

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

**No. ICC-01/09-01/11 OA 5
Date: 25 October 2013**

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka

SITUATION IN THE REPUBLIC OF KENYA

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

Public Document

Judgment

**on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of
18 June 2013 entitled “Decision on Mr Ruto’s Request for Excusal from
Continuous Presence at Trial”**



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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr Fabricio Guariglia

Counsel for Mr William Samoei Ruto
Mr Karim A.A. Khan
Mr David Hooper

Counsel for Mr Joshua Arap Sang
Mr Joseph Kipchumba Kigen-Katwa
Ms Caroline Buisman

REGISTRY

Registrar
Mr Herman von Hebel



The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Trial Chamber V(a) entitled “Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial” of 18 June 2013 (ICC-01/09-01/11-777),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

- (1) Mr William Samoei Ruto’s request for an oral hearing is rejected.
- (2) The “Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial” is reversed.

REASONS

I. KEY FINDINGS

1. Article 63 (1) of the Statute does not operate as an absolute bar in all circumstances to the continuation of trial proceedings in the absence of the accused.
2. The discretion that the Trial Chamber enjoys under article 63 (1) of the Statute is limited and must be exercised with caution. The following limitations exist: (i) the absence of the accused can only take place in exceptional circumstances and must not become the rule; (ii) the possibility of alternative measures must have been considered, including, but not limited to, changes to the trial schedule or a short adjournment of the trial; (iii) any absence must be limited to that which is strictly necessary; (iv) the accused must have explicitly waived his or her right to be present at trial; (v) the rights of the accused must be fully ensured in his or her absence, in particular through representation by counsel; and (vi) the decision as to whether the accused may be excused from attending part of his or her trial must be taken on a

case-by-case basis, with due regard to the subject matter of the specific hearings that the accused would not attend during the period for which excusal has been requested.

II. PROCEDURAL BACKGROUND

A. Proceedings before the Trial Chamber

3. On 17 April 2013, Mr William Samoei Ruto (hereinafter: “Mr Ruto”) filed the “Defence Request pursuant to Article 63(1) of the Rome Statute”¹ (hereinafter: “Excusal Request”), requesting that Trial Chamber V(a) (hereinafter: “Trial Chamber”) grant a waiver of his right to be present during the trial and conduct the trial without requiring his attendance throughout the duration of the proceedings.²

4. On 1 May 2013, the Prosecutor filed the “Prosecution’s Observations on ‘Defence Request pursuant to Article 63(1) of the Rome Statute’”, opposing the Excusal Request.³

5. On 22 May 2013, the participating victims 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”, also opposing the Excusal Request.⁴

6. On 18 June 2013, the Trial Chamber issued the “Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial”⁵ (hereinafter: “Impugned Decision”), granting, by majority, Judge Olga Herrera Carbucciona dissenting,⁶ Mr Ruto’s request for permission to not be continuously present in court during his trial, subject to certain conditions, “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”.⁷ The Impugned Decision specified certain hearings at which the accused must be physically present in the

¹ ICC-01/09-01/11-685.

² Excusal Request, para. 1.

³ ICC-01/09-01/11-713.

⁴ 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.

⁵ ICC-01/09-01/11-777.

⁶ “Dissenting Opinion of Judge Herrera Carbucciona”, 18 June 2013, ICC-01/09-01/11-777-Anx2 (hereinafter: “Dissenting Opinion”).

⁷ Impugned Decision, paras 1-3.

sh

courtroom and indicated that Mr Ruto's absence from the trial at other times must always be seen to be directed towards the performance of his duties of state.⁸ It was further specified that Mr Ruto must sign a waiver, in a form set out in the annex to the Impugned Decision, to be filed with the Registry by 25 June 2013.⁹

7. On 18 July 2013, further to an application from the Prosecutor,¹⁰ the Trial Chamber granted leave to appeal the following two issues:

The scope of the requirement under Article 63(1) that the accused be present during the trial and whether, or to what extent, the Trial Chamber has a discretionary power to excuse an accused from attending most of the trial; and

Whether the test for an excusal of the accused developed by the Trial Chamber is supported by the applicable law.¹¹

B. Proceedings before the Appeals Chamber

8. On 29 July 2013, the Prosecutor filed the "Prosecution appeal against the 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial'"¹² (hereinafter: "Document in Support of the Appeal"), requesting that the Appeals Chamber (i) grant suspensive effect to the appeal and (ii) reverse the Impugned Decision.¹³

9. On 8 August 2013, Mr Ruto filed the "Defence response to the 'Prosecution appeal against the 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial'"¹⁴ (hereinafter: "Response to the Document in Support of the Appeal"), requesting that the Appeals Chamber (i) dismiss the request for suspensive effect, (ii) dismiss the appeal on all grounds and (iii) confirm the Impugned Decision.¹⁵

10. On 20 August 2013, the Appeals Chamber granted the Prosecutor's request for suspensive effect (hereinafter: "Decision on Suspensive Effect") with the result that

⁸ Impugned Decision, p. 52.

⁹ Impugned Decision, p. 52.

¹⁰ "Prosecution's Application for Leave to Appeal the 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial'", 24 June 2013, ICC-01/09-01/11-783.

¹¹ "Decision on Prosecution's Application for Leave to Appeal the 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial'", ICC-01/09-01/11-817.

¹² ICC-01/09-01/11-831 (OA 5).

¹³ Document in Support of the Appeal, p. 20.

¹⁴ ICC-01/09-01/11-846 (OA 5).

¹⁵ Response to the Document in Support of the Appeal, p. 18.

shs

Mr Ruto's presence was required during the trial, pending the final determination of the Prosecutor's appeal.¹⁶

11. On 18 September 2013, having been granted leave by the Appeals Chamber,¹⁷ the United Republic of Tanzania, the Republic of Rwanda, the Republic of Burundi, the State of Eritrea and the Republic of Uganda filed their joint observations pursuant to rule 103 of the Rules of Procedure and Evidence¹⁸ (hereinafter: "Joint Observations").

12. On 20 September 2013, Mr Ruto and the Prosecutor filed their responses to the Joint Observations.¹⁹

13. On 25 September 2013, the Appeals Chamber rejected the requests by the Federal Democratic Republic of Ethiopia and the Federal Republic of Nigeria to submit *amici curiae* observations pursuant to rule 103 of the Rules of Procedure and Evidence, given that the issues the applicants wished to address were repetitive of

¹⁶ "Decision on the request for suspensive effect", 20 August 2013, ICC-01/09-01/11-862 (OA 5), para. 8.

