnect as represented but in fact a comprehensive regime  
13 that combines both horizontal and vertical obligations.

14 That the Prosecutor has not wished to avail herself of the provisions under Article  
15 91(1)(b) is a matter for the Prosecutor. The injunction, of course, applies to justice  
16 rual (phon). The Prosecutor haven't even attempted to use that article. They could  
17 have used it before trial started. They knew in relation to at least some of these  
18 witnesses before trial started that they had recanted, that they said that they had told  
19 a pack of lies and that they were not willing to assist the Prosecution. It would have  
20 behaved, we say, the Prosecution not to have marched blithely on, but if they wished  
21 to, they could have made the proper application in Kenya and saw what happened.

22 And, your Honour, one sees again a complete disconnect, a lack of consistency in  
23 what should be a unified office, because in the Kenyatta case, in the sister case, in the  
24 companion case, what did the Prosecution do? Quite rightly, faced with a witness  
25 who conceded -- yet another witness, who conceded that he had told a pack of lies

1 and a witness who had decided that he did not want anything to do with the Office  
2 of the Prosecutor, the Prosecutor conceded that there were only pebbles left and  
3 there was not any realistic prospect of conviction.

4 And what the Prosecutor did in that case is refer to the provisions of Article 87(7),  
5 noncompliance. Yet the same office in this case takes a completely different tact.

6 PRESIDING JUDGE EBOE-OSUJI: But we cannot presume why the Prosecutor  
7 would have treated different matters differently. What I wanted to find out from  
8 you is whether in your view -- I mean, you spoke about vertical and horizontal  
9 obligations. Would in there, somewhere in that axis, come in an obligation upon a  
10 witness to appear before the Court if the Court were minded to make such an order  
11 upon a witness?

12 MR KHAN: Your Honour, the only circumstances where a witness can be  
13 compelled is in circumstances where the witness is already before the Court, but the  
14 actual task of deciding to give evidence, the actual task of travelling to the Court and  
15 getting into that seat and taking the oath must be voluntary, not on the punishment  
16 of fine or all the rest of it. It must be coercive.

17 And, your Honours, there's reasons for that, and I'll deal with that later, if I may, not  
18 just at state sovereignty but issues regarding the protection, not to the witness, but to  
19 the administration of justice that flows from a witness giving voluntary evidence.

20 Now, your Honour, before I move on with your leave, in my submission, even if  
21 there was an express provision allowing subpoenas, subpoena ad testificandum, for  
22 example, an order, that this would not be the case to do it. And why do I say that?  
23 There must be a legitimate forensic interest in getting the evidence.

24 Your Honour, it happens in litigation that a party may wish -- may believe witness A  
25 is going to give a certain account, and in good faith they call that witness. And after

1 taking the oath, the witness turns hostile, displays hostile animus or is found not to  
2 be desirous of telling the truth, and with the Court's leave the witness may be  
3 termed hostile and may be controverted with a previous statement.

4 That is patently not the position that we face. Here the Prosecution are wishing to  
5 call a witness to knock the witness down. They have -- there is under the code of  
6 conduct an ethical obligation not to present evidence one knows to be false. And  
7 here the witnesses have given accounts in which they say they gave false evidence.  
8 The Prosecution we say are using a procedural device, an ingenious but  
9 fundamentally flawed argument to connive to get -- or to get a witness before the  
10 Court.

11 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, you surely know about the concept of  
12 declaring a witness hostile. Even your own witness, even compelling your own  
13 witness who was somebody who was on your list but refused to come, to bring them  
14 into this Court and make them a hostile witness and get evidence from them, that's  
15 something you're quite familiar with. Why is that so different from what the  
16 Prosecutor -- I don't know if that's what they are going to do -- contemplated here.

17 MR KHAN: Your Honour, absolutely an essential provision for administration of  
18 justice, the right to declare a witness hostile for the Court to decide a witness has  
19 turned hostile for it to be cross-examined, I have no problems with that. But, your  
20 Honour, when that happens in the witness box, in this situation --

21 PRESIDING JUDGE EBOE-OSUJI: That's right. But you wouldn't know that until  
22 the witness has stepped into the witness box. So we do not know if the  
23 Prosecution's strategy here is to bring a witness and tear them apart or whether once  
24 a witness comes in, the witness gives evidence without the need for declaration of  
25 hostility.

1 MR KHAN: Well, your Honour, I think I've read some and I'll get it later on in the  
2 day if I may. The Prosecution have alluded to the possibility that a witness will  
3 have to be declared hostile. Indeed, that's one of the reasons it was mentioned by  
4 my learned friend this morning why Article 93(1)(b) would be inappropriate because  
5 of the very great likelihood, the very clear foreseeability that they're going to be  
6 controverting their own witness.

7 So, your Honours, it's a small point, but it's an important point.

8 PRESIDING JUDGE EBOE-OSUJI: Why should that not be allowed? That's the  
9 question.

10 MR KHAN: Your Honour, because every party must present evidence that they  
11 believe to be true, yet you can't use a procedural device to call a witness who you  
12 know is saying something different simply to get them before the Court to then  
13 controvert them with a previous statement. That's not -- in my respectful  
14 submission, that is a very different kettle of fish than declaring a witness in good  
15 faith, believing a witness will say A, finding a witness says Z and then seeking to  
16 controvert them.

17 So, your Honour, that's my submission on that particular issue.

18 PRESIDING JUDGE EBOE-OSUJI: All right.

19 MR KHAN: But, your Honour --

20 PRESIDING JUDGE EBOE-OSUJI: Enough on that. Moving on. You submit that  
21 witness is not compellable. Why is the situation here -- why should the situation in  
22 this Court on that matter be different from, say, the ICTY where, as you know, in  
23 Blaskic the Court went even as far as ordering the state of Croatia to tender  
24 documents and officers of that country? Why should that be different?

25 MR KHAN: Your Honours, this Court is constrained as an international body

1 created by international treatment agreement by the usual principles of international  
2 law. The ICTY, the ICTR of course were creations of the Security Council creating  
3 sui generis subsidiary legal bodies imbued with legal powers.  
4 Now, your Honour, that -- those bodies, those ad hoc courts clearly had primacy  
5 over domestic courts. The word we all know, states shall comply with any order of  
6 the courts because they were creatures of the Security Council.  
7 This is a completely different animal, this Court, and its powers are those that are  
8 detailed expressly, we say, or by necessary implication in the Statute.  
9 Your Honours, there's no power that can coerce a witness. It's not about -- the  
10 difficulty is not the order that the Bench may make. It's what are the consequences  
11 and what are the international obligations both upon the Republic of Kenya and  
12 upon the target, which is a witness, to do something which is not expressly required.  
13 PRESIDING JUDGE EBOE-OSUJI: But the point is this: If you read the ICTR  
14 and -- ICTR Statute, not the rules, not the rules, but the Statute, which in the order of  
15 things we have a Statute too -- yes, Rule 54 of the ICTY and ICTR, they do in both  
16 places contemplate subpoenas and summonses. And Rule 74 of ICTY rule  
17 contemplates contempt of court for failing to appear unjustifiably. But that  
18 is -- those provisions are in the rules. As you know, the rules of the ICTY and ICTR  
19 are Judge-made norms, not Security Council made.  
20 The equivalent document would be the Statute of those ad hoc tribunals. You  
21 compare that to ICC Statute, and the provisions on State co-operation more or less  
22 say the same things on this. You do not find anywhere in the ICTY/ICTR Statute  
23 where it is indicated expressly that the Court may order a witness to appear before  
24 it, but the Judges recognised that and put that in the Rules. Why shouldn't that  
25 happen somehow here?



1 MR KHAN: Your Honour, the basis of Rule 54 and the express provisions  
2 regarding subpoena, for example, were taken -- were drafted by the -- by the judges  
3 and amended by the judges based upon the Statute. And that of course has been  
4 the case for the last 15 years.

5 Now, your Honours, the provisions of the Statute are clear. The Court, the ICTY  
6 and the ICTR, had primacy. Indeed the ICTR was created despite the position of  
7 Rwanda which voted in the end against the Court despite initially supporting it  
8 because of sentencing and other issues that your Honour is very familiar with. So  
9 it's an assertion, a coercive court from day one that is imposed on a State despite its  
10 will. This Court --

11 PRESIDING JUDGE EBOE-OSUJI: The primacy -- the primacy argument, isn't that  
12 a question of ranking if it were? It is a matter of ranking of courts. What has that  
13 got to do with intrinsic power of a court or the inherent ability of a court to be a  
14 court where that should be effective in the search for the truth, whether it is at the  
15 high court or the magistrate's court? If a court that is empowered to investigate,  
16 why should it not have the power to be effective?

17 MR KHAN: Yes.

18 PRESIDING JUDGE EBOE-OSUJI: Incidental authority to be effective?

19 MR KHAN: Your Honour, we're very much in favour of this Court being effective.  
20 That's been our consistent position. But the powers are there. They're the powers  
21 in the Statute that we are -- that the Court and that the parties, the organs can  
22 actually utilise. They can't conjure up or create inventively or engage in mental or  
23 legal gymnastics to contort the express provisions of those drafters of the Statute.  
24 So, your Honours, leaving aside the primacy argument, I've made my point for  
25 whatever value it's got, is the Statute is very clear about the principle of

1 voluntariness. And it's that that the Prosecution are seeking to undermine by an  
2 argument that we say has absolutely no merit.

3 Now, your Honours, one issue on the subpoena issue, the argument I was saying  
4 about compellability or the appropriateness to use a subpoena in circumstances  
5 where you know the witness is already hostile, your Honours, in the Kenyatta case  
6 in a decision of the -- in a filing of 31 January 2014, the Prosecutor conceded at  
7 paragraph 8, and I read paragraph 8, "Nevertheless, the Prosecution acknowledges  
8 that the hostile stance of these witnesses makes it unlikely that they will provide  
9 information useful to the Prosecution of the accused. "

10 Now, your Honours, even under the ICTY, one of the important factors in issuing a  
11 subpoena is relevance, a legitimate forensic utility and its material to a live issue.

12 So, your Honours, according to the stand of the Prosecutor in the sister case, the fact  
13 of a witness turning hostile shows that the evidential utility is minimal, and that by  
14 itself should militate in favour of rejecting the application.

15 Your Honour, the other issue -- I don't want to overrun my time -- the Prosecution  
16 conflate certain issues. Effectively what they're seeking to do -- because what  
17 they're seeking to do is to say there's a difference between appearing before the  
18 Court, which must be voluntary, and the residual provisions of subparagraph (l),  
19 which allows the Court to do anything.

20 Well, your Honours, a number of remarks in relation to that. If that was correct as a  
21 matter of construction, all the previous subparagraphs would be irrelevant. They  
22 would be otiose. The drafters could simply have drafted (l) that all types of  
23 assistance should be given and leave it at that.

24 Your Honours, subparagraph (e) is *lex specialis* -- is *lex specialis*. It says facilitating  
25 the voluntary appearance of persons as witnesses or experts before the Court.

1 The drafters could quite easily have left out the word "voluntary" because that's  
2 what the Prosecution basically are reading into subparagraph (l). They're saying a  
3 court can order a State Party to facilitate the appearance of witnesses as witnesses or  
4 experts before the Court as long as it's not prohibited by domestic law.  
5 So there's many different permutations of drafting that could easily have been done.  
6 The reason the draftsmen didn't do it is because the Assembly of State Parties were  
7 cognizant -- I mean this was an epoch making court, it is, it is today, and they were  
8 trying to balance the competing requirements of efficiency and state sovereignty.  
9 And there was a concern both about an overarching so-called rogue prosecutor and  
10 a court extending itself beyond the terms of its agreement. And a lot of negotiations  
11 went on, not just because of the United States and the concerns of bringing the  
12 United States on board, but actually because courts and countries and State Parties  
13 want to know the responsibilities and the obligations that they're signing up to.  
14 Now, your Honours, your Honour has touched upon, and it's a key argument which  
15 debunks or some would say puts a blinding spotlight on paragraph -- on the issue  
16 on subparagraph (7) it's ludicrous to suggest we say that an accused person  
17 convicted, a felon in the United States would have a right to decide whether or not to  
18 come before the Court, and yet somebody of good character does not.  
19 Now, your Honours, the distinction between the seat of the Court and travelling and  
20 transport is erroneous. It's erroneous. But for two votes in plenary, this Court  
21 would have been sitting in Kenya.  
22 Now, are the Prosecution seriously contending in order to get the result they want  
23 but one that is not supported by the plain reading of the Statute, that if your  
24 Honours -- if you would have had the honour of sitting and the pleasure of sitting in  
25 Nairobi, your Honours couldn't require because of the provisions of 93(1)(e) a

1 Kenyan national to come before the Court, but yet you would have the power to  
2 require the same national to go to a building next door and get the evidence by video  
3 link. It's nonsensical we say. It's nonsensical.

4 And, your Honours, the distinction the Prosecution are raising between video link  
5 and physical attendance again is debunked by their own filing because in paragraph  
6 3 of their filing they concede whether it's in situ proceedings or whether it's video  
7 link, they're trying to get the witness to appear before the Court, the exact same  
8 language of article -- that is prohibited under Article 93(1)(e) unless its voluntary.

9 So it makes no difference if a witness is from Timbuktu and appears by video link,  
10 that witness is appearing before the Court. Mr Ruto is not physically present before  
11 this Court, but he is present in this courtroom. He's represented by counsel. So the  
12 argument put forward by the Prosecution falls on many different counts.

13 PRESIDING JUDGE EBOE-OSUJI: Why do you say that -- why do you say that the  
14 distinction they try to make in relation to 93(7) is nonsensical? Isn't the argument  
15 basis, Mr Stewart had said that you have somebody who is already -- who is in  
16 custody as a result of the processes of the foreign state, the person is serving  
17 sentence, a term of years. And there is some humanitarian sensibilities to  
18 compounding that state of disability by also moving that person in the condition of  
19 disability in custody and moving the person into the custody of another place or  
20 another court. I mean, the distinction might be highly evolved, but it isn't that  
21 evanescent, is it?

22 MR KHAN: Your Honour, in my respectful submission, that argument is -- indeed  
23 is wholly without merit, because the Secretary General's reports dealing with the  
24 ICTY and ICTR made it clear that the Court was seeking to apply the best  
25 international human rights standards to the Court.

1 Now, we have over the last 15 years goodness knows how many convicted persons  
2 from the ICTR and from the ICTY. And is there a presumption that they serve their  
3 sentence back in the country, even those countries now that are part or seeking to  
4 become part of the European Union? No. They find themselves in Italy, in  
5 Sweden, in the Netherlands, in the United Kingdom.

6 So that humanitarian principle, if a principle it be, must be applied consistently. It  
7 cannot be --

8 PRESIDING JUDGE EBOE-OSUJI: The difference --

9 MR KHAN: -- extracted from a general principle of law recognised by countries we  
10 say.

11 PRESIDING JUDGE EBOE-OSUJI: Yes, yes, but the difference there is -- I mean  
12 that's where the distinction with Rule 193 comes in. And Mr Stewart also submitted  
13 to that. The difference is in Rule 193, you are dealing with your own prisoner. So  
14 if you send them somewhere, you can also move them back. They are where they  
15 are as a result of the due process of your own court. And that's not the same thing  
16 with the sort of person we are talking about implicated in Article 93(7). They are  
17 serving sentence as a result of the due process of one court. They're not there as a  
18 result of the due process of some other court. So there is something quite not right  
19 about shifting them from where they are, from here to there.

20 MR KHAN: Your Honour, if it is permanent transfer, in my respectful submission,  
21 my learned friend's argument may be a little bit different, a little bit stronger. But if  
22 it were simply focused solely on issues of state sovereignty, there would be no  
23 requirement for the consent of the prisoner, for the detained person, because an  
24 individual has no say if he is kept in Arnhem prison or in Scheveningen prison or in  
25 Amsterdam prison. It's a matter for the State. His liberty is restricted.

1 So if that was -- one is looking at it from a human rights centric point of view and it  
2 doesn't come within that category, in my respectful submission, the state sovereignty  
3 aspect could be properly met by the second limb that a State will decide if somebody  
4 in custody could come to the Court, if so, for how long, and of course, the provision  
5 says must be returned as soon as possible thereafter.

6 But, your Honour, it doesn't say that. It says very importantly and critically the  
7 person who is a convicted criminal or a person who is otherwise in detention must  
8 have a say and must consent.

9 Now, your Honours, what are the Prosecution saying? One of the principles of law  
10 it said is deterrence. And there's a whole amount of argument on whether or not  
11 that's effective and all the rest of it. But here we have witnesses who say -- who  
12 have been convicted, they've been incarcerated, they're on travel bans, they can't  
13 enter this country. Some are alcoholics. Some are -- have psychological problems.  
14 The Prosecution glossed that away and said the only reason why they're not coming  
15 is a sniff of foul play. We say that's a smoke-screen to put a defence in advance for  
16 the day we say, with the greatest of humility, this case collapses.

17 They're trying to say and change the narrative it's because of Kenyan  
18 non-cooperation, not because they got the wrong people to start with. It's a  
19 fundamental point. It's a fundamental point.

20 But, your Honour, are the Prosecution -- well, the Prosecution I say cannot, would  
21 not incite crime, because these individuals, wherever they be, if they do not want to  
22 come voluntarily, are they saying well, get yourself locked up --

23 PRESIDING JUDGE EBOE-OSUJI: Three more minutes.

24 MR KHAN: -- get yourself locked up. Commit a crime, commit a burglary and  
25 you'll get outside the long arm of the Prosecution or the long arm of Court. Because

1 once they're in custody, the Prosecution concede that subparagraph (7) would act as  
2 an absolute bar to compelling them to testify.

3 So, your Honours, we get in knots, we get into numerous difficulties. And the  
4 reason we do that is we're seeking to force, you know, a round peg through a square  
5 hole. We're trying to twist and painfully contort a clear statutory regime to one of  
6 convenience that the law does not support.

7 Your Honour, I am handed by my learned friend, Ms Lawrie and Ms Alagendra, an  
8 article from Mr Rastan and it's at page 442 of his article. And I'll just read the  
9 highlighted bit. And he states that, "Furthermore, the principle of attribution holds  
10 that an international organisation cannot act beyond the powers attributed to it by its  
11 constituent treaty."

12 Now, your Honour, that of course is the point I was raising earlier, that we're bound  
13 by the Statute. And I think --

14 PRESIDING JUDGE EBOE-OSUJI: It goes without saying of course. We all agree  
15 with that. We all agree with that.

16 MR KHAN: Indeed.

17 PRESIDING JUDGE EBOE-OSUJI: Yes.

18 MR KHAN: So, your Honours, the point is sometimes the simplest solution is the  
19 right one. Here we have a regime of co-operation. The Prosecution have not acted  
20 and done the right thing at the right time. We've seen that with disclosure.

21 Judicial comment and criticism has been made of that. We've seen that on  
22 numerous issues. And we see it in relation to 93(1)(b). They didn't utilise the  
23 power that was there that would have solved this problem. Instead of seeking to  
24 adjourn the case, they marched on thinking that they've been given a blank cheque  
25 and they get the result that they wanted. And, your Honours, the same problem

1 whether it's legal recharacterisation, whether it's temporal scope of the indictment or  
2 whether it's 93(1)(b), taking testimony under oath, the Prosecution have  
3 acted -- haven't used the powers that are there, and that is not -- that should not  
4 grant them the benefit of conferring on them a power that the Statute does not give.  
5 We say the application is inherently implausible, without legal basis, it's contrary to  
6 the intention of the drafters and should be redrafted. I'm grateful, your Honour.

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

8 Mr Kigen-Katwa?

9 MR KIGEN-KATWA: With your permission, Mr President and your Honours, I  
10 propose to have Ms Caroline Buisman to address the Court initially.

11 PRESIDING JUDGE EBOE-OSUJI: Ms Buisman, we will be rising in 15 minutes for  
12 the morning break.

13 MS BUISMAN: Good morning, Mr President. Good morning, your Honours,  
14 everyone else.

15 We basically made four critical points, and the first one is that the Statute does not  
16 allow the Court to compel witnesses to testify -- well, I just -- and the second is that  
17 the Court doesn't have the power to impose a duty on any State to compel witnesses  
18 to testify before the ICC. And we also said that, in any event, Kenyan law doesn't  
19 allow it, and also that in this particular situation, the Prosecution has not made a  
20 case to actually justify such a request.

