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APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public

Prosecution appeal against the "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial"

Source: **Office of the Prosecutor**

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

The Office of the Prosecutor
Ms. Fatou Bensouda
Mr. James Stewart
Mr. Fabricio Guariglia

Counsel for the Defence
For William Samoei Ruto:
Mr. Karim Khan
Mr. David Hooper
Mr. Shyamala Alagendra

For Joshua Arap Sang:
Mr. Joseph Kipchumba Kigen-Katwa
Mr. Silas Chekera

Legal Representatives of the Victims
Mr. Wilfred Nderitu

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims
Ms. Paolina Massidda

The Office of Public Counsel for the Defence

REGISTRY

Registrar
Mr. Herman von Hebel

Counsel Support Section

Deputy Registrar
Mr. Didier Preira

Victims and Witnesses Unit
Mr. Patrick Craig

Introduction

1. This appeal can be resolved by reference to seven unambiguous words in Article 63(1) of the Statute:

> "The accused shall be present during the trial".

2. The Majority of Trial Chamber V(a) ("Majority") erred in law when it disregarded this statutory requirement and excused Mr Ruto from attending substantially all of his trial in its "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial" ("Decision").[1]

3. Article 63(1) establishes the accused's presence as a fundamental requirement or condition of the trial. The seven words of Article 63(1) are clear on their face and even clearer when read in the context of the Statute as a whole, which permits an accused's presence to be waived at confirmation – but not at trial. The drafting history of Article 63(1) further clarifies its meaning. The drafters considered the possibility of permitting the Majority's approach – treating presence at trial as simply a "general rule" subject to exceptions – but rejected it due to opposition to trials *in absentia*. In the end, they included only one exception to the presence-at-trial requirement, which is not applicable here. Thus, pursuant to Article 63(1), the accused is required to attend the trial.

4. Despite the clarity of Article 63(1) and the legislative intent behind it, the Decision sets aside the attendance rule. Instead of following the law agreed upon by the States Parties, the Decision changes it. The Majority asserts that it has the authority to do so by virtue of its "general power" under Article 64(6)(f), which, according to the Majority, provides a Chamber with "discretion" to waive statutory requirements such as Article 63(1). This analysis is incorrect. Whatever "discretion" a Trial Chamber may have, it does not permit it to discard controlling statutory requirements, or to substitute its own policy preferences for those of the States

[1] ICC-01/09-01/11-777.

Parties. The Majority it is bound to apply the law as it stands. The Decision fails to do this, and is incorrect as a result.

5. If upheld, the Decision would indicate that Trial Judges have virtually unlimited "discretion" to apply some parts of the Statute and to ignore others. That is not the system the States Parties agreed to when they ratified the Statute and transferred some of their sovereignty to the Court. The States Parties expect all provisions of the Statute to be given effect – particularly those such as Article 63(1), which are unambiguous. The Decision fails to observe this basic rule and must be reversed.

The Decision

6. In the Decision, the Majority granted Mr Ruto's request not to be continuously present at trial.[2] While the Majority recognised that under Article 63(1), "the general rule as to presence [...] is one of continuous presence at trial",[3] it sought to circumvent the plain text of that article by holding that the Chamber's "general power" under Article 64(6)(f) afforded it "discretion [...] to excuse an accused, on a case-by-case basis, from continuous presence at trial".[4] The Majority exercised this purported "discretion" to excuse Mr Ruto from Article 63(1)'s attendance requirement on the basis of his recent election as his country's executive Deputy Head of State.[5]

7. While the Majority purported to grant Mr Ruto's request "within the limits of certain conditions",[6] the Decision excuses Mr Ruto from attending the entirety of the Prosecution's presentation of evidence, subject only to the proviso that the Chamber may order "any other attendance".[7] Mr Ruto is required to attend only the

[2] Decision,paras.1-2.
[3] Decision,para.49.
[4] Decision,paras.47,49.
[5] Decision,paras.27,53,71.
[6] Decision,para.2.
[7] Decision,para.3(a)(i)-to-(iv). Items (v)-to-(viii) relate to post-conviction procedural steps.

opening[8] and closing[9] of his trial and any hearings "when victims present their views and concerns in person".[10] His attendance is otherwise excused.[11]

