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THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding
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

**Defence response to the “Prosecution appeal against the ‘Decision on Mr Ruto’s
Request for Excusal from Continuous Presence at Trial’”**

Source: Defence for Mr. William Samoei Ruto

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

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I. Introduction

1. The defence for Mr. William Samoei Ruto (“Defence”) respectfully submits that the *Prosecution’s appeal against the “Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial” (“Appeal”)*¹ should be dismissed. The Majority of Trial Chamber V(A) (“Majority”) did not err when they granted, within the limits of certain conditions, Mr. Ruto’s request to not be continuously present in court during his trial (“Decision”).²
2. In the Appeal, the Prosecution advocates an overly narrow interpretation of Article 63(1) of the Rome Statute (“Statute”). This interpretation is not supported by the Court’s established jurisprudence on general principles of statutory interpretation nor by wider international human rights law principles which, as the Majority rightly observed, “the Court’s Statute forms a part.”³ The Appeal is also riddled with inherent contradictions and built on arguments which misrepresent the Majority’s approach and reasoning. Crucially, the Prosecution’s absolutist, narrow and excessively rigid approach to the presence of an accused at trial is fatally undermined by the Court’s existing practice, as evidenced in the *Bemba* case (and, indeed, the Prosecution’s own passive approach therein), which establishes that Trial Chambers do have the power to excuse accused who are otherwise cooperating with the Court from continuous presence at trial. The Prosecution singularly fails to convincingly address this precedent at any point in the Appeal.
3. The Prosecution’s request for suspensive effect should also be dismissed. Again, the *Bemba* precedent proves problematic, revealing that the Prosecution’s concerns that continuing proceedings in the absence of an accused risks recalling witnesses, or worse, restarting trial, to be scaremongering and utterly baseless. In any event, when the Prosecution does attempt to distinguish the *Bemba* precedent

¹ ICC-01/09-01/11-831.

² ICC-01/09-01/11-777.

³ Decision, para. 2.

in the Appeal, it does so on the basis of duration.⁴ Should the Appeals Chamber overturn the Decision, then any questions about the possible effect of Mr. Ruto's absence on proceedings can be similarly answered because the duration of any absence will be limited. The Prosecution's inconsistent and differential approach to the absence of accused in different trials is not only worrying, it is unjustifiable. In addition, a detailed, unequivocal waiver signed by Mr. Ruto regarding the effects of any absence has already been lodged with the Court.⁵ This will ensure proceedings are safeguarded and will not be vitiated even if the Appeal were to ultimately succeed. Accordingly, the Prosecution has failed to show any compelling need or, indeed, justification of any sort requiring the Appeals Chamber to grant suspensive effect to the Decision.

II. Request for an Oral Hearing

4. The Decision is the first time that Article 63 of the Statute and its import have been judicially considered in any detail at this Court. Due to the importance and novelty of the issue and to assist the Appeals Chamber in resolving the two grounds of appeal, the Defence submits that an oral hearing on the Appeal would be beneficial.

III. Response to the First Ground of Appeal: The Majority did not Err in Law in its Interpretation of Article 63(1) of the Statute

5. Contrary to the Prosecution's assertions, the Decision does not involve any error of law. As the following analysis demonstrates, the Majority properly applied the Court's established jurisprudence on general principles of statutory interpretation and correctly followed the law agreed upon by the States Parties. The Defence, therefore, respectfully submits that the Decision should be affirmed.

⁴ Appeal, paras. 30-31.

⁵ ICC-01/09-01/11-782.

A: the ordinary meaning of a term alone is not determinative of its proper interpretation

6. The Prosecution's erroneous, unduly narrow, and overly simplistic approach to statutory interpretation is apparent from paragraph 1 of the Appeal. The Appeal cannot "be resolved by reference to [the] seven unambiguous words in Article 63(1)"⁶ alone. This Court's jurisprudence expressly provides that a literal interpretation of a provision is not definitive and, given the complexity of a statutory instrument which extends to 128 articles, a more holistic approach is appropriate.⁷
7. Specifically, and as required by Article 31 of the Vienna Convention on the Law of Treaties (1969),⁸ this Appeals Chamber has held that "[t]he rule governing the interpretation of a section of law is its wording read in context and light of its object and purpose".⁹ Despite being aware of this jurisprudence,¹⁰ the Prosecution's first argument fails to properly apply it, being satisfied instead to erroneously rely on a narrow, literal interpretation of the provision alone.¹¹
8. In contrast, and in accordance with the aforementioned Appeals Chamber's jurisprudence, the Majority correctly set out the principles of statutory interpretation which a Chamber must apply at the very outset of its analysis, noting that "provisions are not to be construed in isolation" and that "[t]he Statute must be read as a whole".¹² The Majority also correctly noted that such an approach avoids a "blinkered view of only certain provisions of the Statute".¹³ Indeed, the Prosecution's reliance on the dissenting opinion of Judge Herrera Carbuccion in this regard¹⁴ is misplaced given that the learned Judge did not