21 I'll be very brief, 15 minutes.

22 PRESIDING JUDGE EBOE-OSUJI: If I can help you, I'm interested right away in  
23 the proposition that the Statute, did you say, does not allow -- you actually used the  
24 words "does not allow" compellability. Isn't that something that needs to be quite  
25 explicit in the Statute?



1 MS BUISMAN: Mr President, we think it is quite explicit if we read 93(1)(e),  
2 because it does actually refer to voluntary appearance, and it doesn't actually make  
3 any distinction between transfer and non-transfer, because this seems to be the main  
4 argument that we can somehow make a distinction between those who actually  
5 testify in the state or those who testify before the ICC.

6 We say on the basis of 93(1)(e), which is very clear, that it only allows voluntary -- it  
7 only requires States to facilitate voluntary appearance --

8 PRESIDING JUDGE EBOE-OSUJI: But that's something different, requiring a State,  
9 requiring a State to facilitate it. Let's accept the proposition that at the end of the  
10 day, after construing Article 93, it is agreed -- for argument's sake, it is agreed that  
11 Article 93 says "voluntary", there's no compellability there. Should we take that  
12 outside of the context of Article 93, which deals with a request that may be made of a  
13 State Party? In other words, you may have a situation where -- let's assume that we  
14 agree 93 says only voluntary and not compellability. Is there more to it than this:  
15 "State Party A, we want you to compel a witness to appear." State Party A says,  
16 "Well, we've looked at 93. We all see that it's voluntary and not compellability, but  
17 it's about an assistance that we can give. We agree to compel the witness." Is that  
18 prohibited by 93?

19 MS BUISMAN: Well, we say yes, because we say if you look at Article 64(6)(b), that  
20 makes the explicit link to State co-operation. And unlike the ICTY and ICTR  
21 statutes that are not drafted by States, and the States have not signed and agreed on  
22 that statute, that Statute was imposed on the States and that is a big difference.  
23 Here we have a State that has chosen specific words, and that was chosen by States.  
24 You cannot now rewrite that Statute unless we have another provision amended by  
25 the Assembly of States.

1 And if you look at the Statute in totality, we suggest that there is actually we cannot  
2 compel witnesses to testify before the Court, irrespective of what the law of the State  
3 says.

4 And I'm relying on Article 64(6)(b) read together with 93(1)(e). Then there is of  
5 course what you already mentioned, the 93(7) provision, which says that persons in  
6 custody must give their consent. And we -- you already mentioned it,  
7 Mr President, that it is rather an absurd suggestion -- although that was not exactly  
8 what you said, but that's my submission -- that if someone who is already in a  
9 compelled situation, if someone in that situation actually has to give consent, but we  
10 can -- someone else who is not in a compelled situation yet, we can allow a State to  
11 put that individual in a compelled situation.

12 And they are not yet discussing -- are we -- are we only talking about fines, or are we  
13 also talking about imprisonment? Because the moment an individual is in prison,  
14 then there is no reason why that individual would be in a different position than an  
15 individual already in custody. And the individual already in custody under 93(7) is  
16 actually explicitly required to give consent.

17 So on that basis we say it's very natural to draw the same conclusion for someone  
18 who is subject to a summons order from this Court.

19 And unlike the ICTY and the ICTR statutes, they did not have these explicit  
20 provisions. There is no provision in the ICTY statute like similar to 93(1)(e). There  
21 is nothing that sort of requires the voluntary appearance or the consent of anyone,  
22 whether they're in custody or not. So there are differences.

23 So we do say that on that basis, the Court cannot infer a power to summon witnesses  
24 against their will because the consequences are actually rather intense.

25 PRESIDING JUDGE EBOE-OSUJI: What does "require" mean in 64(6)(b)? 64(6)(b)

1 says -- can you -- you have it. "In performing its functions prior to trial or during  
2 the course of a trial, the Trial Chamber may, as necessary, require the attendance and  
3 testimony of witnesses." We can stop it there. We know it also further down says  
4 if necessary by obtaining the assistance of States. But leaving it there, "require the  
5 attendance of testimony."

6 I say this because you say the Statute does not allow witnesses to be compelled to  
7 appear, but we have this provision that says that the Court, if necessary, may require  
8 the attendance of a witness.

9 Now, Mr Stewart has submitted that in the French text the word "ordonner" is  
10 actually used, and we know, those who speak French, "ordonner", what it means.  
11 How do we say that the Statute does not allow a witness to be compelled as a matter  
12 separate from requiring a State Party to be complicit in that kind of activity of  
13 compelling a witness to appear?

14 MS BUISMAN: Mr President, I submit that Article 64(6)(b) indeed in the -- in the  
15 French it says "ordonner," but in English it says "require". And it's actually the only  
16 English provision where they use the word "ordonner", where they use the word  
17 "require". So we say that was actually a deliberate choice of words.

18 And when you look at -- for us there is no inconsistency --

19 PRESIDING JUDGE EBOE-OSUJI: Are you saying -- are you saying that "require"  
20 in the English language may not mean "order" or "compel"?

21 MS BUISMAN: Indeed, your Honour. I think it's a less extreme -- it's a less  
22 forceful term, and I think there was a reason why they used the word "require"  
23 rather than "order". "Order" is very explicit. "Require" is not very specific. And,  
24 Mr President --

25 PRESIDING JUDGE EBOE-OSUJI: Ms Buisman, I brought -- I brought the

1 thesaurus in the courtroom, you know. If we can turn to -- I will turn to it.

2 MS BUISMAN: But if -- okay.

3 PRESIDING JUDGE EBOE-OSUJI: I'm sure you can trust me. I know you don't  
4 have the text in front of you. I'm looking at the Oxford Thesaurus under the entry  
5 "require", one, "order, command." Those are the first two entries. "Ask for, call for,  
6 press, instruct, coerce, force, insist, demand, make" and so on.

7 And you're saying that "require" excludes all that? Is that your submission?

8 MS BUISMAN: Mr President, it's admittedly not one that I looked at. There is  
9 another dictionary that I've looked at, and it did not actually define "require", but I  
10 still maintain that there is a -- there is just -- it's a more forceful term when you use  
11 the word "order" than -- it's more explicit. It's clear what we mean. When you say  
12 I can order you, we know that it means that I can give you this instruction and you  
13 have to comply by it, whereas "require" I think in the context of Article 64(6)(b) it  
14 can -- is more about arrangement of the facilities.

15 And I also think the more important argument is that Article 64(6)(b) is not linked or  
16 coupled to any power to impose sanctions on anyone who doesn't actually comply.  
17 So the way I read Article 64(6)(b) is that this provision allows the Court, the  
18 Chamber to require the parties to call additional evidence, because we, obviously,  
19 provide the evidence. And at the end of the day, you may feel the need to hear  
20 more, and that's -- at that moment, you can -- you can require the attendance of a  
21 particular witness not yet heard. Like in the case of Bemba, they called a witness of  
22 the Court.

23 But that doesn't mean, necessarily, that then if the particular witness in question is  
24 not willing to testify, that you can compel this witness to testify. In our submission,  
25 that is a whole different power that is not included in Article 64(6)(b), and rather we

1 say that -- that particular power is excluded by 93(1)(e) and 93(7). That is our  
2 submission.

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

4 MR KHAN: Could I just -- (microphone not activated)

5 PRESIDING JUDGE EBOE-OSUJI: Go on. I take it -- Ms Buisman had three or  
6 four minutes left, so we'll take it she's yielding those to you.

7 MR KHAN: Well, your Honour, I can raise it later perhaps.

8 MS BUISMAN: Maybe two -- two. Just very briefly, because it's actually already  
9 been said. Just on the issue of 93(1)(l) we submit it's not an open-ended submission.  
10 You cannot use 93(1)(l) to circumvent a very explicit provision excluding such  
11 compellability. That's our submission.

12 On the Kenyan law, I will leave it to our Kenyan colleagues in court.

13 And on the issue of this particular case, we submit that guidance needs to be  
14 adopted when a -- if there is going to be a power to compel witness, then there must  
15 be certain guidelines to be respected. And we have suggested, obviously that is  
16 something for you to determine, to look at the ICTY/ICTR in this respect, and we  
17 set -- set out three criteria, that it must be shown that it's necessary, that the  
18 compelled testimony materially assists the Court, and that it's not obtainable  
19 through other means.

20 And we say that in this particular case, given the complete lack of credibility of these  
21 witnesses, such a request was not made out. I'll give my last two minutes to my  
22 colleague. Thank you.

23 PRESIDING JUDGE EBOE-OSUJI: While you're on your feet -- and, Mr Khan,  
24 when you stand up to speak you might also address this. This is a particular  
25 question for Defence counsel. So here we are. You tell us the Court does not have

1 the power to compel. Now, sooner or later in this Court it's a matter of time before  
2 this scenario arises. You have a case where perhaps the case for the Prosecution is  
3 built on circumstantial evidence that put together may tend to show proof of guilt.  
4 But the Defence says, "Judges, there is one exculpatory witness somewhere who,  
5 when he or she appears, will make it very clear that my client did not commit this  
6 crime. The problem we have is that this person does not want to show up, does not  
7 want to come to court, maybe because their employers don't want them to come to  
8 court and testify."

9 Are you telling us that this Court will have no power to compel the attendance of  
10 such a witness, both of you?

11 MS BUISMAN: Well, unfortunately I do. I do see the problem, and it was already  
12 pointed out by my learned friend on the other side.

13 I just want to highlight, this is a very strong argument of Sluiter, who is the leading  
14 academic in arguing that there is no right for the courts to compel witnesses against  
15 their will. And yet -- he sees it as a real weakness of this Court, yet that's not a  
16 reason to rewrite the Statute. That is a reason perhaps to look at the Statute again  
17 and ask the Assembly of States to -- to amend it.

18 PRESIDING JUDGE EBOE-OSUJI: And you're saying despite what "require"  
19 means, there is still need for amendment?

20 Anyway, Mr Khan, can you advise us, what you -- imagine the scenario I've  
21 indicated. Are we then to set a precedent that says no -- yes, such a witness exists  
22 that may come and testify and give exculpatory evidence for the Defence, but the  
23 Court has no power to compel that? What justice is in there? Tell me.

24 MR KHAN: Your Honour, one thing is, as the Americans would say, what's sauce  
25 for the goose is sauce for the gander.

1 There must be a reciprocity in fairness regarding application of rules. And the right  
2 of the Defence is calling witness under the same terms as the Prosecution. Now, of  
3 course the Prosecution have the burden of proof, and if there were circumstances  
4 where the Defence could not get a witness and evidence in some other way was  
5 presented that shows, for example, that due to noncompliance by a country, the  
6 Defence had been materially prejudiced, having professional Judges hopefully  
7 would allow the Court to assess the evidence fairly.

8 I mean that's precisely the situation in dealing with the Darfur rebel case where  
9 Defence cannot go in, cannot subpoena witnesses out. And in those circumstances  
10 the Bench has right very properly said, being professional Judges, they will be able  
11 to assess that at the end of the day.

12 So, your Honours, we could not create or carve out for ourselves a power to compel  
13 against a witness's will in circumstances where we say that the Prosecution  
14 and -- well, rather the Statute denies that for both parties.

15 These provisions are drafted applying to the parties as a whole, and one of the  
16 essential requirements is it's voluntary.

17 Your Honour, the other point I wanted to raise deals with the issue of Article 64. In  
18 my submission, an interesting --

19 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, we're already past 11.

20 MR KHAN: I'm grateful. I'll deal with it later with your leave, your Honour.

21 PRESIDING JUDGE EBOE-OSUJI: All right.

22 MR KHAN: I'm grateful.

23 PRESIDING JUDGE EBOE-OSUJI: Court will now rise and we'll come back at  
24 11.30.

25 THE COURT USHER: All rise.

1 (Recess taken at 11.02 a.m.)

2 (Upon resuming in open session at 11.36 a.m.)

3 THE COURT USHER: All rise.

4 Please be seated.

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

6 Mr Khan, you were on your feet.

7 MR KHAN: I'm most grateful, Mr President and your Honours.

8 PRESIDING JUDGE EBOE-OSUJI: Two more minutes and then if you can wrap it  
9 up.

10 MR KHAN: I'm most grateful.

11 PRESIDING JUDGE EBOE-OSUJI: I realise that Ms Buisman didn't get through her  
12 three points. She had announced three points. I think you only spoke to one of  
13 them, and we will be coming back to her to quickly make the other two.

14 MR KHAN: Your Honour, I'm in your hands. I can deal with the points briefly  
15 now, or wait until my learned friend finishes.

16 PRESIDING JUDGE EBOE-OSUJI: Why don't you finish since you're already on  
17 your feet.

18 MR KHAN: I'm grateful. Your Honour, as far as the Defence of Mr Ruto is  
19 concerned, we can accept that in certain circumstances the word "require" can have a  
20 similar connotation to "order." There wouldn't be much difference between them.  
21 But there is two observations I'd make with respect.

22 The first, Article 64 is the general rule, and Article 93, particularly we say Article  
23 93(1)(e), is the *lex specialis* provision, and we shouldn't lose sight of that in overly  
24 putting the spotlight on Article 64 when we have a specific provision that deals with  
25 the situation at hand.



1 But, your Honour, even if -- and I can concede that there are circumstances quite  
2 properly where the word "require" can include, if not coercive elements, mandatory  
3 elements. And, your Honour, the way to read it is subject to an important caveat,  
4 "States can be required to assist as provided by the Statute."

5 So, in other words, we say the right way to read this provision is an individual who  
6 is willing to co-operate with the Court and wishes to come, in those circumstances  
7 the Court can order the country to facilitate travel.

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 But what Article 64 cannot do, we say, is to breathe new life into a provision or to  
16 change or redraft a *lex specialis* provision which states that voluntariness is an  
17 important principle upon which this Court was created.

18 Your Honour, the only other point I wish to make very briefly is my learned friend  
19 referred to the 2000 European Convention. Your Honour, the obvious point, it's a  
20 simple one, of course, this isn't the European criminal court for Africa. It's an  
21 international court that must comply with its own Statute.

22 But we say two observations. The first is many European states have not acceded to  
23 that agreement requiring video link testimony. It's not all European countries by  
24 any stretch of the imagination. But the fact that it's there, that this requirement is  
25 explicitly pleaded, and it's an express provision shows that the argument of the

1 Prosecution is without basis, because unlike those countries that have agreed to  
2 compelled evidence by video link, the Rome Statute does not include it.

3 Your Honour, the last point --

4 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, we have to leave it there. You were  
5 living on borrowed two minutes.

6 MR KHAN: May I have 50 seconds?

7 PRESIDING JUDGE EBOE-OSUJI: We will come back to you later. We may come  
8 back to you later.

9 MR KHAN: I'm grateful.

10 PRESIDING JUDGE EBOE-OSUJI: Ms Buisman?

11 MS BUISMAN: Thank you, Mr President. Just one issue on the requirement's  
12 definition. I just wanted to point out that we looked at the Black's Law Dictionary  
13 and some others as well or legal dictionaries. None of them have actually given a  
14 precise or any definition at all of "require," which shows to us that this is not a very  
15 clearly defined term, and it is subject to interpretation. We do say that "require"  
16 was used deliberately rather than "order." And although we agree also with the  
17 submissions made by Mr Khan that there is some, some -- it can be some obligation  
18 on "require," but not the one that we're discussing here. As I said earlier, it is more  
19 to the parties to maybe help and facilitate to bring an additional witness to the  
20 Court.

21 PRESIDING JUDGE EBOE-OSUJI: Ms Buisman --

22 MS BUISMAN: Yes.

23 PRESIDING JUDGE EBOE-OSUJI: -- the difficulty I had and which I was  
24 expressing is that there is a difference between saying the Court does not, which was  
25 what you started with, that the Statute does not allow the witness to be compelled,

1 as a separate matter from whether the Statute contemplates that a State Party in  
2 virtue of assistance may be required to compel the witness to attend. Is that two  
3 separate things? And that is where we have a distinction between what Article  
4 64(6)(b) and Article 93 say. That's the point I was trying to make with you,  
5 but if you can speak to your next two points quickly, please.

6 MS BUISMAN: And just I understood the point, and we still maintain our position  
7 that Article 64 does not give this power because it's not linked to any sentencing  
8 requirement. So nowhere in the Statute is there any -- any provision that allows  
9 you, the Court, to subject someone who is unwilling to testify to sanctions. So that's  
10 our argument.

11 On the other points, in terms of the States, the Prosecution has made a distinction  
12 between those States that have actually explicitly authorised some compellability of  
13 witnesses before the ICC; then they say there are States that have not explicitly  
14 denied that power; and then there are states that have actually only -- they only  
15 authorised voluntary participation. These are the three groups that the Prosecution  
16 has identified.

17 We submit -- we leave out the discussion on the first group, which we have already  
18 discussed, but even if you are to disagree with me that the group that where they  
19 explicitly authorised this, that they can actually compel witnesses to testify, we do  
20 not think you can make a distinction between those that have not prohibited it. You  
21 cannot force a state that hasn't explicitly prohibited the power of compellability, the  
22 power of subpoena of witnesses. Such a State cannot be compelled under a very  
23 vague provision, which says "other assistance," "any other assistance not prohibited  
24 by law."

25 We submit this is just not an explicit enough provision to compel a State that has not

1 actually authorised -- in its own law authorised the Court to compel witnesses.

2 PRESIDING JUDGE EBOE-OSUJI: All right. Can we focus the discussion so that  
3 it's more -- it's real? We now are dealing with Kenya. So we don't need to account  
4 for what every other State has done in this regard. If we can deal with the situation  
5 concerning Kenya and which is what we're dealing with now.

6 MS BUISMAN: It's in our submission Kenya is actually a country where it's  
7 actually not authorised. So it's not even in the category where the Prosecution  
8 places Kenya, that it's not actually explicitly prohibited. We say it is. But  
9 obviously I don't want to speak for the Kenyan authorities who are here with us  
10 today.

11 I can point it out in our submission, this is paragraph 66 up to 75, where we deal  
12 with the Kenyan law. And as we have highlighted, all the provisions require  
13 consent of the witness who is subject in the summons.

14 So if you'll read in our submission Section 86, in light of the following Sections 87,  
15 88, 89, then it's clear that the summons that can -- that 86 speaks about a summons  
16 requiring a person to appear as a witness. This must be read in our submission,  
17 but, again, the Kenyan authorities will deal with this more in more detail, but it has  
18 to be read in light of 87, 88, 89. And this is all about voluntary participation.

19 In fact, it goes so far that it imposes an obligation on the attorney general to inquire  
20 with the witness whether or not the prospective witness will consent to giving  
21 evidence or assisting the International Criminal Court.

22 And that last part we think is important, because it doesn't distinguish from  
23 testimony here in the Court or giving assistance in any other way, which of course is  
24 not dependent on the region.

25 PRESIDING JUDGE EBOE-OSUJI: I'm sorry again. I just turned to 86. Are you

1 talking about article -- sorry, Section 86(3) of the ICA?

2 MS BUISMAN: Indeed.

3 PRESIDING JUDGE EBOE-OSUJI: And you're saying in this provision says in this  
4 section "document" -- let me back up. I'll back up. So the provision begins in  
5 subsection 1, where the ICC requests assistance under paragraph 8, Article 19. I see  
6 Article 64 or paragraph (1)(d) of Article 93 of the Rome Statute in arranging for the  
7 service of the document in Kenya.

8 And then 86(3) says, "In this section 'document ...'", quote and unquote, "... includes  
9 a summons requiring a person to appear as a witness, and, B, summons to an  
10 accused."

11 So here we're dealing with sub (3)(a). It says "... 'document' includes a summons  
12 requiring a person to appear as a witness. "

13 So you're telling us that the ICA does not contemplate serving an order to a witness  
14 to appear? Is that what you are saying?

15 MS BUISMAN: What I say is that this section must be read in light of 87 and 88 and  
16 89. And if you look at 89(1)(a), it explicitly states that "... Attorney General shall  
17 assist in the making of arrangements to facilitate a witness's attendance before the  
18 ICC if he's satisfied that the prospective witness has consented to giving the  
19 evidence or assistance requested."