8. In her dissenting opinion, Judge Herrera Carbuccia observed that "[p]ursuant to Article 63(1) of the Rome Statute [...], the presence of the accused during the trial is required", and that the "word 'shall'" used in Article 63(1) of the Statute, denot[es] a *requirement* and not an *option*.[12] Noting that "equality [of treatment] under the law is a fundamental value of the administration of justice", Judge Herrera Carbuccia concluded that "Mr Ruto should not be given a different legal status on the basis of his personal position as Deputy President of the Republic of Kenya".[13] While Judge Herrera Carbuccia suggested that "Mr Ruto's absence may be permissible in some specific and limited instances", she refused to join the Majority's "once and for all" grant of non-attendance.[14]

Standard of review

9. The Appeals Chamber has held that, "[o]n questions of law, the Appeals Chamber will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law".[15] This standard of review should guide the Appeals Chamber's assessment of the Decision.

[8] Decision,para.3(a)(i).
[9] Decision,para.3(a)(ii)-and-(iv).
[10] Decision,para.3(a)(iii).
[11] There is no merit to the suggestion that despite the relief granted in the Decision, the "general rule remains that Mr Ruto must be present in the courtroom during the trial" (Decision, para.104). The "conditions" imposed in the Decision excuse Mr Ruto from attending substantially all of his trial (*see* Decision,para.104(a)-and-(b)).
[12] ICC-01/09-01/11-777-Anx2,("Dissenting"),paras.3-4,(emphasis added).
[13] Dissenting,para.7.
[14] Dissenting,paras.9-10.
[15] ICC-02/05-03/09-295OA2,para.20; ICC-01/04-01/10-514OA4,para.15.

Grounds of Appeal

I. First ground of appeal: The Majority erred in law by disregarding the attendance requirement under Article 63(1) and by excusing Mr Ruto from attending substantially all of his trial.

10. As explained below, a literal reading of Article 63 indicates that the accused shall be present at trial and allows for only one exception, the removal of a disruptive accused. A contextual and teleological interpretation of the Statute supports this plain text reading. The Chamber is required to give effect to the precise terms of the Statute where, as here, there is no lacuna and no uncertainty as to the meaning of the operative statutory provision. As the Appeals Chamber has stated, Chambers must limit themselves to applying the letter of the Statute where "[n]o gap is noticeable in the Statute […] in the sense of an objective not being given effect to by its provisions".[16]

A. The Decision fails to give effect to Article 63(1) in line with its ordinary meaning

11. The Appeals Chamber has held that the interpretation of the Statute is governed by Article 31 of the Vienna Convention,[17] which provides that:

> "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[18]

12. The "ordinary meaning" of Article 63(1) could not be clearer. It is brief and unambiguous, and reflects a clear choice by the drafters: the accused's presence at trial is required.[19] As Judge Herrera Carbuccia correctly observed, the mandatory language of Article 63(1) ("shall") does not leave room for judicial discretion –

[16] ICC-01/04-168OA3,para.39.
[17] ICC-01/04-168OA3,para.33; ICC-01/04-01/07-522OA3,para.39; ICC-01/04-01/07-573OA6,para.5; ICC-01/04-01/06-1432OA9-and-OA10,para.55; ICC-01/04-01/06-1486OA13,para.40.
[18] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol.1155, p.331,at-p.340.
[19] By way of comparison, Article 62, which is a similarly brief provision governing the "[p]lace of trial", provides room for judicial discretion by including the words "[u]nless otherwise decided". The absence of such language in Article 63(1) supports the view that the drafters did not intend to provide the judiciary with discretion to alter Article 63(1)'s attendance requirement.

attendance at trial is a "requirement and not an option".[20] By authorising Mr Ruto's absence for substantially all of his trial, the Majority failed to apply Article 63(1) in line with its ordinary meaning.

B. The Decision misconstrues the context, object and purpose of Article 61(3)

13. The Majority failed properly to consider Article 63(1) in the context of the Statute as a whole.[21] When considered against other relevant statutory provisions, the compulsory nature of the attendance requirement in Article 63(1) is unmistakable. The most instructive provisions are as follows:

14. **Article 63(2)**, which establishes the sole exception to the rule that an accused must be present at trial. Under this exception, a Trial Chamber may remove a disruptive accused from the courtroom but even then, the language of Article 63(2) reveals that the drafters viewed the accused's presence as a central requirement of the trial: "If the accused, *being present before the Court*, continues to disrupt the trial, the Trial Chamber may remove the accused".[22] Moreover, Article 63(2) states that a disruptive accused may be removed from the courtroom "only for such duration as strictly required". This limitation on the Chamber's power to remove an accused 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.

