Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/09-01/11**
Date: **18 June 2013**

TRIAL CHAMBER V(A)

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public

Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial

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

The Office of the Prosecutor
Ms Fatou Bensouda
Ms Cynthia Tai

Counsel for William Samoei Ruto
Mr Karim A A Khan
Mr David Hooper
Mr Kioko Kilukumi
Ms Shyamala Alagendra

Counsel for Joshua Arap Sang
Mr Joseph Kipchumba Kigen-Katwa
Mr Silas Chekera

Legal Representatives of Victims
Mr Wilfred Nderitu

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit
Mr Patrick Craig

Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber V(A)* (the 'Chamber')[1] of the International Criminal Court (the 'Court'), in the case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, **having regard** to Articles 27, 61, 63, 64 and 67 of the Rome Statute (the 'Statute') now, by Majority, **renders** its decision on Mr Ruto's request for excusal from continuous presence at trial ('Decision').

I. OVERVIEW

1. The Defence of William Ruto ('Ruto Defence') presented the Chamber with a request to grant Mr Ruto permission to not be continuously present in court during his trial, in order to enable him to perform his functions of state as Deputy President of Kenya, while still remaining personally subject to the jurisdiction of the Court for purposes of the inquiry into his individual criminal responsibility in respect of the crimes over which the Court has jurisdiction.

2. The Chamber has carefully considered the request and the arguments advanced against it. The Chamber, by Majority, grants the request within the limits of certain conditions. The Decision of the Chamber resulted from careful regard both to the Statute of the Court as a whole (in its relevant texts, context, object and purpose) and to relevant aspects of the wider international law of which the Court's Statute forms a part.

3. In granting the request on the conditional basis, the Chamber has endeavoured to strike the 'balance that protects all the different competing concerns'. The conditions of the grant of excusal are as follows:

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* Judge Herrera Carbuccia, who was appointed as Judge to Trial Chamber V(A) on 21 May 2013, and therefore was not present in the status conferences subject of this decision, and so as not to affect the expeditiousness of proceedings, hereby attests that she has familiarised herself with the record of the proceedings and the written and oral submissions made by the parties and participants.

[1] Where 'the Chamber' is used in this decision it refers to both the Trial Chamber V in its composition as until 21 May 2013 and to Trial Chamber V(A) as composed by the Presidency's Decision constituting Trial Chamber V(a) and Trial Chamber V(b) and referring to them the cases of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* and *The Prosecutor v Uhuru Muigai Kenyatta*, 21 May 2013, ICC-01/09-01/11-745.

(a) Mr Ruto must be physically present in the courtroom for the following hearings:

i. the entirety of the opening statements of all parties and participants,
ii. the entirety of the closing statements of all parties and participants,
iii. when victims present their views and concerns in person,
iv. the entirety of the delivery of judgment in the case,
v. the entirety of the sentencing hearings (if applicable),
vi. the entirety of the sentencing (if applicable),
vii. the entirety of the victim impact hearings (if applicable),
viii. the entirety of the reparation hearings (if applicable), and
ix. any other attendance directed by the Chamber;

(b) The absence resulting from excusal from continuous presence at the trial at other times must always be seen to be directed towards performance of Mr Ruto's duties of state; and

(c) The Ruto Defence shall file with the Registry no later than one day after expiry of time limit for Request for leave to appeal a waiver signed by Mr Ruto himself in the form attached as annex to this decision.

II. BACKGROUND

4. In the Kenyan election year 2007, William Ruto was a senior member of a political movement competing in the elections against the side to which Uhuru Kenyatta belonged—also as a senior member on his side.[2] It is said that the two men belong to two of the larger ethnic groups in Kenya, in which they are respectively viewed as leaders

[2] Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373, paras 302 and 309.

because of their prominent social and political status in Kenya.[3] It is also said that Mr Ruto is Kalenjin and Mr Kenyatta is Kikuyu.[4]

5. It is alleged that the manner in which the two men conducted themselves and their political contest during that election resulted in the violence now generally known as the Kenyan Post-Election Violence 2007-2008, which allegedly had a distinct inter-ethnic orientation.[5] It is alleged that hundreds of persons were killed and many more were maimed or displaced.[6] This resulted in the Prosecutor of this Court laying charges against Mr Ruto and Mr Kenyatta for crimes against humanity.

6. On 23 January 2013, the Pre-Trial Chamber confirmed the charges against the two men.[7] And on 29 March 2012, both cases were transferred to Trial Chamber V (as it then was) for purposes of trial; and, proceedings continued in earnest in that regard, with preparations being made for trial.

7. At all material times, for purposes of the proceedings of the Trial Chamber and of the Pre-Trial Chamber before it, neither Mr Ruto nor Mr Kenyatta was placed in detention. They have been—and still remain—under the regime of summons to appear, on their own recognisances, and on their promises of continued cooperation with the processes of the Court.

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[3] Annex to Prosecution's Updated Document Containing the Charges pursuant to the Trial Chamber's Order (ICC-01/09-01/11-439), 21 August 2012, ICC-01/09-01/11-448-AnxA, para 10; Annex to Prosecution submission of Second Updated Document Containing the Charges and the Updated pre-trial brief, 7 May 2013, ICC-01/09-02/11-732-AnxA-Red, paras 3 – 5 and 15.

[4] ICC-01/09-01/11-448-AnxA, para 1; ICC-01/09-02/11-732-AnxA-Red, para. 1.

[5] Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, paras 117 – 118.

[6] ICC-01/09-01/11-373, paras 177 – 178; ICC-01/09-02/11-382-Red, paras 231 – 240.

[7] ICC-01/09-01/11-373 and ICC-01/09-02/11-382-Red.

8. While their cases were awaiting trial, Mr Ruto and Mr Kenyatta teamed up to contest in the 2013 Kenyan presidential election on the same ticket on which Mr Ruto was Mr Kenyatta's running mate for the post of President of Kenya.[8]

9. On 4 March 2013, Mr Kenyatta and Mr Ruto were successfully elected as President and Deputy President of Kenya, respectively, on the same electoral ticket. It is this turn of events in his circumstances that gave rise to the request made by Mr Ruto's Defence that is the subject of this Decision.

10. During the status conference held on 14 February 2013, counsel for Mr Sang ('Sang Defence') first raised the possibility of a request for the accused to participate at the trial via video link.[9] The Chamber indicated to Counsel that such a request needed to be in writing with submissions on both the legal basis of the request and the contemplated modalities.[10] In the result, counsel for Mr Ruto and for Mr Sang jointly filed on 28 February 2013 the 'Joint Defence Submissions on Legal Basis for the Accused's Presence at Trial via Video Link' ('Video Link Application'),[11] requesting the Chamber to 'authorize, in principle, the use of video link technology to ensure the accused's right to be present at trial is effectuated'.[12]

11. On 22 March 2013, the Prosecution filed the 'Prosecution's Observations on Joint Defence Submissions on Legal Basis for the Accused's Presence at Trial via Video Link'.[13] Submissions were also received from the Common Legal Representative for Victims

[8] Transcript of Status Conference of 15 May 2013, ICC-01/09-01/11-T-23-Red-ENG, p 27, lines 19 -22.
[9] Transcript of Status Conference of 14 February 2013, ICC-01/09-01/11-T-19-ENG, p 6.
[10] Ibid.
[11] ICC-01/09-01/11-629.
[12] Ibid, para 18.
[13] ICC-01/09-01/11-660.

('Victims' Counsel') on 19 March 2013,[14] as well as from the Registry on 9 April 2013 regarding the modalities of a video link.[15]

12. On 17 April 2013, the Ruto Defence filed an application in view of Article 63(1) of the Statute, seeking permission from the Chamber for Mr Ruto to be excused from continuous presence during the trial ('Excusal Application').[16] It is indicated in this application that the Excusal Application is to be considered as the primary request of Mr Ruto, with the Video Link Application to be considered in the alternative.[17] The OTP filed the 'Prosecution's Observations on "Defence Request pursuant to Article 63(1) of the Rome Statute"'[18] on 1 May 2013, and the Victims' Counsel filed the 'Submissions of the Common Legal Representative for Victims on Partial Absence of the Accused During Trial in Relation to Article 63(1) of the Rome Statute' on 22 May 2013.[19] Both the Prosecution and the Victims' Counsel opposed the Excusal Application, as they had done against the Video Link Application.

13. At the status conference held on 14 and 15 May 2013, the parties and participants made oral submissions on the Excusal Application.[20]

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[14] Request of the Common Legal Representative for Victims to Submit a Response to the 'Joint Defence Submissions on Legal Basis for the Accused's Presence at Trial via Video Link', ICC-01/09-01/11-657.
[15] Registry's Submissions on Modalities of a Video Link, ICC-01/09-01/11-673.
[16] Defence Request pursuant to Article 63(1) of the Rome Statute, ICC-01/09-01/11-685.
[17] Ibid, paras 3 and 22.
[18] Prosecution's Observations on 'Defence Request pursuant to Article 63(1) of the Rome Statute', ICC-01/09-01/11-713.
[19] ICC-01/09-01/11-749. A corrigendum was filed on 23 May 2013, ICC-01/09-01/11-749-Corr and ICC-01/09-01/11-749-Corr-Anx.
[20] Order issuing agenda for status conference, ICC-01/09-01/11-728, para 1(c).

III. SUBMISSIONS

Mr Ruto's Submissions on the Excusal Application

14. As this Decision is based on the revised primary prayer, being the Excusal Application, and is dispositive of the request on that basis, there is no further need to consider the submissions made by the parties as regards the Video Link Application; considering especially that during the status conference of 15 May 2013, Counsel for Mr Sang stated on the record that Mr Sang intends to be present at the trial throughout.