¹⁷ Annex 1 to "Registry Transmission of document received from the United Republic of Tanzania", dated 9 September 2013 and registered 10 September 2013, ICC-01/09-01/11-918-Anx1 (OA 5); Annex 1 to "Registry Transmission of document received from the Republic of Rwanda", dated 6 September 2013 and registered 10 September 2013, ICC-01/09-01/11-921-Anx1 (OA 5); Annex 1 to "Registry Transmission of document received from the Republic of Burundi", dated 9 September 2013 and registered 11 September 2013, ICC-01/09-01/11-924-Anx1 (OA 5); Annex 1 to "Registry Transmission of document received from the Special Envoy of the President and Permanent Representative of the State of Eritrea to AU and UNECA", registered 11 September 2013, ICC-01/09-01/11-926-Anx1 (OA 5); Annex 1 to "Registry Transmission of documents received from the Republic of Uganda", dated 9 September 2013 and registered 11 September 2013, ICC-01/09-01/11-928-Anx1 (OA 5); "Decision on the requests for leave to submit observations under rule 103 of the Rules of Procedure and Evidence", ICC-01/09-01/11-942 (OA 5); "Dissenting Opinion of Judge Anita Ušacka", ICC-01/09-01/11-942-Anx (OA 5).

¹⁸ "Joint *Amicus curiae* Observations of the United Republic of Tanzania, Republic of Rwanda, Republic of Burundi, State of Eritrea and Republic of Uganda on the Prosecution's appeal against the 'Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial'", ICC-01/09-01/11-948 (OA 5).

¹⁹ "Defence response to the 'Joint *Amicus curiae* Observations of the United Republic of Tanzania, Republic of Rwanda, Republic of Burundi, State of Eritrea and Republic of Uganda on the Prosecution's appeal against the 'Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial'", ICC-01/09-01/11-960 (OA 5) (hereinafter: "Mr Ruto's Response to the Joint Observations"); "Prosecution Response to the 'Joint *Amicus curiae* Observations of the United Republic of Tanzania, Republic of Rwanda, Republic of Burundi, State of Eritrea and Republic of Uganda on the Prosecution's appeal against the 'Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial'" (ICC-01/09-01/11-948)", ICC-01/09-01/11-964 (OA 5) (hereinafter: "Prosecutor's Response to the Joint Observations").

those contained in the Joint Observations and in order to avoid any unnecessary delay given the advanced stage of the appeals proceedings.²⁰

14. On 27 September 2013, the Appeals Chamber dismissed Mr Ruto's request for reconsideration of the Decision on Suspensive Effect.²¹

III. MERITS

A. Mr Ruto's request for an oral hearing

15. Mr Ruto submits that "[d]ue to the importance and novelty of the issue and to assist the Appeals Chamber in resolving the two grounds of appeal [...] an oral hearing on the [a]ppeal would be beneficial".²²

16. Pursuant to rule 156 (3) of the Rules of Procedure and Evidence, "[t]he appeal proceedings shall be in writing unless the Appeals Chamber decides to convene a hearing". It is thus within the Appeals Chamber's discretion to decide whether it should convene a hearing. The Appeals Chamber considers that it has received sufficient information to determine the issues before it. Accordingly, there is no need for an oral hearing. Mr Ruto's request for an oral hearing is therefore rejected.

B. Relevant part of the Impugned Decision

17. The Trial Chamber found that the Statute must be read as a whole and, while articles 63 and 27 ("Irrelevance of official capacity") of the Statute have the most obvious bearing on the Excusal Request, articles 66 ("Presumption of innocence"), 64 (2) (duty of the Trial Chamber "to ensure that the trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses") and 64 (6) (f) of the Statute (discretion of the Trial Chamber to "rule on any other relevant matter") must also be accommodated in the resolution of the matter.²³

²⁰ "Second decision on the requests for leave to submit observations under rule 103 of the Rules of Procedure and Evidence", ICC-01/09-01/11-988 (OA 5); "Partly Separate Opinion of Judge Anita Ušacka", ICC-01/09-01/11-988-Anx (OA 5).

²¹ "Decision on Mr Ruto's request for reconsideration of the 'Decision on the request for suspensive effect'", ICC-01/09-01/11-993-Red (OA 5).

²² Response to the Document in Support of the Appeal, para. 4.

²³ Impugned Decision, paras 31-33.

18. Having concluded that presence at trial is a right of the accused set out in article 67 (1) (d) of the Statute,²⁴ the Trial Chamber found that article 63 (1) of the Statute sets out a duty, of which the accused is the subject.²⁵ The Trial Chamber thus concluded that article 63 (1) of the Statute “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”.²⁶

19. The Trial Chamber, however, was not persuaded that article 63 (1) of the Statute imposes an equivalent duty on the Chamber.²⁷ The Trial Chamber considered that an interpretation that imposes a duty in this regard on the Chamber would “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 [...] 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”.²⁸ The Trial Chamber concluded that “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 [a]rticle 64 (6)(f)”.²⁹

20. Based on the foregoing considerations, the Trial Chamber concluded 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

²⁴ Impugned Decision, para. 39.

²⁵ Impugned Decision, para. 40.

²⁶ Impugned Decision, para. 42.

²⁷ Impugned Decision, para. 43.

²⁸ Impugned Decision, para. 44.

²⁹ Impugned Decision, para. 47.

shs

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.³⁰

21. Considering the functions of the Deputy President of Kenya, the Trial Chamber found that the demands of the office met the requirements of the test set out above.³¹

22. The Trial Chamber summed up its interpretation of article 63 (1) of the Statute in the following terms:

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.³²

23. The Trial Chamber further found that neither article 63 (2) nor article 61 (2) (a) of the Statute indicate an intention on the part of the drafters to exhaust the circumstances in which a Trial Chamber may *permit* an accused to be absent during his trial or to exclude the discretion of the Trial Chamber to permit the absence of the accused from trial.³³

24. With regard to article 27 (1) of the Statute, the Trial Chamber found that the "central principle captured in [a]rticle 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"³⁴ and that excusing an accused from continuous presence at trial under the circumstance of this case does not defeat that purpose.³⁵ Furthermore, the Trial Chamber rejected the suggestion that allowing the accused to be absent from his trial would have an extremely negative impact on how the Court is perceived.³⁶ Finally, the Trial Chamber further found that concerns that the excusal of Mr Ruto from

³⁰ Impugned Decision, para. 49.

³¹ Impugned Decision, para. 51.

³² Impugned Decision, para. 53.

³³ Impugned Decision, paras 54-62.

³⁴ Impugned Decision, para. 69.

³⁵ Impugned Decision, para. 70.