20 And I think the main disagreement here between us and the Prosecution is that they  
21 make a distinction between testifying here at the seat of the Court and testifying in  
22 Kenya. And we say that is an erroneous interpretation of the law of Kenya as well  
23 as the Rome Statute, because this -- when someone testifies in Kenya, it would still  
24 be a testimony before the seat -- before the ICC, even if not -- the physical presence  
25 might not be here, it's still testimony before the inter court. So in that sense I do

1 want to leave it to the Kenyan authorities to give the proper interpretation to 86(3)(a)  
2 and if there is an inconsistency with 87, 88, 89; but on the face of it, in my view, in  
3 our view, there is no inconsistency, because it's one thing to submit the summons  
4 and requiring a person to appear, but it is another thing to force a person if he's  
5 unwilling to appear, to force him then either through a fine or through  
6 imprisonment. That is a whole next step. And that next step is nowhere to be  
7 found in this law. It is only found in another law that the Prosecution is trying to  
8 transplant into the International Crimes Act.

9 PRESIDING JUDGE EBOE-OSUJI: What law?

10 MS BUISMAN: It's the Criminal Procedure.

11 PRESIDING JUDGE EBOE-OSUJI: The Criminal Procedure Code?

12 MS BUISMAN: Yes.

13 PRESIDING JUDGE EBOE-OSUJI: All right, okay. But is it necessary to have  
14 sanctions before an order is an order?

15 MS BUISMAN: Well, we submit that if there are no sanctions, then you cannot  
16 enforce that order in the case that someone is unwilling. If someone is willing, there  
17 is no problem. There is no problem requesting a witness to testify, to submit a  
18 summons, and if the witness is willing, then there is no issue, but if the witness is  
19 unwilling then you need an authority, a force, a power to compel this witness.

20 PRESIDING JUDGE EBOE-OSUJI: But isn't that a second stage? The question is, is  
21 the character of the whole process itself dependent on that second stage so that an  
22 order of the Court or a summons or subpoena as the case may be, it isn't what it is or  
23 what it should be if it doesn't -- if there is no ability to enforce it through sanctions?

24 MS BUISMAN: Mr President, we have no problem with this Court's asking Kenya  
25 to issue under this section a summons requiring these persons to appear. But if

1 these persons then do not so appear, we do have a problem with the second step and  
2 say, well, you have to, you have to oblige them to appear. We say that there is no  
3 provision for that. There is no authority for that. That is our position.

4 PRESIDING JUDGE EBOE-OSUJI: Maybe the Prosecution during their turn will  
5 speak to that and whether or not that is what they are contemplating as well. And  
6 the reason I say that, I think Blaskic might have said something different. Somehow  
7 it may not be directly on the same issue, but I remember the Appeals Chamber did  
8 not always require sanctions to be in place before a subpoena is seen as such, with  
9 particular regard to States, subpoenas to States or officials of States think that -- well,  
10 anyway, you will speak to it when we come.

11 Please proceed.

12 MS BUISMAN: The issue here is compellability, Mr President, and we say there is  
13 no such thing as compellability. Whether we call it subpoena or summons, there is  
14 obviously no problem submitting a document asking these witnesses to appear.

15 And I think this is where we may disagree. I already stated earlier that there is a  
16 difference between ICTY and ICTR on the one hand and the ICC on the other.

17 And in Blaskic, they have also recognised a direct relationship between the Court  
18 and individuals. So you can bypass a state's co-operation by going directly to the  
19 individual.

20 In our submission, you cannot do that in the ICC, because ICC depends on States.

21 It's an agreement. It's the States that have actually ratified and signed the Rome  
22 Statute. You cannot bypass them and create a direct relationship with the  
23 individual. I think that for us is also a distinction.

24 And I think I leave it for here and wait for other replies later on. Thank you.

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

1 Mr Attorney, I think it's your turn. I know you're a Professor of Law, but we still  
2 have time limits.

3 MR MUIGAI: Thank you very much, Mr President. I want to reiterate the  
4 gratitude of the Government of the Republic of Kenya for this opportunity to  
5 participate in these proceedings. We have had long and protracted discussions  
6 about how we can assist the Court to arrive at a fair and just determination of the  
7 matters before it.

8 I want to start also by saying, Mr President, that I would wish to commend the  
9 Prosecution, because in five years of engagement with the Government of the  
10 Republic of Kenya, this is the first time that the Prosecution has said that the  
11 Government of Kenya is capable of being entrusted with the weighted matter of (a)  
12 getting to know the witnesses and (b) assisting in the taking of the testimony of the  
13 witness.

14 This is a 360 degrees about turn. What the Prosecutor has consistently said since  
15 this case commenced is that the Government of the Republic of Kenya cannot be  
16 trusted at all with the witnesses. So we welcome this change of heart.

17 And having said that, however, let me also confirm this. The Government of the  
18 Republic of Kenya is committed to its treaty obligations. And the Government of  
19 the Republic of Kenya will enforce the Rome Statute. And the Government of the  
20 Republic of Kenya will enforce its own International Crimes Act that has  
21 domesticated the Rome Statute. That is our commitment.

22 Now, what is our understanding of the law? Happily for us, we do not, we do not  
23 share the views expressed either by the Defence or by the Prosecution that there is a  
24 complex question of law that requires much learning to resolve. The Kenyan  
25 government takes the view that what is before the Court is a very simple, very



1 straightforward issue, and that we can resolve it if we have fidelity to the treaty and  
2 to the Kenyan law affecting the treaty.

3 We have raised, Mr President, three issues only. And I'll try to be very brief in my  
4 submission. In my submission filed with this Court on 10 February, I have raised  
5 three very straightforward issues, and they are as follows: Number one, that in our  
6 reading of the treaty, the treaty requires the voluntary appearance of witnesses to  
7 testify before the Court, whether the Court be sitting here in The Hague, which is its  
8 seat, or in any other venue. That is our reading of the Treaty, and we will explain  
9 why briefly.

10 Secondly, it is our view that neither this Court as a judicial organ nor the Prosecutor  
11 as an organ of the Court can impose on any State Party any obligations that don't  
12 directly flow from the treaty itself, and we will explain why. We will be saying  
13 neither the Government of the Republic of Kenya nor any other State Party should  
14 be obligated to assume any responsibility that were not expressly assented to at the  
15 date of the ratification of the treaty.

16 Finally, our third and final point, we will be submitting to you, Mr President and the  
17 Court, that the Prosecutor's reading of Kenya's law regarding the appearance of  
18 witnesses is wrong. And we will be submitting that under the law of the Republic  
19 of Kenya, which has domesticated the Rome Statute, the Government of the  
20 Republic of Kenya cannot, cannot without violating the constitution compel any  
21 person who does not volunteer to be a witness to become a witness.

22 Let me now go to my first point very --

23 PRESIDING JUDGE EBOE-OSUJI: Mr Muigai --

24 MR MUIGAI: Yes, sir.

25 PRESIDING JUDGE EBOE-OSUJI: -- before you proceed, so that we clearly

1 understand what the problem is, I'm thinking here about three scenarios. One is a  
2 scenario in which, let's assume the Prosecution is able to persuade the Court that the  
3 Court has a power to compel a witness, quite apart from what the Government of  
4 Kenya does about it. And the Court issues an order the witness should appear and  
5 then on the basis of that order makes a request. And what we're now working  
6 with -- this is scenario one -- is only the order of the Court coupled with a request.  
7 Some may say there is an expectation or not that the Government of Kenya may act  
8 upon it. That's one scenario.  
9 Second scenario is there is the order and the request, but armed with that order and  
10 the request the government says: All right. We will go to a domestic court, and on  
11 the basis of this order and the request domesticate the request, so to speak, or the  
12 order and then get a high court order, which is on subpoena. That is the second  
13 scenario.  
14 And the third scenario is it doesn't matter whether or not the request of the Court is  
15 propelled of its own force or is assisted by a domesticated court order from Kenya.  
16 It doesn't matter. The point is the request would not be -- it's not appropriate and  
17 will not be allowed. Which is the position?

18 MR MUIGAI: I'm sorry, Mr President. As I understand the Prosecution's  
19 application, and I stand corrected on this, they wish that the Government of Kenya  
20 be directed by this Court to facilitate these seven witnesses to appear at some forum,  
21 which I believe is a forum within the territorial jurisdiction of Kenya, and by some  
22 process which is to be discussed at a later time, their evidence be taken in a process  
23 that is adjunct to this Court.  
24 I do not understand that the Prosecution is interested in a purely Kenyan domestic  
25 process. In fact, I understood my learned colleague the Prosecutor to have said this

1 morning that that is an avenue they do not wish to explore --

2 PRESIDING JUDGE EBOE-OSUJI: No, no, no. I may have misstated the scenario.

3 What I meant wasn't a matter of what I described earlier as rogatory commission,

4 but a scenario -- in the second scenario I mean, where the request is made, and then

5 operating under the principle of international law, the general one third states, it's

6 up to States how they implement their international obligations. I believe the ICJ

7 recently said that in the Hissène Habré case, confirmed that.

8 But I'm saying request is made. The attorney general, that is you, decides the right

9 or most appropriate way to move on this request is to take this request to a Kenyan

10 judge, who would then issue summons to a witness to appear before the ICC, not to

11 appear before a rogatory commissioner, the person of a high court judge to take the

12 evidence. But Kenyan court directs a witness, "ICC wants your attendance. The

13 attorney general has made this application for me to issue summons. I'm issuing a

14 summons to you, witness whoever. Appear before the ICC and give your

15 testimony."

16 Do you rule that out as well?

17 MR MUIGAI: I would take the view that I would have to address you on the first

18 question first, because our -- the position of the Kenyan government is that this

19 Court should not even contemplate the possibility of issuing such an order, because

20 this Court will have acted in violation of the Statute. However, if I do not persuade

21 you at the end of that argument, then we will come to the secondary argument.

22 Supposing you issued the order in any event, what would we do with it in Kenya?

23 And I would come to the point you are raising now, if I may?

24 So I will be very brief on this question of international law, because it's been argued

25 in my very humble judgment in a very persuasive manner by those who have

1 spoken before, especially Mr Ruto's Defence and Mr Sang's Defence, and I want for  
2 the record to say the Kenya government is in complete agreement with their  
3 understanding of international law.

4 In particular, Mr President, the learned opinion of this Dutch academic, Mr Sluiter,  
5 in this very seminal and interesting article, "I beg you please come to testify -- the  
6 problematic absence of subpoena powers of the ICC."

7 We have perused this article and must commend this gentleman, because in our  
8 judgment he captures the problem of the matter before you very, very well indeed.  
9 And we agree, with respect, that his conclusions are the correct conclusions.

10 PRESIDING JUDGE EBOE-OSUJI: Mr Muigai, while you're on that point, when the  
11 debate was occurring before you stood up, I had brought in the comparative  
12 situation of the ad hoc tribunals, and I made the point that if you took the Statute of  
13 the ad hoc tribunals, ICTR or ICTY, and stood it side by side, ignoring the rules, you  
14 might actually see the absence of the phrase "require the attendance of a witness" as  
15 you have it in 64(6)(b) in this Statute, in the Statute of this Court. It is there. You  
16 don't even have anything as close to that in the statute of the ad hoc tribunals.

17 But we still recognise the power of issuing subpoenas and summons in the rules of  
18 the Court and in the subsequent judgments of the Court, both of which -- I mean the  
19 rules and the judgments are Judge-made norms. Why do we say that this Court is  
20 in a worse position than the ad hoc tribunals?

21 MR MUIGAI: The answer was provided by the Sang Defence a few minutes ago.  
22 The Rome Statute was negotiated by States. And, Mr President, I have had the  
23 distinct privilege to attend and participate in the deliberations that take place in the  
24 Assembly of State Parties. It is a political forum. And there is a lot of horse  
25 trading and a lot of people -- parties that feel that extreme positions jeopardise the

1 package that you want to carry.

2 And in my own readings about the preparation of the Rome treaty, there were a lot  
3 of States that were very concerned about extreme positions that would jeopardise a  
4 package deal.

5 Mr President, you're familiar with this --

6 PRESIDING JUDGE EBOE-OSUJI: It might be why 93, is it (1)(l), is that what it  
7 says?

8 MR MUIGAI: Yes, yes.

9 PRESIDING JUDGE EBOE-OSUJI: Because of the horse trading, perhaps lack of  
10 agreement on explicit positions, then we have that open-ended mechanism there.  
11 Could it be why that is there? I don't know. I'm asking you.

12 MR MUIGAI: That's right. That's why --

13 PRESIDING JUDGE EBOE-OSUJI: All right.

14 MR MUIGAI: -- that's why obviously you can see there, Mr President, that is exactly  
15 why a draftsman would introduce 93(1)(l), because there is -- obviously there was a  
16 difficulty here carrying a consensus that State Parties would be obliged to arrest  
17 their -- arrest their countrymen, arrest their subjects, their nationals, compel them to  
18 appear, and at the pain or at the risk of a term of imprisonment or other  
19 consequence, bring them to the Court.

20 Many States were very uncomfortable with that sort of --

21 PRESIDING JUDGE EBOE-OSUJI: So then that then boils down, does it not, to  
22 what each States Party chooses to do?

23 MR MUIGAI: Exactly.

24 PRESIDING JUDGE EBOE-OSUJI: In its own law.

25 MR MUIGAI: Exactly.

1 PRESIDING JUDGE EBOE-OSUJI: Which takes us now to the ICA and what it  
2 actually says.

3 MR MUIGAI: Yes.

4 PRESIDING JUDGE EBOE-OSUJI: Yes.

5 MR MUIGAI: Indeed. And I want -- even before I go there, I want to draw your  
6 attention, Mr President, to something that hasn't quite been alluded to this far. In  
7 the rules of this Court, in Rule 65 is a very, in our view, illuminating provision  
8 providing as follows, Mr President, compellability of witnesses, compellability of  
9 witnesses. And it says 65(1), "A witness who appears before the Court is  
10 compellable by the Court to provide testimony unless otherwise provided for in the  
11 Statute and the Rules."

12 A witness who appears before court. Our own reading of that is that this is a  
13 witness who has come to the Court voluntarily. This is a witness who has  
14 submitted to the jurisdiction of the Court, and under the jurisdiction of the Court the  
15 Court then is entitled to say you are here. We have your statements. All  
16 statements. You are under an obligation to do this.

17 PRESIDING JUDGE EBOE-OSUJI: Is Rule 65 a general indication of -- general rule  
18 of compellability of a witness at large, or --

19 MR MUIGAI: No.

20 PRESIDING JUDGE EBOE-OSUJI: -- does it speak to precautions like the right to  
21 not self-incriminate and things like that once you're on the stand?

22 MR MUIGAI: If, Mr President, you will look at the heading of Chapter 4, it relates  
23 to provisions relating to various stages of the proceedings. So this witness in Rule  
24 65 is already before court. His attendance has been obtained by a process that the  
25 Court itself sanctions, is legitimate and is legal.

1 It is only then when all these processes have been complied with that he becomes  
2 compellable. That is our submission.

3 Now, let me come to the obligations of a State Party and in this case the obligations  
4 of a country like the Republic of Kenya. We submit that Article 64(6)(b) and Article  
5 93(1)(d) do not empower the Court to compel witnesses' attendance and testimony.

6 And we want to agree totally with the very, very lucid submissions of Mr Karim  
7 Khan QC, that where the rule is specific, where the rule is specific, it overrides the  
8 rule that is general for purposes of the specific application.

9 The rule that should concern this Court is not the general powers of the Court. It is  
10 the specific powers of the Court. This is our submission. If you look at Article 64,  
11 Mr President, Article 64 has a subheading that says the functions and powers of the  
12 Trial Chamber. And it says in 64(6)(b), they will require the attendance of the  
13 testimony of witnesses, et cetera, et cetera, if necessary, and the assistance of  
14 Statute -- of States as provided in this Statute. 96(6)(b) is not conclusive. We have  
15 to go to what then does the Statute provide.

16 And in our very humble view, that is again very clearly taken care of by 93(1)(d), I  
17 think it is, because 93(1)(d) says the service of documents including judicial  
18 document and then (l), any other type of -- any other type of assistance.

19 In our submission, nothing could have been clearer. If the draftsmen of the Rome  
20 Statute intended compellability of witnesses generally, it would -- nothing would  
21 have been easier than to donate that power expressly. It was not donated.

22 PRESIDING JUDGE EBOE-OSUJI: But 64(6)(b) --

23 MR MUIGAI: 64(6)(d), sir?

24 PRESIDING JUDGE EBOE-OSUJI: 64(6)(b), the one you just referred to.

25 MR MUIGAI: Yes.

1 PRESIDING JUDGE EBOE-OSUJI: What does it tell us if it says require the  
2 attendance and testimony of witnesses and production of documents and other  
3 evidence by obtaining, if necessary, the assistance of States as provided for in this  
4 Statute?

5 MR MUIGAI: I can --

6 PRESIDING JUDGE EBOE-OSUJI: If necessary.

7 MR MUIGAI: If necessary.

8 PRESIDING JUDGE EBOE-OSUJI: Does it tell us that there may be circumstances  
9 where it may not be necessary to obtain the assistance of States? Now, if we can  
10 envisage that possibility, what does that do to the argument that witnesses are  
11 non-compellable as a general proposition?

12 MR MUIGAI: I would start by saying, Mr President, as you may know -- as you do  
13 know, sir, the witnesses before this Court are not known by the Kenya government  
14 at all. We cannot put a name to any person. We have never been part of the  
15 process of discovery. To the extent that the Kenya government is aware of any  
16 witness, it's the witnesses that have already testified and most of them have done so  
17 in camera in this Chamber.

18 How did they arrive at The Hague? We don't know. We don't know. We  
19 assume, therefore, that they are covered by 64(6)(b), that they came here without the  
20 requirement of any assistance by the State Party.

21 PRESIDING JUDGE EBOE-OSUJI: There you go. Now, let's stop there for a  
22 minute. You've engaged that scenario, and in my view it is a very important one.  
23 Now, let's say a witness -- mind you, we're still dealing with the theory that  
24 witnesses are not compellable.

25 MR MUIGAI: True.



1 PRESIDING JUDGE EBOE-OSUJI: Okay. We have a situation you've just invoked,  
2 a witness arrives at The Hague with no help from you or State Party.

3 MR MUIGAI: Yes.

4 PRESIDING JUDGE EBOE-OSUJI: But while the witness is in The Hague, time for  
5 testimony arrives. Witness says, "No, I don't want to come." They're still in The  
6 Hague, in the custody of -- or in the care of the VWU. Are you saying that they  
7 cannot be compelled to appear? The witness comes and tells the Judges, "Look, I  
8 know what Article 64(6)(b) says. It says I cannot be compelled. I'm here against  
9 my will. I will not testify." Are you saying that is what 64(6)(b) contemplates?

10 MR MUIGAI: I think by your Rule 65, if the witness is sitting before you in this  
11 Court --

12 PRESIDING JUDGE EBOE-OSUJI: No, no, no, no. They have not yet come.  
13 They're in --

14 MR MUIGAI: Is he in Kenya or --

15 PRESIDING JUDGE EBOE-OSUJI: No, no. He's in The Hague.

16 MR MUIGAI: He's in The Hague.

17 PRESIDING JUDGE EBOE-OSUJI: In The Hague but refuses to come, so that is  
18 where the compellability issues began or begins. Time to testify, witness. VWU  
19 goes to get the witness. Witness says, "I've changed my mind. I don't want to  
20 attend court any more."

21 So you have the compellability issue engaged from that point. They're not in the  
22 court yet. Are you saying that they could not be compelled to come? Or worse  
23 still, let me make it even -- perhaps cleaner, cleaner. VWU go. Witness says, "I  
24 don't want to come to court." And the VWU come to court and tell the Judges,  
25 "Sorry, the witness does not want to appear." What do we do?

1 MR MUIGAI: I would imagine that -- I would imagine that that is an issue that  
2 does not -- the fact that he's a Kenyan witness is immaterial. I assume that this  
3 applies to -- you're asking a witness across the board.

4 PRESIDING JUDGE EBOE-OSUJI: We are dealing with the theory of  
5 non-compellability, which everybody is arguing the Court cannot compel a witness  
6 to come to court and testify. Witnesses are voluntary in the ability to come to court  
7 and testify.