15. As indicated earlier, Mr Ruto's reason for the Excusal Application is in order that he may continue to perform his functions as the Deputy President of Kenya, while still remaining personally within the jurisdiction of the Court for purposes of his trial.[21] Obviously, and for good reason, considering it a prerequisite to their Excusal Application, the Ruto Defence stipulated to Mr Ruto's waiver of his right to be present during the trial. The Ruto Defence offered assurances that the waiver of Mr Ruto's right to be present at trial was freely made, unequivocal, and made with full knowledge of its implications.[22] The Ruto Defence submitted that an accused can waive the right to be present at trial as long as the Chamber is able to satisfy itself that the waiver is free, unequivocal and knowingly made.[23]

16. It had been indicated in the written submissions of Counsel that Mr Ruto does not seek a 'blanket waiver'; and that he undertakes to attend the opening and closing of trial, judgment, and all other hearings at which his attendance is directed by the Chamber or sessions which he may opt to attend.[24] But, at the status conference, in response to a question from the Bench regarding whether the Ruto Defence was making some

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[21] ICC-01/09-01/11-685.
[22] See ICC-01/09-01/11-T-23-Red-ENG, p 19.
[23] ICC-01/09-01/11-685, paras 4 and 8.
[24] Ibid, para 10.

reservations as to the idea of waiver (generally taken to mean voluntary abandonment of legal right, claim or advantage), the lead counsel for Mr Ruto clarified that the phrase 'blanket waiver' was incorrectly used in the given context. He clarified that what the Ruto Defence meant to communicate was that Mr Ruto was not seeking a 'blanket excusal': they did not mean to communicate any reservations as regards waiver.[25] The Ruto Defence further clarified, however, that Mr Ruto only waives those rights that may flow from physical presence, but not those rights associated with participation in the proceedings or the right to be represented properly through counsel.[26] Without limiting the generality of the waiver, the Ruto Defence indicated, in particular, that they would raise no issue to the effect that a witness did not identify Mr Ruto on the record during the witness's testimony.[27]

17. The Ruto Defence offered their undertaking that in the event of the Excusal Application being granted, they will submit a *pro forma* waiver signed by Mr Ruto to the Court on a regular basis confirming Mr Ruto's continued informed consent to the waiver.[28] The Ruto Defence also undertook to keep Mr Ruto properly apprised of developments, and indicated that if unforeseen or unexpected circumstances were to arise for which it did not have instructions, such instructions could be obtained immediately over the telephone and would not cause a delay to the proceedings.[29]

18. The Ruto Defence submitted that on a proper interpretation of Article 63, construed in accordance with the true purpose of the article, physical presence is not required. According to the submission, presence is met by the combination of Mr Ruto's voluntary surrender to the Court (already made in advance of the trial), together with such

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[25] ICC-01/09-01/11-T-23-Red-ENG, p 22.
[26] Ibid.
[27] ICC-01/09-01/11-T-23-Red-ENG, p 23.
[28] ICC-01/09-01/11-685, para 18.
[29] ICC-01/09-01/11-T-23-Red-ENG, p 24.

other assurances as necessary and as the Chamber may indicate, as well as the constant presence of Counsel for the accused throughout the trial.[30] The Ruto Defence referred to Mr Ruto's past compliance and standing promise of continued cooperation with the Court.[31] Furthermore, the Ruto Defence argued that despite the use of the word 'shall' in Article 63(1), a purposive interpretation of the Statute would lead to the conclusion that the Chamber retains the discretion to excuse an accused from continuous presence during the trial.[32] It was submitted further that there is no reason to construe the content of Article 63 of the Rome Statute as an obligation rather than a right viewed in line with the presumption of innocence.[33]

19. Counsel further submitted that it would be in the interest of justice to grant the Excusal Application for the following reasons: first, Mr Ruto's other fair trial rights will still be protected, in that he will *inter alia* be represented in the court room and will still be able to follow the proceedings using the Court's External Parties Network and the live video streaming that is available on the Court's website;[34] second, the granting of the Excusal Application will have no effect on the rights of any other party or on the proceedings;[35] third, there is no question of the Court's authority being undermined as Mr Ruto would personally remain subject to the Court's jurisdiction;[36] and fourth, when the Excusal Application is considered in its proper context, as a right of an accused capable of being waived, it is easily seen that the Defence application is a reasoned and practical request in view of the unique position of Mr Ruto.[37]

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[30] ICC-01/09-01/11-685, para 19; transcript of status conference on 14 May 2013, ICC-01/09-01/11-T-22-Red-ENG, p 7, lines 21 - 23.
[31] ICC-01/09-01/11-685, para 10.
[32] ICC-01/09-01/11-T-23-Red-ENG, pp 25 – 26.
[33] ICC-01/09-01/11-685, para 5.
[34] Ibid, paras 13 – 14.
[35] Ibid, para 15.
[36] Ibid, para 16.
[37] Ibid, para 17.

Mr Sang's Submissions on the Excusal Application

20. The Sang Defence indicated at the status conference on 14 May 2013 that it aligns itself with the submissions of the Ruto Defence regarding Article 63(1).[38] Notably, the Sang Defence made no submissions orally or in writing requesting or making out a case for Mr Sang to be excused from being present during the trial. Counsel for Mr Sang had initially argued orally that the Ruto Defence's Excusal Application should be granted to Mr Ruto, but that no distinction should be made on account of his position as Deputy President of Kenya. It was an essentially contradictory submission that was tentatively made and not pursued as to its latter half. In the end, however, the Sang Defence informed the Chamber that it is Mr Sang's intention to attend at the Court throughout the trial.[39]

Prosecution's Submissions on the Excusal Application

21. In opposing the Defence request, the Prosecution submitted that presence as required by Article 63(1) of the Statute means the physical presence of the accused; arguing that there is no support in the Statute, the Rules or the jurisprudence of this Court for the contention that an accused may waive the requirement of attendance contained in Article 63(1).[40] The Prosecution submitted that the Defence's interpretation of Article 63(1) is at odds with the plain language of the Statute.[41] Moreover, the Prosecution submitted that the drafters of the Statute had considered 'how to make the presence of the accused waivable' as is the case for the confirmation hearing, but did not include such a provision for trial.[42]

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[38] ICC-01/09-01/11-T-22-Red-ENG, p 23.
[39] ICC-01/09-01/11-T-23-Red-Eng, p 17.
[40] ICC-01/09-01/11-713, paras 5 – 6.
[41] Ibid, para 8.
[42] Ibid.

22. The Prosecution contended that Mr Ruto's interpretation of Article 63(1) as conferring a right would render the provision superfluous, as Article 67 of the Statute also includes the presence of the accused at trial as a right,[43] and that the provisions of the Statute are intended to protect both the rights of the accused as well as the interests of the other parties and the integrity of the trial.[44] In the Prosecution's submission, all the parties have a fundamental interest in Mr Ruto being physically present at the trial, and to permit him at his own instance to be absent while the trial is in progress would have an 'extremely negative impact' on the victims, the witnesses, and the way in which the Court is perceived by the public.[45]

23. The Prosecution submitted that, in view of Article 27(1) of the Statute, Mr Ruto is not entitled to special consideration simply because of his position as Deputy Head of State of Kenya, and urged the Chamber to reject the Defence's suggestion to interpret the Statute in a manner to accommodate political considerations in Kenya.[46] The Prosecution drew a distinction between the present case and that of *Prosecutor v Jean-Pierre Bemba Gombo*, noting that in the latter instance, the accused was already in custody during his trial, and was only permitted to be absent for portions of two days.[47] The Prosecution submitted further that Article 64 of the Statute is of no assistance to Mr Ruto, because Article 63 explicitly requires the accused's presence at trial and provides for no waiver, and it cannot be supplanted with the regime of the Pre-Trial Chamber process, which explicitly allows for the accused to waive presence at the confirmation hearing.[48]

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[43] Ibid, para 9.
[44] Ibid, para 10.
[45] Ibid, para 11.
[46] Ibid, para 12.
[47] Ibid, para 13.
[48] Ibid, para 14.

The Submissions of Victims' Counsel

24. The Victims' Counsel objected to the Excusal Application, and submitted that there can be no doubt from a reading of Article 63(1) that an accused is required to be present at trial.[49] The Victims' Counsel submitted that the fundamental assumption contained in Article 63(1) is that an accused will be tried at the seat of the Court, and that all parties, including the witnesses, will be at a coinciding location.[50] It is submitted, *inter alia*, that it would be contrary to the principle of Article 63(1) to permit an accused to be absent from trial because of the demands of an elective public office that he voluntarily or consciously decided to pursue in the full knowledge of the fact that he had been charged with international crimes.[51]

25. The Victims' Counsel submitted that the absence of Mr Ruto would have an extremely negative impact on how the Court is perceived for two reasons: first, because the traditional model of criminal litigation requires the physical presence of an accused person in the courtroom; and, second, because the confirmation hearing is itself an exception from the traditional model, and the person against whom allegations have been made at that stage has the status of 'suspect', rather than of an 'accused', with the quantum of rights at that stage being consistent with that status.[52] Victims' Counsel submitted that the presence of an accused is required to ensure the integrity of the proceedings.[53]

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[49] ICC-01/09-01/11-749, para 1.
[50] Ibid, para 2.
[51] Ibid, para 5.
[52] Ibid, para 7.
[53] Ibid, paras 9 – 10.

IV. DISCUSSION

A. INTRODUCTION

(1) Two Independent Strands of Reasoning

26. There are two distinct strands of reasoning that recommend themselves for the present Decision. Each of the strands is self-contained and independent in its ability to resolve the litigation. The first and primary strand of reasoning hinges on the interpretation of the different provisions of the ICC Statute that have the most obvious bearing on the Defence request. The second strand of reasoning engages considerations of international law beyond the obvious provisions of the ICC Statute.

(2) The Question of Judicial Precedent

27. But before continuing, the Chamber feels it important to clarify some preliminary matters. It is an accepted axiom in the administration of justice that each case must be determined according to its own particular facts and circumstances. That remains the dominant consideration, notwithstanding that the resulting decisions establish the framework of judicial precedents for subsequent cases that identify with the facts and circumstances of earlier cases. As indicated earlier, the facts and circumstances that make the present application peculiar are that Mr Ruto has in the meantime, during the pendency of this case, become the executive Deputy Head of State of the country where the alleged crimes occurred; as a result, he has duties of state to perform, the accommodation of which he seeks, relative to the requirement of him to be present during his trial. These facts and circumstances make this case different from the average case.

28. It must be clearly stressed from the outset that the Deputy President of Kenya *as such* is not on trial before this Chamber. The accused person over whom the Chamber is exercising jurisdiction is William Samoei Ruto. He is being tried in his *individual* capacity

for allegations of crimes made against him *personally*. It may also be noted that the charges against him were laid and confirmed and the case transferred to the Trial Chamber for his trial—and indeed an initial date for the trial was once set—before he was elected into office as Deputy President of Kenya. Although Mr Ruto has come into that office in the meantime, while his trial remained pending, let it not be understood that the Deputy President of Kenya is on trial in that capacity. There is a material difference in the law in this regard.