⁶ Appeal, para. 1. See also Appeal, paras. 1, 3, 10, 12.

⁷ See, e.g., ICC-01/04-01/07-776 OA 7, 26 November 2008, para. 73 (individual provisions must be "read in light of the statutory scheme as a whole").

⁸ See ICC-01/04-168 OA 3, 13 July 2006, para. 33 ("The interpretation of treaties, and the Rome Statute is no exception, is governed by the Vienna Convention on the Law of Treaties (23 May 1969), specifically the provisions of Articles 31 and 32.").

⁹ ICC-01/04-168 OA 3, para. 33 (emphasis added, footnotes omitted).

¹⁰ Appeal, fn. 17 and para. 17.

¹¹ *Ibid.*, paras. 11, 12.

¹² Decision, para. 31. See also para. 47.

¹³ *Ibid.*

¹⁴ Appeal, para. 12.

ultimately subscribe to a literal interpretation of Article 63(1), recognising that “Mr. Ruto’s absence may be permissible in some specific and limited instances”.¹⁵

9. Accordingly, arguments that the Majority failed to give effect to Article 63(1) in line with its ordinary meaning should be dismissed because such a principle is without legal basis at this Court. In contradistinction to this, the Defence respectfully submits that the Majority’s approach is correct in law and should be upheld and approved of by the Appeals Chamber.

B: The Majority correctly read Article 63(1) in light of the Statute as a whole

10. The Prosecution criticises the Majority for failing to “properly to consider Article 63(1) in the context of the Statute as a whole.”¹⁶ As is evident from the above discussion, this criticism is a blatant misrepresentation of the Majority’s detailed analysis which begins with the heading “(1) *The Statute Read as a Whole*”.¹⁷ In addition, while the Prosecution limits its own statutory analysis to Articles 63(2), 61(2)(a), 58(1)(b), 58(7) and 67(1)(d),¹⁸ the Majority expressly considered all these articles plus Articles 64 and 66.¹⁹
11. The Prosecution further misrepresents the Majority’s wider statutory analysis by stating that the “Decision erroneously conflates Articles 63(1) and 67(1)(d)” and concluding that “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)”.²⁰ This is incorrect as demonstrated by a basic analysis of the Decision. In this regard, the Majority gave careful consideration to Articles 63(1) and 67(1)(d), noting that to read Article 63(1) as a right would be to “presume that the drafter had used words in vain” and would also render the provision “entirely redundant”.²¹ The Majority,

¹⁵ ICC-01/09-01/11-777-Anx2, Dissenting Opinion of Judge Herrera Carbuccion, para. 9.

¹⁶ Appeal, para. 13.

¹⁷ *Ibid.*, p. 16. See also Decision, paras. 31-33.

¹⁸ Appeal, paras. 14-17.

¹⁹ Decision, paras. 32, 33, 35, 39, 40, 47-49, 55-62.

²⁰ Appeal, para. 17.

²¹ Decision, para. 39.

therefore, concluded that Article 63(1) lays down a duty²² whereas Article 67(1)(d) enshrines a right.²³

12. On the basis that the Prosecution's arguments under this head are founded on a series of clear misrepresentations of the Majority's reasoning in the Decision and do not identify any error of law, they should be dismissed in their entirety.