8 MR MUIGAI: Yes.

9 PRESIDING JUDGE EBOE-OSUJI: And now we have this scenario.

10 MR MUIGAI: I think that the distinction you make is important, but there is one  
11 that I cannot speak to. I can speak to this: If the witness is within the territory of  
12 the Republic of Kenya, the answer is no. That witness is not compellable by you  
13 and is not compellable by us. If that would --

14 PRESIDING JUDGE EBOE-OSUJI: Why the distinction? Can you -- why do you  
15 make that distinction --

16 MR MUIGAI: Because --

17 PRESIDING JUDGE EBOE-OSUJI: -- between -- does that imply that you may give  
18 some ground in the scenario where the witness is already --

19 MR MUIGAI: If the --

20 PRESIDING JUDGE EBOE-OSUJI: -- in the Netherlands, in The Hague --

21 MR MUIGAI: Yes.

22 PRESIDING JUDGE EBOE-OSUJI: -- but does not want to come to court --

23 MR MUIGAI: Yes.

24 PRESIDING JUDGE EBOE-OSUJI: -- you're saying a distinction can be made. Do I  
25 take it you might agree in that sort of scenario that yes, 64(6)(b) might mean the

1 Court may compel the witness to attend --

2 MR MUIGAI: Well --

3 PRESIDING JUDGE EBOE-OSUJI: -- because the witness is in The Hague?

4 MR MUIGAI: I have considered --

5 PRESIDING JUDGE EBOE-OSUJI: You have considered.

6 MR MUIGAI: -- one thing, sir. Let me make it clear what I have considered. I  
7 have considered that when you have a live witness in front of your Trial Chamber  
8 who has been sworn and is about to commence his testimony, if he became -- or if he  
9 purported to refuse to testify, I think you have clear legal mandate to compel him.

10 PRESIDING JUDGE EBOE-OSUJI: That's not an issue. The issue is the other one  
11 where the witness is in his bedroom or his flat and does not want to come.

12 MR MUIGAI: If the witness is at The Hague and is in some hotel and refuses to  
13 come to court, are you asking me whether you have the authority to issue an order  
14 for his arrest and production before the Court?

15 PRESIDING JUDGE EBOE-OSUJI: According to your view of what 64(6)(b) means,  
16 yes.

17 MR MUIGAI: Let me come -- let me concede that, because it is immaterial to our  
18 own case.

19 PRESIDING JUDGE EBOE-OSUJI: Right. So you concede that. Now let's move  
20 forward.

21 MR MUIGAI: Let us concede that that is --

22 PRESIDING JUDGE EBOE-OSUJI: All right.

23 MR MUIGAI: -- that would be somebody else's headache.

24 PRESIDING JUDGE EBOE-OSUJI: All right.

25 MR MUIGAI: It wouldn't be the headache of the Kenya government.

1 PRESIDING JUDGE EBOE-OSUJI: Good.

2 MR MUIGAI: But we concede -- I concede that if this witness is a witness already in  
3 the seat of the trial court brought to the trial court through a regular legal legitimate  
4 procedure, there may -- there may be a residual authority on your part to compel  
5 him to testify.

6 PRESIDING JUDGE EBOE-OSUJI: Right.

7 MR MUIGAI: But let me go to --

8 PRESIDING JUDGE EBOE-OSUJI: But before you go on, let's -- I won't push you  
9 further on than to concede more than you've done. The question now is we move  
10 forward. You said, all right, but if the witness is in Kenya --

11 MR MUIGAI: Yes.

12 PRESIDING JUDGE EBOE-OSUJI: -- it's a different matter.

13 MR MUIGAI: Absolutely.

14 PRESIDING JUDGE EBOE-OSUJI: Why?

15 MR MUIGAI: Because the law, the law that we shall enforce in the Republic of  
16 Kenya is a law that even 64(6)(b) recognises.

17 PRESIDING JUDGE EBOE-OSUJI: What is that law?

18 MR MUIGAI: It says "require the attendance of the witness" --

19 PRESIDING JUDGE EBOE-OSUJI: Wait. What are you looking at? What are you  
20 looking at?

21 MR MUIGAI: Let's take the comma, Mr President, that you alluded to earlier,  
22 comma, if necessary, comma, the assistance of States as provided by this Statute.  
23 The procedure of the assistance of States is not in 64. It is in 93. And 93 then says  
24 that the State will invoke its own domestic law. And when I receive your request, if  
25 that day ever comes, if I receive your request, my concern, the concern of the DPP,

1 the concern of the Court shall be what does Kenya law, which the Statute has  
2 recognised, say?

3 One of my fundamental duties as attorney general is to satisfy myself that this  
4 person is voluntarily -- and that's the language, it's the language of the Rome Statute,  
5 it's the language of the ICA, if I am satisfied.

6 Now, I am assuming, Mr President, sir -- first, you know, I don't know who these  
7 seven people are. I'm assuming through some process the Prosecution will make  
8 them known to me, and I am assuming through some process that they are still  
9 within the Republic of Kenya, which they may or may not be. I do not know. All  
10 right.

11 Assuming we can overcome all those hurdles, then we would have to overcome  
12 another hurdle that I can find them.

13 PRESIDING JUDGE EBOE-OSUJI: That's a problem you have made?

14 MR MUIGAI: Having found them --

15 PRESIDING JUDGE EBOE-OSUJI: Yes.

16 MR MUIGAI: -- the last one, I am assuming I can obligate them through some  
17 method or other to come to me and let me know, do you or do you not wish to  
18 testify? Because my responsibility is triggered once I can make that determination.

19 PRESIDING JUDGE EBOE-OSUJI: Now, we've looked at earlier during the  
20 argument, I believe somebody -- and that was Ms Buisman referred us to Section 86.

21 MR MUIGAI: Section ...?

22 PRESIDING JUDGE EBOE-OSUJI: 86(3) of the ICA.

23 MR MUIGAI: 86(3).

24 PRESIDING JUDGE EBOE-OSUJI: Which contemplates that the assistance that may  
25 be rendered by the Government of Kenya pursuant to Article 64 may include service

1 of documents, and documents would include, "a summons requiring the person to  
2 appear as a witness." A summons requiring the witness to appear.

3 Are you saying that Kenyan law in light of 86(3)(a) does not contemplate the ICC's  
4 summons to a Kenyan witness to appear, even though it's --

5 MR MUIGAI: I welcome the opportunity, Mr President, to make that clarification,  
6 because it's fundamental. In the -- in the argumentation between the Prosecution  
7 and the Defence, I got the impression that summons was treated as a hostile  
8 instrument. It need not be. In the criminal process you can use a summons even to  
9 bring to court a friendly witness.

10 Let me give you two examples. You can have a witness who says, "I am able, ready  
11 and willing to come to the Court; however, the Kenya government has failed to give  
12 me a passport or to facilitate a travel document." You can issue a summons to him,  
13 which then is enforceable in Kenya.

14 He's a volunteer witness. What the summons does is obligate, is obligate the Kenya  
15 government to facilitate his appearance. What is the facilitation? To grant him a  
16 travel document and such other support as he may require. That's one scenario.

17 Scenario number two, Mr President, a witness says to the Prosecutor, "I am a  
18 medical doctor who works in a government hospital. I want to come and testify,  
19 but my superiors have refused to grant me leave from my job." Again, the Court  
20 can issue a summons for him, although he's a friendly witness, because the  
21 summons becomes the basis upon which he activates the co-operation of his  
22 employer to come to court.

23 It is an entirely different situation where the person sought as a witness is saying, A,  
24 I do not wish to testify; two, I do not wish to leave Kenya; three, I do not wish to be  
25 associated with this process for reasons that -- I have never seen the affidavits. I

1 assume they are in the -- and I don't need to see them, but I think the import of the  
2 affidavits is that that's what the witnesses have said.

3 PRESIDING JUDGE EBOE-OSUJI: Yes, but the conception of summons doesn't  
4 depart, does it, from an understanding of it that the idea of it is you receive that  
5 document as a witness, you must go to court whether or not you like it, isn't that  
6 what summons means? You shall appear before the Court.

7 MR MUIGAI: I think that when the Court issues a summons, it is expressing the  
8 hope that the person to whom the instrument is addressed will comply.

9 PRESIDING JUDGE EBOE-OSUJI: The incidence is they have to comply. It isn't a  
10 voluntary matter for them any more once a summons has come into the picture.

11 MR MUIGAI: I would have my own difficulty with that.

12 Whatever the Court maintained, the Court can issue summons -- for example, Mr  
13 President, let us assume that the court sitting at The Hague, the district court, I don't  
14 know the court structure, issues a summons for the president of the United States of  
15 America to appear in a Hague court while he's attending an international conference  
16 in The Hague. Does it mean the president of the United States is going to appear  
17 before that court?

18 PRESIDING JUDGE EBOE-OSUJI: It's a question of -- no, no, no. It doesn't change  
19 the meaning of the word "summons".

20 MR MUIGAI: Yes.

21 PRESIDING JUDGE EBOE-OSUJI: It doesn't. The question is what happens then?

22 MR MUIGAI: Yes.

23 PRESIDING JUDGE EBOE-OSUJI: Whether or not the summons --

24 MR MUIGAI: Yes.

25 PRESIDING JUDGE EBOE-OSUJI: -- is violated or not. Isn't that the question? It's

1 a question of law.

2 MR MUIGAI: But the Court has issued a summons in vain, Mr President, because  
3 the president is immunised by international law as is a minister, as is a diplomat, as  
4 is a person who enjoys immunities. So that I as a minister of the Kenya  
5 government, if I were summoned by the district court here, I would send learned  
6 counsel to say I will not be appearing before that court.

7 PRESIDING JUDGE EBOE-OSUJI: Yes, but, Mr Muigai --

8 MR MUIGAI: That court has no jurisdiction over me. I enjoy immunities under  
9 the Vienna Convention.

10 PRESIDING JUDGE EBOE-OSUJI: That's an argument you have to make in  
11 Defence in order to stave off the incidence of the summons, isn't it?

12 MR MUIGAI: And that's why in international law, Mr President, we do have an  
13 appearance and a protest where we say the Government of the Republic of Kenya  
14 were sued in a court here in The Hague, we would say we do not admit the  
15 jurisdiction of the court. We have made an appearance under protest, meaning the  
16 summons requiring the Kenya government to appear and defend a suit will not be  
17 recognised as -- by us as such, but we will be saying for the purposes of persuading  
18 that court that it has the wrong people at the wrong time.

19 So let me take you to 87, Mr President, sir. 87 is very, very clear, because it is what  
20 captures what -- everything that's gone before. It says where the ICC requests  
21 assistance under those paragraphs and those ones and those ones and Article 93, the  
22 operative paragraph, under Article 93 of the treaty, in facilitating the voluntary  
23 appearance of a witness. Nothing could be clearer than that in elucidating this  
24 point.

25 Where the ICC has made a request for assistance in facilitating the voluntary



1 appearance of a witness, the attorney general may give authority. My first question  
2 when I receive this request in whatever form it may come, I will ask myself and my  
3 legal advisors, is the person sought by the Court appearing voluntarily?

4 The Prosecutor tells me not at all. These persons, not only have they left my  
5 protection here in The Hague, they have also gone back to Kenya. That's what he  
6 says. And even in Kenya I have gone after them and spoken sometimes to some of  
7 them on the phone and they have said never, never, never.

8 So that is the difficulty I would be facing.

9 PRESIDING JUDGE EBOE-OSUJI: But the idea of voluntary appearance, what does  
10 it really mean when it is indicated in Article 93 and brought into Section 87 of the  
11 ICA? Could it mean more than the witness says, "I want to go and testify at The  
12 Hague" and the government is aware of this and says, "Oh, good for you. Thank  
13 you. You're on your own. Go."

14 But he says, "I can't go."

15 "Well, that's up to you how you get there."

16 Doesn't 93 say, "No, it is not for you to tell the witness 'Good for you. It's up to you  
17 how you get there. It is for you to kick something in motion and make sure that the  
18 witness who wants to come does come to court, or even ..." --

19 MR MUIGAI: I concede that point.

20 PRESIDING JUDGE EBOE-OSUJI: Hold on, hold on.

21 MR MUIGAI: Let me --

22 PRESIDING JUDGE EBOE-OSUJI: "... or even it could be worse than good for you,  
23 go." It could also be witness wants to come, but -- present company excepted of  
24 course -- a certain government might then put certain obstacles in the way of the  
25 witness really coming. Isn't that what 93 is meant to avoid by the concept of

1 voluntary appearance in that sort of context?

2 MR MUIGAI: And I have conceded that point.

3 PRESIDING JUDGE EBOE-OSUJI: All right.

4 MR MUIGAI: I have conceded --

5 PRESIDING JUDGE EBOE-OSUJI: So why do we need to take --

6 MR MUIGAI: -- that where the witness himself wishes to testify, there is a positive  
7 duty on the part of the Government of the Republic of Kenya to facilitate that person  
8 to go and testify wherever the forum will be. I want to concede that point again on  
9 the record. So that even tomorrow, whenever I get back to my office, if I receive  
10 from my learned and distinguished friend, the Prosecutor, a letter saying, "Since our  
11 appearance in court on Friday, witness number 30 ...", whatever the wording is, "...  
12 has indicated to me that he is willing to testify if you provide an avenue for that," my  
13 response instantaneously will be, "No problem. No problem."

14 But if he wrote to me and said, "Do you remember the seven witnesses we were  
15 discussing? Have you now found them?", and assuming by some miracle I had  
16 found all seven and they had come to my chambers and I had put the question, "Do  
17 you wish to testify in the ICC case number 2?", and all of them had told me "No,"  
18 and had I asked them, "Will you make an affidavit confirming that this is something  
19 you have consciously decided?", then I would have to write back to my colleague  
20 and say, "I regret that I am unable to process your request, because there is no  
21 voluntariness."

22 And allow me, Mr President, to make this point. The International Crimes Act of  
23 Kenya makes reference to voluntariness three times. And with your permission, let  
24 me take you through that in two seconds.

25 87, I want you, Mr President, to read the marginal note. What does the marginal

1 note say? "Request for voluntary appearance of witnesses." It is beyond dispute  
2 that the intention of the legislature is to legislate for the voluntary appearance of  
3 witnesses.

4 But read the marginal note further. It says, this is to give effect to the Rome Statute,  
5 Article 19, 56, 64, 91.

6 Let me take --

7 PRESIDING JUDGE EBOE-OSUJI: That's the marginal notes. It is a marginal note.  
8 Now, let's -- one can say that -- you don't need to take us in the various places where  
9 the ICA mentions the idea of voluntary appearance. What perhaps might be of  
10 some assistance is where the ICA says the only way that a witness may appear  
11 before the ICC is by voluntary appearance. Do you see where it says that the only  
12 way that a witness may appear or that the only way -- or the only assistance, the  
13 only assistance that a government may render in relation to appearance of a witness  
14 is if the appearance is voluntary.

15 Does the ICA say that if it is, can you tell us?

16 MR MUIGAI: It need not say that.

17 PRESIDING JUDGE EBOE-OSUJI: Okay. Then can we look at Article 20 -- sorry,  
18 Section 20 of the ICA.

19 MR MUIGAI: Article 20, sir?

20 PRESIDING JUDGE EBOE-OSUJI: No, no. Section 20.

21 MR MUIGAI: Yes, request for assistance.

22 PRESIDING JUDGE EBOE-OSUJI: Section 20.

23 MR MUIGAI: Yes.

24 PRESIDING JUDGE EBOE-OSUJI: Forgetting 20(1), let's look at 20(2).

25 MR MUIGAI: 20(2), yes?

1 PRESIDING JUDGE EBOE-OSUJI: What are we to make of this provision in that  
2 place? "Nothing in this section (a) limits the type of assistance that the ICC may  
3 request under the Rome Statute or the ICC Rules in relation to provision of  
4 information or otherwise, or (b) prevents the provision of assistance to the ICC  
5 otherwise than under this act, including assistance of an informal nature," what are  
6 we to make of this provision?

7 MR MUIGAI: This is what a draftsman would use to try and create a residual  
8 jurisdiction in the -- in the likely event that the entire 21, which is very, very  
9 exhaustive, has left out something. And I want to draw your attention first to when  
10 they say "... the assistance that the ICC may request under the Rome Statute or the  
11 ICC Rules, whether in relation to the provisions of the information or otherwise."  
12 What does this mean? Where the ICC Statute or the International Crimes Act has  
13 made a specific and detailed procedure, 20(2) is of no use. You cannot say to  
14 me -- my learned friend, my learned and distinguished friend, the Prosecutor, cannot  
15 come to me and say: Mr Attorney General, I agree with you entirely. My case fails  
16 to fall under 87, 88, 89, 90, but isn't there a residual process where I can request you,  
17 as two -- as two lawyers, as two gentlemen, can you not assist me generally  
18 speaking? The answer is no, no. I can only assist you in the strict language of the  
19 Statute.

20 PRESIDING JUDGE EBOE-OSUJI: Can you -- can you look at Article 23 of the ICA.

21 MR MUIGAI: Yes. Where in 23, Mr President?

22 PRESIDING JUDGE EBOE-OSUJI: Article 23 of the ICA, subsection (1).

23 MR MUIGAI: Yes.

24 PRESIDING JUDGE EBOE-OSUJI: If the ICC makes a request for assistance, the  
25 request shall be dealt with in accordance with the relevant procedure under the law

1 of Kenya as provided in this act.

2 MR MUIGAI: Yes.

3 PRESIDING JUDGE EBOE-OSUJI: And then (b), "... if the request for assistance  
4 specifies that it should be executed in a particular manner that is not prohibited by  
5 Kenyan law or by using a particular procedure that is not prohibited by Kenyan law,  
6 the attorney general or the minister, as the case may be, shall use his best  
7 endeavours to ensure that the request is executed in that manner or using that  
8 procedure as the case may be."

9 MR MUIGAI: Yes, absolutely.

10 PRESIDING JUDGE EBOE-OSUJI: Unquote.

11 MR MUIGAI: Absolutely.

12 PRESIDING JUDGE EBOE-OSUJI: When we look at 20 and 23, am I wrong in  
13 getting this picture, that there is no limit to the type of request that the ICC may  
14 make, one. Second, the silence of the ICA does not prevent the government  
15 rendering any assistance that the ICC may make. Three, if the ICA provides for the  
16 procedure to be followed, that procedure shall be followed, but if ICA or any other  
17 law does not specify the procedure, then the attorney general shall make his best  
18 efforts to act on the request as long as it is not prohibited by the law of Kenya. Isn't  
19 that the sum of it?

20 MR MUIGAI: I regret I am unable to make the same reading. Section 20 of the  
21 ICA states in the marginal note -- and permit me to use the marginal note. That is  
22 the tradition. The marginal note explains what the provision is intended to achieve.  
23 It says, "requests for assistance." Then it sets out in Roman numerals about a dozen  
24 different ways -- in excess of a dozen different ways in which Kenya will provide  
25 assistance.

1 Where 20 expressly provides a method, 21, 22 cannot provide a residual method.  
2 So where I am told, Mr President, where 87 tells me, if you receive a request under  
3 93, you shall do the following. I cannot then say, I will not ask these people  
4 whether they want to appear voluntarily. I shall not make this inquiry. I will go  
5 and find something that may enable me to go in the penumbra area and act against a  
6 specific and direct provision of law. I will not do that.

7 PRESIDING JUDGE EBOE-OSUJI: You will need then to identify a specific and  
8 direct provision of the law that says you should not or you may not do that. Isn't  
9 that what is required? And that is what, it seems to me --

10 MR MUIGAI: Yes, indeed.

11 PRESIDING JUDGE EBOE-OSUJI: -- Section 23 is saying. Unless you can identify  
12 a law that specifically and directly says you may not do that, you have to use your  
13 best endeavours to act on any request that is made.

14 MR MUIGAI: Luckily for us in this sort of application that has been made or is  
15 sought to be made by the Prosecution, there is direct law, direct clear, unambiguous  
16 law.

17 PRESIDING JUDGE EBOE-OSUJI: What is that?

18 MR MUIGAI: It is here, Mr President, sir. It is 87. I shall be required to provide  
19 assistance for the voluntary appearance of a witness. That is what has to happen,  
20 period. And unless that happens, no residual, no -- no creative construction of this  
21 Statute can give me any authority, can give a court in Kenya any authority.  
22 And I venture to suggest with the greatest possible respect as counsel, not as  
23 attorney general of Kenya, as counsel independently admitted to practise before you,  
24 I venture to suggest with great respect neither should this Court.

25 PRESIDING JUDGE EBOE-OSUJI: Mr Muigai, I've already recognised your

1 standing in very many ways.