³⁶ Impugned Decision, paras 72-76.

continuous presence at trial would have a negative impact on the integrity of proceedings “should be adequately addressed by a regime of carefully considered conditions of any excusal that may be granted”.³⁷

C. Submissions of the parties

1. *Submissions of the Prosecutor*

25. The Prosecutor presents two grounds of appeal. Under her first ground of appeal, the Prosecutor submits that the Trial Chamber “erred in law by disregarding the attendance requirement under [a]rticle 63(1) and by excusing Mr Ruto from attending substantially all of his trial”³⁸ (hereinafter: “First Ground of Appeal”). The Prosecutor submits that a literal reading of article 63 of the Statute shows that the accused is required to be present at trial and that the removal of a disruptive accused is the only exception to this requirement, an interpretation which, the Prosecutor argues, is also supported by a contextual and teleological interpretation of the Statute.³⁹ The Prosecutor contends that article 63 (1) of the Statute “does not leave room for judicial discretion”.⁴⁰

26. According to the Prosecutor, the Trial Chamber “failed properly to consider [a]rticle 63(1) in the context of the Statute as a whole. When considered against other relevant statutory provisions, the compulsory nature of the attendance requirement in [a]rticle 63(1) is unmistakable” (footnote omitted).⁴¹ The Prosecutor argues that article 63 (2) of the Statute “demonstrates that even in the exceptional situation of a disruptive accused, the drafters wanted to ensure that the accused was ‘present during the trial’ to the greatest extent possible”.⁴² The Prosecutor further argues that the provision in article 61 (2) (a) of the Statute for a charged person to waive his or her right to attend the confirmation hearing and the lack of an analogous provision for trial proceedings shows “that the drafters considered an accused’s presence to be a central requirement of the trial” as also supported by the drafting history.⁴³ In addition, the Prosecutor submits that “the legislative intent” that the accused’s presence be required at trial is evident from articles 58 (1) (b) and 58 (7) of the

³⁷ Impugned Decision, para. 77.

³⁸ Document in Support of the Appeal, p. 6.

³⁹ Document in Support of the Appeal, para. 10.

⁴⁰ Document in Support of the Appeal, para. 12.

⁴¹ Document in Support of the Appeal, para. 13.

⁴² Document in Support of the Appeal, para. 14.

⁴³ Document in Support of the Appeal, para. 15.

shs

Statute, which allow the Pre-Trial Chamber to issue arrest warrants and summonses to appear in order “[t]o ensure the person’s appearance at trial”.⁴⁴ The Prosecutor contends that, since article 67 (1) (d) of the Statute establishes the presence of the accused person as a right, article 63 (1) of the Statute establishes a “mandatory procedural requirement”.⁴⁵

27. The Prosecutor further submits that the *travaux préparatoires* demonstrate that presence at trial was “viewed [...] as a necessary condition for the validity of the trial, rather than a feature that could be waived”.⁴⁶ According to the Prosecutor, the 1995 Report of the *Ad hoc* Committee on the Establishment of an International Criminal Court shows that the rule that the accused be present at trial was “widely endorsed”⁴⁷ and the deletion from the 1994 International Law Commission draft of the words “[a]s a general rule” shows that the drafters “considered, and rejected” the notion that the accused’s presence at trial is “simply a ‘general rule’, subject to undefined exceptions”.⁴⁸ The Prosecutor emphasises that, contrary to the position taken in the Impugned Decision, “the delegations agreed on only one exception – [a]rticle 63(2)’s mechanism for the removal of a disruptive accused”, even though the possibility of other exceptions was discussed.⁴⁹ The Prosecutor underlines that “in four years of negotiations, there does not appear to have been any suggestion that the attendance requirement under [a]rticle 63(1) should be subject to a ‘voluntary waive[r]’ exception of the type endorsed in the [Impugned] Decision”.⁵⁰

28. Regarding the exercise of discretion under article 64 (6) (f) of the Statute, the Prosecutor states that article 64 (6) (f) of the Statute “does not permit a Chamber to disregard unambiguous statutory requirements”, otherwise it would be able to “overrule any statutory provision on the basis of [a]rticle 64(6)(f) and to selectively apply parts of the Statute, while disregarding others”.⁵¹ The Prosecutor argues that, since article 63 (1) of the Statute is one of the simplest provisions in the Statute, if the

⁴⁴ Document in Support of the Appeal, para. 16.

⁴⁵ Document in Support of the Appeal, para. 17.

⁴⁶ Document in Support of the Appeal, para. 18.

⁴⁷ Document in Support of the Appeal, para. 19, citing Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, U.N.GAOR, 50th Sess., Supp. No. 22, U.N. Doc.A/50/22 (1995), p. 34.

⁴⁸ Document in Support of the Appeal, para. 19.

⁴⁹ Document in Support of the Appeal, paras 20-21.

⁵⁰ Document in Support of the Appeal, para. 22.

⁵¹ Document in Support of the Appeal, para. 24.

shs

Impugned Decision is upheld, “it will signal that Trial Chambers enjoy almost unfettered discretion to set aside statutory requirements with which they disagree, no matter how unambiguous those requirements may be”.⁵²

29. According to the Prosecutor, the situation in the case of the *Prosecutor v. Jean-Pierre Bemba Gombo* is not comparable⁵³ and, in the present case, “the Appeals Chamber need not decide whether it is permissible for an accused to be absent from a small number of court sessions in a lengthy trial”, but “for substantially all of [the accused’s] trial”.⁵⁴

30. Under her second ground of appeal, the Prosecutor submits that the Trial Chamber erred in law by excusing Mr Ruto on the basis of his “important functions”⁵⁵ (hereinafter: “Second Ground of Appeal”). The Prosecutor avers that the Trial Chamber’s “test violates the bedrock legal principle that all persons are to be treated equally under the law” as “reflected in [a]rticle 27(1)” by excusing Mr Ruto from attending substantially all of his trial purely as a “matter of accommodation of the demanding functions of his office as Deputy Head of State of Kenya”.⁵⁶ The Prosecutor submits that the Trial Chamber overlooked the “broader” scope of article 27 (1) of the Statute, namely its function “to ensure that all persons receive equal treatment under this Court’s rules, both on substantive and procedural matters”.⁵⁷ According to the Prosecutor, this interpretation is confirmed by article 21 (3) of the Statute, which provides that the application and interpretation of law must be without adverse distinction based on any other status.⁵⁸

31. Finally, the Prosecutor submits that, even if the Trial Chamber’s “test had a basis in the law of this Court, it is still the wrong standard because it invites a flood of excusal applications from accused who do not wish to attend trial”⁵⁹ and that “[a]lmost every accused will be able to present a reason why he or she ‘has important

⁵² Document in Support of the Appeal, para. 27.

⁵³ Document in Support of the Appeal, para. 30

⁵⁴ Document in Support of the Appeal, para. 31.

⁵⁵ Document in Support of the Appeal, p. 16.

⁵⁶ Document in Support of the Appeal, para. 35.

⁵⁷ Document in Support of the Appeal, para. 36.

⁵⁸ Document in Support of the Appeal, para. 36.

⁵⁹ Document in Support of the Appeal, para. 37.