C: The Majority's approach conforms with the law agreed by the States Parties

13. Contrary to the Prosecution's submissions,²⁴ the Majority's analysis which interprets Article 63(1) in light of a Chamber's discretionary powers contained in Article 64 and determines that Article 63(2) is not the only exception to an accused's continuous presence at trial, correctly conforms to the law agreed upon by the States Parties as evidenced by the *travaux préparatoires*.
14. During the Rome Conference, the *travaux préparatoires* show that discussions on Article 63 focused effectively on whether or not trials *in absentia* should be permitted at the Court and, if so, in what form.²⁵ As correctly noted by the Prosecution, ultimately, the debate on the issue divided down civil and common law lines but, in the end, no compromise on the issue of *in absentia* trials proved possible.²⁶
15. However, this was not the end of the matter. By agreeing to the wording which now forms Article 63(1), what was effectively rejected by States Parties was the holding of "true" trials *in absentia*.²⁷ But, as evidenced by the "Working paper on

²² *Ibid.*, para. 40.

²³ *Ibid.*, para. 35.

²⁴ Appeal, paras. 18-22.

²⁵ See, e.g., Proposal for article 63 submitted by Egypt, Iraq, the Libyan Arab Jamahiriya, Oman, Qatar, the Sudan and the Syrian Arab republic, UN Doc. A/CONF.183/C.1/WGPM/L.15 (25 June 1998); Proposal Submitted by Malawi for article 63, UN Doc. A/CONF.183/C.1/WGPM/L.16 (25 June 1998); Proposal for article 63 submitted by Columbia, UN Doc. A/CONF.183/C.1/WGPM/L.17 (25 June 1998).

²⁶ Appeal, para. 21 citing to William Schabas in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, C.H. Beck-Hart-Nomos, 2008, p. 1194.

²⁷ There is a distinction to be drawn between "true" trials *in absentia* where trials of accused who have not yet been arrested or have fled the jurisdiction of the Court take place in the absence of the accused (as at the Special Tribunal for Lebanon) and trials where the accused has appeared in person before the relevant court and is otherwise available but, for reasons such as sickness or disruption, does not attend proceedings. See Statute, Article 63(2) for trials in the absence of a disruptive accused. See also *Prosecutor v. Nahimana et al.*, ICTR-99-

article 63”, agreement on the wording of Article 63(1) was achieved because the States Parties agreed that special provisions to deal with situations when proceedings did take place for whatever reason in the absence of an accused who was otherwise available were not required “because these matters were adequately addressed in articles 64 (Functions and powers of the Trial Chamber) and 67 (Rights of the accused).”²⁸ Therefore, it was expressly intended by States Parties that a Trial Chamber would have recourse to Article 64, including the discretionary powers contained therein, when interpreting Article 63.²⁹ Accordingly, the Majority’s approach is correct in law. It is of note that the Prosecution makes no reference to this inconvenient part of Article 63’s drafting history which completely undermines the foundations of its entire Appeal.

D: The Majority properly construed Article 63(1) alongside Articles 64(2) and 64(6)(f)

16. Given that, as explained above, it was expressly intended that Article 63(1) be read in conjunction with Article 64, it is clear that the Prosecution’s assertion that the “Decision is based on the erroneous premise that a Trial Chamber has “discretion” to disregard the attendance requirement under Article 63(1)”³⁰ is incorrect.
17. Additionally, the Prosecution’s implied argument that the Majority exceeded its discretion is without merit. Even a cursory assessment of the Decision demonstrates that the series of exaggerated Prosecution claims that “the Majority effectively ruled that it had the authority to substitute its policy preferences for those of the States Parties”,³¹ the Decision signals that “Trial Chambers enjoy

52-A, Judgement (AC), 28 November 2007, para. 98, where the ICTR Appeals Chamber concludes that the expression “*in absentia*” refers to an accused who has not yet been arrested by the Tribunal.

²⁸ William Schabas in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, C.H. Beck-Hart-Nomos, 2008, p. 1194 citing to fn. 1 to Working Paper on article 63, UN Doc. A/CONF.183/C.1/WGPM/L.67 which states: “After having further reflected upon the provisions in articles 64 and 67, it has been concluded that the text of paragraph 1 in document A/CONF.183/C.1/WGPM/L.51 should be retained.”

²⁹ *Contra* Appeal, paras. 4, 5, 22.

³⁰ Appeal, p. 12.

³¹ *Ibid.*, para. 24.

almost unfettered discretion”³² and the Decision indicates “that Trial Judges have virtually unlimited “discretion” to apply some parts of the Statute and to ignore others”³³ are all based on the erroneously selective approach adopted by the Prosecution to its analysis of the *travaux préparatoires* (see above) and the plain text of the Decision itself.