2 MR MUIGAI: I appreciate your very kind comments, Mr President.

3 PRESIDING JUDGE EBOE-OSUJI: And in light of that, of course, I am still in the  
4 same zone as the discussion we're having. On 8 April 2013, you filed a process in  
5 the Court, filing number 670. And at paragraph 36, you say this amongst other  
6 things, I think the second sentence:

7 "After promulgation of the new constitution" -- I think I better -- I'll take it from the  
8 beginning, the whole passage.

9 MR MUIGAI: Yes.

10 PRESIDING JUDGE EBOE-OSUJI: Paragraph 36:

11 "On 4 August 2010, the Kenyans codified a new constitution. The new constitution  
12 incorporates all international treatise ratified by Kenya as part of the country's laws  
13 including the Rome Statute to which Kenya is a signatory. After promulgation of  
14 the new constitution, the ICC became part of the judicial system of our country." I'll  
15 leave it there for now.

16 Now, "... ICC became part of the judicial system of our country." Surely that was  
17 an informed comment and not just an apostrophe that was made to make you and  
18 those listening to you feel good. The question is what does that mean, that the ICC  
19 has become part of the Kenyan judicial system?

20 MR MUIGAI: I think it means what it would mean if I told you, Mr President, that  
21 the East African Code of Justice is part of Kenya's judicial system. It is available to  
22 resolve disputes touching on the Republic of Kenya, and it is available also in  
23 appropriate cases for the resolution of disputes involving Kenya and our  
24 neighbours, the same way that Kenya is part of the International Court of Justice.  
25 The International Court of Justice is part of Kenya's judicial system.

1 The minute you ratify a treaty with a judicial component, that court becomes part of  
2 your judicial structure.

3 PRESIDING JUDGE EBOE-OSUJI: But it means -- it means more than merely  
4 ratifying the treaty, does it not?

5 MR MUIGAI: If your --

6 PRESIDING JUDGE EBOE-OSUJI: Let's look at Section 4.

7 MR MUIGAI: Yes.

8 PRESIDING JUDGE EBOE-OSUJI: Section 4 of the ICA.

9 MR MUIGAI: That's right here. I'm there now.

10 PRESIDING JUDGE EBOE-OSUJI: All right. Title "Rome Statute to have force of  
11 law."

12 MR MUIGAI: That's right.

13 PRESIDING JUDGE EBOE-OSUJI: And the provision -- sub (1), "The provisions of  
14 the Rome Statute specified in (2) ...", and I pause to say that doesn't mean everything  
15 in the Rome Statute but says specified in subsection (2), "... shall have the force of  
16 law in Kenya ..." - shall have the force of law, that is direct force of law in  
17 Kenya - "... in relation to the following matters: (a) the making of requests by the  
18 ICC to Kenya for assistance and the method of dealing with those requests ... (c) the  
19 bringing and the termination of proceedings before the ICC."

20 And in sub (2) it tells us that the relevant provisions of the Rome Statute  
21 are -- remember it said relevant provisions that have the force of law -- (2)(e) part 6,  
22 which relates to the conduct of trials. We'll stop it there. Part 6, that is where  
23 64(6)(b) falls, doesn't it?

24 Now, this is the direct provision of the ICA that makes those parts of the Rome  
25 Statute the law in Kenya. And we also note, do we not, that the second schedule to



1 the ICA is the Rome Statute itself. Does it not tell us that the ICC has then, to that  
2 extent, it bears out your comments that the ICC is part of the judicial system of  
3 Kenya to that extent? Isn't that the case?

4 MR MUIGAI: No, it is not. Section 4 of the International Crimes Act is standard in  
5 any statute that seeks to domesticate law, because what it is trying to do is draw a  
6 distinction between what appears in the treaty that Kenya has accepted and what  
7 Kenya has not accepted.

8 If I was a draftsman and Kenya had accepted the entire Rome Statute, I would have  
9 an International Crimes Act that would be one sentence: The parliament of the  
10 Republic of Kenya hereby enacts the international crimes court Statute to be part of  
11 the law of Kenya, full stop.

12 PRESIDING JUDGE EBOE-OSUJI: And then append the schedule.

13 MR MUIGAI: And then we would make it a schedule. The reason the draftsman  
14 is at great pains in Section 4, to tease out what specifically is Kenya accepting in the  
15 Rome Statute is very critical. It isn't --

16 PRESIDING JUDGE EBOE-OSUJI: (Microphone not activated)

17 MR MUIGAI: That's the point, Mr President, that I'm coming to. In these general  
18 terms, the draftsmen then goes to the body of the act, and deals with each aspect of  
19 what Kenya has accepted. The enforcement of part 6, which is -- relates to the  
20 conduct of the trials is accepted in terms of the detail that is set out in the act, not  
21 independently of the Statute.

22 There isn't something that can be inferred from the Rome Statute in general terms  
23 that conflicts with what appears in the International Crimes Act in specific terms.

24 PRESIDING JUDGE EBOE-OSUJI: Mr Attorney, we have to leave it there for now.  
25 We will return at 2.30 from the lunch break. We have given you a lot of time

1 because we don't often have you with us.

2 MR MUIGAI: I appreciate.

3 PRESIDING JUDGE EBOE-OSUJI: And we need you to also help us with questions  
4 pertaining to the law of Kenya. So we might as well get as much out of you as we  
5 can while you're here.

6 MR MUIGAI: I do appreciate it.

7 PRESIDING JUDGE EBOE-OSUJI: Thank you. We will rise and come back at 2.30.

8 THE COURT USHER: All rise.

9 (Recess taken at 12.59 a.m.)

10 (Upon resuming in open session at 2.31 p.m.)

11 THE COURT USHER: All rise.

12 Please be seated.

13 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. Welcome back  
14 everyone.

15 Mr Muigai, you were on your feet I believe before the luncheon break and I believe  
16 we were discussing the issue of to what extent the Rome Statute forms part of the  
17 law of Kenya, yes.

18 Now, one of the -- before we proceed, there is a matter of procedure I thought I  
19 should bring to your attention. I'm sure you and I have made the work of court  
20 reporters very difficult, because we've been talking at, more or less, crossing the wire  
21 on the microphone, and it makes the work difficult.

22 I realise that when you are in full force, it's difficult to stop. But I have right of way,  
23 you see, not because of the formalities of the courtroom, but because you have to  
24 persuade the Chamber. So if there are some questions we have, these are questions  
25 that are troubling us that we would like you to answer.

1 One of them is the implication of Section 108 of the ICA, and I ask that in the context  
2 of whether or not -- I mean, this is a discussion we picked up before lunch -- whether  
3 or not the ICA is exhaustive in the types of assistance that it indicates that may be  
4 given by Kenya to the ICC. It takes us to Section 108, and Section 108 comes after a  
5 listing or heading of all other types of assistance that a court may request and ends  
6 up with the provision in sub (1) "... where the ICC requests any other type of  
7 assistance," under paragraph (1)(i) -- sorry, under paragraph (1)(i) of Article 93 of the  
8 Rome Statute.

9 So here we see paragraph (1)(i) coming in of Article 93. It comes in after paragraph,  
10 is that (1)(e), the one that talks about voluntary assistance, isn't it? It says "any other  
11 type of assistance." Does it not tell us that assistance beyond voluntary attendance  
12 of a witness may be requested by the Court?

13 MR MUIGAI: My own reading of that, Mr President, sir, would be 108 is trying to  
14 provide a domestic framework for the implementation of the obligations under  
15 Article 93(1)(i) are very narrow, very, very narrow. This is what we called earlier in  
16 the morning the residual jurisdiction.

17 The draftsmen of the treaty spends a lot of time enumerating what kind of  
18 cooperation would be required. And at the end of it, (l) is a catch-all, and it is  
19 intended in our view to ensure that these categories of cooperation are not  
20 exhausted.

21 We do not believe that it is intended where there is a specific provision to expand  
22 that specific provision, and that's why it says, I think, 108(1) says, 108(1)(b), "The  
23 attorney general shall give authority ... (b), if he's satisfied that the assistance sought  
24 is in accordance with Kenyan law." And, therefore, irrespective of any assistance  
25 that may be sought by any other person, the attorney general must be satisfied that

1 it's in accordance with Kenyan law.

2 Indeed, if I were the Prosecutor, I would not invoke this sort of provision, because it  
3 actually limits more than expands. It then creates a bottleneck where the attorney  
4 general, without any reference to any other body or authority, is the judge of  
5 whether the request has complied with Kenyan law.

6 If I were the Prosecutor, I would perhaps stay with the straight and narrow, which is  
7 to say facilitating the voluntary appearance of persons as witnesses or experts before  
8 the Court. That one is clear. It is unambiguous. The attorney general doesn't  
9 have to satisfy himself anything if it is clear that the witness has volunteered to  
10 testify.

11 PRESIDING JUDGE EBOE-OSUJI: Yes. We know that voluntary  
12 assistance -- voluntary attendance it seems from the Prosecutor's written material is  
13 out of the question, because the witnesses have said they're not coming anymore.  
14 So they will not be requesting voluntary attendance from someone who does not  
15 want to come anymore. So they now have to find a way to bring the witness. They  
16 feel that the witness's evidence is material.

17 And then Mr Khan raised an important question, which the Prosecution would have  
18 to address in their reply, on the matter of why do we want to do this if the witnesses  
19 have already indicated that they had recanted their story. That's a different  
20 separate matter, but here we see enlisting of assistance or instance of assistance,  
21 including the Section 87 you mentioned, and then all the way through 90, through  
22 100, and then 108 talks about any other assistance.

23 MR MUIGAI: Yes.

24 PRESIDING JUDGE EBOE-OSUJI: So you would have already, 108 would have  
25 already, taking into account, does it not, Article 87 -- sorry, Section 87 I mean --

1 MR MUIGAI: Yes.

2 PRESIDING JUDGE EBOE-OSUJI: -- which has been invoked repeatedly by both  
3 yourself and by Ms Buisman when it says "any other kind of assistance."

4 MR MUIGAI: Let us assume -- let us assume, Mr President, that we were  
5 exchanging communication with the Prosecutor and he wrote to me and said, "I  
6 would want assistance under Section 108 of the ICA to have the following witnesses  
7 appear in Nairobi at a given forum in order for us to take testimony from them," my  
8 simple and clear answer would be Section 108 does not and was never intended to  
9 cater for the request that you are making. I believe that you invoke Section 118 in  
10 order to avoid the very clear legal requirements of 87, 88, 89 and 90. Please satisfy  
11 those requirements and we would be more than happy to assist you. That would be  
12 my answer.

13 PRESIDING JUDGE EBOE-OSUJI: Is Section 108 not consistent with the theme we  
14 have picked up in Section 20 and Section 23? Remember, Section 20 is the section  
15 that says nothing in that section limited the types of requests that the ICC may make,  
16 and nothing in that section would prevent the rendering of assistance to the ICC as  
17 they may request if it was not prohibited by Kenyan law. See there 20?

18 MR MUIGAI: I do, sir.

19 PRESIDING JUDGE EBOE-OSUJI: And then 23 talks about again what may be  
20 done if there is a procedure in place, follow that procedure. But if there is no  
21 procedure in place, make your best efforts to comply with the request. And then  
22 here we see the same theme picked up in 108, after listing all kinds of specific  
23 assistance, the provision says "any other assistance may be requested." See the  
24 trajectory I'm getting at?

25 MR MUIGAI: I think I have understood the point of departure, and maybe I should

1 make two clear points. Point number one, we lawyers speak of the letter and the  
2 spirit of a statute. In my view, good lawyers start with the letter of the statute.

3 Where the letter of the statute speaks for itself, you do not have to harvest in a spirit  
4 of the statute.

5 In this case it is our submission that the clarity of the black letter law is such that we  
6 have no reason to depart from it, to investigate the penumbra, as you recall Professor  
7 Hart taught, the penumbra of the rule, because the rule is so clear. That is one  
8 doctrine or issue, and I hope we have laid it down.

9 Number two, I think that it is also important to make the point that where a rule of  
10 law is specific, very specific and clear, the clarity of its specificity cannot be taken  
11 away by the generality of another rule.

12 Let me give you an example, Mr President. In domestic law in procedural statutes,  
13 there will always be a general catch-all that says, notwithstanding everything said  
14 about in this statute, nothing would diminish the power of the Court to do justice;  
15 substantive justice.

16 A lawyer who comes to court and says, "I am looking at the Criminal Procedure  
17 Code or the Civil Procedure Code, but I find no basis for my application in law, but I  
18 want the Court to use its general powers to do justice," in my own view that would  
19 not be a good lawyer.

20 What lawyer -- what law can do is set by parliament. Lawyers should not be  
21 creative to find within law that which the legislature has not provided for.

22 I want to repeat, therefore, the argument, Mr Chairman, sir. The Rome Statute was  
23 debated at great length. And I have, I have been presumptuous enough to bring  
24 this article by this very distinguished professor who I would like to believe that, Mr  
25 Chairman, you are familiar with, Mr Goran Sluiter, Professor of International Law at

1 the University of Amsterdam. He makes this argument so eloquently that these  
2 issues were debated at great length, and then they were abandoned for lack of  
3 consensus.

4 For you, your Honour, Mr President, and this Court, for you to write into this  
5 Statute what was rejected at the Assembly of State Parties would do a great  
6 disservice to this Court.

7 PRESIDING JUDGE EBOE-OSUJI: It would be -- I think it would help us more if  
8 we had provisions in the statute itself actually that says that the Court may not do X.

9 MR MUIGAI: Uh-huh.

10 PRESIDING JUDGE EBOE-OSUJI: It's better, it helps everybody better than an  
11 academic article that was written before the Court actually confronted a question to  
12 deal with it. So if you have any provision in the statute or even the laws of Kenya,  
13 that's my trouble here I'm trying to consistently come at, a provision that clearly says  
14 the Court may not do X, then please bring it to us so we can read it, either in the  
15 Rome Statute or in the ICA. That would be very greatly helpful to us.

16 We need not go to the extent of the maxim that whatever the law does not forbid it  
17 allows. There is a maxim like that as you can remember, but we're not, we need not  
18 go that far. Right now if we can limit our self to a clear what you call plain letter of  
19 the law that says this shall not be done by the Court. And this is important, because  
20 one interesting position we found our self with in this Court, and of course people  
21 may make that they think of it, we find that when it suits one side, they tell us "You  
22 have all the discretion in the world to do something," but then you would be  
23 surprised the next day when it doesn't suit them with someone else, "No, you don't  
24 have the power to do anything."

25 So here we are. You remember the excusal debate we had? That was part of it.

1 So here if we have a provision that clearly says no, you don't have the power to  
2 order a witness to come to court or make a request of a certain kind to a State Party,  
3 that would help us more than academic articles written before the Chamber has  
4 actually had a live case and had debate from so many lawyers on this question on  
5 the matter.

6 MR MUIGAI: I want to say this, Mr President, we must warn ourselves of the  
7 danger of creating a false dichotomy. What we write in law on the whole is what  
8 can be done. And that is why 93 is a very exhaustive provision in the treaty. It  
9 says the State Parties shall co-operate in this way: Identify, take evidence, question,  
10 serve documents, facilitate.

11 PRESIDING JUDGE EBOE-OSUJI: And it ends with the (l).

12 MR MUIGAI: And ends with the (l).

13 PRESIDING JUDGE EBOE-OSUJI: The (l).

14 MR MUIGAI: It is very unusual in my experience for a statute to dedicate itself to  
15 what cannot be done, because the limit, the limit of what cannot be done, the  
16 permutations are in the -- they are unimaginable at any given time.

17 We in Kenya did not write the International Crimes Act to say what will not be done  
18 by the Court or by somebody else. We wrote it to say what will be done. So if you  
19 ask me, as you have, "Show me where it says you can do it," I say, "I can't show you,  
20 because that wasn't the purpose of our statute."

21 If you ask me --

22 PRESIDING JUDGE EBOE-OSUJI: But you were asked --

23 MR MUIGAI: -- "Show me where it says what you can do," that's what I've shown  
24 you, 86, 87, 88, 89, 90.

25 PRESIDING JUDGE EBOE-OSUJI: And 108.



1 MR MUIGAI: Yes. And, yeah, very good, sir, that you brought me to 108. Let's  
2 look at its heading, "Other Types of Assistance." The draftsmen could not have  
3 been clearer. The draftsman is saying "I have set out extensively specific instances  
4 of the obligation of the State" and goes on and on and on and on and then says "If I  
5 have forgotten something, other types of assistance."  
6 Let me then suggest this to you with tremendous respect, Mr President, the  
7 obligation that you now impose on me is an obligation that lies squarely in the  
8 hands of the applicant. The applicant must convince you that they have exhausted  
9 the very clear, specific, and detailed statutory procedure and, therefore, have become  
10 entitled to a fuzzier, secondary, indeterminate, controversial procedure. That's their  
11 duty, not mine.  
12 My duty is a simple one, which is to say I have shown you everything that the  
13 Statute demands me to do.  
14 I cannot show you things it doesn't demand me to do, because it is not written to  
15 exclude. It is written to itemise. So my simple answer is this, the Government of  
16 the Republic of Kenya cannot and does not believe it is under an obligation to  
17 demonstrate that there is an impediment to the execution of a secondary request  
18 where the primary one in the first place has not been made and has not been  
19 demonstrated to be deliverable under the specific law.  
20 Let me put it differently. 108 cannot be a refuge, it cannot be a refuge for a  
21 Prosecutor who is manifestly unable to bring his case on a long, clear, well set out  
22 provisions of the law. So even if this Court were desirous of doing justice, of being  
23 fair, of doing equity, of doing all the great things we like to see done, they must be  
24 done in accordance with the law. And if the law, as it is our submission, is very  
25 clear, it says do this, do that, do that, do that, and the Prosecutor says, "I have been

1 unable to do what the law says, please find for me somewhere a spirit, some -- some  
2 woolly, some fuzzy, some -- find me refuge there, " it would be a very unhappy day.  
3 And I can tell you this, my lord chairman, Mr President, I can tell you this, with your  
4 permission, it would come to haunt this Court. It would open up a Pandora's Box  
5 that would never shut because --

6 PRESIDING JUDGE EBOE-OSUJI: No, it isn't woolly, because 93(l) says what it  
7 says. It does not -- it says "any other assistance apart from those listed already from  
8 (a) to (k) may be requested. So it isn't woolly as if there is no legal basis for it.

9 MR MUIGAI: It is woolly where it says in (l) "... any other assistance which is not  
10 prohibited by the law of the requested state."

11 Now, what is not prohibited in the law of the requesting state is not something to be  
12 determined by the Prosecutor. It is to be determined by the receiving state. We in  
13 Kenya are masters of our own jurisprudence. What does our law say? What does  
14 our law compel us to do? We with tremendous respect submit to this Court that we  
15 are the judges of that.

16 PRESIDING JUDGE EBOE-OSUJI: But it's not that simple though, is it?

17 MR MUIGAI: Yes.

18 PRESIDING JUDGE EBOE-OSUJI: And the reason I say so, if you look at 93(1)(l) --

19 MR MUIGAI: Yes.

20 PRESIDING JUDGE EBOE-OSUJI: -- it is in fact an unusual provision in  
21 international law in the sense that it is telling a State Party you may rely on your  
22 local law to refuse to perform what may be characterised as an international  
23 obligation. Now, that is what makes it unusual, because the usual thing in  
24 international law is that a State may not rely on a local or domestic law to defeat  
25 what may be an international obligation. You know that.

1 MR MUIGAI: Yes.

2 PRESIDING JUDGE EBOE-OSUJI: So here we have the generosity of 93(1)(l) saying  
3 "any other assistance that is not prohibited by the law," that -- why does that become  
4 something that may not be requested, that it would be a bad day, and you do not  
5 encourage the Court to go through that route?

6 MR MUIGAI: Absolutely.

7 PRESIDING JUDGE EBOE-OSUJI: Why?

8 MR MUIGAI: Let me say this, from where I sit, my interpretation of what is not  
9 prohibited by domestic law is this, as the Attorney General of the Republic of Kenya  
10 invited to come, invited to act in a manner that calls me potentially to compromise  
11 the rights of a citizen of the Republic of Kenya, then I say this, if the Statute doesn't  
12 expressly ask me to do that, it prohibits me from doing that.

13 PRESIDING JUDGE EBOE-OSUJI: Now, the rights of a citizen of Kenya, for you to  
14 make that argument, you need to convince us that the laws of Kenya would not  
15 permit a citizen to be compelled to appear in any court. We'll begin with that.