29. Whatever value the foregoing consideration may have, there is, however, one argument of counsel that needs to be clearly addressed and put to the side. As part of his oral submissions in support of his application, Counsel for Mr Ruto argued that one reason that recommends the indulgence he seeks for his client is that it will generate judicial precedent that will make it easier in future for leaders of State to stand trial before this Court while still fulfilling their obligations of governance at home.[54] But that normative argument is necessarily counter-intuitive to this Court's reason for being; and, thus, wholly infelicitous a policy reason to grant the prayer. Quite the contrary, the better policy is the one that stresses the need for leaders of nations to lead well, in a manner that avoids occurrences that may occasion criminal charges the trials of which will inevitably distract the accused from their state obligations—whether or not they are present in court during their trials. Counsel's normative argument in this regard is therefore not a sound reason to grant his request: and its apparent unity with the outcome of this application—decided on its very own peculiar facts and circumstances—is purely a matter of coincidence, not of policy.

30. The Chamber will now discuss the substantive strands of reasoning that motivate this Decision, beginning immediately with a construction of the provisions of the Statute as the primary considerations for the Decision.

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[54] ICC-01/09-01/11-T-22-Red-ENG, p 7.

B. PRIMARY CONSIDERATIONS FOR EXCUSAL

(1) The Statute Read as a Whole

31. As will be seen presently, Articles 63 and 27 of the Statute have the most obvious bearing on the Defence's request. But those two provisions are not to be construed in isolation. The Statute must be read as a whole. As the Permanent Court of International Justice observed in a 1922 advisory opinion: 'In considering the question before the Court upon the language of the Treaty, it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense.'[55] And as Francis Bennion correctly observed: 'The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the Act is *expressly or by implication modified by another provision elsewhere* in the Act.'[56] These considerations rightly discourage a blinkered view of only certain provisions of the Statute. For, the legal implications of other provisions located elsewhere in the Statute may import necessary limits to the effects of the particular provisions that arrest immediate attention.

32. In reading the ICC Statute as whole, it becomes evident that the other provisions that will have to be accommodated in the resolution of this matter are Articles 66 and 64. They need only be summarised for present purposes. Article 66 underscores the traditional

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[55] *Competence of the ILO to Regulate Agricultural Labour*, PCIJ (1922), Series B, Nos 2 and 3, p 23. See also *Customs and Excise Commissioners v Zielinski Baker & Partners Ltd* [2004] UKHL 7, para 38 [UK House of Lords], where Lord Walker of Gestingthorpe observed as follows: 'If the outcome of this appeal were to depend on a simple choice between a "step by step" approach and a "holistic" approach to statutory construction, it would be easily resolved in favour of the latter. A step by step approach sounds pedestrian and mechanistic ... whereas a holistic approach would seem to accord with the universally acknowledged need to construe a statute as a whole.' For his part, Justice Oliver Wendell Holmes Jr, writing extra-judicially, evoked the imagery of '[letting] whatever galvanic current may come from the rest of the instrument run through the particular sentence': Oliver Wendell Holmes Jr, 'The Theory of Legal Interpretation' (1898-99) 12 *Harvard Law Review* 417.

[56] F A R Bennion, *Bennion on Statutory Interpretation—A Code*, 5th edn [London: LexisNexis, 2008] p 1156 (emphasis added).

criminal law principles that the accused enjoys a presumption of innocence; and, the presumption may not be displaced except by proof of guilt beyond a reasonable doubt. Notably, the presumption of innocence is described as a 'right' under article 14(2) of the International Covenant on Civil and Political Rights.

33. For its part, Article 64 is significant in two principal respects. First, it requires the Trial Chamber, by virtue of Article 64(2), to ensure that the 'trial is fair and expeditious and is conducted with full respect to the rights of the accused and due regard for the protection of victims and witnesses'. And, secondly, it gives the Trial Chamber the discretion, by virtue of Article 64(6)(f), to '[r]ule on any other relevant matter'. This may, in other words, be described as the general, residual power to do what is fair, reasonable and just in the particular circumstances confronting the Chamber. It goes without saying, of course, that nothing done under the purported authority of that power will be fair, reasonable or just if it is truly repugnant to the object and purpose of the Statute.

(2) The Significance of Article 63

(a) The Question of Right

34. Article 63(1) is the provision of the ICC Statute that was most prominently in contention in this application. It is also one of the most succinct provisions in the Statute. It simply says: 'The accused shall be present during the trial.' The questions that immediately arise are whether the provision engages a right of the accused or a duty; and, if a duty, on whom it is imposed.

35. Quite apart from the provisions of Article 63(1), there is no doubt that presence at trial is a right for the accused. Article 67 provides for '[r]ights of the accused'. Among them is the 'minimum [guarantee] ... to be present at trial' specified in clause 67(1)(d).

Therefore, it is correct to say that presence at trial is primarily a matter of right for the accused, viewed from the particular perspective of Article 67(1)(d).

36. Having rightly conceived presence as a right, the Defence Counsel, on behalf of Mr Ruto, voluntarily stipulated an unequivocal waiver of that right, for purposes of their request to the Court. In addition to their stipulation of the waiver made as part of their written submissions,[57] the Ruto Defence also repeated that stipulation in oral submissions: making clear that the waiver is voluntary, informed and without any reservation, mindful of the consequences of the voluntary absence of the accused himself from the courtroom.[58]

37. In the Chamber's view, that the *right* to presence can be voluntarily waived is a settled proposition in international law. According to the ICTR Appeals Chamber: 'Such right is clearly aimed at protecting the accused from any outside interference which would prevent him from effectively participating in his own trial; *it cannot be violated when the accused has voluntarily chosen to waive it.*'[59] This observation is wholly consistent with a long line of case law of the European Court of Human Rights that also recognises that the right to presence can be waived—either expressly or by necessarily implication.[60] Notably, in *Demebukov v Bulgaria*, the European Court reiterated the following proposition: 'Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair

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[57] ICC-01/09-01/11-685, para 10.

[58] ICC-01/09-01/11-T-23-Red-Eng, pp 23 – 24.

[59] *Nahimana* et al *v Prosecutor (Judgment)* 28 November 2007 [ICTR Appeals Chamber] para 107 (emphasis added).

[60] Some notable ECtHR cases of note in this regard are *Demebukov v Bulgaria*, Application No 68020/01, Judgment of 28 February 2008, para 45; *Sejdovic v Italy*, Application No 56581/00, Judgment of 1 March 2006, paras 82 and 83; *Somogyi v Italy*, Application No 67972/01, Judgment of 18 May 2004, para 66; *Medenica v Switzerland*, Application No 20491/92, Judgment of 14 June 2001, paras 55—59; *Krombach v France*, Application No 29731/96, Judgment of 13 February 2001, para 85; *Poitrimol v France* (1993) 18 EHRR 130, paras 30 and 31; *Colozza v Italy*, Application No 9024/80, Judgment of 12 February 1985, paras 28 and 29; *Ensslin v Germany* (1978) 14 DR 64, pp 115—116). See also Council of Europe, Committee of Ministers, Resolution (75) 11 adopted on 21 May 1975.

trial.'[61] On the authority of article 31(3)(c) of the Vienna Convention on the Law of Treaties[62]—and, indeed, Article 21(1) of the Statute—the Chamber is prepared to accept that the drafters of the ICC Statute have indicated no clear intention to exclude this international legal norm from reasonably influencing the interpretation and application of the Statute in the relevant respect.

(b) The Question of Duty

38. But, the submissions of the Defence also suggest that quite apart from Article 67(1)(d) that clearly provides for the *right* to be present during the trial, what is provided for in Article 63(1) is also a right, which it is up to the accused to waive. According to this submission, Article 63(1) does not impose a duty. The Prosecution disagrees; arguing that Article 63(1) imposes a duty on the accused to be present.

39. That particular debate is easily resolved against the proposition advanced by the Defence. To say that Article 63(1) expresses a right is to presume that the drafter had used words in vain. The law abjures such a presumption. *Ut res magis valeat quam pereat.*[63] The drafter had clearly expressed a 'right' of the accused specifically so described in Article 67(1)(d) 'to be present at the trial'. It is not then readily to be supposed that in also providing in Article 63(1) that the 'accused shall be present during the trial' the drafter had intended another instance of the same right. Such a supposition would clearly have rendered Article 63(1) entirely redundant.

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[61] *Demebukov v Bulgaria*, supra, para 47. See also *Sejdovic v Italy, supra*, para 86.

[62] 'There shall be taken into account, together with context...any relevant rules of international law applicable in the relations between the parties': Vienna Convention on the Law of Treaties, article 31(3)(c).

[63] See *Corfu Channel case*, (Judgment of 9 April 1949) (1949) ICJ Reports 4 at p 24 ['It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect.'] See also *Interpretation of Peace Treaties (Second Phase) Advisory Opinion* (1950) ICJ Reports 221 at p 229, and the dissenting opinion of Judge Read at p 231 [International Court of Justice] To a similar effect, see *The 'Kronprins Gustaf Adolf' (Sweden v USA)* (1932) Reports of International Arbitral Awards, vol II 1239 at p 1256.

40. The more persuasive proposition is that advanced by the Prosecution, to the effect that the provision lays down a duty. This interpretation is supported by other provisions in the Statute relating to the issuance of an arrest warrant or summons to appear. Notably, Article 58(1)(b)(i) provides that one of the grounds on which an arrest warrant may be issued is where it appears necessary 'to ensure the person's appearance at trial'. Article 58(7), for its part, provides for a summons to appear (with or without restrictions on liberty) to be issued, as an alternative to an arrest warrant, where a summons 'is sufficient to ensure the person's appearance'. These provisions offer clear support for the view that an accused's appearance at trial is an obligation, which can be enforced by means of arrest, if not voluntarily undertaken.

41. But that does not settle the matter for purposes of the present application. For, it is equally important to consider the question as to who bears the burden of that duty. In their written submission, the Prosecution argued that in the light of the plain wording of the provision, the duty is imposed upon the accused. But in their oral submissions, in response to a question from the Bench, the Prosecution expanded the scope of that duty and argued that the provision imposes 'a two-fold duty'— i.e. on the accused and on the Chamber.

42. The Chamber finds that the plain wording of Article 63(1) and the Statute taken as a whole make the accused the subject of the duty in question. It is easy enough to see that in the plain wording of the provision—'[t]he *accused shall* be present during the trial.' [Emphases added.] As well, it should not be too difficult to appreciate that a holistic reading of the Statute also imposes the duty on the accused. One reason among many for this view is that such a duty is consonant with judicial control over the case being tried. Comprised in that judicial control is the need to continue to subject accused persons to the jurisdiction of the Trial Chamber during the course of the trial, especially when (a) the trial is prolonged, and (b) there are no other equally strong legal sources of such judicial control

for this particular international court, unlike in national jurisdictions where such sources of power may exist in different pieces of legislation, case law or customary law that guide the work of the courts or the police. Article 63(1) thus affords an unquestionable statutory basis for the Chamber to make impositions upon the time and whereabouts of the accused for purposes of the trial; such that the failure to comply with any resulting order of the Chamber may attract due sanctions and forfeitures against the accused upon a clear statutory basis.