Sho

functions of an extraordinary dimension to perform' and should be excused from attending the trial".⁶⁰

2. *Submissions of Mr Ruto*

32. Regarding the First Ground of Appeal, Mr Ruto submits that the Prosecutor's approach to statutory interpretation is "erroneous, unduly narrow, and overly simplistic" and that the "Court's jurisprudence expressly provides that a literal interpretation of a provision is not definitive and [...] a more holistic approach is appropriate".⁶¹ Mr Ruto argues that, as previously held by the Appeals Chamber and as also required by article 31 of the Vienna Convention on the Law of Treaties, "[t]he rule governing the interpretation of a section of law is its wording read in context and light [*sic*] of its object and purpose".⁶² Mr Ruto submits that the Trial Chamber "correctly set out the principles of statutory interpretation [...] noting that 'provisions are not to be construed in isolation' and that '[t]he Statute must be read as a whole'".⁶³

33. According to Mr Ruto, the Prosecutor's argument that the Trial Chamber failed "properly to consider [a]rticle 63(1) in the context of the Statute as a whole" is a "blatant misrepresentation of the [Trial Chamber's] detailed analysis", which took into account not only those provisions referenced by the Prosecutor but also articles 64 and 66 of the Statute.⁶⁴ Mr Ruto submits that "the Trial Chamber gave careful consideration to [a]rticles 63 (1) and 67 (1) (d) [of the Statute], noting that to read [a]rticle 63 (1) [of the Statute] as a right would be to 'presume that the drafter had used words in vain' and would also render the provision 'entirely redundant'".⁶⁵

34. Mr Ruto further submits that, as evidenced by the *travaux préparatoires*, more precisely the "Working paper on article 63", when the States Parties agreed on article 63 of the Statute, they were effectively rejecting the holding of trials *in absentia* and did not see a need for "special provisions to deal with situations when proceedings did take place in the absence of an accused [...] because these matters

⁶⁰ Document in Support of the Appeal, para. 37.

⁶¹ Response to the Document in Support of the Appeal, para. 6.

⁶² Response to the Document in Support of the Appeal, para. 7.

⁶³ Response to the Document in Support of the Appeal, para. 8.

⁶⁴ Response to the Document in Support of the Appeal, para. 10.

⁶⁵ Response to the Document in Support of the Appeal, para. 11, referring to Impugned Decision, para. 39.

were adequately addressed in articles 64 [...] and 67 [...]”.⁶⁶ Thus, the States Parties wanted the Trial Chamber to have recourse to their discretionary powers under article 64 of the Statute when applying article 63.⁶⁷

35. Furthermore, Mr Ruto submits that the Trial Chamber “exercised [its] discretionary powers in full cognisance of their limitations”, by stating that the powers contained in article 64 (6) (f) of the Statute are “subject to the object and purpose of the Statute”, “relevant aspects of the wider international law”, and the requirement “that trials must 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”.⁶⁸

36. Mr Ruto states that the Prosecutor’s argument that the presence requirement of the accused cannot be set aside is erroneous as the case of the *Prosecutor v Jean-Pierre Bemba Gombo* shows.⁶⁹ Mr Ruto argues that the Prosecutor’s “arguments on the *Bemba* precedent run completely counter to the absolutist approach to the interpretation of [a]rticle 63(1) which it otherwise advocates throughout the [a]ppeal”.⁷⁰ Mr Ruto contends that, while first arguing “that the accused’s presence at trial is a condition akin to a confirmation of charges being required before a trial can proceed, [...], the Prosecut[or] makes a complete *volte face* to argue that absence for a ‘handful of hours’ is permissible”.⁷¹ Mr Ruto emphasises that, despite the Prosecutor’s suggestion to the contrary, the Appeals Chamber *does* need to decide whether it is permissible for an accused to be absent for a small number of court sessions in a lengthy trial, the central issue for determination being “whether a Trial Chamber has the power to excuse the continuous presence at trial of an otherwise available and cooperating accused no matter the duration of the absence”.⁷²

37. Regarding the Prosecutor’s Second Ground of Appeal, Mr Ruto submits that the Trial Chamber “did not err in law when it found that [a]rticle 63(2) is not the solitary

⁶⁶ Response to the Document in Support of the Appeal, para. 15, referring to W. Schabas “Article 63”, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article* (C.H. Beck-Hart-Nomos, 2nd ed., 2008), p. 1194.

⁶⁷ Response to the Document in Support of the Appeal, para. 15.

⁶⁸ Response to the Document in Support of the Appeal, para. 18.

⁶⁹ Response to the Document in Support of the Appeal, para. 21.

⁷⁰ Response to the Document in Support of the Appeal, para. 23.

⁷¹ Response to the Document in Support of the Appeal, para. 24.

⁷² Response to the Document in Support of the Appeal, para. 25.

exception to [a]rticle 63(1). This conclusion was properly reached by applying the Court's established jurisprudence on general principles of statutory interpretation and confirmed by reference to the *travaux préparatoires* and international human rights law. It is also supported by the Court's existing practice and provides a useful and workable precedent for a Court where lengthy trials are the norm".⁷³

38. Mr Ruto argues that the principle that all persons are to be treated equally under the law is not violated by the Impugned Decision because the "exceptional circumstances", which must be demonstrated to justify an exception to the requirement of the accused's presence, are not necessarily related to an accused's position, but must be determined on a case-by-case basis.⁷⁴

39. According to Mr Ruto, "[p]aragraph 49 of the [Impugned] Decision and the plain wording of the test – 'exceptional circumstances' – clearly evidence that the bar is set high and an accused will not lightly be excused from continuous presence" and the Prosecutor "simply speculates about the potential effect the [Impugned] Decision will have on trial proceedings at the Court and the Trial Chambers' ability to control same".⁷⁵ Mr Ruto submits that the Impugned Decision "preserves the Court's discretion to proceed in certain circumstances and prevents it from being 'held hostage to impunity ... in circumstances that are precisely calculated to frustrate the trial and the course of justice'".⁷⁶ Furthermore, Mr Ruto contends that granting his request has the "potential to bolster the effectiveness of the Court by demonstrating that the Court's framework can accommodate a flexible and pragmatic approach to surrendering to its jurisdiction and to participating in proceedings by those occupying high office".⁷⁷

⁷³ Response to the Document in Support of the Appeal, para. 29.

⁷⁴ Response to the Document in Support of the Appeal, paras 30-32.

⁷⁵ Response to the Document in Support of the Appeal, para. 35.

⁷⁶ Response to the Document in Support of the Appeal, para. 36.