16 MR MUIGAI: Yes.

17 PRESIDING JUDGE EBOE-OSUJI: The laws of Kenya do not permit the  
18 compellability of any witness to appear even before the Kenyan courts. Then we're  
19 getting somewhere.

20 MR MUIGAI: Indeed.

21 PRESIDING JUDGE EBOE-OSUJI: Right. Short of that, I mean, once you've  
22 overcome that, then the next obstacle is where the law of Kenya says that a citizen  
23 may not be compelled to appear before the ICC. Do we have any or both?

24 MR MUIGAI: Two points there, Mr President. Number one, the entire  
25 constitutional law jurisprudence of Kenya is founded on a very simple principle.

1 Where the coercive powers of the State may be used against a subject, a citizen of  
2 Kenya, it must be on the basis of a clear law, clearly set out by the legislature,  
3 empowering that organ or that officer of the State to do so.

4 Under Kenyan law, we cannot compromise. And whenever you take the liberty of  
5 any person, even so that he may testify in the tribunal, any tribunal, you have taken  
6 his liberty away from him. You have taken the right for him to be where he would  
7 have been otherwise. It cannot be by inference that we shall do that.

8 PRESIDING JUDGE EBOE-OSUJI: But it's not by inference, is it, when Section 4  
9 says that the Rome Statute in the listed part, including part 6 of the Rome Statute,  
10 shall have the force of law in Kenya.

11 MR MUIGAI: It does.

12 PRESIDING JUDGE EBOE-OSUJI: So that is the force of law in Kenya.

13 MR MUIGAI: Yes.

14 PRESIDING JUDGE EBOE-OSUJI: If we now plug into that --

15 MR MUIGAI: Yes.

16 PRESIDING JUDGE EBOE-OSUJI: -- part 6 and its elements that includes Article 64  
17 (6)(b), which you have at least to some extent, and I believe Mr Ruto's counsel have  
18 gone perhaps further, I don't know --

19 MR MUIGAI: No problem.

20 PRESIDING JUDGE EBOE-OSUJI: -- to agree that it can involve making an order -  
21 a compulsive order - on a witness in certain circumstances.

22 MR MUIGAI: First I think that that gives me an opportunity to raise another  
23 doctrine, or question, which is there seems to be an assumption that the Rome  
24 Statute and the International Crimes Act have a special place in the hierarchy of  
25 Kenyan law. Let me discourage that notion, because they do not. Under the

1 constitutional law of Kenya, all statutes - all of them - lie below the Constitution of  
2 the Sovereign Republic of Kenya. And no statute, no matter -- no matter this very  
3 important Statute that we ourselves joined voluntarily, or indeed any other,  
4 including the Universal Declaration of Human Rights, including the UN Charter,  
5 nothing overrides the Constitution of the Republic of Kenya and it says so itself.

6 PRESIDING JUDGE EBOE-OSUJI: And I think that has been -- that is recognised in  
7 93(1)(l), isn't it?

8 MR MUIGAI: Yeah.

9 PRESIDING JUDGE EBOE-OSUJI: That is already –

10 MR MUIGAI: That's right.

11 PRESIDING JUDGE EBOE-OSUJI: It's implicit in there.

12 MR MUIGAI: Yes.

13 PRESIDING JUDGE EBOE-OSUJI: So the question then becomes what does the  
14 Constitution of Kenya then say which defeats the prospect of the request to be made  
15 to the Government of Kenya?

16 MR MUIGAI: That's fine. Let me read for you what the constitution says in the  
17 supremacy clause, which is Article 2(6), "Any treaty or convention ratified by Kenya  
18 shall form part of the law of Kenya under this constitution."

19 What does that mean? First, "under this constitution," meaning the bill of rights of  
20 the Republic of Kenya securing - and I am about to read that for you in a moment, if  
21 I should go there - all the rights secured for the individual in Chapter 4 part 2 of the  
22 constitution: the right to life, equality and freedom, human dignity, privacy, freedom  
23 of expression, freedom of association, freedom of political rights and so on and so  
24 forth, fair administrative hearing, access to justice.

25 These are the fundamental juridical norms that govern the Republic of Kenya. If

1 there be a law, any law, or any treaty, or any convention, or any judgment of any  
2 tribunal that compromises those principles, the Government of the Republic of  
3 Kenya would be -- would be invited therefore to determine whether it will obey the  
4 constitution, or it will obey some other --

5 PRESIDING JUDGE EBOE-OSUJI: But you've not been put in that position at all.

6 MR MUIGAI: I hope we never get there.

7 PRESIDING JUDGE EBOE-OSUJI: No, no, no. You have not been put in that  
8 position, because Article 93(1)(l) does not put you in that position. It says "any  
9 other assistance that is not prohibited by the law of Kenya." So it is now for you to  
10 say, "Yes, the assistance that is being requested, or that is being contemplated, is  
11 forbidden by the constitution of Kenya in these terms," and then you read out the  
12 specific provision of the Kenyan Constitution that says, "No, this cannot happen."  
13 That's why we want -- we invited you to come and help us.

14 MR MUIGAI: Good. First let me say this, and I think I will be repeating myself  
15 but it probably bears repeating. In my own understanding of the law, where the  
16 Government of the Republic of Kenya enacts a law through its parliament, or  
17 through the conclusion of a treaty, and where that law creates very clear  
18 circumstances - very clear circumstances - in which the fundamental constitutional  
19 rights of a citizen of the Republic of Kenya may be abrogated or compromised, there  
20 can be no other basis of compromising those rights absent a clear empowerment of  
21 an officer or an institution.

22 So the question you've put to me several times, which is this, "Show me where it says  
23 you can't do it," my answer is in our jurisprudence we do not write law to exclude.  
24 We write law to include.

25 PRESIDING JUDGE EBOE-OSUJI: That's also --

1 MR MUIGAI: So this Statute tells me, if I may –

2 PRESIDING JUDGE EBOE-OSUJI: Yes, yes --

3 MR MUIGAI: If I may, sir?

4 PRESIDING JUDGE EBOE-OSUJI: -- you've said that. Do I then take it to mean  
5 that there is no provision in the Constitution of Kenya that excludes that? I mean,  
6 that's a simple question.

7 MR MUIGAI: That excludes what?

8 PRESIDING JUDGE EBOE-OSUJI: Excludes the type of request that is  
9 contemplated in the Prosecutor's application.

10 MR MUIGAI: If you're asking me, Mr President, does the Constitution of Kenya  
11 address the question of whether a tribunal - an international tribunal - having made  
12 a request about a witness to be brought to Kenya to have his testimony taken can or  
13 cannot be compelled, the answer is no. I do not know of any country in the world  
14 that would write such a rule in the constitution.

15 PRESIDING JUDGE EBOE-OSUJI: But then –

16 MR MUIGAI: But let me finish this, sir, if I may?

17 PRESIDING JUDGE EBOE-OSUJI: All right.

18 MR MUIGAI: I don't even know of any country in the world, and I would  
19 challenge my more distinguished and learned colleagues here to tell me by their  
20 own research and endeavours -- any country in the world that has domesticated the  
21 Rome Statute, yes, and that has then set up a category of a section that says, "The  
22 following acts are not prohibited and the State is at liberty to enforce them."  
23 There is no style of drafting of that nature in the world.

24 PRESIDING JUDGE EBOE-OSUJI: All right. Let me stop you.

25 MR MUIGAI: That is why the discretion in 108 is my discretion.

1 PRESIDING JUDGE EBOE-OSUJI: All right.

2 MR MUIGAI: Yes.

3 PRESIDING JUDGE EBOE-OSUJI: Now, we've established that the Constitution of  
4 Kenya doesn't exclude --

5 MR MUIGAI: And I don't know of any in the world that does.

6 PRESIDING JUDGE EBOE-OSUJI: But what we do know is what you've read out  
7 now, the constitution saying treaties ratified to form part of the law of Kenya. We  
8 also know that Section 4 of the ICA says certain parts of the Rome Statute shall form  
9 part of the law of Kenya.

10 When we have that in place, and we have a provision like Article 64(6)(b) which says  
11 that the Chamber may require attendance of a witness, on what basis do we then say  
12 that that sort of request is not accommodated by the law of Kenya in the absence of  
13 clearly excluding language? That's my dilemma.

14 MR MUIGAI: Right. Let me -- I think we have misunderstood each other, because  
15 I thought the question you were asking me is does the Constitution of Kenya speak  
16 in specific language to the question of what is to happen in an instance such as we  
17 confront where an application is made for evidence to be taken from a witness, and  
18 my answer was the Constitution of Kenya is not a procedural statute.

19 PRESIDING JUDGE EBOE-OSUJI: That's not -- that wasn't my question.

20 MR MUIGAI: So now let me answer your question. The Constitution of Kenya  
21 does. It does create fundamental norms that preclude the exercise of arbitrary  
22 power by government officials, and the attorney general is a government official.  
23 The attorney general of Kenya cannot exercise arbitrary power against a citizen of  
24 Kenya and then say, "I have no specific law that allows me to hold you  
25 incommunicado. However -- however - there is no specific law prohibiting me from



1 doing so if the request is from the ICC."

2 This is what the Constitution of Kenya says, Mr President, sir, "Freedom and security  
3 of the person. Every person has the right of freedom and security of his person,  
4 including the right ...", note (a), that's Article 29(a), "... to be deprived of freedom  
5 arbitrarily or without just cause."

6 PRESIDING JUDGE EBOE-OSUJI: Mr Muigai, you see, we have to move on.

7 MR MUIGAI: Yes.

8 PRESIDING JUDGE EBOE-OSUJI: It looks like we keep looping back into notions  
9 that extend the debate. We're now -- you're now invoking arbitrary action, but I  
10 don't know how we can say "arbitrary action" when there is a provision that we've  
11 been reviewing all along what they mean and whether ICC is part of the -- the ICC  
12 Statute is part of the laws of Kenya.

13 MR MUIGAI: Absolutely, subject to the constitution.

14 PRESIDING JUDGE EBOE-OSUJI: So the point about arbitrary doesn't come in, but  
15 let's move on.

16 One point you make in your written submissions is that, whatever -- I think you  
17 made that point --

18 MR MUIGAI: Yes.

19 PRESIDING JUDGE EBOE-OSUJI: -- in the context of the reading of the word  
20 "require," its meaning within Article 64(6)(b), and you say we need to go back to  
21 Article 31 of the Vienna Convention on the law of treaty.

22 MR MUIGAI: Yes.

23 PRESIDING JUDGE EBOE-OSUJI: Do you remember that?

24 MR MUIGAI: Yes.

25 PRESIDING JUDGE EBOE-OSUJI: And naturally that also goes, I take it, for any

1 other provision in the Statute, including what to make of Article 93. So we go to the  
2 Vienna Convention on the law of treaties; Article 31 of it.

3 MR MUIGAI: Yes.

4 PRESIDING JUDGE EBOE-OSUJI: Right. And the provision is, quote, which is set  
5 out in your written matter --

6 MR MUIGAI: Indeed.

7 PRESIDING JUDGE EBOE-OSUJI: "A treaty shall be interpreted in good faith in  
8 accordance with the ordinary meaning to be given to the terms of the treaty in their  
9 context and in the light of its object and purpose," unquote.

10 MR MUIGAI: Absolutely.

11 PRESIDING JUDGE EBOE-OSUJI: You make that point.

12 MR MUIGAI: Yes.

13 PRESIDING JUDGE EBOE-OSUJI: So there we see four notions I believe that are  
14 implicated in the provision: (1) the notion of good faith. All right.

15 What does that mean in the context of a criminal trial, the search for the truth?

16 How does that throw light on the interpretation of the word "require" as the word is  
17 used in Article 64(6)(b)?

18 MR MUIGAI: Let me come to -- may I? First, I welcome the opportunity to  
19 discuss what the Vienna Convention on the law of treaties means for these  
20 proceedings.

21 We are a treaty body. This Chamber - this Court - is created by a treaty. This  
22 treaty is negotiated by independent Sovereign States. In the course of that  
23 negotiation, those Sovereign States consider various possibilities, advised by  
24 eminent jurists like some of those in this court today.

25 If they make -- I cannot think of a more eminent person than my friend, the

1 Prosecutor. So I mean that as well. But what I meant, Mr President, is that Article  
2 31 of the Vienna Convention is telling us "... a treaty shall be interpreted in good  
3 faith in accordance with the ordinary meaning to be given to the terms of the treaty  
4 in their context and in the light of its object and purposes."

5 I would imagine that even the most creative jurist in this courthouse admits that this  
6 treaty speaks in the clearest possible language about the voluntariness (sic) -- the  
7 voluntariness of the testimony of witnesses.

8 PRESIDING JUDGE EBOE-OSUJI: They do not --

9 MR MUIGAI: There is no doubt about that.

10 PRESIDING JUDGE EBOE-OSUJI: No, they don't agree with it and that's a question  
11 to be determined still. So let's not assume it.

12 MR MUIGAI: Oh, I thought that was conceded that, as a fundamental principle of  
13 the treaty, it is anticipated that the witness will appear voluntarily. Shall we call it  
14 "the general rule," then grant them the exception they're trying to create now?

15 PRESIDING JUDGE EBOE-OSUJI: The general rule indeed.

16 MR MUIGAI: The general rule is the witness will appear voluntarily. That is the  
17 spirit of the Vienna Convention. We must give the treaty its clear and ordinary and  
18 unambiguous meaning and interpretation. The creativity --

19 PRESIDING JUDGE EBOE-OSUJI: We're beyond that. We're beyond that. We're  
20 now in the stage where there is no question of voluntary appearance any more. The  
21 question is: Can a witness be compelled? That is the question. So let's lead  
22 ourselves to that --

23 MR MUIGAI: And the answer --

24 PRESIDING JUDGE EBOE-OSUJI: -- and see what the concept of good faith  
25 invoked in not only Article 31(i), but also Article 26 of the Vienna Convention on the

1 law of treaties. So what does it mean in the context of the search for the truth where  
2 the witness refuses to voluntarily appear in the search for the truth?

3 Remember in the beginning I cited you and your eminent credentials as a chief law  
4 officer, and if this trial were happening in a national jurisdiction a witness says, "I do  
5 not want to come in the search for the truth in a criminal inquiry," what should be  
6 done in the context of a provision that says a Trial Chamber may require attendance  
7 of a witness in the courtroom?

8 MR MUIGAI: Let me first say that, in the context of the Vienna Convention in  
9 Article 31, I would like to remind the Honourable Judges that the Vienna  
10 Convention is speaking to the obligation of States. It is speaking to the obligation of  
11 States. And my Latin is not very good, but I believe it is *pancta (sic) sunt servanda*?

12 PRESIDING JUDGE EBOE-OSUJI: *Pacta sunt servanda*, yes.

13 MR MUIGAI: Well, there you are, my Lord. You are a more learned man than  
14 myself --

15 PRESIDING JUDGE EBOE-OSUJI: No, no, I'm not.

16 MR MUIGAI: -- but I am obliged by the correction.

17 It is, "You are bound by your undertaking, by your commitment." It is the State.

18 We are in a very difficult situation where we are talking not about the obligation of  
19 the Kenya government *per se*, but the rights of a citizen of the Republic of Kenya  
20 that are independent of the State and to a very large constitutional extent cannot be  
21 compromised by the State.

22 If the Government of the Republic of Kenya went and negotiated a treaty that said,  
23 "We will never require any extradition requirements," any country in the world can  
24 write us a letter and say, "We require Mr Odede," and that treaty would not be  
25 worth the piece of paper it is written on. Why? Because the rights of the citizen of

1 the Republic of Kenya are so fundamental that they would trump in a contestation  
2 the clearly unconstitutional treaty.

3 And in international law, as all the jurists here know, it is the responsibility – the  
4 responsibility of the government. It cannot be the responsibility of the citizen. We  
5 cannot --

6 PRESIDING JUDGE EBOE-OSUJI: In a local -- in a domestic criminal trial, let's say  
7 there is a robbery or a murder --

8 MR MUIGAI: Yes, yes.

9 PRESIDING JUDGE EBOE-OSUJI: -- and a witness that the DPP or the Prosecutor  
10 wants to call, insists on calling, says, "Sorry, Prosecutor. I'm not coming to court,"  
11 does the constitution or the bill of rights authorise that witness to stay away and not  
12 be compelled to appear?

13 MR MUIGAI: You have invited me, Mr President, to compare oranges and mangos.  
14 A prosecution under Kenya's domestic law in enforcement of Kenyan law is a  
15 completely different thing, and I know in the morning you alluded to the  
16 International Court -- Criminal Court being a Kenyan court. That is metaphorical.  
17 It is not juridical. Kenyan courts are set out in the constitution. The constitution  
18 says clearly the Supreme Court, the Court of Appeal, the High Court and the  
19 subordinate courts. There is no reference to the ICC --

20 PRESIDING JUDGE EBOE-OSUJI: But it does say --

21 MR MUIGAI: -- or indeed the ICJ.

22 PRESIDING JUDGE EBOE-OSUJI: Yes, but the constitution says that every other  
23 treaty --

24 MR MUIGAI: Yes.

25 PRESIDING JUDGE EBOE-OSUJI: -- that has been ratified as part of the law of

1 Kenya.

2 MR MUIGAI: Yes.

3 PRESIDING JUDGE EBOE-OSUJI: So the treaty – the constitution need not mention  
4 the ICC, does it, if it says that any other treaty ratified shall be part of the law and  
5 the Rome Statute has been ratified?

6 MR MUIGAI: Yes, yes.

7 PRESIDING JUDGE EBOE-OSUJI: And the Rome Statute is the enabling body for  
8 the ICC.

9 MR MUIGAI: Well, there is -- the simple and direct answer to you is that that does  
10 not make the ICC a Kenyan court. I doubt that Judges of this Court would like to be  
11 referred to as "Kenyan judges," or the Prosecutor --

12 PRESIDING JUDGE EBOE-OSUJI: I don't mind. Speaking for myself I wouldn't  
13 mind that at all, but go on.

14 MR MUIGAI: We – you -- this is a court that is recognised by the law of the  
15 Republic of Kenya as a court that has a limited jurisdiction - may I add a very limited  
16 jurisdiction - in its application to the Kenyan State and the Kenyan people, and that  
17 application is confined to the trial of war crimes and crimes against humanity.

18 Now, if you've ever looked at our Penal Code, we have more than 300/400 criminal  
19 offences. So to call this Court a Kenyan court for purposes of that would be  
20 inaccurate. It's a Kenyan court in a metaphorical sense, the way the East African  
21 court is, the way the African Court of Justice is, the way the International Court of  
22 Justice is a court that Kenya ascribes to by treaty.

23 So let me come back to the last point and state this. The constitution -- I'm sorry, the  
24 application of the International Crimes Act in fulfilment of Kenya's international  
25 treaty obligation, as contained in the Vienna Convention, requires me to keep asking

1 myself what was the context and object and purpose of the treaty? And may I tell  
2 you, my Lord Chairman, Mr President, what my answer is? The purpose of the  
3 treaty was to create a fair, independent, impartial tribunal that would effect justice in  
4 matters of international criminal law as defined.  
5 Further, that jurisdiction being a limited jurisdiction, the Statute is permissive. The  
6 Statute was intended to show under what circumstances you can do something.  
7 For the attorney general, or the DPP, or the Minister of the Interior to arrogate  
8 themselves extra penumbra powers by saying, "I have looked at the International  
9 Crimes Act. Nothing says I cannot send you to The Hague, at least until Monday.  
10 I know they will come back. The Prosecutor told me he will send you back."  
11 And the victim -- and this is a real victim then. And the victim asks me, "Why  
12 would you do that?" And I said to him, "Show me something that says I can't do it."  
13 This is what law -- this is why the Magna Carta was written, that all these plenary  
14 powers of kings and unaccountable individuals should be subordinated to law. If  
15 this Court was invited to find that we have opened a new era in which the attorney  
16 general, or the DPP, or a minister says, "Anything not prohibited in this law is  
17 permitted to me and right now I think I would like to smack your face, show me  
18 something that says I can't do it."  
19 PRESIDING JUDGE EBOE-OSUJI: Mr Attorney --  
20 MR MUIGAI: It would be preposterous.  
21 PRESIDING JUDGE EBOE-OSUJI: Mr Attorney, again hold on. Of course you can.  
22 It's up to you if you want to state that. That's one answer you can give and no  
23 one -- but it is another law officer - chief law officer - may not -- sorry may, may she  
24 not, take the view or reply to the witness that, "We have a constitution that says the  
25 Rome Statute is part of the laws of Kenya and we have Section 4 of the ICA that says

1 the Rome Statute in certain sections is part of the law of Kenya, and within that is a  
2 provision that says the Chamber may require the attendance of witnesses and that  
3 provision is in Article 64(4)(b). It is on that basis that we say power is not arbitrary.  
4 It is part of the law of Kenya to the extent the Rome Statute is part of the law of  
5 Kenya."