15. **Article 61(2)(a)** permits a charged person to waive his attendance at the confirmation hearing. There is no similar provision for the trial. That the drafters chose to include a waiver provision for the confirmation stage (Article 61(2)(a)) but *not* for the trial stage (Article 63) supports the view that the drafters considered an accused's presence to be a central requirement of the trial. Indeed, the drafting history suggests that the adoption of Article 61(2)(a) (which permits confirmation hearings *in absentia*) helped resolve disputes about Article 63(1) by providing a

[20] Dissenting,paras.3-4.
[21] ICC-01/04-01/07-776OA7,para.73.
[22] Emphasis added.

"replac[ement]"[23] to those delegations that supported *in absentia* trials. This analysis is further supported by Rules 124-126, which regulate the conduct of confirmation proceedings in the absence of the charged person. The Rules contain no such provisions for the trial stage.

16. **Articles 58(1)(b) and 58(7)** grant the Pre-Trial Chamber the authority to issue an arrest warrant or summons "[t]o ensure the person's appearance at trial". Again, the legislative intent is clear – the accused's presence is required at trial – and nothing in the provisions envisages a trial without the accused present.

17. **Article 67(1)(d)** establishes that an accused has a right "to be present at trial".[24] The inclusion of both the presence-at-trial *requirement* in Article 63(1) and the codification of the *right* to be present in Article 67(1)(d) demonstrates that the drafters viewed the two as distinct concepts; that presence at trial is not merely a right of the accused, but also a mandatory procedural requirement of the trial itself. Article 63(1) codifies the procedural *requirement* that the accused must be present and Article 67(1)(d) codifies the *right* to be present. The Decision erroneously conflates Articles 63(1) and 67(1)(d). By excusing Mr Ruto from the attendance requirement under Article 63(1), the Decision treats that requirement as though it were a waivable right.[25] In effect, the Majority's analysis reads Article 63(1) out of the Statute by treating it as though it were the same as Article 67(1)(d). This violates the basic principle of statutory interpretation that statutes shall be read so as to give effect to all terms.

C. The Decision ignores the drafting history of Article 63(1), which demonstrates that the accused's presence at trial is required

18. The Appeals Chamber has held that the *travaux préparatoires* may be used to "confirm[...] the meaning of a statutory provision".[26] The *travaux* – which the

[23] Roy Lee(ed.), *The International Criminal Court: the making of the Rome Statute: issues, negotiations and results* (Martinus-Nijhoff-Publishers,1999),p.261.
[24] Notably, Article 67(1)(d) explains that the exercise of the accused's right to be present at trial is "[s]ubject to article 63, paragraph 2"–the exception for the disruptive accused discussed above.
[25] While the Decision notes that other international courts and tribunals have permitted accused to waive the right to be present, no previous Chamber of this Court has done so. *See* Decision,para.37.
[26] ICC-01/04-168OA3,para.40; ICC-01/04-01/07-522OA3,paras.37,50; ICC-01/04-169,para.81.

Decision fails to mention – demonstrate that the drafters viewed the presence-at-trial requirement under Article 63(1) as a necessary condition for the validity of the trial, rather than a feature that could be waived, as the Decision suggests.

19. The attendance requirement codified in Article 63(1) was maintained without significant variation throughout the Statute's negotiating history.[27] The 1995 Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court confirms that the rule was "widely endorsed" by the delegations.[28] In its final incarnation in the Statute, the "express language" of Article 63(1) signals the "significant importance [...] placed on the presence of the Accused during trial".[29] Notably, the only change from the 1994 International Law Commission draft was the elimination of the words, "[a]s a general rule", at the beginning of the sentence.[30] This deletion shows that the drafters considered, and rejected, the very notion advanced in the Decision – that the accused's presence at trial is simply a "general rule", subject to undefined exceptions.[31]