43. Beyond this duty upon the accused, the Chamber is not persuaded that the provision also imposes an equivalent duty upon the Chamber. Such a view of the duty is neither apparent from the plain language of the provision nor from an appreciation of the Statute as a whole. First, from the perspective of plain language, the provision that says that the 'accused shall' be present during the trial does not implicate any apparent or implied restraint on the discretion of the Court to excuse the accused in a reasonable way from the duty imposed on him to be present during the trial. Had the drafter intended Article 63(1) to impose such a duty on the Trial Chamber, it would not have been too difficult for the provision to have been worded in the prohibitory model of either rule 60(A) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone[64] or s 92(1) of the Criminal Procedure (Scotland) Act of 1995 as amended,[65] each of which

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[64] Rule 60(A) of the SCSL Rules provides: '(A) *An accused may not be tried in his absence*, unless: (i) the accused has made his initial appearance, has been afforded the right to appear at his own trial, but refuses to do so, or (ii) the accused, having made his initial appearance, is at large and refuses to appear in court.' [Emphasis added.]

[65] Section 92(1) of the Criminal Procedure (Scotland) Act provides:

> (1) Without prejudice to section 54 of this Act, and subject to subsections (2) and (2A) below, *no part of a trial shall take place outwith the presence of the accused.'*
>
> (2) If during the course of his trial an accused so misconducts himself that in the view of the court a proper trial cannot take place unless he is removed, the court may order—
>
> > (a) that he is removed from the court for so long as his conduct makes it necessary; and
> >
> > (b) that the trial proceeds in his absence,
> >
> > but if he is not legally represented the court shall appoint a solicitor to represent his interests during such absence.
>
> (2A) If—

expresses itself in language that so clearly imposes a general restraint on the court against proceeding in the absence of the accused; by prohibiting the trial as an action the court alone can take, while exceptionally preserving the discretion of the court to proceed in the absence of the accused under certain conditions.

44. And, secondly, reading the Statute as a whole will similarly not support the view that the duty is upon the Chamber. For, such a conclusion is not entirely consistent with the idea (reviewed above) that the duty which Article 63(1) imposes upon the accused inures to the benefit of the Court itself for purposes of judicial control. Furthermore, an interpretation that imposes the duty on the Chamber will not only foster judicial inefficiency by constraining the Chamber to stop the trial on every occasion that the accused is unable with good reasons to be present during the trial although he consents that the trial may proceed in his absence (as was obviously the case in the *Bemba* trial); but it will also hold the Court hostage to impunity by negating the power of the Chamber to proceed with the trial of an accused who deliberately absconded from his own trial in circumstances that are precisely calculated to frustrate the trial and the course of justice. The outcome indicated in the latter scenario and the view that supports it are wholly detrimental to the overall purpose of the establishment of the Court. It plays into the hands of the very impunity that the Statute eschews so fundamentally.

45. Further, on the matter of the discretion to try absconding accused persons, it may be noted, in passing, that there was a brief debate at the hearing, on the question whether Article 63(1) had foreclosed in this Court the discretion to proceed with a trial in

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> (a) after evidence has been led which substantially implicates the accused in respect of the offence charged in the indictment or, where two or more offences are charged in the indictment, any of them, the accused fails to appear at the trial diet; and
> (b) the failure to appear occurred at a point in proceedings where the court is satisfied that it is in the interests of justice to do so,
> then the court may, on the motion of the prosecutor and after hearing the parties on the motion, proceed with the trial and dispose of the case in the absence of the accused. (Emphasis added.)

the absence of an absconding accused. Oddly enough, the Prosecution argued that the discretion was foreclosed, and the Ruto Defence argued that it was not. According to the Ruto Defence, the discretion remains with the Court to proceed with the trial of an accused who does 'a runner' after initially having submitted to the jurisdiction of the Court in an ongoing case.[66]

46. This Chamber remains to be convinced that the trial is foreclosed in this Court in the case of an accused who absconded from his own trial after having made appearances before the Court and accepted the Court's jurisdiction. This is all the more so when such an accused had made to the Court pledges of continued cooperation and appearance and been allowed to remain out of detention on summons to appear or judicial interim release. Apart from the strong string of practice and precedents at the national level that generally supports such trials, as seen below,[67] there is an equally strong and compelling recognition of such procedure in international law.[68] The Chamber is not convinced that the ICC Statute—read in its parts and as a whole—stands so distinctly against these national and international authorities as to compel the view that the discretion is foreclosed in this tribunal for purposes of trial of an accused who absconded from his trial following an

[66] ICC-01/09-01/11-T-23-Red-ENG, p 18.

[67] See the discussion under the subheading entitled 'Impact on How the Court is Perceived.'

[68] Some instances of this international recognition include the following: (1) in *Prosecutor v Nahimana, Barayagwiza and Ngeze*, the ICTR Appeals Chamber upheld the decision of the Trial Chamber in conducting the trial in the entire absence of Mr Barayagwiza who had refused to attend his own trial, while in detention at the United Nation Detention Facility in Arusha: *Nahimana* et al *v Prosecutor (Judgment)* 28 November 2007 [ICTR Appeals Chamber] paras 96—109; (2) in an oral decision on the record, delivered from the Bench on 2 April 2002, the ICTR TCIII decided in *Prosecutor v Bagosora* to proceed with the trial in the absence of the 'striking' accused: *Prosecutor v Bagosora et al*, Transcripts of proceedings of 2 April 2002, pp 58—59; (3) in May 2003, the ICTR adopted r 82*bis* that permitted trials in the absence of absconding accused who had put in initial appearance; (4) rule 60(A) of SCSL also permits it; notably in the *Nahimana* case, the ICTR Appeals Chamber cited the SCSL r 60 with approval, observing that it 'sheds light on the ... international practice' in relation to trials *in absentia*: *Nahimana, supra*, para 106; (5) a strong line of case law of ECtHR (including *Demebukov v Bulgaria*, Application No 68020/01, Judgment of 28 February 2008, para 45) also permits trials in absentia; (6) the UN Human Rights Committee permitted it in *Mbenge v Zaire*, Communication No 16/1977 of 25 March 1983, para 14.1; and (7) the UN Human Rights Committee also approved of the procedure in General Comment 13/21 of 12 April 1984 (UN Human Rights Committee), para 11.

earlier submission to the jurisdiction of the Court. That the discretion likely exists is even more compelling a conclusion where the absconding accused who had earlier submitted to the jurisdiction of the Court is a national of a State that is party to the ICC Statute; noting that it is a settled principle of international law that parties to a treaty must live up to its objectives, in good faith.[69] These considerations thus set apart the cases of suspects or accused who had neither submitted to the jurisdiction of the Court nor are nationals of State Parties to the ICC Statute: the Chamber does not suggest here that they, too, may be tried in their absence.

47. Returning now to the question whether Article 63(1) imposes a duty on the Trial Chamber, the better construction is one that respects and comfortably accommodates the general power of the Trial Chamber to do what is fair, reasonable and just, under Article 64(6)(f). In construing Article 63(1), mindful of its general power to do justice under Article 64(6)(f), the Chamber will read the Statute as a whole. In doing so, the Chamber will, as noted earlier, have due regard to Article 64(2) that requires the trial to be fair and expeditious and 'conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses'. What is called for then, for purposes of the present request, is an outcome that reflects a balance suitably calibrated to accommodate all the concerned interests.

48. In the circumstances of the present litigation, to have 'full respect for the rights of the accused' will necessarily begin with giving the minimum of a reasonable accommodation to the presumption of innocence that the accused enjoys under Article 66(1) of the Statute—also accepted as a 'right' under international human rights law, as noted earlier. To give it full effect in the circumstances now under consideration will require the Chamber to take the path of construction that will accommodate the natural incidence of that right, in a manner that is not unduly inconvenient to the overall purpose

[69] See article 26 of the Vienna Convention on the Law of Treaties.

of administering justice substantively in the case, having due regard for the concerns of victims and witnesses.

49. Bearing the foregoing in mind, the Chamber considers that the general rule as to presence, dictated by the duty on the accused to be present, is one of continuous presence at trial. In exceptional circumstances, however, the Chamber may exercise its discretion under Article 64(6)(f) of the Statute to excuse an accused, on a case-by-case basis, from continuous presence at trial. The exceptional circumstances that would make such excusal reasonable would include situations in which an accused person has important functions of an extraordinary dimension to perform. It will not be possible to prescribe a hard and fast template for the test. It will be for each Trial Chamber to appraise the situation according to its own judgement. But it suffices, for now, to venture the view that the functions that meet the test are not ones that many people are in a position to perform at the same time and in the same sphere of operation.

50. In the Chamber's consideration, the demands of the office of the executive vice president of a State may meet the requirements of the test, depending on what those functions are. For, few tasks are more important and extraordinary in their dimension as to have a principal role in the management of the affairs and destiny of a State and all its people, and their relationship with the world, for any period of time. How well or correctly a particular incumbent performs those functions is a separate question that should not encumber the need to permit that incumbent reasonable room in the first place to discharge those functions in the right way.

51. The Chamber finds that the functions of the Deputy President of Kenya would meet the test. Only one person at a time is constitutionally authorised to perform the functions of the Deputy President of Kenya during any presidential term of five years,[70]

[70] See the Constitution of Kenya (2010), s 148 generally, together with a 136(2)(a).

and those functions include the following: the Deputy President of Kenya is the principal assistant of the President and deputises for the President in the execution of the President's functions;[71] when the President is absent or is temporarily incapacitated, and during any other period that the President decides, the Deputy President shall, within certain limits, act as the President;[72] in the event of vacancy in the office of the President, the Deputy President shall assume office as President for the remainder of the term of the President;[73] and, the President and the Deputy President are the principal members of the National Executive of the Republic.[74]

52. In arriving at the correct outcome that depends on the interpretation of certain provisions of the Statute, it is particularly important to heed the wisdom of restraint when giving effect to the scope of a statutory provision, especially in view of existing law and competing considerations. Such a restrained view of interpretation was expressed as follows in a classic work on statutory interpretation: 'Sometimes, to keep the Act within the limits of its scope, and not to disturb the existing law beyond what the object requires, it is construed as operative between certain persons, or in certain circumstances, or for certain purposes only, even though the language expresses no such circumscription of the field of operation.'[75] An example was given of the operation of a piece of legislation on diplomatic privileges, which rendered null and void all processes undertaken to arrest an ambassador or seize their goods. The relevant provision was held not to extend beyond what might be necessary for the protection of the rank, duties and religion of the ambassador. No protection under the statue was recognised for an ambassador's servant who was tenant in a house, but rented out part of it: as a 'house of that character not being absolutely necessary for the servant's residence, to extend the operation of the Act to such

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[71] Ibid, s 147(1).
[72] Ibid, s 147(3).
[73] Ibid, s 146(2)(a).
[74] Ibid, s 130(1).
[75] P St J Langan, *Maxwell on The Interpretation of Statutes*, 12th edn [London: Sweet & Maxwell, 1969] p 109.

a case would have been to cover ground foreign to its scope.'[76] The requirement to keep written law within reasonable limits of its own provisions, particularly as circumscribed by general law, is not an idea peculiar to national law. It is also a recognised policy in treaty interpretation.[77]

53. In the end, the Chamber considers that the purpose of Article 63(1) is to ensure that a Trial Chamber will maintain judicial control over the accused, from the perspective of making impositions on his time and whereabouts, for purposes of effective inquiry into his individual responsibility for the crimes as charged. It is neither reasonable nor necessary to interpret the provision in a manner that eliminates the discretion of the Trial Chamber reasonably to permit the accused to carry out his duties as his country's executive Deputy Head of State who, as an accused, remains fully subject to the jurisdiction of the Court for purposes of the inquiry into his individual criminal responsibility under the Court's Statute.