6 Is that not an answer that can be given by another law officer who chooses not to  
7 make the argument that whatever the law does not prohibit it allows?

8 MR MUIGAI: It is not usual in a forum of this nature for counsel to ask a question,  
9 but I probably would ask what is this that is not prohibited?

10 PRESIDING JUDGE EBOE-OSUJI: That which article -- sorry, Section 20 and  
11 Section 24 of the ICA and Section 108 of the ICA say, which are any other requests  
12 for assistance that have not been specifically itemised may be made, and that might  
13 include a request for compelling your witness to attend.

14 MR MUIGAI: It would not. And I want to repeat myself and make myself I would  
15 hope absolutely clear. This Statute commences by itemising, and you were quite  
16 right when you drew our attention to Section 20, it itemises what it intends to  
17 legislate about.

18 Then the draftsman spends a lot of time detailing if you want a witness to appear,  
19 look at 80. If you want to serve a document, look at 86. If you want a witness to  
20 appear, look at 87. If you want assurances, look at 88, and so on and so forth. The  
21 draftsmen had such clarity. And what I have been saying, which probably bears  
22 repeating, is that Section 108 was not intended to reopen the express -- the draftsmen  
23 is saying if you want a witness to appear, I have discussed that exhaustively in 86.  
24 There can be no legitimate reading of the Statute that would make other types of  
25 assistance, other types, meaning you have already exhausted assistance, what



1 assistance is,  
2 You have now come to create a general provision just in case you have forgotten  
3 something else. So an argument that says can I not come under 108 to find some  
4 authority to summon witnesses who do not wish to be summoned? My simple  
5 answer is: How can you, how can you seriously want to say that? Did you not see  
6 Section 86 or did you not see Section 87? Bring yourself within the ambit of 87,  
7 because what you are trying to say then to the Court in that situation, you would be  
8 saying the truth is that I know that there is a very clear provision of Kenyan law. I  
9 know that.

10 I also know that I am unable to abide by it. I am unable to. Therefore, please find  
11 something else, somewhere for me to hook my wagon. That is bad jurisprudence.  
12 I do not want to use a stronger word that would go to impeaching motive. But it  
13 wouldn't lie in the mouth of the Prosecutor -- let me, let me leave it at that and just  
14 say --

15 PRESIDING JUDGE EBOE-OSUJI: Why don't you leave it. Let's move on. We  
16 still need to exhaust what Article 31(1) of the Vienna Convention said. And you  
17 have taken us to the concept of context and purpose. And you've defined context  
18 and purpose in terms of what the ICC was meant to do, the Statute.

19 MR MUIGAI: Yes.

20 PRESIDING JUDGE EBOE-OSUJI: Is it the case or not that the preamble to the  
21 Statute is perhaps the most compendious expression of the purpose of the Statute,  
22 objects and purpose --

23 MR MUIGAI: Yes.

24 PRESIDING JUDGE EBOE-OSUJI: -- of the Statute? You agree. So we look at the  
25 preamble now, if we may.

1 MR MUIGAI: Yes.

2 PRESIDING JUDGE EBOE-OSUJI: First five paragraphs, the first paragraph,

3 "Conscious that ..." -- the interpreters can turn to the French version, of course.

4 "Conscious that all peoples are united by common bonds, their cultures pieced,

5 pieced together in a shared heritage, and concerned that this delicate mosaic may be

6 shattered at any time; mindful that during this century millions of children, women,

7 and men have been victims of unimaginable atrocities that deeply shock the

8 conscience of humanity; recognising that grave crimes threaten the peace, security,

9 and well-being of the world; affirming that the most serious crimes of concern to the

10 international community as a whole must not go unpunished and that their effective

11 prosecution must be ensured by taking measures at the national level and by

12 enhancing international co-operation; determined to put an end to impunity for the

13 perpetrators of these crimes and thus to contribute to the prevention of such crimes."

14 Let's stop there.

15 MR MUIGAI: Yes.

16 PRESIDING JUDGE EBOE-OSUJI: These are lofty aims, are they not --

17 MR MUIGAI: Yes, yes.

18 PRESIDING JUDGE EBOE-OSUJI: -- the object and purpose of the Rome Statute.

19 How do we begin to hope to achieve these ends if people who may shed light on the

20 truth or the inquiry, rather, in the search for the truth say, "No, we don't want to

21 come," and then we say: That's it. That's the end of it. How do you begin to hope

22 to end impunity?

23 MR MUIGAI: My Lord President, Mr Chairman, the poetry of the Statute is very

24 important. It is intended to remind us of the commitments that we have made as a

25 civilized humanity. I'm sure when you find the time in your deliberations you will

1 read the preamble of the constitution, of which I am part draftsman. It contains the  
2 same exact poetry, which is fundamental, because it is intended to remind us that  
3 the things that have gone wrong in our various experiences should never be  
4 repeated.

5 But nothing in the poetry that I wrote in the Constitution of Kenya affects the way I  
6 shall construe the right of a prisoner in a Kenyan jail. I am mandated in very clear  
7 terms to act in accordance with the Prison's Act of the Republic of Kenya. And  
8 where it says I will accord the prisoner six hours of sunshine, and I will give him a  
9 good diet, I will not be able to answer him by saying "Show me where it says you  
10 need protein once a week."

11 What we are saying, Mr President, is that the lofty ideals of the treaty are conceded.  
12 The work that this Court is doing, if we thought less of it, we wouldn't be here. We  
13 think highly of what this Court is doing in its search for justice. We are only asking  
14 this Court to confine itself to law. And we are warning -- sorry, that's a strong  
15 word. We are cautioning that should this Court allow itself to be seduced down the  
16 road of reading more powers for itself, arrogate more powers for itself, two things  
17 will follow, as night follows day, the number of state parties willing to join this  
18 Court with an indeterminate treaty, whose meaning is not known by anybody,  
19 whose meaning is created by the Court in an experimental way from case to case, I  
20 don't know of a state that has not signed on the treaty that would sign on that basis;  
21 say, "What are we signing on?" And the lawyer advising the government will say  
22 "We are not quite sure, because the Court creates its jurisprudence as it goes along."  
23 Shall we be required to surrender our soldiers who have fought in a foreign, in a  
24 neighbouring country for an act of war? We don't know. It is unclear from the  
25 Statute, but the Court probably would want to exercise that extra power as well.

1 We would strongly discourage as a State Party that the Court should go down this  
2 road of adventure.

3 PRESIDING JUDGE EBOE-OSUJI: Mr Muigai, moving on, there is another line of  
4 question that I have, but before I do that in his submissions Mr Stewart said that  
5 there is an injunction that prevents any judge in Kenya from acting as, I used the  
6 expression before rogatory commissioner, you know what I mean, a judge that takes  
7 evidence in Kenya from the ICC, is that the case?

8 MR MUIGAI: There is an inaccuracy there, because that was a specific proceeding,  
9 those were specific proceedings, and they related to specific individuals in a specific  
10 context.

11 I think the most important to remember there is that these were proceedings before  
12 these cases were commenced. So they were in the nature of investigations. There  
13 was not a prosecution, and, therefore, there is a big difference.

14 PRESIDING JUDGE EBOE-OSUJI: All right. So then what you are saying is that  
15 Article 93(1) -- is it (b)? I think it is -- that contemplates taking of evidence under  
16 oath is still possible, is that the case?

17 MR MUIGAI: Sorry, I missed that question. If you could be as kind as to repeat it?

18 PRESIDING JUDGE EBOE-OSUJI: I'm asking you whether it is the case that the  
19 taking of evidence under oath pursuant to Article 93(1)(b) of the Rome Statute is still  
20 a possibility? Is that what you are saying, that there is no impediment to that kind  
21 of assistance being rendered? Is that the case?

22 MR MUIGAI: Subject to the constitution and the law, which is what we've been  
23 debating, subject to the constitution and the law. If as I have demonstrated that this  
24 can be done subject to compliance with the International Crimes Act, the answer is  
25 yes, subject to complying.

1 PRESIDING JUDGE EBOE-OSUJI: Let's do this, could you kindly -- one second.

2 (Trial Chamber confers)

3 PRESIDING JUDGE EBOE-OSUJI: So you don't -- it may not be that you -- I did not  
4 want to put you in a difficult position now of making commitments and answering  
5 questions on that point. Could you kindly within, could seven days be enough time  
6 for you to write back further submissions to the Court on that specific question,  
7 whether or not there is an impediment, a legal impediment within Kenya to execute  
8 requests pursuant to Article 93(1)(b) of the Rome Statute -- when I say "legal  
9 impediment," that includes the claim made earlier there is an injunction that forbids  
10 it -- and, two, any other law, constitution or any other law in Kenya that says this  
11 may not be done? Can you in seven days write back to the Chamber on that?

12 MR MUIGAI: That would be very difficult because, Mr President, sir, Article 96 is  
13 very clear. It is Article 96 that makes it possible for us to understand the nature of  
14 the request. And Article 96 says this, "The contents of a request or other form of  
15 assistance under Article 93, a request and other form referred shall be made in  
16 written" -- so on and so forth. "The request shall set out the following."  
17 So the hypothetical is very difficult for us to respond to unless there was a specific  
18 that is set out in 96.

19 PRESIDING JUDGE EBOE-OSUJI: No, no, no, no. 96 is about other forms of  
20 assistance. But here 93 specifies Article 93(1)(b).

21 MR MUIGAI: No, sir. I beg to differ. 96 says clearly, "The contents of the request  
22 of other forms of assistance under Article 93 in its generality."

23 PRESIDING JUDGE EBOE-OSUJI: 93(1)(i).

24 MR MUIGAI: The whole of it.

25 PRESIDING JUDGE EBOE-OSUJI: (1)(i)(l).

1 MR MUIGAI: The whole of 93.

2 PRESIDING JUDGE EBOE-OSUJI: 93(1)(i) is the one that speaks of other forms of  
3 assistance, isn't it?

4 MR MUIGAI: No, sir. Article 96 provides a procedure for all applications under  
5 93.

6 PRESIDING JUDGE EBOE-OSUJI: Anyway, we need not belabour the point. I  
7 was wondering whether it might be more efficient for you to write back and say --

8 MR MUIGAI: Yes, I can write back and repeat this.

9 PRESIDING JUDGE EBOE-OSUJI: You don't need to, if that's all you're telling us,  
10 then that's the extent of it. The question would have been whether --

11 MR MUIGAI: If, if what --

12 PRESIDING JUDGE EBOE-OSUJI: One second, please. The question would have  
13 been whether the laws of Kenya, either in terms of an order of the Court, of a court  
14 or the specific provision of the constitution or other law would impose an  
15 impediment to taking commission evidence under 93(1)(b). So if you are not in the  
16 position to do that, then we'll leave that.

17 MR MUIGAI: No. The difficulty, the difficulty, Mr President, sir, is that actually  
18 the question you have posed has created the matter, has more -- has obstructed,  
19 obstructed the matter more, because the Prosecution's request is very concrete, and it  
20 is this, we want you to take evidence from persons who used to cooperate with us,  
21 who have now refused to cooperate with us, who have said they will never  
22 cooperate with us again.

23 So that is very, very, very narrow and very, very specific. If you asked me to  
24 elaborate on our response as to whether in those very narrow grounds there can be  
25 any basis under Kenyan law, because, you see, I have already said in Kenya we ask

1 our self is there a basis for doing this? And where there is no basis, we will not act  
2 in a manner that is inconsistent with the law.  
3 If you are asking me, my Lord Chairman, Mr President, if you are asking me to  
4 respond to that narrow question, that would the Kenyan government have a  
5 difficulty executing a request that said "Go and find these people." Remember, Mr  
6 Chairman, sir, I don't know these people, but I assume that can be overcome if the  
7 Prosecution allowed me to know. If the question was: Would there be a difficulty  
8 on the part of the Kenyan government finding these people, putting them in a  
9 Chamber, compelling them, meaning finding a law in Kenya that allows me either to  
10 send them to jail until they give the statement or to fine them or to take their assets  
11 or to -- some other penal process that compels them to, I would be happy to respond  
12 to that question.

13 PRESIDING JUDGE EBOE-OSUJI: All right. It's simple, Mr Muigai. You see, the  
14 reason why Article 93(1)(b) enters the picture is this, Article 93(1)(b) is a specific  
15 provision in the Rome Statute. It is not a matter of Article 93(1)(l) that is a catch-all.  
16 Article 93(1)(b) in its own standing enjoys the same separate distinct standing as  
17 article 93(1)(e) that you like very much.

18 So if 93(1)(b) says evidence may be taken by a Kenyan judge, remember, the  
19 Prosecutor had said they would like the Chamber to either do this, implement their  
20 request by way of a video conference with the witness in Kenya, or the Chamber  
21 goes to Kenya to conduct proceedings and receive the testimony of these people.  
22 And you are saying, your response is that cannot be done. It doesn't matter  
23 whether the Court comes to Kenya to sit or the Court is sitting in The Hague, that the  
24 Kenyan government, your position is that the witness may not be compelled to  
25 attend. Now, that was your position. And here we have 93(1)(b) that specifically

1 says it is the duty upon a State as part of cooperation to receive requests about  
2 taking evidence, and the ICA recognises that I believe -- not I believe, because if you  
3 look at rule -- the rules, the ICA rules, if you look at the ICA rules, the rules under  
4 ICA, from Rule 4, specifically Rule 4 and Rule 8 provide rules for these sort of  
5 commission evidence to be taken in Kenya. It is part of the ICA.  
6 If that can be done by a Kenyan court sitting in Kenya, why would it be difficult for  
7 the ICC sitting in Kenya to not be able to compel a witness to testify when a witness  
8 can be compelled to attend a rogatory commission conducted by a Kenyan judge?  
9 It is that that I want to find a difference. We are trying to figure out what good faith  
10 means in the context of a Vienna Convention law of treaties in this matter. Why the  
11 difference?

12 MR MUIGAI: I am not sure that it is conceded by us that there is -- that if, if in  
13 Kenya we constituted a judicial panel and Gazetted it or the chief justice undertook  
14 whatever measure that a Kenyan court would compel the witness on behalf of the  
15 ICC to be present in the Kenyan court. It would not.

16 PRESIDING JUDGE EBOE-OSUJI: All right. Let's not speak hypothetically. I will  
17 read the specific question. Rule 4, do you have it? The ICA rules, Rule 4, and I'll  
18 quote: "The International Criminal Court may request, may make a request" --

19 MR MUIGAI: Hang on, Mr President. I am trying to check it in the bundle that  
20 has been supplied here. The first schedule, yeah? Sorry, Mr President. Just read  
21 it.

22 PRESIDING JUDGE EBOE-OSUJI: I can read it. Rule 4, "The International  
23 Criminal Court may make a request to the attorney general for the taking of  
24 evidence and production of documents in relation to an investigation by the  
25 Prosecutor or to any proceeding before the International Criminal Court," unquote.



1 That's Rule 4.

2 And Rule 8 says --

3 MR MUIGAI: Yes, go ahead.

4 PRESIDING JUDGE EBOE-OSUJI: Before I go to Rule 8, because it makes reference  
5 to Rule 7, Rule 7 says, provides for forwarding the request. "Upon designation of a  
6 judge under Rule 5, the AG shall forward the request received under Rule 4 together  
7 with the particulars of the intended witnesses or documents to the chief justice, to  
8 the chief justice, who shall promptly transmit the requests to the judge," unquote.

9 Now, if you go to Rule 8, it provides, "(1), on receipt of the request under Rule 7, the  
10 Court shall issue summons to the intended witnesses together with a summary of  
11 the issues upon which any intended witness is requested to testify on; and, (2),  
12 where the request relates to the production of any document, the Court shall issue  
13 summons to the person in possession of the document or who has authority over the  
14 document, requiring him or her to appear and produce the document" -- and here is  
15 the crucial part, (3), sub (3), "This summons shall be served on the intended witness  
16 personally, and there shall be a period of 15 days between the date of service of the  
17 summons and the date any intended witness is required to appear."

18 So we have rules intended to service what is contemplated by Article 93(1)(b). My  
19 question is, if this can be, what is the material difference with saying an ICC cannot  
20 come and sit in Kenya and take this evidence itself directly?

21 MR MUIGAI: Mr Chairman, Mr President, the confusion that is arising is partly  
22 caused by the fact that I have been responding to the application as framed by the  
23 Prosecutor. As I understand it, the Prosecutor is not interested -- and I'm not  
24 inferring. He said so in clear language, he said "I do not wish and I am not  
25 interested in a process that anticipates a Kenyan court or tribunal being involved in

1 this process," unless I misunderstood him. So the high qualification --

2 PRESIDING JUDGE EBOE-OSUJI: That -- that is not my issue, Mr Muigai, Mr  
3 Attorney. The issue is not to force the Prosecution, and they will respond, to go  
4 through Article 93(1)(b). The question, rather, is your position is that the Prosecutor  
5 says, well, they are not requesting for witnesses to be compelled to appear in The  
6 Hague. They want them compelled to a certain location in Kenya so that a video  
7 examination may be done there, video conferencing; or the Chamber will convene in  
8 Kenya and hear the testimony of the witness in situ.

9 My question is, are you saying: No, that is not allowed?

10 MR MUIGAI: On the contrary.

11 PRESIDING JUDGE EBOE-OSUJI: As long as it's about compelling your witness at  
12 all, that's not allowed. But I'm saying here that Rule 4, in the Rules, the ICA Rules,  
13 and Rule 7 and 8 does suggest, does it not, that all that may be done before a Kenyan  
14 judge. And I'm saying if that can be done before a Kenyan judge, why, what is the  
15 material difference that prevents it being done directly by the ICC sitting in Kenya,  
16 which you oppose?

17 MR MUIGAI: Let me clarify that, because as a matter of record before this Court,  
18 when an application was made in this Court by the Defence, I don't remember which  
19 Defence, suggesting that this case could be held in Kenya, we filed a memoranda in  
20 support. So the support of the Kenyan government that the ICC can sit anywhere is  
21 a matter of public record. I therefore wish to clarify that at no point have I  
22 suggested in my presentation today that the ICC cannot sit in Kenya, either  
23 physically or by video link or in any other manner.

24 PRESIDING JUDGE EBOE-OSUJI: That's not the point. The point is about  
25 compelling your witness to attend and testify --

1 MR MUIGAI: I'm coming to that, I'm coming to that --

2 PRESIDING JUDGE EBOE-OSUJI: -- before the ICC in Kenya.

3 MR MUIGAI: -- Mr Chairman, Mr President.

4 PRESIDING JUDGE EBOE-OSUJI: Yes.

5 MR MUIGAI: You have taken international crimes procedure for obtaining

6 evidence rules, rules made under the Statute, and given them a meaning beyond

7 what the Statute says itself. This is, this is subsidiary legislation of the weakest type

8 possible in that it has to be measured every day against the Statute itself. These

9 rules and the Statute must sit together comfortably.

10 What do the rules themselves say? They say this, "These rules shall apply where

11 the Attorney General has authorised the taking of evidence and production of

12 evidence under section 78 and 79 of the Act."

13 What do 78 and 79 do? They create a general discretion on the part of the Attorney

14 General upon a proper application. What is a proper application? It takes us back

15 to where we have been all morning, compellability. I can never imagine a situation

16 in which I would issue a certificate for the taking of evidence without satisfying

17 myself that the specific provisions on the taking of evidence from a witness, which

18 are in 85, 87, 88, have been fulfilled. Nothing in these rules can confer on me a

19 power that I don't have under the main act.

20 PRESIDING JUDGE EBOE-OSUJI: Mr Attorney, I need to cut you short now.

21 MR MUIGAI: Mr President --

22 PRESIDING JUDGE EBOE-OSUJI: I've cut you -- one second, one second, one

23 second. We've been served notice by the system - the Court systems - that we will

24 be adjourning at 4.30.