18. Indeed, the plain text of the Decision reveals that the Majority correctly and carefully exercised their discretionary powers in full cognisance of their limitations. Specifically, the Majority directed themselves that the discretionary powers contained in Article 64(6)(f) of the Statute are subject to the “object and purpose of the Statute”,³⁴ “relevant aspects of the wider international law”,³⁵ and the Article 64(2) requirement that trials 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.³⁶ These directions demonstrate that, first, the Majority was acting in compliance with this Court’s jurisprudence,³⁷ and, secondly the Prosecution’s portrayal of the Decision heralding the advent of a period when, but for the intervention of the Appeals Chamber, Trial Chambers are effectively unconstrained by the law, represents hyperbole that is false and utterly disconnected from the reasoning actually set out by the Majority.
19. The Prosecution’s invocation of the Appeals Chamber’s jurisprudence in the *Lubanga* case to support its interpretation of Article 63(1) should also be dismissed because the Prosecution fails to fully and completely present the Appeals Chamber’s reasoning.³⁸ The Appeals Chamber found Trial Chamber I’s interpretation of Article 82(1)(d) of the Statute to be wrong not only because “the

³² *Ibid.*, para. 27.

³³ *Ibid.*, para. 5.

³⁴ Decision, para. 33. See also para. 2.

³⁵ *Ibid.*, para. 2. See also para. 37.

³⁶ *Ibid.*, paras. 33, 47.

³⁷ ICC-01/04-01/07-2297 OA10, 28 July 2010, Dissenting Opinions of Judges Kourula and Trendafilova, paras. 42 and 44 that a Trial Chamber’s Article 64(2) discretionary powers must be exercised in accordance with internationally recognised human rights standards. The Defence submits that these comments apply to the exercise of all discretionary powers contained in the Statute.

³⁸ Appeal, paras. 25-26.

Statute defines exhaustively the right to appeal against decisions of first instance courts”³⁹ but also because that conclusion was confirmed by the *travaux préparatoires* and was “fully consistent with internationally recognised human rights”.⁴⁰ The situation in *Lubanga* concerning the interpretation of Article 82(1)(d) is, therefore, completely different to that in the instant case and the proper interpretation of Article 63(1). In the instant case, both the *travaux préparatoires*⁴¹ and internationally recognised human rights law support the view of the Majority.⁴²

20. In light of the above, it is clear that the Majority committed no error of law when determining that Article 63(1) can be construed in conjunction with the discretionary powers contained in Article 64(6)(f).

E: The Prosecution’s arguments regarding “duty” are erroneous

21. The Prosecution’s arguments in this section of the Appeal can be swiftly dealt with. The first argument that “the accused’s presence is a fundamental condition of the trial that cannot be set aside”⁴³ is clearly erroneous as evidenced by the four occasions on which Mr. Bemba was absent from his trial.⁴⁴ If presence is so fundamental a condition, akin in the Prosecution’s view to a trial being contingent on a confirmation of charges,⁴⁵ then Mr. Bemba’s trial should never have continued in his absence, no matter the duration.
22. The second argument is equally fallacious and effectively amounts to a rehash of the argument made in Section D of the Appeal, regarding the exercise of discretionary powers.⁴⁶ As argued above, the Majority did not exercise their discretionary powers in an unchecked manner. Rather, in assessing whether a

³⁹ ICC-01/04-01/06-2799 OA19, 27 January 2012, para. 7 citing to ICC-01/04-168 OA3, para. 39.

⁴⁰ ICC-01/04-01/06-2799 OA19, 27 January 2012, para. 7 citing to ICC-01/04-168 OA3, paras. 38, 40-41.

⁴¹ *Supra*, para. 15.

⁴² See discussion in the Decision, paras. 37, 46. See also Decision, fn. 68.

⁴³ Appeal, para. 28.

⁴⁴ ICC-01/5-01/08-T-183-Red-ENG, pp. 1-2; ICC-01/5-01/08-T-306-Red-ENG, p. 62; ICC-01/5-01/08-T-324-ENG, pp. 16-17; ICC-01/5-01/08-T-324bis-CONF-ENG, p. 1; ICC-01/05-01/08-T-131-Red-ENG, pp. 9-10.

⁴⁵ Appeal, para. 28.

⁴⁶ *Ibid.*, para. 29.