(c) *Expressio unius est exclusio alterius*

54. It is, perhaps, necessary to address at this juncture the question that often arises when a positive provision is made in any regard. That question is whether such a positive provision raises a negative implication that excludes other things not expressly accounted for in the positive provision. The applicable canon of statutory construction is usually expressed in the Latin maxim *expressio unius est exclusio alterius*. Indeed, the Prosecution had made submissions to that effect.

55. As indicated in the Prosecution's submissions, there are two provisions of the ICC Statute that raise that question. One is Article 63(2) that says: 'If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the

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[76] Ibid, pp 110—111.

[77] *The 'Kronprins Gustaf Adolf' (Sweden v USA), supra*, at pp 1262, 1280 and 1287. See also *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* (1949) ICJ Reports 174 at p 182.

accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.'

56. The other provision is Article 61(2), which says that a Pre-Trial Chamber may 'hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has: (a) Waived his or her right to be present; or (b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held'.

57. The *expressio unius* maxim may then tempt the conclusion that Articles 63(2) and 61(2) have exhausted the permissibility of conducting hearings in the absence of the accused or suspect, thus excluding by negative implication the permissibility of the circumstances in which the accused now requests excusal from continuous presence during his trial. Both the Prosecution and the Counsel for Victims make that argument.[78] For the reasons that follow, the Chamber finds that argument unpersuasive.

58. To begin with, it has been correctly observed that '[v]irtually all the authorities who discuss the negative implication canon emphasise that it must be applied with great caution …'.[79] One reason suggested for such 'great caution' is that the maxim's 'application depends so much on context'.[80] In that connection, the negative implication that the *expressio unius* maxim entails is necessarily weakened if there is an alternative purpose to the positive provision urged as indicating an exclusion of something else not mentioned. As Lord Justice Jenkins usefully observed, the *exclusio* maxim 'has little, if any, weight

[78] ICC-01/09-01/11-T-22-Red-ENG, p 36; ICC-01/09-01/11-T-23-Red-ENG, p 15.
[79] See Antonin Scalia and Bryan Garner, *Reading Law: The Interpretation of Legal Texts* [St Paul, MN: West 2012] p 107.
[80] Ibid.

where it is possible ... to account for the *inclusio unius* on grounds other than an intention to effect the *exclusio alterius*.'[81]

59. Article 63(2) is unique and particular in its context; and it has a purpose that is not inevitably explained by a legislative intention to exclude a Trial Chamber's power to grant permission to an accused to be absent from his own trial. The primary purpose of Article 63(2) is to grant to the Trial Chamber the power to (positively) prevent the accused from exercising what is also a right (the right to presence), when the accused insists on exercising that right in a disruptive way. That unique context of a positive power to effect lawful *deprivation* of the right of the accused to presence at trial, by way of *enforced* absence against his will, does not, as such, implicate any intention on the part of the drafter to exhaust the circumstances in which a Trial Chamber may *permit* an accused at his own prayer to be absent during his trial.

60. Article 61(2) also has a unique context that sensibly circumscribes the remit of the provision. It deals with a hearing to *confirm* charges against a person who has not yet become an accused person. There is nothing remarkable in that scenario, if the Statute readily contemplates that the proceedings may be held in his absence, if he so chooses; considering that no judicial decision would as yet have confirmed as realistic the probability that he has a case to answer. In the absence of such a judicial decision, there would have been no appreciable juridical tether that tied the indictee to the Court and its processes in a substantial way. That context is therefore different, as compared to the *trial* of a person who is an accused person, by virtue of a solemn decision of a Pre-Trial Chamber, following an appraisal of some evidence establishing substantial grounds to believe that the accused committed the crime charged. That the Statute provides for the waiver of presence of a *suspect* while a confirmation hearing proceeds is therefore no convincing indication of any intention in the drafter to exclude the discretion in the Trial

[81] *Dean v Wiesengrund* (1955] 2 QB 120 [England Court of Appeal] at p 131.

Chamber, pursuant to Article 64(6)(f), to permit the accused to be absent from his trial in circumstances that the Chamber considers reasonable in the different context of a trial. To conflate the two contexts is to succumb to the fallacy of mixing up two different things, merely because they look somewhat alike.

61. Finally, there are other reasons, apart from context sensitivity, that 'great caution' has been sounded against too enthusiastic a resort to the *expressio unius* maxim. Notably, Lord Justice Lopes wrote in *Colquhoun v Brooks* that the maxim 'is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The *exclusio* is often the result of inadvertence or accident, and the maxim ought not to be applied when its application, having regard to the subject matter to which it is to be applied, leads to *inconsistency or injustice.* [¶] I think a rigid observance of the maxim in this case would make other provisions of the statute *inconsistent and absurd*, and result in injustice. I cannot, therefore, permit it to govern my decision.'[82] And in *Re Newspaper Proprietor's Agreement*, Russell J declined to apply the maxim because it 'would produce a wholly irrational situation' in the particular circumstances.[83] On appeal to the House of Lords, Lord Reid agreed, as indicated above.[84] Lord Justice Jenkins once declined to apply the maxim where it would have led to a 'capricious ... operation' of the statute under consideration.[85]

62. As is clear from the reasons indicated in this decision, these observations have an obvious bearing in the context of the matter now before the Chamber. The Chamber is thus not persuaded that the *expressio unius* maxim is a safe guide to the right decision in the present case.

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[82] *Colquhoun v Brooks* (1888) 21 QBD 52 [England Court of Appeal] at p 65 (emphasis added).
[83] *Re Newspaper Proprietor's Agreement* [1962] 1 WLR 328 [England Restrictive Practices Court] at p 335.
[84] *Re Newspaper Proprietor's Agreement* [1964] 1 WLR 31 [House of Lords] at p 38.
[85] See *Dean v Wiesengrund, supra*, p 131.

63. The Chamber will next consider the significance of Article 27 of the Statute in the circumstances of this application.

(3) *The Significance of Article 27*

64. In this application, another statutory bone of contention prominently canvassed by Counsel on all sides is Article 27(1). It says:

> This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

65. The first sentence of the provision—i.e. that the Statute 'shall apply equally to all persons without any distinction based on official capacity'—necessarily provokes the question whether the accused's request for excusal from the duty to be present during the trial may be properly granted to him on the grounds that he requires the indulgence in order to permit him to perform the duties of his office as Deputy President of Kenya.

66. The correct answer to the question will begin with an appreciation of the object of the provision, notwithstanding isolated words and phrases employed to effectuate it. The Chamber is of the view that the main aim of Article 27(1) is to align the ICC Statute with the contemporary norm of international law according to which public officials are no longer entitled to immunity for violation of international criminal law. Notably, some of the more highly qualified legal publicists appear to be of the same view.[86]

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[86] See the International Law Commission, *Report of the International Law Commission on the work of its fifty-third session* (23 April-1 June and 2 July-10 August 2001), Official Records of the General Assembly, Fifty-sixth session, Supplement No 10 (A/56/10) p 364, footnote 886. See also Otto Triffterer in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn [Munich: Beck, 2008] p 785; Kai Ambos, *Treatise on International Criminal Law*, vol I [Oxford: OUP, 2013] p 414. Notably, Professor Schabas observes that the opening wording of the provision 'is original and intriguing', fair and consistent with article 14 of the International Covenant on Civil and Political Rights: William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* [Oxford: OUP, 2010] pp 447—449.

67. It used to be the case that public office shrouded the holder with blanket immunity from prosecution, particularly if it was established that the impugned act or omission was committed in an official capacity. But that immunity became an ironic casualty to the atrocities of World War II. Beginning with the Nuremberg Charter, the norm of immunity was revised in favour of jurisdiction of international courts to try Heads of State and other senior public officials, for violation of international criminal law. It all began with article 7 of the Nuremberg Charter that provided as follows: 'The official position of defendants, whether as heads of state, or responsible officials in government departments, shall not be considered as freeing them from responsibility, or mitigating punishment.' The correctness of that provision was confirmed by the Nuremberg Tribunal in the following classic pronouncement:

> It was submitted that international law is concerned with the actions of sovereign states and provides no punishment for individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the state. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon states has long been recognized. ... [I]ndividuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced. ... The principle of international law which, under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.[87]

68. The International Law Commission subsequently endorsed the resulting norm in 1950 as Principle III in the 'Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal'. According to the principle: 'The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not

[87] Judgment of the International Military Tribunal at Nuremberg, 30 September 1946, pp 464—465.

relieve him from responsibility under international law.'[88] By the early 1990s, the norm was thus so sufficiently settled in international law as to be incorporated into the statutes of both the ICTY and the ICTR, when they were adopted by the UN Security Council in 1993 and 1994 respectively.[89] So, too, in the Statute of the Special Court for Sierra Leone.[90]

69. It is the incorporation of the same principle that is the chief object of Article 27(1) of the ICC Statute. The central principle captured in Article 27 then is that the official position of the accused does not shield him against the jurisdiction of the Court for purposes of inquiring into his or her own individual criminal responsibility for crimes proscribed in the Statute. Indeed, the struggle against impunity for crimes that shock the conscience of humanity, being the *raison d'être* of the ICC, is a hopelessly lost cause without that cardinal principle of modern international criminal law.