20. Contrary to the position taken in the Decision, the delegations agreed on only one exception – Article 63(2)'s mechanism for the removal of a disruptive accused. While some delegations argued that the presence requirement "should not be accompanied by any exceptions",[32] others advocated certain prescribed

[27] The provision's first incarnation was in Article 37(1) of the 1994 International Law Commission Draft Statute for an International Criminal Court, which read: "As 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 (2 May-22 July 1994)*, 49th Sess.,Supp.No.10,U.N.Doc.A/49/10(1994),p.53; another option considered but ultimately not adopted was Option 1 of Article 63 of the text of the 1998 General Assembly Preparatory Committee submitted to the Diplomatic Conference, which read: "The trial shall not be held if the accused is not present", *see Draft Statute for the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N.Doc.A/CON.183/2/Add.1-and-Corr.1,(1998), reprinted in *Official Records from the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, U.N.Doc.A/CONF.183/13(Vol.III)(1998),p.53.

[28] *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.

[29] Khan & Dixon, *Archbold:International Criminal Courts Practice, Procedure And Evidence* (3rd ed.,Sweet-&-Maxwell,2009),p.522, margin-no.8-40.

[30] *See Report of the International Law Commission on the work of its forty-sixth session (2 May-22 July 1994)*, 49th Sess.,Supp.No.10,U.N.Doc.A/49/10(1994),p.53.

[31] ICC-01/09-01/11-777,para.49.

[32] *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.

exceptions.[33] The different approaches were honed into four options in the final Draft Statute submitted by the 1998 Preparatory Committee:[34]

> **Option 1**
>
> 1. The trial shall not be held if the accused is not present.
>
> **Option 2**
>
> *General rule*
>
> 1. As a general rule, the accused shall be present during the trial.
>
> *Exceptions*
>
> 2. In exceptional circumstances, the Trial Chamber may order that the trial proceed in the absence of the accused, if the accused, having been present at the commencement of the trial thereafter:
>
> a. Has escaped from lawful custody or has broken bail; or
>
> b. [Is continuing to disrupt the trial.]
>
> . . .
>
> **Option 3**
>
> 1. As a general rule, the accused should be present during the trial.
>
> 2. In exceptional circumstances, the Trial Chamber may, in the interests of justice [at the request of the Prosecutor] [*proprio motu* or at the request of one of the parties] order that the trial proceed in the absence of the accused, if the latter, having been duly informed of the opening of the trial:
>
> a. Requests to be excused from appearing for reasons of serious ill-health;
>
> b. Disrupts the trial;
>
> c. Does not appear on the day of the hearing;
>
> d. Under detention has, when summoned for the date of the trial, refused to appear without good reason, and made it particularly difficult to bring him to the Court;
>
> . . .

[33] William Schabas in Otto Triffterer(ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd ed.,C.H.Beck-Hart-Nomos,2008),pp.1193-4, margin-no.5,7,9.

[34] Text of the 1998 General Assembly Preparatory Committee submitted to the Diplomatic Conference, Article 63, *Draft Statute for the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court,* U.N.Doc.A/CON.183/2/Add.1-and-Corr.1,(1998), reprinted in *Official Records from the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court,* U.N.Doc.A/CONF.183/13(Vol.III)(1998),pp.53-54,(footnotes omitted).

Option 4

1. The accused shall have the right to be present at the trial, unless the Trial Chamber, having heard such submissions and evidence as it deems necessary, concludes that the absence of the accused is deliberate.

. . .

21. At the Rome Conference, these options were negotiated, along with several new proposals.[35] Arguments centred on "the classic controversies between Romano-Germanic and common law procedural models on the subject of *in absentia* trials".[36] In the end, "[c]ompromise on these issues proved impossible and, as is often the case, the result is that there is no provision on *in absentia* trials, saving the exception where an accused disrupts the proceedings", codified in Article 63(2).[37] Even then, Article 63(2)'s final text is more restrictive than earlier drafts, indicating a policy choice to limit the situations in which the trial could proceed in an accused's absence. This policy preference appears to have been driven at least in part by the concern that trials *in absentia* were "of little practical value" given the right of the accused, under certain lines of international case law,[38] to demand a new trial upon his or her appearance before the court.[39]

22. In sum, the *travaux* reveal that the drafters considered – and rejected – the Majority's position that Rule 63(1)'s attendance requirement is merely a "general rule" that can be set aside in "exceptional circumstances".[40] Moreover, in four years of negotiations, there does not appear to have been any suggestion that the

