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TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

***IN THE CASE OF
THE PROSECUTOR V. UHURU MUIGAI KENYATTA***

Public

**Prosecution's response to the Defence Request for Mr Kenyatta to be Present
During Trial via Video-Link**

Source: The Office of the Prosecutor

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Introduction

1. The Defence application to Trial Chamber V (the Chamber) requesting that the accused be authorized to attend the trial via video link¹ (the Request) lacks any legal basis and should be rejected. The Rome Statute (Statute) is clear: an accused is required to be physically present at trial. The Request should also be denied because: (i) the Defence advances no cogent reasons why it would be appropriate to permit the Accused's attendance at trial by video-link; (ii) it is against the interests of justice; and (iii) the Court's technology is currently inadequate to ensure meaningful attendance.

Submissions

I. No legal basis in the Court's regulatory structure

a. The Statute and the Rules of Procedure and Evidence (Rules) require the Accused's physical presence in the Courtroom

2. The Request can be disposed of on the basis of the plain language of Article 63(1) of the Statute, which provides that "[t]he accused *shall* be present during the trial" (emphasis added).
3. The only instance provided by the Statute where the accused can observe the trial via video-link from outside the Courtroom is in case of disruption as provided for by Article 63(2).² This demonstrates that, although the drafters of the Statute were well aware of the capabilities of video-link

¹ ICC-01/09-02/11-667.

² Article 63 (2) of the Statute provides that "[i]f 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".

technology, they did not intend for an accused to be permitted to be “present” at trial by means of video-link.

4. Article 63(2) further confirms that the term “present” in Article 63(1) means physically present, referring, as it does, to the possibility of an “accused, *being present before the Court*” having to be “remove[d]” and taken outside “the courtroom” (emphasis added). Moreover, in the exceptional instance envisaged in Article 63(2), the accused’s “presence” by way of video-link is limited for such duration as is “strictly required”, which confirms the drafters’ intention that the accused should be physically present in court during his trial unless such presence renders the proceedings unworkable.
5. The obligation of the Accused to be present at trial is also clear from other provisions in the Statute and the Rules.
6. *First*, whereas Article 61(2)(a) permits a charged person to waive his/her right to be present at a confirmation hearing before the Pre-Trial Chamber, there is no such provision with respect to trial. Had the drafters intended for an accused to be able to waive his/her right to be present at the trial, they would have included such provision, as they did for the confirmation hearing.
7. *Second*, Rule 124(3) provides that if a charged person has **waived** his right to be present at the confirmation hearing, “[t]he Pre-Trial Chamber may authorise the person to observe the hearing from outside the courtroom through the use of communication technology, if required”. The link between waiving presence and the ability to observe by communication technology confirms that the drafters equated “presence” to mean physical presence. The fact that no such right to waive presence, while watching from afar, exists at the trial stage confirms that the drafters chose not to

create an option for an accused to be “present” via “communication technology”.

8. *Third*, while Articles 68 and 69 and Rule 67 provide a mechanism for witnesses to testify by means of a video-link, there is no such option with respect to the presence of the Accused at trial. This further shows that the drafters of the Statute did not intend for the accused to observe the trial by means of a video-link.
9. *Fourth*, the requirement for an accused to be physically present at trial was recently confirmed by Trial Chamber IV in *Banda and Jerbo*, which stated, when ruling on the conditions of summonses to appear, that:

“[F]or purposes of their attendance *in person at trial* pursuant to Article 63 (1) of the Statute... the Chamber considers and hereby orders that the accused persons shall continue to be bound by summonses to appear ... (emphasis added).³

10. *Fifth*, decisions of other international courts and tribunals define the presence of the accused as “physical presence”.⁴ The Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) held that, according to Article 20(4)(d) of the ICTR Statute, “to be present at trial means to be *physically present* in the courtroom” (emphasis added). The same Chamber also noted that Rule 65*bis* of Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (ICTY) illustrates that participation at trial via video-link is not “presence” and that other

³ ICC-02/05-03/09-455 para. 21.

⁴ *The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006 para. 11. Similar findings on the interpretation of presence as physical presence can be found in: *The Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-AR73.10, Decision on Nzirorera’s Interlocutory Appeal Concerning His Right To Be Present At Trial, 5 October 2007, para. 11 (where the Appeals Chamber interpreted the scope of the right to be tried in his or her presence to mean that an accused has a right to be physically present at his trial).

international, regional, and national systems share the view that presence at trial means physical presence.⁵

11. In sum, the Courts statutory framework is clear: Article 63(1) requires accused persons to be physically present at trial. The only exception is the Article 63(2) disruptive accused scenario, which is not at issue here. In consideration of its wording, Article 63(2) is not open to extensive interpretation.

b. The provisions of other international courts and tribunals are inapplicable

12. The Defence relies on jurisprudence of the international criminal tribunals/courts that is inapplicable in the ICC context, given the Court's clear and unambiguous statutory requirement of physical presence at trial.⁶

13. Unlike the ICC, regulatory frameworks of other international criminal courts and tribunals do not mandate the presence of an accused at trial. They only provide for the *right* of the accused to be present at trial.⁷

14. The Statute of the Special Tribunal for Lebanon (STL) even explicitly allows for trials *in absentia*.⁸ Not surprisingly, in that context the STL's Rules of Procedure and Evidence also allow accused to use video-link technology.⁹ The situation is different at the ICC, where trials *in absentia* are foreclosed by Article 63 of the Statute.