70. In the circumstances, the Chamber is satisfied that Article 27 is mainly intended to accomplish (i) the (now usual) removal of immunity from jurisdiction on grounds of official position; and (ii) the removal of any special immunity or procedure that impedes effective exercise of jurisdiction of the Court over a public office holder in relation to his individual criminal responsibility.

71. The object of Article 27 is not to remove from the Trial Chamber all discretion to excuse an accused from continuous presence in an ongoing trial, when the excusal is recommended by the functions implicit in the office that he or she occupies. Hence, the Chamber does not consider that the object of Article 27 is offended or wholly defeated,

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[88] *Report of the International Law Commission on its Second Session* (5 June to 29 July 1950), Official Records of the General Assembly, Fifth session, Supplement No 12 (A/1316), p 375.

[89] Article 7(2) of the ICTY Statute provides: 'The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.' An identical provision appears in article 6(2) of the ICTR Statute.

[90] According to the Statute of the Special Court for Sierra Leone: 'The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment': article 6(2).

merely by allowing Mr Ruto to be excused from continuous presence at his trial in order to permit him to carry out the essential functions of the Deputy President of Kenya, subject to certain conditions of such excusal. But, the Chamber must stress here that any indulgence allowed Mr Ruto in this regard is purely a matter of accommodation of the demanding *functions* of his office as Deputy Head of State of Kenya, and not merely the gratification of the dignity of his own occupation of that office.

(4) Impact on How the Court is Perceived

72. As part of their submissions opposing the application, the Prosecution had argued, among other things, that allowing the accused to be absent from his trial, according to the Defence request, will have an 'extremely negative impact on how the Court is perceived'. That argument was made in writing and repeated in oral submissions.

73. The Prosecution's argument may be safely rejected for a number of reasons. First, it is an unpersuasive hyperbole with no hint of empirical support. As such, it is hardly a convincing reason to reject the Defence application. Second, one reason for the improbability of that argument is that the Statute itself permits an indictee to be absent from hearings to confirm charges against him.[91] Purely as a matter of *perceptions*, it is difficult to see how excusal from continuous presence at trial will have an 'extremely negative impact on how the Court is perceived,' when such an excusal is already permitted during the confirmation hearings. Third, the Prosecution's efforts to overcome that dilemma did not improve the persuasive quality of the original proposition. They asserted the proposition that there would be no impact on how the Court is perceived if the accused were permitted to be absent from the charges confirmation hearing, because that stage is different from the trial stage where the witnesses and victims would come to the courtroom to tell their story. It is difficult to see how that explanation anchors the

[91] See Article 61(2) of the Statute.

difference in how the Court is perceived, considering that witnesses who go to court go there to tell the 'their story' to the judges who are there to hear the witnesses and victims for purposes of deciding whether or not the accused is guilty as charged and for sentencing and reparation. It is not clear how it could be that the presence of the accused in court to hear the witnesses tell their story would make material difference to the judgment of the Court. To be kept in mind also in this regard are the many instances in which protection of vulnerable witnesses and victims generates some pressure to maintain anonymity of victims and witnesses and keep them from interfacing with the accused. It is the logic of that pressure that has resulted in the practice of redaction of statements of witnesses in Prosecution's disclosure to the accused, together with the prosecutorial inclination to delay revelation of the identity of witness to the accused for as long as possible before the dates of their testimony. There is thus an inversion of intuition in the argument that insists upon a negative impact on the image of the Court if witnesses do not see the accused person in the courtroom when they come to testify.

74. And, finally, the matter may also be considered from the perspective of how the court is perceived in criminal justice systems that permit trials to proceed in the absence of the accused. Notably, the doctrine of *semel praesens semper praesens* is not known to have had an extremely negative impact on how the Italian criminal justice system is perceived. According to that principle, a trial of an accused person may proceed in his absence if he had appeared at the commencement of the trial, provided he is represented by defence counsel. [92] There is truly no difference in principle between what that doctrine contemplates and what the Defence of Mr Ruto is seeking in this case.

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[92] According to article 488 of the Italian Criminal Procedure Code: '*(1) Le disposizioni degli articoli 486 e 487 non si applicano quando l'imputato, anche se impedito, chiede o consente che il dibattimento avvenga in sua assenza o, se detenuto, rifiuta di assistervi.L'imputato in tali casi è rappresentato dal difensore. (2) L'imputato che, dopo essere comparso, si allontana dall'aula di udienza è considerato presente ed è rappresentato dal difensore. (3) Le disposizioni del comma 2 si applicano anche quando l'imputato detenuto evade in qualsiasi momento del dibattimento ovvero durante gli intervalli di esso.*'

75. Beyond the example of Italy, there is no evidence that conducting trials in the absence of the accused have had an 'extremely negative impact on how the Court is perceived' in the many other national criminal law systems that permit trials in the absence of accused persons who abscond from their own trials.[93] It is often mistakenly supposed that such trials are something peculiar to only civil law systems. But nothing is further from the truth. The discretion of the court to conduct trials in the absence of absconding accused is also a firmly established feature of common law systems. The case laws of England and Wales,[94] New Zealand[95] and South Australia[96] have established that a criminal court has discretion to commence or proceed with the trial of an absconding accused. In the United States, it has been accepted that the discretion exists to continue a trial where the accused absconds after the commencement of the trial.[97] But, until the US Supreme Court ruled in *Crosby v United States* to confine the discretion—in the federal courts—to cases of absconding after commencement of trial,[98] some federal and state appellate courts had held that the discretion similarly existed to commence a trial of an absconding accused, insisting that they did 'not perceive any talismanic properties which

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[93] See also Article 366 of the Swiss Criminal Procedure Code.

[94] See *R v Jones (Anthony)* [2002] UKHL 5 [House of Lords].

[95] See *R v Paraku* [2002] DCR 699, *R v Sthmer* (17 June 2003) HC WN T064/01, *R v Williams* (10 September 2004) HC AK CRI 2003-404-025445, *R v McFall* (7 April 2005) HC HN CRI 2004-019-20514, *R v Guo and Hui* (22 February 2006) HC AK CRI 2004-004-18566, and *R v Dunn* (4 June 2008) HC AK CRI 2008-404-000076. According to the Law Commission of New Zealand: 'Since at least the mid-1980s, New Zealand courts have been willing to exercise their discretion to commence or continue a trial in an accused's absence. In that sense, while the House of Lords' decision in Jones provided the courts with additional and useful guidance, it did not lead to a significant change in the approach the courts were already beginning to take': Law Commission of New Zealand, 'Discussion Document: Proceeding in the Absence of the Defendant' (May 2009), para 28.

[96] Recently, in *R v Gee*, the Supreme Court of South Australia sitting in full court as the Court of Criminal Appeal followed it, by a majority, in rendering an affirmative answer to the question: 'whether the common law of Australia allows for the trial of a defendant to commence and continue to verdict in their absence': *R v Gee* [2012] SASCFC 86.

[97] *Crosby v United States*, 506 US 255 (1993) 255 [US Supreme Court], interpreting rule 43 of US Federal Rules of Criminal Procedure.

[98] See ibid.

differentiate[d] the commencement of a trial from later stages'.[99] In Canada, s 475(1) of the Criminal Code peremptorily imputes a waiver against an accused who absconds after the commencement of the trial, in which event the court may continue with the trial. And, in Scotland, the court is permitted to proceed if: '(a) after evidence has been led which substantially implicates the accused in respect of the offence charged in the indictment or, where two or more offences are charged in the indictment, any of them, the accused fails to appear at the trial diet; and (b) the failure to appear occurred at a point in proceedings where the court is satisfied that it is in the interests of justice to do so'.[100]

76. At the international level, it is notable that the trial of Jean-Bosco Barayagwiza was conducted by an ICTR Trial Chamber entirely in the absence of the accused who had refused to be present for his own trial. Having proceeding in that manner is not known to have had an 'extremely negative impact on how the [ICTR] is perceived'. Also to be noted is that rule 60(A) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone permits a trial to proceed in the absence of the accused who has made an initial appearance before the Court.

77. For the foregoing reasons and the further reasons more fully explored later in this Decision, the Chamber is also not persuaded by the arguments voiced against the Defence's request to the effect that the excusal of Mr Ruto from continuous presence during the trial will have a negative impact on the integrity of the proceedings. These concerns should be adequately addressed by a regime of carefully considered conditions of any excusal that may be granted.

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[99] *Government of Virgin Islands v Brown*, 507 F 2d 186 (1975) [US CA, 3rd Cir]. See also *United States v Peterson* et al, 524 F 2d 167 (1975) [US CA, 4th Cir] p 184; *State v Goldsmith*, 542 P 2d 1098 (1975) [Arizona Supreme Court]; *State v LaBelle*, 568 P 2d 808 (1977) [Washington Court of Appeals, 1st Div]; *United States v Powell*, 611 F 2d 41 (1979) [US Court of Appeal, 4th Cir]; *People v Sanchez*, 65 NY 2d 436 (1985) [NY Court of Appeals]. But, for federal cases, this line of federal appellate authorities was overruled by the US Supreme Court in *Crosby v United States, supra*, for purposes of application of rule 43 of US Federal Rules of Criminal Procedure in its own terms.

[100] See Section 92(2A) of the Criminal Procedure (Scotland) Act 1995, as amended.

78. The foregoing considerations amply support the conditional grant of the Defence's request. But, it is also possible to support the Decision on the basis of the alternative reasons considered next.

C. FURTHER CONSIDERATIONS FOR EXCUSAL

79. In addition to the result dictated by construing the Statute in its own terms, which is sufficient in itself to resolve the matter before the Chamber, it is also possible to pay heed to the command of article 31(3)(c) of the Vienna Convention on the Law of Treaties, which requires that account be taken of such relevant rules of international law as may be applicable. Of particular interest is international law's recognition of democracy when not held up as a shield against inquiries into individual criminal responsibility of elected public officers.

80. The reasoning in this respect requires a constant and direct view of the fact that the task now before the Chamber is how to deal with the unusual situation in which an earlier reality of the prosecution of an accused person in his individual capacity collides with the later reality that the same person has in the meantime become the incumbent Deputy President of his country, in the purview of a settled principle of international law that recognises no immunity before this Court on grounds of official capacity. In considering the novel question presented, inspiration may be derived from the following words of the International Court of Justice when once it had to answer a novel question: 'The Court is here faced with a new situation. The questions to which it gives rise can only be solved by realizing that the situation is dominated by the provisions of the Charter considered in the light of the principles of international law.'[101] What is needed generally to adapt that quote to the matter now before the Chamber is to substitute the word 'Charter' in that quote with 'Statute'.

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[101] *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion), supra*, at p 182.