[35] *Proposal for Article 63 submitted by Egypt, Iraq, the Libyan Arab Jimahiriya, Oman, Qatar, the Sudan Arab Republic and the Syrian Arab Republic*, A/CONF.183/C.1/WGPM/L.15; *Proposal for Article 63 submitted by Columbia*, A/CONF.183/C.1/WGPM/L.17; *Proposal submitted by Malawi for Article 63*, A/CONF.183/C.1/WGPM/L.16. These were summarised in the Chair's working paper on 4 July 1998, *Proposal for Article 63*, A/CONF.183/C.1/WGPM/L.51.
[36] William Schabas in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd ed.,C.H.Beck-Hart-Nomos,2008),p.1194, margin-no.9.
[37] William Schabas in Otto Triffterer(ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd ed.,C.H.Beck-Hart-Nomos,2008),p.1194, margin-no.10 (citations omitted); *see also* Casesse, Gaeta, Jones(eds), *The Rome Statute of the International Criminal Court: A Commentary* (Vol.II) (2nd ed.,OUP,2009),p.1283 ("Trial *in absentia*, or *par contumace*, that is, in the absence of the accused, is not provided for by the Statute");Roy Lee(ed.), *The International Criminal Court:the making of the Rome Statute:issues, negotiations and results* (Martinus-Nijhoff-Publishers,1999),p.261 ("the Statute does not provide for any such trials to take place before the Court").
[38] *See, e.g.*,European Court of Human Rights, *Colozza v. Italy*, (Application no.9024/80), 12 February 1985, para.29.
[39] William Schabas in Otto Triffterer(ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd ed.,C.H.Beck-Hart-Nomos,2008),p.1194, margin-no.9; *see also* p.1193, margin-no.5.
[40] Decision,para.49.

attendance requirement under Article 63(1) should be subject to a "voluntary waive[r]" exception of the type endorsed in the Decision.

D. The Decision is based on the erroneous premise that a Trial Chamber has "discretion" to disregard the attendance requirement under Article 63(1)

23. The Decision is based on the notion that a Trial Chamber has the "discretion under Article 64(6)(f)" to set aside statutory requirements when it sees fit to do so.[41] The Appeals Chamber has already stated that this analysis is incorrect.

24. The exercise of discretion under Article 64(6)(f) does not permit a Chamber to disregard unambiguous statutory requirements. If that were the case, a Chamber would be able to overrule any statutory provision on the basis of Article 64(6)(f) and to selectively apply parts of the Statute, while disregarding others. By holding that the Chamber had the "discretion" to set aside the attendance requirement under Article 63(1), the Majority effectively ruled that it had the authority to substitute its policy preferences for those of the States Parties. That is not the system the States Parties agreed to when they signed up to the Statute and transferred some of their sovereignty to the Court.

25. In the *Lubanga* case, Trial Chamber I granted leave to appeal to The Netherlands and to the Democratic Republic of the Congo "[i]n order to give full effect to Article 64(2)" and therefore, for grounds other than those set out in Article 82(1)(d).[42] The Chamber's stated basis for granting leave outside the scope of Article 82(1)(d) was its authority "to rule on any other relevant matters" under Article 64(6)(f).[43] The Appeals Chamber overturned the Chamber's decision and found that it had been issued *ultra vires*.[44] The Appeals Chamber noted that decisions which are subject to appeal are exhaustively regulated in Articles 81 and

[41] Decision,para.49; *see also* paras.43,53,60,71,75, 99,104.
[42] ICC-01/04-01/06-2779,para.23.
[43] ICC-01/04-01/06-2779,para.23.
[44] ICC-01/04-01/06-2799OA19,para.8.