25 MR MUIGAI: Right.

1 PRESIDING JUDGE EBOE-OSUJI: And the Prosecutor has a lot I believe on his  
2 plate to reply to. So can you wrap up now in two minutes?

3 MR MUIGAI: Yes. And I'm saying this --

4 MR KHAN: I'm sorry, I do apologise, Attorney General.

5 Your Honour, I beg the Court's indulgence. I would ask that we sit 'til 5 o'clock,  
6 because I covered, I tried to honour the timetable that I was required to abide by,  
7 and I touched things very quickly. Indeed, there were other questions from the  
8 Bench that I tried to answer in my allotted time. And I have quite a bit to say, some  
9 issues, with the greatest respect, I have a different position from the Attorney  
10 General. And, your Honours, I would ask that that time be given to the Defence.  
11 Hopefully if we could sit 'til 5 o'clock, that would allow the Prosecution to respond  
12 to the Attorney General, and it would give me on behalf of Mr Ruto the opportunity  
13 to make what I submit are important submissions that will shed light on this issue.  
14 So, your Honour, I would crave the indulgence of the Court, we sit by 5 o'clock, and  
15 so the necessary submissions that have to be made are put before the Bench for  
16 consideration. I'm grateful.

17 PRESIDING JUDGE EBOE-OSUJI: All right. I also see Mr -- you have to make  
18 some submissions as well?

19 MR NDERITU: Yes, sir.

20 PRESIDING JUDGE EBOE-OSUJI: All right.

21 MR. NDERITU: Mr President, thank you.

22 PRESIDING JUDGE EBOE-OSUJI: Let's do this, Mr Stewart, how much time do  
23 you think you will need to respond?

24 MR STEWART: If you give me ten or 15 minutes, I'll try to keep within that.

25 PRESIDING JUDGE EBOE-OSUJI: Do you think you can do it in five?

1 MR STEWART: I think I'd do an injustice to what I want to tell you.

2 (Trial Chamber confers)

3 MR KHAN: Mr President, the other option -- with your leave, the other option is  
4 that, I don't know the Attorney General's commitments, but if the Court was minded  
5 to allow submissions to be made on Monday?

6 PRESIDING JUDGE EBOE-OSUJI: That's what we just conferred briefly on. I  
7 think that's what we will need to do. As you know, we did not confine Mr Attorney  
8 to a timeframe. The reason being, we wanted to give -- to ask him all the questions  
9 we thought he can assist us with.

10 MR KHAN: I'm grateful.

11 PRESIDING JUDGE EBOE-OSUJI: So he need not be here on Monday. So  
12 that's -- but we can resume on Monday on the issue after 4.30 today and deal with  
13 any more submissions that need to be made.

14 Mr Kigen-Katwa?

15 MR KIGEN-KATWA: Mr President, I was requesting that when you are locating  
16 time, you give us some time as well.

17 PRESIDING JUDGE EBOE-OSUJI: Yes, we will. As I said, we will continue.

18 MR STEWART: Mr President, I might be forgiven for revising my very limited time  
19 schedule, if we are going to go on Monday, but I wanted in fairness to the  
20 Honourable Attorney General simply to point out something that he may need to  
21 address. I didn't want to in reply address it when he's not here. I think that might  
22 not be right.

23 He referred in the International Crimes Act to Sections 78 and 79 quite properly in  
24 relation to the rules that you were asking him about, but under Section 80 there is  
25 very clearly a compellability feature to the provisions.

1 And I would be unfair if I remain silent on that. I wouldn't normally have gotten  
2 up to interrupt the proceedings, but I did want to raise that issue. Thank you.

3 PRESIDING JUDGE EBOE-OSUJI: Thank you. So why don't we do this, for all of  
4 us who are residents of the courtroom, so to speak, we can let Mr Attorney take the  
5 rest of the day, and then on Monday we can pick up the rest of what we need to deal  
6 with.

7 So Section 80.

8 MR NDERITU: Mr President, your Honours, just a clarification. Initially I had  
9 programmed myself to leave tomorrow. But, of course, I would be ready to stay on  
10 if --

11 PRESIDING JUDGE EBOE-OSUJI: Mr Nderitu, you can stay with us on Monday if  
12 that's not too inconvenient.

13 MR NDERITU: Very well. All right, thank you.

14 Mr Stewart, what provision in particular are you reading?

15 MR STEWART: Subsections (1) and (2) of Section 80 of the International Crimes Act  
16 provides for compellability of witnesses. And I just didn't want to leave that  
17 unsaid, because we skipped beyond that to the rules. And I would expect the rules  
18 derive from that particular provision, at least insofar as a Kenyan judge is concerned  
19 designated to take evidence.

20 PRESIDING JUDGE EBOE-OSUJI: Mr Attorney, can you please speak to that  
21 matter.

22 MR MUIGAI: May I, Mr President, before I go to that issue come to the issue  
23 you've raised in respect of Section 78 and 79 and say this, they pose absolutely no  
24 problem, because we've already discussed the two very separate cases of a witness  
25 who wishes to cooperate. Yes.

1 If I receive a request for the taking of evidence and a witness comes to me and says,  
2 "I am very anxious and eager to give evidence," then 78 kicks in, 79 kicks in. There  
3 is not a problem.

4 PRESIDING JUDGE EBOE-OSUJI: But the matter of the witness who wishes to  
5 cooperate is controlled by Article 93(1)(e), is it not, of the Statute?

6 MR MUIGAI: Is it?

7 PRESIDING JUDGE EBOE-OSUJI: Yes. Article 93(1)(e) speaks of facilitating as an  
8 assistance you may render.

9 MR MUIGAI: That's right.

10 PRESIDING JUDGE EBOE-OSUJI: Facilitating the voluntary appearance of persons  
11 as witnesses or experts before the Court.

12 MR MUIGAI: That's right.

13 PRESIDING JUDGE EBOE-OSUJI: Now, about what 93(1)(b), which is a separate  
14 matter, is it not, or is it, the taking of, evidence including testimony under oath and  
15 the production of evidence, including expert opinions and reports necessary to the  
16 Court.

17 And then here we have Section 80 of the ICA that's talking about Section 78, the  
18 taking of evidence. And here Section 80 talks about questions of compelling a  
19 witness to appear before a judge under Section 78.

20 MR MUIGAI: Yes.

21 PRESIDING JUDGE EBOE-OSUJI: Yes.

22 MR MUIGAI: First I want to clarify this, Mr President, sir. There is nothing in the  
23 Statute that determines the procedure, and there cannot be. The purpose of the  
24 Rome Statute is not to identify how State Parties will comply with the obligation.  
25 So it is incorrect to say let us refer to 93(b), and we will find an answer to how

1 evidence will be taken. We will not. We will find an obligation to facilitate the  
2 taking of the evidence.

3 Where shall we find the procedure? In the domesticating law and, therefore, we  
4 will come to the International Crimes Act. Where shall we find that procedure?  
5 We will find it in 77 and 78. But let us read 77.

6 PRESIDING JUDGE EBOE-OSUJI: And 80.

7 MR MUIGAI: And 80. I would plead with the Court to give me time to make this  
8 argument. If you go to 77 it is very clear, "The Attorney General shall give  
9 authority for the request to proceed if the Attorney General is satisfied ..." - not any  
10 other body or authority, "... if the Attorney General is satisfied ...", not if some court  
11 or other official is satisfied - "... (a) that the request relates to an investigation being  
12 conducted by the Prosecution or any proceedings before the ICC."

13 Let me confirm to you that I am aware there are proceedings before the ICC,  
14 "(b) there are reasonable grounds for believing that the evidence can be taken or as  
15 the case may be the documents or other articles can be produced in Kenya."

16 Let me break that down into two. I have to be satisfied of two things: Number  
17 one, that the evidence can be taken, therefore, I need to be satisfied that there is a law  
18 in Kenya allowing what is said to be requested. I must be satisfied that there is such  
19 a law.

20 And let me tell you why, Mr President, 793(b) is married to 93(e). It is because I  
21 have a voluntary, have a volunteer witness that I am able to constitute a process of  
22 taking his evidence. It is not because that there is some evidence that there will be a  
23 volunteer witness. Can I make that clear? Can I repeat it again?

24 Article 93(b) and 93(f) -- (e), sorry, are married together. The way the Attorney  
25 General will facilitate the taking of evidence under 77 and 78 is (a) by being in a



1 position to identify volunteer witnesses.

2 Number two, let me break 77(2) further. I must also be satisfied that the evidence

3 can be produced in Kenya. This is not about a physical thing. This is not to say

4 that the motor vehicle is located in Kenya. No. The evidence can -- can be

5 produced in Kenya. It's a legal requirement. It's not an evidential requirement. I

6 hope I am responding to that. It is a legal requirement that I must satisfy myself

7 that the evidence can be produced in Kenya.

8 If I am not satisfied that I'm looking at a volunteer witness, if I am not satisfied that

9 there is a reason to do that, then I will not do it. But if I do it, if I do it, that is when

10 then Section 80 can be relevant so that there is a process before which this would

11 need to.

12 But let's read the side margin on 80, Mr President. Let's read the protection of

13 witnesses, "The applicable law without respect to compelling a person to appear

14 before a judge under Section 78 or 79, and to give evidence or ask a question to

15 produce a document is the law specified in such," and then it goes on to say, all those

16 notwithstanding; notwithstanding.

17 What is the purpose? The protection of witnesses. So my answer is a simple one.

18 Until 77, 78, 79 kick in, 80 is an academic proposition.

19 PRESIDING JUDGE EBOE-OSUJI: That is your response to that?

20 MR MUIGAI: That is my response.

21 PRESIDING JUDGE EBOE-OSUJI: I thought you were going to say more. All

22 right. We've got 15 minutes to finish our time with you.

23 MR STEWART: Mr President, forgive me, I really -- forgive me, Honourable

24 Attorney General. I just don't want to be speaking on Monday about an issue that

25 the Attorney General has not had a chance to address.

1 We have been speaking about the possibility of a sitting in situ. If we did that then  
2 the -- I should say if the Trial Chamber did that, in the National Crimes Act has  
3 provisions that deal with that, Sections 161 to 167 and we'll have a certain position  
4 on that on Monday obviously, but I just didn't want the Attorney General to return  
5 to Nairobi without having an opportunity at least to think about those provisions  
6 before he leaves. Thank you.

7 PRESIDING JUDGE EBOE-OSUJI: Mr Muigai, are you looking at those sections,  
8 161 to 168?

9 MR MUIGAI: 61 of --

10 PRESIDING JUDGE EBOE-OSUJI: 161 to 167 of the ICA.

11 MR MUIGAI: Yes.

12 PRESIDING JUDGE EBOE-OSUJI: In particular if you look at 162.

13 MR MUIGAI: Yes.

14 PRESIDING JUDGE EBOE-OSUJI: And 163.

15 MR MUIGAI: Yes, I have no difficulty with that. I thought, Mr President, that I  
16 had already affirmed that we, we as the Republic of Kenya are already on record as  
17 saying in both cases that subject to logistics and all the other issues, we have no, we  
18 have no reason to believe that the ICC cannot sit in this way. But may I draw --

19 PRESIDING JUDGE EBOE-OSUJI: 163 in particular, if you can look at 163. "While  
20 the ICC is sitting in Kenya, it may exercise its functions and powers as provided  
21 under the Rome Statute and under the ICC procedures."

22 MR MUIGAI: Yeah. That poses no difficulty, because the ICC will be sitting as if it  
23 were at The Hague.

24 PRESIDING JUDGE EBOE-OSUJI: And the provision, if you can see, it  
25 cross-references the Rome Statute underneath there, Articles 42 and 64.

1 MR MUIGAI: 164, sir?

2 PRESIDING JUDGE EBOE-OSUJI: 64.

3 MR MUIGAI: 64.

4 PRESIDING JUDGE EBOE-OSUJI: I do not know what version. One difficulty we  
5 have is the version of the ICA that I have does not have the marginal notes you were  
6 reading all along, and I do not know whether the one you were looking at would  
7 have the annotation you see underneath the --

8 MR KHAN: Mr President, with your leave, we'd be delighted to hand up an  
9 unmarked copy that has the margin notes for the Bench. And perhaps it could be  
10 culled later on.

11 PRESIDING JUDGE EBOE-OSUJI: Yes, it will assist us. But in the meantime I do  
12 not know whether the version Mr Attorney has has the annotation that appears  
13 under the provision, not that the annotation or margin notes would control  
14 interpretation, but it's something of interest to see in any event.

15 So the question is the provision here, 163, part of the law of Kenya, clearly, so it's no  
16 longer a theoretical argument, while the ICC sits in Kenya, it has, it can exercise its  
17 powers and functions as provided under the Rome Statute, and that would include  
18 what we make of the word "require." This appears under Article 64(6)(b), does it  
19 not?

20 MR MUIGAI: I want to put it on record again that we have no difficulty  
21 whatsoever with this as a general proposition. I say to place this on record again, if  
22 the ICC were sitting in Kenya, it would be bound by Article 93(e), that is to say that  
23 it would have to request me to facilitate the voluntary appearance of persons as  
24 witnesses.

25 So we will continue with this chicken and egg, chicken and egg, chicken and egg.

1 Will the ICC be sitting in Kenya if we have no witnesses who have volunteered to  
2 testify? And we go back to where we started in the morning. Is the Attorney  
3 General under an obligation to arrest, incarcerate, and then bring to the custody of  
4 the ICC sitting in Kenya, let us say in the UN headquarters? I have no such power.  
5 I wish I would promise I have such power. I don't.

6 PRESIDING JUDGE EBOE-OSUJI: All right. Mr Attorney, you talk about chicken  
7 and egg. Let's address that for a minute. In the morning when I welcomed you,  
8 we noted your impeccable credentials as a lawyer, including immediately from a  
9 position of the UN Human Rights Council Special Rapporteur on contemporary  
10 forms of racism, racial discrimination, and xenophobia and related intolerances.

11 MR MUIGAI: Indeed.

12 PRESIDING JUDGE EBOE-OSUJI: All right. Racism, xenophobia, related  
13 intolerances, now, when we look at those what is the most extreme manifestation of  
14 those social ills? Genocide, would it not be?

15 MR MUIGAI: It probably would be, yes.

16 PRESIDING JUDGE EBOE-OSUJI: And what we're looking at here is a situation  
17 where we have a case of genocide. And you, a former UN Special Rapporteur in  
18 the capacity that encompasses that, and there is a question of whether there is -- we  
19 have to get to the bottom of it --

20 MR MUIGAI: Indeed.

21 PRESIDING JUDGE EBOE-OSUJI: -- and in the search for the truth.

22 MR MUIGAI: Absolutely.

23 PRESIDING JUDGE EBOE-OSUJI: And you were saying that a witness may not be  
24 compelled to come, even though the Court is sitting in Kenya, and we are looking at  
25 the provisions of 162 of the ICA. You say "chicken and egg." Is that where we are

1 left with the question of justice?

2 MR MUIGAI: Could you --

3 PRESIDING JUDGE EBOE-OSUJI: Chicken and egg?

4 MR MUIGAI: Could you permit me once more to break with tradition and put a  
5 question to you again? My heart goes out to the people who are the victims of this  
6 violence. I do not think there can be any person in the world or any group of  
7 people in the world who would be more conscious of the damage that was caused to  
8 our people and our country.

9 Having said that, because we are a court of law and because this is a judicial process,  
10 we must conduct it in accordance with the law. Otherwise the temptation then to  
11 say "This has dragged on for too long. Let us go into the streets and pick the people  
12 we believe we know who did this and line them up and shoot them" would be a  
13 more attractive proposition.

14 We are jurists. I do not say it flippantly or lightly that we are in a legal conundrum.  
15 I wish I had the power to unlock it. But I am an officer who has taken an oath, like  
16 you have, dear judges, to protect the law. I would break my oath if I suggested that  
17 if I were brought a warrant of arrest from The Hague, here, I would go into the  
18 streets with some policemen and we'd pick up Mr Walter Barasa and put him in a  
19 plane and send him to The Hague.

20 I would not do that. I would resign my office first, because the law does not allow  
21 me to do the things that my heart tells me. The law tells me to do what the law  
22 empowers me to do, irrespective of what my heart may feel. I would want the  
23 Court, and I have said that, and I don't know whether I should repeat myself, can the  
24 ICC sit in Nairobi? Yes. In fact, it is us who first supported that proposition, and it  
25 was rejected by you.

1 So to turn around and say that that can be visited on us, it would be very unfair. So  
2 the ICC can sit in Kenya. The ICC can hear witnesses in Kenya. It can take  
3 evidence in Kenya subject to the law, subject to the law. And, therefore, when -- I  
4 therefore want to put it on record for the sake of my learned friend the Prosecutor  
5 that I have -- I am aware of the provisions he has referred to, and they pose no  
6 difficulty to me.

7 What I think we ought to go back to is in order for the ICC to come to Nairobi and  
8 sit, what would be the evidence it will be considering in its docket in that period?

9 If it is the seven witnesses that are alleged to have disappeared, whose names I don't  
10 know, whose identity I don't know, whose location I do not know, then we would  
11 have to have a legal procedure consistent with the treaty, consistent with the Statute,  
12 and consistent with Kenyan law that allows me -- because that's the word, I want, I  
13 want Mr Henderson to hear this personally and, therefore, I will repeat it. The  
14 Prosecution has asked you to require us to facilitate the presence of --

15 PRESIDING JUDGE EBOE-OSUJI: You mean Mr Stewart, not Mr Henderson?

16 MR MUIGAI: Sorry, sorry. I'm sorry about that. He knows the other name I have  
17 used. And I apologise to him. He's a man I hold in the highest possible record.

18 But as I was saying, Mr President, the Prosecutor's request is that you should get us  
19 to compel the attendance of. And what I have said over and over again is the  
20 mechanism for, A, locating, identifying these people, locating them, and then  
21 compelling them to be present is a mechanism that is problematic.

22 I don't think that that argument has been made without some reflection on our part.  
23 It is not made flippantly. It is not made in a frivolous manner. It is made because  
24 this whole six hours of argument demonstrate that it is a difficult issue.

25 PRESIDING JUDGE EBOE-OSUJI: Mr Attorney, you have two minutes to finish.

1 MR MUIGAI: Yeah, so let me then wrap up.

2 MR KHAN: Mr President, sorry to interrupt my learned friend, but I also don't  
3 want to raise an issue of Kenyan law in his absence, but I would ask if learned  
4 Attorney General could look at Section 84.

5 MR MUIGAI: That was going to be my last point.

6 MR KHAN: I'm grateful.

7 PRESIDING JUDGE EBOE-OSUJI: Two minutes, because it's not in my discretion  
8 nor the discretion of my colleagues to provide you more time.

9 MR MUIGAI: I will wrap up by saying, I will wrap up by saying the comfort that  
10 may appear at first sight to be given by Section 80 of the ICA is indeed not a comfort,  
11 because 80(4) creates a very clear exception, and it says, "Notwithstanding  
12 subsection 1, a person who is required under Section 78 or 79 to give evidence or  
13 produce articles is not required to give evidence or produce any document or any  
14 article that the person could not be compelled to give or produce in proceedings  
15 before the ICC."

16 We come back to what do you have compellability powers here at the Hague? If  
17 you don't have them, even if there was this process in Kenya, you wouldn't have  
18 them.

19 Let me now say this, we thank you, we thank you for the opportunity, we thank you  
20 for the very engaging discussion, and I thank all my colleagues for their  
21 interventions. I want to repeat that the Kenyan government remains ready, able,  
22 and willing and desirous to assist this process, but we will do it in accordance with  
23 the law. Thank you.

24 PRESIDING JUDGE EBOE-OSUJI: Thank you. We'll leave it at that for now. On  
25 Monday we should take up any replies and responses. We will be doing that in one

1 hour, because this witness -- Prosecution, I take it, Mr Steynberg, you have a witness  
2 on Monday, right?

3 MR STEYNBERG: We do indeed have a witness lined up for Monday, yes, your  
4 Honour.

5 PRESIDING JUDGE EBOE-OSUJI: So we can take the first hour and wrap up what  
6 needs to be done on this discussion on compellability.

7 MR STEYNBERG: We will convey that to the witness, your Honour.

8 PRESIDING JUDGE EBOE-OSUJI: Thank you. And thank you very much,  
9 everyone. Mr Attorney and your colleagues, I wish you safe travels back. The  
10 Court will adjourn.

11 (The status conference ends in open session at 4.29 p.m.)