(1) Bona Fide Accommodation of Democracy within the Rule of Law

81. To begin with, it is not necessary, in light of the peculiar circumstances of this case, to yield to any view of a tension between the processes of this Court and the Kenyan presidential election result of 2013. For, such perceptions of a tension betray a flattened view of the law. It may be observed, as a starting proposition, that the absence of the normative tension is sufficiently clear from the very terms of the Constitution of Kenya (2010). It grants immunity to 'the President or a person performing the functions of that office' during their term in office.[102] This apparently suggests that 'the President or a person performing the functions of that office' may not be tried in the Courts of Kenya. That being the case, the one functioning court that the Constitution of Kenya appears currently and immediately to recognise as having lawful powers to try 'the President or a person performing the functions of that office' is the International Criminal Court. This is because the Constitution of Kenya specifically provides in s 143(4) that the immunity that even the President ordinarily enjoys from criminal proceedings 'shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is a party and which prohibits such immunity'. A well-known treaty that primarily comes to mind in the context of that provision is the ICC Statute under which the accused is now being prosecuted. It prohibits such immunity in the following provision appearing in Article 27(1): '[O]fficial capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.'

[102] Section 143(1) of the Constitution of Kenya provides: 'Criminal proceedings shall not be instituted or continued in any court against the President or a person performing the functions of that office, during their tenure of office.'

82. Thus, it is eminently clear that the Constitution of Kenya and the ICC Statute are perfectly in harmony in their agreement that Mr Ruto must stand trial, as charged, even though he is the Deputy President of Kenya. The one court that has been established, fully equipped and tested precisely for the purpose of conducting such trials is the ICC. And, its process is well under way in relation to Mr Ruto.

83. It is clearly for that reason that the Attorney General of Kenya, Dr Githu Muigai SC, representing the Government of Kenya, recently submitted in a filing before the Chamber that 'the ICC [is] part of the judicial system of [Kenya]'; and according to him, 'the [ICC] Prosecutor has a constitutional right to deal with crimes committed in Kenya'. As he put it in reference to the Constitution of Kenya (2010):

> The new Constitution incorporates all international treaties ratified by Kenya as part of the country's laws, including the Rome statute to which Kenya is a signatory. After promulgation of the new constitution the ICC became part of the judicial system of our country, and therefore the Prosecutor has a constitutional right to deal with crimes committed in Kenya.[103]

84. Given the clarity and ease with which the Constitution of Kenya accommodates the rule of law within its pages, and the need for Kenyan democracy truly to respect the rule of law that is represented by the processes of this Court, pursuant to that constitutional imperative in particular, the question is whether it is *legally* impossible for the processes of this Court to accommodate in a reasonable way the incidence of the national election that brought the accused into office as the Deputy President of Kenya.

85. The request under consideration thus presents an opportunity to consider how international law appears to accommodate the democratic processes of public office elections within States; within the compass, of course, of the settled legal norm that has

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[103] Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, or, in the alternative, Application for Leave to file Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence, filed on 8 April 2013 and notified on 9 April 2013, ICC-01/09-01/11-670, para 36.

abolished immunity for Heads of State and public officials in the realms of international criminal law.

86. The late Professor Thomas Franck provided a useful account of the way in which international law accommodates democracy.[104] The outlines of the phenomenon that he described include the following components: the right to self-determination, the right of free political expression, and the right to participatory electoral process. They 'creat[e] the opportunity for all persons to assume responsibility for shaping the kind of civil society in which they live and work'.[105] Although the discussion could also dwell on the right to expression for purposes of tracing the connection of these components to the main frame of international law, the picture will become sufficiently clear upon a closer look at the first and third rights.

87. The emanations of self-determination include 'the right of a people organized in an established territory to determine its collective political destiny in a democratic fashion ...'.[106] The idea of self-determination means much more than that, of course; but the stated proposition is sufficient for present purposes. The sources of the notion of self-determination, for purposes of international law and policy are especially traceable to article 1(2) and article 55 of the UN Charter,[107] as well as article 1 of the International Covenant on Civil and Political Rights.[108]

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[104] Thomas M Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46.

[105] Ibid, p 79.

[106] Ibid, p 52.

[107] In this regard, the UN Charter provides as follows: 'The purposes of the United Nations are...To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace' (article 1(2)); and '...conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples ...'. (article 55).

[108] Article 1(1) of the ICCPR provides: 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

88. The right to participatory electoral process is self-evident in its import. Its sources in international law include the Universal Declaration of Human Rights that provides as follows: 'Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.'[109] As well: 'The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.'[110] Provisions to the same effect appear in the International Covenant on Civil and Political Rights.[111]

89. Naturally, international law's recognition of all these democratic rights of persons and peoples comes with the concomitant presumption that the result of their exercise ought also to be accorded recognition and given effect in international law.

90. But all these considerations are readily accommodated within the same edifice of the law that also houses the requirement for proper judicial inquiry (and its resulting outcome) into the criminal responsibility of a particular accused regardless of official position. Perhaps, a stark demonstration of the point comes in the general legal phenomenon that a citizen's right to freedom of movement is never known to shield him from a prison sentence upon conviction for a criminal conduct. The same legal phenomenon makes it possible for the incidence of democracy to co-exist with the incidence of proper inquiry into questions of criminal responsibility of an elected official facing charges of violation of norms of international criminal law, particularly pursuant to the ICC Statute. But beyond that consideration, the overriding influence of *jus cogens* must also be kept highly in the mind. These are the norms of international law that must operate notwithstanding the incidence of other norms of international law that do not similarly enjoy the stature of *jus cogens*. It is generally agreed that the interdiction of crimes against

[109] The Universal Declaration of Human Rights, article 21(1).
[110] Ibid, article 21(3).
[111] See International Covenant on Civil and Political Rights, article 25.

humanity enjoys the stature of *jus cogens*. In contrast, democracy as an international legal norm has not, so far, been known to enjoy the *jus cogens* status. Hence, in the event of any perceived conflict between the two norms, considerations of democracy must yield to the need to conduct proper inquiry into criminal responsibility of an elected official for crimes against humanity. This must be so: lest the majority of a given *polis* hold up democracy as a valid argument against proper inquiry into allegations of genocide or extermination committed against a socially or politically inconvenient minority group.

(2) International Law and Special Accommodation for Senior Officials Performing Functions on Behalf of their States

91. Also centrally provoked in this application is the question concerning the accommodation that international law permits Heads of State and Governments and senior state officials. The chief object of such accommodation is to protect the individual concerned against any act which would unduly hinder him or her in the performance of his or her duties on behalf of his or her State. It is for that reason that such officials are granted immunity from the criminal or civil processes of other States.[112] The immunity accrues to such officials, as a matter of customary international law; and, it is 'not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States'.[113] That is to say, the beneficial interest in the immunity is the State of the office-holder, though the office-holder is the direct locus of the legal interest in the immunity. The aspect of international law that generated the legal norms in this regard is the aspect that deals with diplomacy which has been described as 'an ancient institution and international legal provisions governing its manifestations are the result of centuries of state practice.'[114] The special immunities that such rules have traditionally

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[112] See the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, ICJ Reports (2002) 3, para 54; Antonio Cassese, *International Criminal Law*, 2nd edn [Oxford: OUP, 2008] p 310.
[113] *Arrest Warrant Case, supra*, para 53.
[114] See Malcolm Shaw, *International Law*, 6th edn [Cambridge: CUP, 2008] p 751.

maintained are 'an essential requirement of an international system' and a matter of 'practical convenience.'[115] The analogous value of these legal norms cannot be wholly ignored in the matter now before the Chamber.

92. But, as already seen, this is not at all to say that any accused enjoys immunity from the jurisdiction of this Court. Quite to the contrary, it is now firmly settled that accommodations to office holders no longer may go so far as to permit such officials immunity from the jurisdictions of international criminal courts.[116] And, notably, the Defence in this case do not urge the Chamber to grant such immunity. They urge, rather, for a balanced approach by virtue of which the Court will continue to exercise the jurisdiction to inquire into the criminal responsibility of the accused, while still permitting him to continue to perform his functions of state as the executive vice-president of his country.

93. But, the Prosecution's and Victims' Counsel's opposition of the Defence's request necessarily engages the question whether the incidence of jurisdiction in international courts to try such officials necessarily also comes with it the complete erasure of all aspects of the accommodation that international law has, as 'the result of centuries of state practice', traditionally recognised for senior state officials, inuring to the benefit of their States, for purposes of protecting the office-holders from undue hindrance in the performance of their functions of state. And, is that the case, notwithstanding that the recognition of any such accommodation may not, in particular cases, detract from the ability of an international criminal court to exercise its jurisdiction to conduct the necessary inquiry into the individual criminal responsibility of the given official? The answer to these questions will depend upon the construction to be given to the relevant provisions of the ICC Statute, as was done in the first part of these reasons.

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[115] Ibid.

[116] See the *Arrest Warrant Case, supra,* para 61.

94. In that connection, a particular provision to be considered, once more, is Article 27. As was seen earlier, the pith and substance of that provision is that the official position of the accused affords him no immunity against the jurisdiction of the Court for purposes of inquiring into his or her own individual criminal responsibility for crimes proscribed in the Statute.

95. But, there is no reason to over-task the principle captured in Article 27, especially in a manner that places it on a needless collision course with other valid norms of international law. That will be the case if Article 27 is applied in a manner that denies the citizens of a State the dividends of their democratic entitlement to elect whom they want into the executive presidency of their country, when such an entitlement was not corrupted by proof of guilt of the candidate, as such.

96. In that regard, the Chamber is mindful of the Victims' Counsel's objection to the Defence request on grounds that its intended beneficiary chose to run for election for the office of Deputy President of Kenya fully aware that he had to stand trial for the charges outstanding against him. In other words, Mr Ruto created the dilemma from which he now seeks reprieve. That objection attracts much visceral sympathy. But the law is not with it in the particular circumstances of the present case. The principle in the maxim *ex turpi causa non oritur actio* does not apply when there is no *turpi*. That is to say, it is not easily sustained as a valid legal proposition that a person charged with a crime may neither run for public office nor be elected as such, even as he enjoys the presumption of innocence until found guilty beyond a reasonable doubt by a court of law properly exercising jurisdiction. Such a proposition requires a clear and solid basis in the law. The Chamber is unaware of any norm of international law that supports such a bar. Whether such a legal prohibition exists in domestic law is a matter within its sphere of regulation. But, any vacuum in domestic law in the relevant respect may not readily be filled by a similar void in international law.