82[45] and that the fact that granting leave to appeal may have been desirable or even necessary did not justify a departure from the terms of the Statute.[46]

26. The same reasoning applies to this case and the Decision should therefore be overturned. As explained above, Article 63(1) leaves no room for a Trial Chamber to excuse an accused from attending substantially all of his trial. Contrary to the Majority's reasoning, nothing in Article 64(6)(f) alters this position. Article 64(1) makes clear that the powers of the Trial Chamber set out in the entire article "shall be exercised *in accordance with this Statute* […]".[47] Article 64(6)(f) is a "catch all" provision, which gives the Trial Chamber residual power to rule on matters not otherwise regulated in the Statute or Rules.[48] It is not a "trump all" provision that enables a Trial Chamber to deviate from clear statutory provisions. As Judge Pikis observed:

> "[t]he remit of interpretation is to construe the law as laid down by the legislator. A purposive interpretation provides no warrant for the redrafting, the remoulding or the addition of new provisions to a section of the Statute. In short, no process of interpretation empowers the Court to remake the law."[49]

27. Article 63(1) is one of the simplest provisions in the Statute and leaves little leeway for judicial interpretation. If the Decision – which effectively strikes out Article 63(1) from the Statute – 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. Such a precedent may undermine confidence in this Court's ability to follow the legal instruments agreed upon by State Parties and with it, the integrity of the Court as a whole. It is therefore critical that the Majority's error be remedied on appeal.

[45] ICC-01/04-01/06-2799OA19,para.7.
[46] ICC-01/04-01/06-2799OA19,para.8.
[47] Emphasis added.
[48] ICC-01/09-01/11-524,para.27.
[49] ICC-01/04-01/07-521OA5,para.19 (dissenting opinion of Judge Pikis).

E. The Decision relies on an incorrect "duty" analysis

28. The Majority finds that Article 63(1) imposes a "duty upon the accused" to be present at trial, but not "an equivalent duty upon the Chamber" to ensure the accused's presence.[50] The Majority uses this holding to support its conclusion that the Trial Chamber can excuse Mr Ruto from attending substantially all his trial. This reasoning is flawed. It is incorrect for Article 63(1) to be cast solely in terms of a "duty" upon accused persons. It is a *requirement* or a *condition* of the trial. In the same way that trials must be heard by a three-Judge Bench,[51] and may take place only if a Pre-Trial Chamber has confirmed the charges,[52] the accused's presence is a fundamental condition of the trial that cannot be set aside in the manner authorised in the Decision.

29. Even assuming, *arguendo*, that the Majority was correct that the attendance requirement under Article 63(1) is a "duty" that attaches only to the accused, this would not support the waiver of that provision as granted by the Decision. The point can be demonstrated by way of analogy: under Article 66, the Prosecution bears the burden to prove an accused's guilt "beyond reasonable doubt". Although this burden of proof falls on the Prosecution alone, the Chamber does not have the "discretion" to relieve the Prosecution of its burden, even if it considers that, as a matter of policy, exceptions to the principle should be allowed. In the same way that a Trial Chamber lacks discretion to alter an essential requirement of the trial such as the Prosecution's evidentiary burden, it also lacks authority to excuse an accused from attending trial. It is irrelevant whether the requirement in question attaches to only one party.

F. *Bemba* does not support the relief granted in the Decision

30. The *Bemba* precedent does not support the Majority's decision to excuse Mr Ruto from attending substantially all of his trial.[53] Mr Bemba was permitted to be absent

[50] Decision,paras.41-47; *see* in particular, paras.43-44.
[51] Articles 39(2)(b)(ii)-and-74(1).
[52] Article 61(7)(a)-and-(11).
[53] Decision,para.44 (noting the approach taken in the *Bemba* case).

for a total of three court sessions,[54] plus one where he was absent from the courtroom for a matter of minutes.[55] In total, Mr Bemba has been absent for less than a handful of hours in a trial that is approaching its third anniversary. This is a far cry from the near-blanket waiver the Decision grants to Mr Ruto.

31. In this appeal, however, 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. The issue in this appeal is not whether such limited relief would ever be permissible under the Statute because that is not what the Decision authorises. Rather, it authorises Mr Ruto to be absent for substantially all of his trial. This relief cannot possibly be reconciled with the text of Article 63(1), which requires the accused to "be present during the trial".