⁷⁷ Response to the Document in Support of the Appeal, para. 37.

shs

D. Joint Observations by the United Republic of Tanzania, the Republic of Rwanda, the Republic of Burundi, the State of Eritrea and the Republic of Uganda and responses by the parties

1. Joint Observations

40. In their Joint Observations, the United Republic of Tanzania, the Republic of Rwanda, the Republic of Burundi, the State of Eritrea and the Republic of Uganda submit that “there can be little doubt as to the ‘important functions of an extraordinary dimension’ that must be performed” by the accused.⁷⁸ They further submit that “[a] Head or Deputy Head of State or Government, depending on the State in question, are responsible for the security and well-being of their entire population through ensuring an effective and functioning national government” and that “[i]t is selfevident that the positions of Head or Deputy Head of State or Government are ones of singular importance – truly ‘round-the-clock’ roles – that reflect the electoral voice of a State as a whole”.⁷⁹

41. The United Republic of Tanzania, the Republic of Rwanda, the Republic of Burundi, the State of Eritrea and the Republic of Uganda further contend that “[i]t will be of little – or inadequate – comfort to the citizenry that elects an accused who is a head of state or deputy head of state to see them acquitted after a trial process that could take years – if this is at the cost of the most effective government to which they are entitled” and that there is no “reason in law or practice that prevents such an accused discharging responsibilities by being present in the country that elected them – subject to the control of a Trial Chamber of the ICC that excuses their attendance”.⁸⁰ Finally, they submit that “a Trial Chamber can also require the attendance of such persons – and the Decision which the Prosecution seeks to impugn has precisely that in built flexibility and adaptability essential to ensuring justice in each individual case”.⁸¹

⁷⁸ Joint Observations, para. 6.

⁷⁹ Joint Observations, para. 6.

⁸⁰ Joint Observations, para. 8.

⁸¹ Joint Observations, para. 8.

phs

2. *Responses of the parties to the Joint Observations*

42. Mr Ruto observes that the interpretation of article 63 (1) of the Statute has never been judicially considered before⁸² and that, in this context, he “welcomes submissions from any state which will assist the Appeals Chamber to determine the proper interpretation of [a]rticle 63 (1)”.⁸³

43. In her response, the Prosecutor submits that the Joint Observations “add little to those previously made by the Defence” and “appear to rely on a misinterpretation of the law”.⁸⁴ The Prosecutor argues that the Joint Observations are founded on “policy considerations extraneous to the narrow legal issue on appeal” and requests that they be dismissed.⁸⁵

E. Determination by the Appeals Chamber

44. The Appeals Chamber recalls that, under her First Ground of Appeal, the Prosecutor alleges that the Trial Chamber erred in law by disregarding the attendance requirement under article 63 (1) of the Statute and by excusing Mr Ruto from attending substantially all of his trial. The Second Ground of Appeal raised by the Prosecutor is that the Trial Chamber erred in law by excusing Mr Ruto on the basis of his “important functions”.⁸⁶

45. Under her First Ground of Appeal, the Prosecutor submits that it is unnecessary for the purposes of the present appeal to resolve the question of whether article 63 (1) of the Statute allows an accused to be absent from a small number of court sessions in a lengthy trial.⁸⁷ The Appeals Chamber notes that, contrary to this assertion, the majority of the Prosecutor’s submissions under the First Ground of Appeal are directed at supporting the argument that article 63 (1) of the Statute establishes a strict requirement that the accused be present at trial and leaves no scope for the exercise of judicial discretion to excuse an accused from a small number of court sessions in a lengthy trial.⁸⁸ The Appeals Chamber considers that it is precisely this question that must be addressed. If it is found that the terms of article 63 (1) of the Statute do not

⁸² Mr Ruto’s Response to the Joint Observations, para. 1.

⁸³ Mr Ruto’s Response to the Joint Observations, para. 2.

⁸⁴ Prosecutor’s Response to the Joint Observations, paras 1, 4-8.

⁸⁵ Prosecutor’s Response to the Joint Observations, paras 1, 6.

⁸⁶ Document in Support of the Appeal, pp. 6, 16.

⁸⁷ Document in Support of the Appeal, para. 31.

⁸⁸ Document in Support of the Appeal, para. 12.

SHS

allow for the exercise of any judicial discretion, no excusal of an accused person, regardless of the justification or duration, would be permissible.

46. Thus, the Appeals Chamber considers that the initial question which arises in the present appeal is whether article 63 (1) of the Statute is absolute in its terms, such that any absence of an accused person during the trial would result in a violation thereof, or whether the provision allows the Trial Chamber some measure of discretion to excuse an accused person, in certain circumstances, from attendance during the trial. In more specific terms, the Appeals Chamber must determine whether the Trial Chamber erred in law when it found that, in exceptional circumstances, a Trial Chamber may exercise its discretion to excuse an accused person, on a case-by-case basis, from continuous presence at trial.

47. Article 63 of the Statute, entitled “Trial in the presence of the accused”, provides as follows:

(1) The accused shall be present during the trial.

(2) If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the 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.

48. In the Impugned Decision, the Trial Chamber found that article 63 (1) of the Statute imposes a duty on the accused to be present during the trial, but no equivalent duty on the Trial Chamber, leaving the Trial Chamber with the discretion to excuse an accused person “in a reasonable way from the duty imposed on him to be present during the trial”.⁸⁹ The Trial Chamber found that “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 [a]rticle 64(6)(f)”.⁹⁰

49. At the outset, the Appeals Chamber notes that article 63 (1) of the Statute establishes that the accused shall be present during the trial, reflecting the central role of the accused person in proceedings and the wider significance of the presence of the accused for the administration of justice. The accused person is not merely a passive

⁸⁹ Impugned Decision, para. 43.

⁹⁰ Impugned Decision, para. 47.

observer of the trial, but the subject of the criminal proceedings and, as such, an active participant therein.⁹¹ It is important for the accused person to have the opportunity to follow the testimony of witnesses testifying against him or her so that he or she is in a position to react to any contradictions between his or her recollection of events and the account of the witness.⁹² It is also through the process of confronting the accused with the evidence against him or her that the fullest and most comprehensive record of the relevant events may be formed. Furthermore, the continuous absence of an accused from his or her own trial would have a detrimental impact on the morale and participation of victims and witnesses. More broadly, the presence of the accused during the trial plays an important role in promoting public confidence in the administration of justice.

50. However, the Appeals Chamber is not persuaded by the Prosecutor's argument that a literal, contextual and teleological interpretation of article 63 of the Statute shows that the removal of a disruptive accused is the only exception to the requirement that the accused shall be present during the trial.⁹³ In view of the rationale for article 63 of the Statute as elaborated upon further below, and given the complex nature of trials of international crimes, the interpretation of article 63 (1) of the Statute advanced by the Prosecutor would prove to be unduly rigid. During the course of prolonged criminal proceedings, unforeseen circumstances may arise, necessitating the absence of the accused person on a temporary basis.⁹⁴ The Appeals Chamber considers that the interests of justice and the psychological well-being of witnesses would not be best served if the trial had to be automatically adjourned in

⁹¹ A. Cassese *et al.*, *Cassese's International Criminal Law* (Oxford University Press, 3rd ed., 2013), p. 361; S. Trechsel and S. Summers, *Human Rights in Criminal Proceedings* (Oxford University Press, 2005), p. 253.