97. Hence, to apply Article 27 in a manner that eliminates all the legitimate interests outlined above, notwithstanding that they do not truly threaten the undisputed jurisdiction of the Court to continue with the inquiry into the individual criminal responsibility of the accused, becomes inconsistent with the traditional views of justice correctly observed 'as maintaining or restoring a *balance* or *proportion*'.[117]

98. In this connection, a particularly important interest engaged in this litigation involves the traditional concern of international law to avoid undue hindrance of Heads of State and senior state officials in their performance of legitimate functions on behalf of their states. Perhaps, the clearest indication that Article 27 may not have been aimed at nullifying the traditional rules of international law in this regard is evident in Article 27(2). It does not proclaim the abolishment of all 'immunities and special procedures' that attached to official capacity under national or international law. The concern of Article 27(2), rather, is that such immunities and special procedures 'shall not bar the Court from exercising its jurisdiction over such a person'. It is particularly for this reason that it is doubtful that the opening wording of Article 27(1)—i.e. that the Statute shall apply 'equally to all persons without any distinction based on official capacity'—signals legislative intention to eliminate all procedural indulgences that are sensitive to the functional reasons that customary international law recognised immunities for Heads of State and senior state officials; notwithstanding that any such indulgence poses no real obstacle to the Court's exercise of jurisdiction to inquire into the individual criminal responsibility of the office holder.

99. The Chamber is thus not persuaded that the provision was intended to exclude the discretion to permit special procedures that do not impede such effective exercise of jurisdiction by the Court.

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[117] See H L A Hart, *The Concept of Law*, 3rd edn [Oxford: OUP, 2012] p 159, emphasis received.

(3) Reconciling article 31(3)(c) of the Vienna Convention on the Law od Treaties and Article 21 of the ICC Statute

100. The Chamber's reasoning in this part places obvious store in the provision of article 31(3)(c) of the Vienna Convention on the Law of Treaties that requires an interpreter of a treaty to have regard to other aspects of international law that have a bearing on the matter at hand.

101. When the ICC Statute is interpreted as a part of the broader international law, in accordance with article 31(3)(c) of the Vienna Convention, in any manner that may have the effect of limiting the scope of particular provisions of the Statute, the question reasonably arises as regards the implications of Article 21(1) of the ICC Statute, which specifies that the ICC Statute, the Rules of Procedure and Evidence, and the Elements of Crimes, shall be applied in the first place. And, that general international law shall be applied in the second place. Is there a conflict, then, between article 31(3)(c) of the Vienna Convention and Article 21(1) of the ICC Statute? In the Chamber's view, there is no conflict. Article 21(1) of the ICC Statute is consistent with how legislative provisions operate in relation to existing or general law. Simply put, the approach is this: existing or general law always governs, until the legislature introduces new legislation that indicates a clear intention to amend existing or general law according to the terms of the new legislation. The new legislation will have to be interpreted as a whole, of course, in order to determine both the proper scope of particular provisions *inter se*, as well as the proper scope of the new legislation itself in the sense of how the legislature indicated any proven intention to vary existing or general law. Article 21(1) of the ICC Statute is not antagonistic to that approach.

102. Nor does article 31(3)(c) of the Vienna Convention stand in opposition to the approach indicated above. In particular, it does not say that a treaty must be given a

subservient standing relative to broader international law. All that article 31(3)(c) does is require the interpreter to keep broader international law in view, in order to determine both the question whether the drafter of the particular treaty has truly indicated an intention to displace applicable broader international law in a particular respect, as well as the true scope of any such displacement according to the proven intention revealed in the particular treaty. It is a sensible provision that preserves the unity and intrinsic integrity of international law in its various respects. It is an approach that prevents undue haphazardness in the development of international law.

D. CONDITIONS OF EXCUSAL

103. In light of the two independent strands of reasons considered above, the Chamber is persuaded that it is reasonable to grant the request made by the Ruto Defence, with the conditions indicated below. Such a conditional grant of the request is the best way to strike the 'balance that protects all the different competing concerns.'[118]

104. The outcome of this litigation hinges upon the recognition that presence of the accused during the trial is not only a right (by virtue of Article 67(1)(d)), but also a duty on the accused (by virtue of Article 63(1)). From the perspective of the imperatives of judicial control, the presence of the accused as a question of his duty establishes the default position. But reading the Statute as a whole and taking into account, in its interpretation and application, the general body of international law, of which the Statute forms a part, there remains a residue of discretion in the Trial Chamber to permit reasonable exceptions to that default position. This is to be done on a case-by-case basis. And it requires the balancing of all the interests concerned. Hence, the Chamber's grant of the Defence's request for Mr Ruto's excusal from continuous presence during the trial is an exception to the general rule. The general rule remains that Mr Ruto must be present in the courtroom

[118] ICC-01/09-01/11-T-22-Red-ENG, p 7.

during the trial. In the unique and particular circumstances of this case, the aim of that general rule is sufficiently met by the regime of presence that the Chamber now directs. It is set out below:

a. Mr Ruto must be physically present in the courtroom for the following hearings:

   i. the entirety of the opening statements of all parties and participants;
   ii. the entirety of the closing statements of all parties and participants;
   iii. when victims present their views and concerns in person;
   iv. the entirety of the delivery of judgment in the case;
   v. the entirety of the sentencing hearings (if applicable);
   vi. the entirety of the sentencing (if applicable);
   vii. the entirety of the victim impact hearings (if applicable);
   viii. the entirety of the reparation hearings (if applicable); and
   ix. any other attendance directed by the Chamber.

b. Mr Ruto is excused from continued presence at other times during the trial. The excusal is strictly for purposes of accommodating his discharge of duties as the Deputy President of Kenya. The resulting absence from the trial must therefore always be seen to be directed towards performance of those duties of state.

c. In view of the waiver of the right to presence that Defence Counsel have stipulated on the record on behalf of Mr Ruto, the Chamber further requires the Ruto Defence to file with the Registry no later than one day after expiry of Request for leave to appeal a waiver signed by Mr Ruto in his own hands, in the form attached as annex to this Decision.

105. Violation of any of these conditions of excusal may result in the revocation of the excusal and/or the issuance of an arrest warrant as appropriate.

106. This decision and its conditions may, from time to time, be reviewed by the Chamber, of its own motion or at the request of any party or participant.

E. WITNESS INTIMIDATION OR INTERFERENCE

107. As a final and equally important matter, the Chamber notes that this Decision has been motivated in part by Article 64(2) of the ICC Statute, which requires the Trial Chamber to ensure that the 'trial is fair and expeditious and is conducted with full respect to the rights of the accused and due regard for the protection of victims and witnesses.' It is obvious that the decision has thus far concentrated on that part that concerns 'full respect to the rights of the accused.' But due regard for the protection of victims and witnesses also warrants serious consideration.

108. In the course of this case, the Prosecution has repeatedly made allegations of witness and victim intimidation and interference. It is understood that those allegations are under investigation by the Prosecution, in order to ascertain the culprits. Notwithstanding the question whether these investigations do ultimately implicate Mr Ruto or not, it is a matter of interest that in his address to the Chamber on 14 May 2013, he pledged in his own words a commitment to ensuring cooperation with this Court and its judicial process against him. He made that pledge apparently in his capacity both as an accused and as the Deputy President of Kenya, in light of his declared belief in the rule of law that the processes of this Court represent. It is an important pledge. But it requires palpable actions in good faith on the part of Mr Ruto. Fine words are not enough. Necessarily coming within that pledge are effective actions that Mr Ruto takes in good faith as the Deputy President of Kenya to ensure that witnesses and victims are not intimidated. Desirable actions in that connection should include impressing upon his

supporters—regardless of his own awareness of their actual links to him—the need to refrain from any conduct or utterance that may reasonably create intimidating or harassing atmosphere for victims and witnesses. Salutary actions in that regard may have obvious benefits in mitigation of sentence, were the Prosecution to succeed in establishing guilt in the end at the requisite standard of proof. But the hope of mitigation of sentence need not be the only motivation for taking effective measures in good faith to ensure that witnesses and victims are not intimidated, harassed or interfered with. It is also the right thing to do in the name of the rule of law and the modern democracy that Kenya is and which Mr Ruto is obligated to play a principal part in guiding as the Deputy President.

V. CONCLUSION

109. A careful look at the Court's Statute in its particular provisions and in its entirely, and its particular context, as well as its broader context of general international law, does not lead to a finding of inevitable incompatibility between the conduct of the inquiry into questions of Mr Ruto's individual criminal responsibility, on the one hand, and, on the other, the granting of the Defence's request for the excusal of Mr Ruto from continuous presence during his trial, in order to allow him to attend to his duties as Deputy President of Kenya.

110. In the those circumstances, it falls on the Chamber to draw upon its general power under Article 64(6)(f) to rule reasonably, according to the peculiar facts of the case. What is required of the Chamber is to strike a balance that accommodates all the interests at stake. Those interests include the obligations of accountability for the crimes charged; the interests of the accused, particularly in light of the presumption of his innocence as to those charges until found guilty beyond reasonable doubt; the need to protect victims and witnesses while the charges are being tried; and, the interest of Kenya that now happens to have a man in office as Deputy President, as regards whom both international law and the

Constitution of Kenya are united in requiring that he stands trial for those charges in his individual capacity in a case that was already in progress before his nomination for the office and his achievement of it.

FOR THE FOREGOING REASONS, THE CHAMBER, BY MAJORITY, HEREBY

GRANTS the Defence's request, with the following directions:

(1) Mr Ruto must be physically present in the courtroom for the following hearings:

i. the entirety of the opening statements of all parties and participants,

ii. the entirety of the closing statements of all parties and participants,

iii. when victims present their views and concerns in person,

iv. the entirety of the delivery of judgment in the case,

v. the entirety of the sentencing hearings (if applicable),

vi. the entirety of the sentencing (if applicable),

vii. the entirety of the victim impact hearings (if applicable),

viii. the entirety of the reparation hearings (if applicable), and

ix. any other attendance directed by the Chamber;

(2) The absence resulting from excusal from continuous presence at the trial at other times must always be seen to be directed towards performance of Mr Ruto's duties of state;

(3) The Ruto Defence shall file with the Registry no later than 25 June 2013 a waiver signed by Mr Ruto himself in the form attached as annex to this decision;

MODIFIES, accordingly, the terms of the summons to appear with the variations reasonably made necessary by this Decision; and

DISMISSES the requests concerning attendance via video-link, and all other prayers.

Judge Herrera Carbuccia appends a dissenting opinion.

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

Judge Chile Eboe-Osuji
(Presiding)

Judge Olga Herrera Carbuccia

Judge Robert Fremr

Dated 18 June 2013

At The Hague, The Netherlands