G. The Decision improperly relies on external sources of law rather than this Court's statutory provisions that resolve the issue

32. The Majority erred by relying on external sources of law in support of its decision to disregard the unequivocal requirements of this Court's Statute.[56] The Appeals Chamber ruled that "[when] a matter is exhaustively dealt with by [the Statute's] text or that of the Rules of Procedure and Evidence [...] no room is left for recourse to the second or third source of law to determine the presence or absence of a rule governing a given subject".[57] Since the issue of the accused's presence at trial "is exhaustively dealt with" in Article 63(1), precedents from other jurisdictions cannot be used as a basis to set aside this statutory requirement. As the Appeals Chamber observed in a different context:

> "[t]his Court has its own legal framework governing the issues that arise in this appeal [...]. This cannot be replaced by the practice of other courts and tribunals in the present circumstances".[58]

[54] ICC-01/05-01/08-T-183-Red-ENG,pp.1-2; ICC-01/05-01/08-T-306-Red-ENG,p.62; ICC-01/05-01/08-T-324-ENG,pp.16-17; ICC-01/05-01/08-T-324bis-CONF-ENG,p.1.
[55] ICC-01/05-01/08-T-131-Red-ENG,pp.9-10.
[56] Decision,paras.73-76.
[57] ICC-01/04-01/06-772OA4,para.34,(referring to ICC-01/04-168OA3,paras.23-24,33-42).
[58] ICC-01/09-02/11-365OA3,para.62.

33. In any event, the international and domestic precedents relied upon in the Decision are inapposite for the simple reason that, while the jurisdictions cited by the Majority may have the equivalent of Article 67(1)(d)'s right to be tried in person, none appear to have the equivalent of Article 63(1) on its statute books – a provision that makes the accused's presence at trial a requirement or condition of the trial. It is a well-accepted principle that "courts must operate within the legal material they are given",[59] and where "clarity of the [relevant] provisions, viewed in their context, admits of no doubt [...] the Court must apply these as they stand".[60]

II. Second ground of appeal: The Majority erred in law by excusing Mr Ruto on the basis of his "important functions".

A. The Majority's test is incorrect because it extends beyond the solitary exception codified in Article 63(2)

34. The Decision incorrectly holds that the attendance requirement under Article 63(1) may be set aside "on a case-by-case basis" and in "exceptional circumstances", including where "an accused person has important functions of an extraordinary dimension to perform".[61] As explained above in relation to the Prosecution's first ground of appeal, such a general exception to the rule requiring the accused's presence at trial finds no support in this Court's legal framework. The drafters adopted only one exception to the rule,[62] which is inapplicable here, and left trial judges with no "discretion" to create additional broad exceptions of the type advanced in the Decision. The Majority's "exceptional circumstances" test is therefore inconsistent with the Statute.

B. The Majority's test violates the principle of equal treatment under the law, as expressed in Article 27(1) of the Statute

35. Furthermore, the Majority's test violates the bedrock legal principle that all persons are to be treated equally under the law. This principle of equal treatment is reflected in Article 27(1), which provides that the "Statute shall apply to all persons without

[59] John Merrills, *The development of international law by the European Court of Human Rights* (Manchester-University-Press,1993),p.232.
[60] International Court of Justice, *LaGrand Case*, ICJ Reports 2001,p.466,-at-p.494,para.77.
[61] Decision,para.49.
[62] Article 63(2).

any distinction based on official capacity". Contrary to this principle, the Decision makes clear that excusing Mr Ruto from attending substantially all of his trial is "purely a matter of accommodation of the demanding functions of his office as Deputy Head of State of Kenya".[63] Stated differently, it appears that the Majority would not have afforded Mr Ruto the same "indulgence" if he did not hold such high office.[64] The importance of Mr Ruto's political office to the Majority's reasoning is evident on the face of the Decision, which references his status no fewer than 29 times.

36. The Majority glossed over Article 27(1) by suggesting that "there is no reason to over-task the principle captured in Article 27",[65] and that Article 27's "chief object" is to remove head of state immunity from prosecution,[66] "not to remove from the Trial Chamber all discretion to excuse an accused from continuous presence in an ongoing trial".[67] The Prosecution submits that the scope of Article 27(1) is broader than the Decision suggests. While it is correct that one of the functions of Article 27(1) is to foreclose functional immunity, the provision is also intended to ensure that all persons receive equal treatment under this Court's rules, both on substantive and procedural matters. This is apparent from the first sentence of Article 27(1), which requires that "this Statute shall apply to all persons without any distinction [...]". The reference to the "Statute" as a whole, rather than solely to those provisions relating to criminal responsibility, suggests that Article 27(1) was intended to ensure that the Court's legal framework is applied equally to all persons. This interpretation is confirmed by Article 21(3), which provides that "the application and interpretation of law" must "be without adverse distinction" based on any "other status". Again, the principle enshrined is equal treatment under the law, regardless of a person's "status". The Decision is inconsistent with this principle.