⁹² See also European Court of Human Rights (hereinafter: "ECtHR"), *Demebukov v Bulgaria*, "Judgment", 28 February 2008, application no. 68020/01, para. 51: "[...] it is of capital importance that a defendant should appear, both because of his right to a hearing and because of the need to verify the accuracy of his statements and compare them with those of the victim – whose interests need to be protected – and of the witnesses".

⁹³ Document in Support of the Appeal, para. 10.

⁹⁴ The Appeals Chamber notes that, in the cases of the *Prosecutor v. Thomas Lubanga Dyilo* and the *Prosecutor v. Jean-Pierre Bemba Gombo*, trial proceedings were permitted to continue for short durations in the absence of the accused after counsel confirmed that they had instructions to proceed in the absence of the accused (*Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Hearing, 12 May 2009, ICC-01/04-01/06-T-172-Red3-ENG, pp. 1-2; *Prosecutor v. Jean-Pierre Bemba Gombo*, Transcripts of Hearings, 7 November 2011, ICC-01/05-01/08-T-183-Red-ENG, pp. 1-2; 12 April 2013, ICC-01/05-01/08-T-306-Red-ENG, p. 62; 17 June 2013, ICC-01/05-01/08-T-324-ENG, pp. 16-17; 17 June 2013, ICC-01/05-01/08-T-324bis-CONF-ENG, p. 1; 27 June 2013, ICC-01/05-01/08-T-331-CONF-ENG, pp. 2-3).

each such instance. A measure of flexibility in the management of proceedings in such circumstances accords with the duty of the Trial Chamber to ensure that a trial is “fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses” under article 64 (2) of the Statute and helps to ensure, as mentioned by the United Republic of Tanzania, the Republic of Rwanda, the Republic of Burundi, the State of Eritrea and the Republic of Uganda, “justice in each individual case”.⁹⁵

51. Furthermore, the Appeals Chamber notes that a trial may be continued in the absence of the accused, in accordance with article 63 (2) of the Statute, when he or she continuously disrupts the trial.⁹⁶ In the case of article 63 (2) of the Statute, the requirement that the accused be present during the trial is superseded by the duty of the Court to ensure that proceedings are carried out in an orderly manner in the interests of the fair and proper administration of justice. In such cases, the continuously disruptive behaviour of the accused may be construed as an implicit waiver of his or her right to be present.⁹⁷ The Appeals Chamber considers that the fact

⁹⁵ Joint Observations, para. 8.

⁹⁶ There are other exceptions to the requirement of presence of the accused in the Statute and the Rules of Procedure and Evidence. See article 72 (7) of the Statute (“Protection of national security information”), rule 74 (4) (“Self-incrimination by a witness”) and rule 88 (“Special measures”) of the Rules of Procedure and Evidence. See also articles 61 (2) (“Confirmation of the charges before trial”), 76 (4) (“Sentencing”) and 83 (5) (“Proceedings on appeal”) of the Statute.

⁹⁷ The right of the accused to be present at trial may be expressly or implicitly waived. According to the ECtHR, waiver by the accused of his or her right to be present, however, must “be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance” (ECtHR, Grand Chamber, *Sejdovic v. Italy*, “Judgment”, 1 March 2006, application no. 56581/00, para. 86; *Demebukov v. Bulgaria*, “Judgment”, 28 February 2008, application no. 68020/01, para. 47; *Poitrimol v. France*, “Judgment”, 23 November 1993, application no. 14032/88, para. 31; see also *Colozza v. Italy*, “Judgment”, 12 February 1985, application no. 9024/80, para. 28). Specifically, the European Court of Human Rights found that a waiver must be given of the accused’s free will, with knowledge of the nature of the proceedings against him or her and of the date of the trial; it must be unequivocal and must not run counter to any important public interest (ECtHR, *Kwiatkowska v. Italy*, “Admissibility Decision”, 30 November 2000, application no. 52868/99). The Appeals Chamber of the International Criminal Tribunal for Rwanda (hereinafter: “ICTR”) has similarly found that “waiver by an accused of his right to be present at trial must be free and unequivocal (though it can be express or tacit) and done with full knowledge. In this latter respect, [...] the accused must have had prior notification as to the place and date of the trial, as well as of the charges against him or her. The accused must also be informed of his/her right to be present at trial and be informed that his or her presence is required at trial. [...] [W]here an accused who is in the custody of the Tribunal decides voluntarily not to be present at trial, it is in the interests of justice to assign him or her Counsel in order, in particular, to guarantee the effective exercise of the other rights enshrined in Article 20 of the Statute” (footnotes omitted) (ICTR, Appeals Chamber, *Nahimana et al. v. Prosecutor*, “Judgement”, 28 November 2007, ICTR-99-52-A, para. 109). Similarly, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provide that “[t]he accused may voluntarily waive the right to appear at a hearing, but such a waiver shall be established in an unequivocal manner and preferably in writing” (Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, prepared by the African Commission on Human and Peoples’ Rights in 2001, point (N)(6)(c)(3)).

that a continuously disruptive accused person may be “excused” from the courtroom *against his will* supports the conclusion that an excusal may be permissible if the accused *voluntarily* waives his or her right to be present.

52. It may further be observed that the *travaux préparatoires*, as a secondary means of interpretation, show that, although a number of exceptions to the requirement of the accused’s presence at trial other than that set out in article 63 (2) of the Statute were discussed and ultimately deemed unnecessary,⁹⁸ the question of whether an accused person could be excused from attending the trial in circumstances where he or she was, in principle, present for the trial, but had waived the right to be present, was not explicitly addressed.⁹⁹ However, it is noteworthy in this regard that, during the Rome Conference, the more peremptory language – “the trial shall not be held except in the presence of the accused and his lawyer”¹⁰⁰ – was considered but not adopted.

53. In formulating article 63 of the Statute, the drafters initially aimed to establish the presence of the accused during the trial as a general rule.¹⁰¹ As the debate evolved, discussions relative to article 63 of the Statute became more focused on the issue of whether to explicitly include or exclude the possibility of holding trials *in absentia*.

⁹⁸ General Assembly, Official Records Fifty-first Session, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee during March-April and August 1996), Supplement No. 22 (AA/51/22), paras 253-256.