⁵ *The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006, para. 12.

⁶ Article 21(1)(a) dictates that first of all the ICC Statute and Rules be applied.

⁷ Article 21(4)(d) of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY); Rule 80(B) and Rule 82 bis of the ICTY Rules; Article 20 (4)(d) of the Statute of the International Criminal Tribunal for Rwanda (ICTR); Rule 80 (B) and Rule 82 bis of the ICTR Rules; Article 17 of the Statute of the Special Court of Sierra Leone (SCSL) and Rules 60 and 80(B) of the SCSL Rules.

⁸ Article 22 of the Statute of the Special Tribunal for Lebanon (STL).

⁹ Rules 104 and 105 of the STL Rules.

15. Precedents from the ICTY are similarly unavailing. While Rule 81 *bis* of the ICTY Rules permits “proceedings be conducted by way of video-conference link” in “the interests of justice”, that provision has been employed in limited circumstances not applicable here. ICTY Trial Chambers have permitted an accused to observe trial via video-link from his bed in the detention centre on account of ill health,¹⁰ but the ICTY has not permitted an able bodied accused, at liberty in his home country, to follow the trial “on a regular basis” via the use of video-link technology, which is the relief sought in the Request.¹¹

II. There are no cogent reasons why video-link technology should be employed in this case

16. The Request should also be denied because it fails to provide the Chamber with any cogent reasons why Mr Kenyatta should be permitted to use video link technology “as a means of participation in the proceedings on a regular basis”.¹² The closest the Request comes is to note that Mr Kenyatta “resides in a country external to the seat of the Court”.¹³ This unremarkable fact – shared by every accused at this Court and the vast majority at other international tribunals – is not a basis to grant the extraordinary relief sought. If it were, the Court quickly would turn into a “virtual tribunal”, where accused appear for trial only if it is convenient for them to do so.

¹⁰ *The Prosecutor v. Stanisic and Simatovic*, Case No. IT-03-69 “Corrigendum to Second Decision Amending Modalities for Trial,” 7 September 2009, para. 5 (“in order to further accommodate Mr Stanisic, the Chamber will allow him, if he opts to, not to be present in court but instead follow the proceedings via a video-conference link from the UNDU”). A similar approach was also taken in *The Prosecutor v. Milan Simic*, Case No. IT 95-9/2-S, Sentencing Judgement, 17 October 2002, para. 8 (the accused participated in his sentencing hearing towards the end of the trial process via video link because of his health condition).

¹¹ ICC-01/09-02/11-667, para. 1.

¹² ICC-01/09-02/11-667, para. 1.

¹³ ICC-01/09-02/11-667, para. 18.

III. Granting the Request would be contrary to the interests of justice

17. There are important reasons for an accused to be physically present in the courtroom. Mr Kenyatta has been called upon to answer serious charges and his proposed absence from the courtroom would undermine the integrity of the proceedings. If witnesses are presumptively required to travel to the Court to testify, no less should be expected of the accused. It is important to ensure that justice is not only done, but is seen to be done,¹⁴ particularly given the wide public interest in the case. Mr Kenyatta's absence from the courtroom would create a risk of this trial being seen as a trial *in absentia*, that the accused can engage with, or ignore, as and when convenient, which would run counter to the interests of justice.

IV. The technology is currently not adequate to ensure smooth and uninterrupted conduct of proceedings via video-link

18. Finally, an accused's physical presence at trial has been associated with the full understanding of the proceedings and the exercise of his rights.¹⁵ Conducting a full trial through video-link raises the prospect of unnecessary technological problems, which could not only delay proceedings but also allow questions about the integrity of the proceedings at a later stage.

19. As witnessed during the 14 February 2013 status conference,¹⁶ where the accused's video feed appeared to break down, video technology is vulnerable to frequent glitches caused by weather and other variables outside the control of the Court's technical staff. In the *Bemba* case, the Chamber was forced to adjourn proceedings when the video-link was

¹⁴ R v. Sussex Justices; Ex parte McCarthy [1924] 1 KB 256; [1923] All ER 233; 93 LJKB 129.

¹⁵ Cassese Gaeta and Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Volume II, page 1282.

¹⁶ ICC-01/09-02/11-T-22-ENG-ET-WT page 3, lines 10-11; page 5, lines 23-25.

disrupted by a snow storm in one case,¹⁷ and transmission problems in another.¹⁸ If video link technology is used “on a regular basis” as requested by the Defence¹⁹, the cumulative effect of disruptions and delays in the proceedings may be significant.

Conclusion

20. For the reasons set forth above, the Prosecution respectfully requests that the Chamber dismiss the Request.

Respectfully submitted,



Fatou Bensouda,
Prosecutor

Dated this 22nd day of March, 2013
At The Hague, The Netherlands

¹⁷ ICC-01/05-01/08-T-294-CONF-ENG-ET, page 21, lines 19-23 (open session).

¹⁸ ICC-01/05-01/08-T-296-ENG-RT, page 2, lines 7-12.

¹⁹ ICC-01/09-02/11-667, para. 1.