[63] Decision,para.71,(emphasis omitted).
[64] Decision,paras.65,71.
[65] Decision,para.95.
[66] Decision,para.69.
[67] Decision,para.71.

C. The Majority's test presents a "floodgates" problem.

37. Even assuming, *arguendo*, that the Majority'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. Almost every accused will be able to present a reason why he or she "has important functions of an extraordinary dimension to perform" and should be excused from attending the trial.[68] While Mr Ruto's position as Kenya's Deputy President may "make this case different from the average case" seen so far at the Court,[69] it is foreseeable that many future accused will put forward a compelling argument as to why they too should be excused from attending the trial.

38. As a matter of policy, the Prosecution focuses its investigations on persons who bear the greatest responsibility for the most serious crimes under the Statute.[70] It is therefore foreseeable that future accused will hold functions that may make the Majority's test applicable to them. To take but a few examples: a government minister may assert that he/ she is the only person "constitutionally authorised to perform the functions" of that office,[71] which would suffer if he or she were required to attend the trial; the head of a political party may assert that the party would be disadvantaged in his/her absence; the leader of an armed group may assert that the group would disband or be disadvantaged in political negotiations without his leadership. In other cases, a self-employed accused may assert that her business would suffer if she is required to attend trial, leading to redundancies for her staff; or, as Judge Eboe-Osuji noted in his dissent to the decision granting leave to appeal the Decision, "a medical practitioner of rare skill and specialty" may assert that his attendance at trial would disadvantage his patients.[72]

39. While the Decision was driven by Mr Ruto's current political office, its precedential effect will no doubt be broader if it is permitted to stand. Many

[68] Decision,para.49.
[69] Decision,para.27.
[70] *See* http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf.
[71] Decision,para.51.
[72] ICC-01/09-01/11-817-Anx,para.10.

accused will be able to craft a reason why they should be excused from attending the trial, and if Article 63(1) is viewed merely as a "general rule",[73] rather than the procedural requirement that it is, Trial Chambers may be tempted to excuse accused from attending trial, particularly in cases where the accused is at liberty and there is no guarantee he will appear for trial.

Request for suspensive effect

40. If the Appeals Chamber is unable to resolve this appeal before Mr Ruto's trial commences on 10 September 2013, the Prosecution requests suspensive effect under Rule 156(5) because the implementation of the Decision would "(i) would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant, (ii) would lead to consequences that would be very difficult to correct and may be irreversible, or (iii) could potentially defeat the purpose of the appeal".[74]

41. Implementation of the Decision will have the effect of excusing Mr Ruto from trial after opening statements. This appeal aims to ensure Mr Ruto's attendance at the trial, and to prevent the possibility of the trial being nullified due to the lack of a necessary condition under the Statute. Implementation of the Decision necessarily defeats this purpose; the trial would commence on the basis of an incorrect legal framework, and as a consequence proceedings would be tainted.[75]

42. Moreover, implementing the Decision "would create an irreversible situation that could not be corrected" and would lead to consequences that "would be very difficult to correct and may be irreversible" if the Decision is overturned and the trial has to re-start in Mr Ruto's presence.[76] In particular, the Prosecution may have to recall witnesses who testified in Mr Ruto's absence. Considering the difficulties faced in this case, such witnesses may be unwilling or unable to return to testify again, depriving the Prosecution of part of its evidence.

[73] Decision,para.49.
[74] ICC-01/11-01/11-387OA4, para.22.
[75] ICC-01/04-01/06-1347OA910,para.23.
[76] ICC-01/11-01/11-387OA4,para.22, quoting ICC-01/04-01/07-3344OA13,para.6.

Conclusion

43. For the above reasons, the Prosecution requests the Appeals Chamber to:

(i) grant suspensive effect of this appeal by ordering that Mr Ruto shall be required to attend trial until this appeal has been decided; and

(ii) reverse the Decision.

Fatou Bensouda, Prosecutor

Dated this 29th day of July 2013

At The Hague, the Netherlands