⁹⁹ The Siracusa Draft Statute, prepared by a Committee of Experts as an alternative to the ILC Draft, proposed a formulation of this nature framed in the following terms: “[t]he Trial Chamber may order that the trial proceeds in the absence of the accused if (a) the accused expressly waived the right to be present [...]” (International Association of Penal Law (AIDP) International Institute of Higher Studies in Criminal Sciences (ISIS) Max Planck Institute for Foreign and International Criminal Law (MPI), Draft Statute for an International Criminal Court-Alternative to the ILC Draft (Siracusa Draft), prepared by a Committee of Experts, Siracusa/Freiburg, July 1995). However, discussions at the Ad-Hoc Committee stage centred on the International Law Commission proposal providing for presence at trial as a general rule (General Assembly Official Records, Fiftieth Session, Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, Supplement No. 22 (A/50/22), para. 164).

¹⁰⁰ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, Working Group on Procedural Matters, Proposal for Article 63 Submitted by Egypt, Iraq, the Libyan Arab Jamahiriya, Oman, Qatar, the Sudan and the Syrian Arab Republic, A/CONF.183/C.1/WGPM/L.15, 25 June 1998).

¹⁰¹ Article 37 of the International Law Commission’s draft Statute addressed the presence of the accused, providing that “[a]s a general rule, the accused should be present during the trial” (*see* Report of the International Law Commission on the work of its forty-sixth session, A/49/355, 1 September 1994, Draft Statute for an International Criminal Court, p. 109). The International Law Commission indicated that it believed that it was “right to begin [...] with the proposition that the presence of the accused at the trial is ‘of vital importance’, not only because of article 14, paragraph 3 (d), of the International Covenant on Civil and Political Rights but in order to establish the facts and, if the accused is convicted, to enable an appropriate and enforceable sentence to be passed” (Yearbook of the International Law Commission 1994, Volume II Part Two, Report of the Commission to the General Assembly on the work of its forty-sixth session, A/CN.4/SER.A/1994/Add.1 (Part 2), p. 54).

Ultimately, concerns in relation to the rights of the accused, as well as the practical utility of trials *in absentia* and their potential to discredit the Court prevailed and article 63 (1) of the Statute was incorporated in order to preclude this possibility.¹⁰²

54. This background is instructive in considering the rationale for including a provision specifying that “[t]he accused shall be present during the trial” in addition to the right of the accused “to be present at the trial” under article 67 (1) (d) of the Statute. The Appeals Chamber finds that part of the rationale for including article 63 (1) of the Statute was to reinforce the right of the accused to be present at his or her trial and, in particular, to preclude any interpretation of article 67 (1) (d) of the Statute that would allow for a finding that the accused had implicitly waived his or her right to be present by absconding or failing to appear for trial.

¹⁰² Some delegations participating in the Preparatory Committee opposed *in absentia* trials on the grounds that such trials violate the rights of the accused (*See, for example*, United Nations, General Assembly, Preparatory Committee on the Establishment of an International Criminal Court, *Press Releases L/2798* (16 August 1996) and *L/2797* (14 August 1996)). The risk that the perception of show trials would be created and the credibility of the ICC destroyed as a result was also highlighted by a number of delegations (United Nations, General Assembly, Preparatory Committee on the Establishment of an International Criminal Court, *Press Release L/2798*, 16 August 1996). “Another view was that the current context was different; it involved exceptional circumstances (e.g. crimes affecting the international community) and pertained to a special international judiciary organ which would not have an enforcement mechanism to ensure the presence of the accused” and that, as a result, consideration must be given to the possibility of holding trial *in absentia* in certain specific cases, such as where an accused deliberately flees justice and every effort to bring him or her to trial has proved fruitless (General Assembly, Official Records Fifty-first Session, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee during March-April and August 1996), Supplement No. 22 (A/51/22), para. 254). During the Rome Conference there was consensus that the presence of the accused should be a general rule with an exception in the case of disruption of the trial by the accused (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, Working Group on Procedural Matters, Working Paper on Article 63, A/CONF.183/C.1/WGPM/L.67, 9 July 1998). It was argued, *inter alia*, that *in absentia* trials would be of little practical value if the accused were afforded the right to a *de novo* trial upon their subsequent surrender to the Court (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, Working Group on Procedural Matters, Working Paper on Article 63, A/CONF.183/C.1/WGPM/L.67, 9 July 1998, p. 2, footnote 2). Proposals submitted by Colombia, Malawi, and Egypt, Iraq, the Libyan Arab Jamahiriya, Oman, Qatar, the Sudan and the Syrian Arab Republic allowed the Court more extensive power to proceed to a trial in the absence of the accused (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, Working Group on Procedural Matters, Proposal for Article 63 Submitted by Colombia, A/CONF.183/C.1/WGPM/L.17, 25 June 1998; Proposal Submitted by Malawi for Article 63, A/CONF.183/C.1/WGPM/L.16, 25 June 1998; Proposal for Article 63 Submitted by Egypt, Iraq, the Libyan Arab Jamahiriya, Oman, Qatar, the Sudan and the Syrian Arab Republic, A/CONF.183/C.1/WGPM/L.15, 25 June 1998).

55. Therefore, the Appeals Chamber considers that article 63 (1) of the Statute does not operate as an absolute bar in all circumstances to the continuation of trial proceedings in the absence of the accused.

56. In light of the foregoing, the Appeals Chamber concludes that the Trial Chamber did not err in law when it found that, in exceptional circumstances, the Chamber may exercise its discretion to excuse an accused person, on a case-by-case basis, from continuous presence at trial.¹⁰³ However, the Appeals Chamber is of the view that the Trial Chamber's reference to article 64 (6) (f) of the Statute as the basis for this discretion is misplaced.¹⁰⁴ As set out above, the Trial Chamber enjoys a measure of discretion under article 63 (1) of the Statute and, in these circumstances, it is not necessary to resort to the powers of the Trial Chamber to rule on "any other relevant matter" pursuant to article 64 (6) (f) of the Statute.

57. The Appeals Chamber will next address the question as to whether the Trial Chamber properly exercised its discretion in the circumstances of the present case. Although the Prosecutor presents the questions of whether the Trial Chamber erred by excusing Mr Ruto from attending substantially all of his trial and whether it erred by excusing Mr Ruto on the basis of his "important functions" as two distinct issues, in the view of the Appeals Chamber, the two grounds are more appropriately addressed together as part of its review of the exercise of discretion by the Trial Chamber.

58. In this regard, the Appeals Chamber first notes that the test for excusal set out by the Trial Chamber was not premised on Mr Ruto's important function, but on the more general requirement of exceptional circumstances, expressed in the following terms:

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

¹⁰³ Impugned Decision, para. 49.

¹⁰⁴ Impugned Decision, para. 49.

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.¹⁰⁵

59. The Trial Chamber, having considered the functions of the Deputy President of Kenya, found that the demands of the office meet the requirements of the test set out above.¹⁰⁶ In particular, the Trial Chamber found that:

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, 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; 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; 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; and, the President and the Deputy President are the principal members of the National Executive of the Republic.¹⁰⁷ [Footnotes omitted.]

On this basis, the Trial Chamber excused Mr Ruto from attending all of the trial with the exception of the opening and closing statements, the presentation in person of the views and concerns of victims, the delivery of judgment, and, if applicable, the sentencing hearings, the sentencing, the victim impact hearings, the reparation hearings, and any other attendance directed by the Chamber, with the provisos that Mr Ruto's absence from the trial at other times "must always be seen to be directed towards performance of Mr Ruto's duties of state" and that Mr Ruto sign a waiver of his right to presence during trial.¹⁰⁸

60. Concerning the standard of review for discretionary decisions, the Appeals Chamber held the following:

The Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion [...] merely because the Appeals Chamber, if it had the power, might have made a different ruling. To do so would be to usurp powers not conferred on it and to render nugatory powers specifically vested in the Pre-Trial Chamber.

[...][T]he Appeals Chamber's functions extend to reviewing the exercise of discretion by the Pre-Trial Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with

¹⁰⁵ Impugned Decision, para. 49.

¹⁰⁶ Impugned Decision, para. 51.

¹⁰⁷ Impugned Decision, para. 51.

¹⁰⁸ Impugned Decision, p. 52.

shs

the Pre-Trial Chamber's exercise of discretion [...], save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions. The jurisprudence of other international tribunals as well as that of domestic courts endorses this position. They identify the conditions justifying appellate interference to be: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion.¹⁰⁹ [Footnotes omitted.]

This standard of review will guide the analysis of the Appeals Chamber.

61. For the reasons set out below, the Appeals Chamber considers that the Trial Chamber did not properly exercise its discretion in the instant case. The discretion that the Trial Chamber enjoys under article 63 (1) of the Statute is limited and must be exercised with caution. In this respect, the Appeals Chamber recalls that the presence of the accused must remain the general rule and that article 63 (1) of the Statute clearly limits the Trial Chamber's discretion to excuse an accused person from presence during the trial. The restrictions on the removal of a disruptive accused, explicitly set out in article 63 (2) of the Statute, are also instructive in determining the limits of the Trial Chamber's discretion under article 63 (1) of the Statute.¹¹⁰ Article 63 (2) of the Statute makes it clear that the removal of a disruptive accused can take place only in exceptional circumstances and as a last resort i.e. *after other reasonable alternatives have proved inadequate*.¹¹¹ Furthermore, the removal of the

¹⁰⁹ *Prosecutor v. Joseph Kony et al.*, "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", 16 September 2009, ICC-02/04-01/05-408 (OA 3), paras 79-80. See also *Prosecutor v. William Samoei Ruto et al.*, "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", 30 August 2011, ICC-01/09-01/11-307 (OA), paras 89-90.

¹¹⁰ By way of illustration see ICTR, Appeals Chamber, *Protais Zigiranyirazo v. Prosecutor*, "Decision on Interlocutory Appeal", ICTR-2001-73-AR73, 30 October 2006, para. 14: "[...] An accused person can waive or forfeit the right to be present at trial. [...] In assessing a particular limitation on a statutory guarantee, the Appeals Chamber bears in mind the proportionality principle, pursuant to which any restriction on a fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish the objective. The explicit exception provided by Rule 80(B) and the ICTY Appeals Chamber's reference to 'substantial trial disruptions' provide a useful measure by which to assess other restrictions on the right to be present at trial" (footnote omitted, emphasis added).

¹¹¹ Article 63 (2) of the Statute read in combination with rule 170 of the Rules of Procedure and Evidence, which provides that "[h]aving regard to article 63, paragraph 2, the Presiding Judge of the Chamber dealing with the matter may after giving a warning: (a) Order a person disrupting the proceedings of the Court to leave or be removed from the courtroom; or, (b) In case of repeated misconduct, order the interdiction of that person from attending the proceedings". See also the

accused shall take place only for *such duration as is strictly required*. Finally, even if removed, the accused must still be represented by and in a position to instruct counsel.

62. From the foregoing, the following limitations on the discretion of the Trial Chamber to excuse an accused person from presence during trial may be derived: (i) the absence of the accused can only take place in exceptional circumstances and must not become the rule; (ii) the possibility of alternative measures must have been considered, including, but not limited to, changes to the trial schedule or a short adjournment of the trial; (iii) any absence must be limited to that which is strictly necessary; (iv) the accused must have explicitly waived his or her right to be present at trial; (v) the rights of the accused must be fully ensured in his or her absence, in particular through representation by counsel; and (vi) the decision as to whether the accused may be excused from attending part of his or her trial must be taken on a case-by-case basis, with due regard to the subject matter of the specific hearings that the accused would not attend during the period for which excusal has been requested.

63. The Appeals Chamber concludes that the Trial Chamber in the present case interpreted the scope of its discretion too broadly and thereby exceeded the limits of its discretionary power. In particular, the Trial Chamber provided Mr Ruto with what amounts to a blanket excusal before the trial had even commenced, effectively making his absence the general rule and his presence an exception. Furthermore, the Trial Chamber excused Mr Ruto without first exploring whether there were any alternative options. Finally, the Trial Chamber did not exercise its discretion to excuse Mr Ruto on a case-by-case basis, at specific instances of the proceedings, and for a duration limited to that which was strictly necessary.

IV. APPROPRIATE RELIEF

64. On an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). For the reasons set out in the preceding section, the Appeals

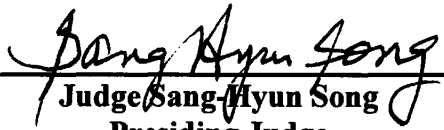
following provisions which allow for the removal of the accused because of disruptive behaviour: Article 18 (c) of the Nuremberg Charter; Rule 5 of the Nuremberg Rules; Article 12 (c) of the Tokyo Charter; Rule 80 of the Rules of the International Criminal Tribunal for the former Yugoslavia; Rule 80 of the ICTR Rules; Rule 80 of the Rules of the Special Court for Sierra Leone; Section 48.2 of the Transitional Rules of Criminal Procedure at the Special Panel for Serious Crimes (East Timor); Rule 37 of the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia; Rule 138 of the Rules of the Special Tribunal for Lebanon.

Chamber finds that the Trial Chamber did not properly exercise its discretion when it decided to excuse Mr Ruto from substantially all of his trial, which materially affected the Impugned Decision.

65. In the above circumstances, the Appeals Chamber deems it appropriate to reverse the Impugned Decision.

Judge Erkki Kourula and Judge Anita Ušacka append a separate opinion to this judgment.

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


Judge Sang-Hyun Song
Presiding Judge

Dated this 25th day of October 2013

At The Hague, The Netherlands