Trial Chamber can excuse an accused from continuous presence at trial, the Majority properly anchored their reasoning in their statutory powers, in the rights of the accused and international human rights law.⁴⁷ The Prosecution fails to undertake the same exercise when proposing its analogy in paragraph 29 of the Appeal. Indeed, while the analogy was probably chosen by the Prosecution for impact, it can be criticised as being poorly chosen and incompletely presented⁴⁸ given that reverse burdens are permitted in some jurisdictions in certain circumstances and have been found not to offend against international human rights law.⁴⁹ While it is unlikely that reverse burdens will ever be considered by this Court,⁵⁰ the Defence submits the analogy is confusing and does not assist in elucidating the issues on appeal.

F: The Prosecution fails to distinguish the Bemba precedent

23. The Majority's approach in the Decision is correct because it is also entirely consistent with the Court's established practice in *Bemba*. The Prosecution's attempts in the Appeal to criticise the Majority while seeking to distinguish the *Bemba* case fail⁵¹ because the Prosecution's arguments on the *Bemba* precedent run completely counter to the absolutist approach to the interpretation of Article 63(1) which it otherwise advocates throughout the Appeal.
24. The inherent contradictions on this point in the Appeal are stark. As already noted, at paragraph 28 of the Appeal the Prosecution argues that the accused's presence at trial is a condition akin to a confirmation of charges being required before a trial can proceed. However, by paragraph 30 of the Appeal, the

⁴⁷ See, e.g., Decision, paras. 32, 33, 35, 37, 46, 47.

⁴⁸ For example, is the Prosecution proposing that the Trial Chamber unilaterally decides to relieve the Prosecution of its burden or is it proposing the Trial Chamber does so at the request of the Prosecution?

⁴⁹ See, e.g., *Brown v Stott* 2001 SLT 50 at 64 (“[Article 6(2) of the European Convention on Human Rights (presumption of innocence)] appears on its face to be an absolute requirement. But it has been held that it does not prohibit rules which transfer the burden to an accused to establish a defence, provided the overall burden of proof remains on the prosecution, nor does it necessarily prohibit presumptions of law or fact provided these are within reasonable limits.”) See also *Salabiaku v France*, 13 E.H.R.R.379 and the dicta of Lord Bingham at paragraph 21 of *Sheldrake v DPP*, [2005] 1 Cr.App R 28.

⁵⁰ Statute, Article 67(1)(i): “[T]he accused shall be entitled...to the following minimum guarantees, in full equality:...Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.”

⁵¹ Appeal, paras. 30-31.

Prosecution makes a complete *volte face* to argue that absence for a “handful of hours” is permissible. The Prosecution cannot have it both ways.

25. In addition, and contrary to the Prosecution’s argument,⁵² the Appeals Chamber does need to decide whether it is permissible for an accused to be absent from a small number of court sessions in a lengthy trial. The central issue for determination is 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. Given that the Prosecution’s stated position on the matter is that “Article 63(1) establishes the accused’s presence as a fundamental requirement or condition of the trial” and there is “only one exception to the presence-at-trial requirement”,⁵³ it is disingenuous of the Prosecution to argue otherwise.

G: The Majority did not rely on external sources of law to interpret Article 63(1) but to consider the impact that their interpretation might have on the perception of the Court

26. The Defence submits that the Prosecution’s arguments under this head are confusing because there is a fundamental disconnect between the arguments advanced and the Majority’s reasoning in the impugned paragraphs of the Decision.⁵⁴ Suffice to say, the Prosecution fails to identify any legal error.
27. The Prosecution argues that in paragraphs 73 to 76 of the Decision “[t]he Majority erred by relying on external sources of law in support of its decision to disregard the unequivocal requirements of this Court’s Statute” and argues that “precedents from other jurisdictions cannot be used as a basis to set aside...statutory requirement[s]”.⁵⁵
28. However, an analysis of paragraphs 73 to 76 of the Decision shows that the Majority did not rely on external sources of law for interpretative purposes and

⁵² *Ibid.*, para. 31.

⁵³ *Ibid.*, para. 3.

⁵⁴ *Ibid.*, paras. 32-33.

⁵⁵ *Ibid.*, para. 32.

to directly set aside statutory requirements but, rather, to consider a secondary issue, namely the potential impact of their interpretation of Article 63(1) on the perception of the Court. The argument regarding perception was advanced by the Prosecution⁵⁶ and obviously is not “exhaustively dealt with” in the Statute. Accordingly, the Majority cannot be criticised for having recourse to external sources in order to address this element of the Prosecution’s original argument.

IV. Response to the Second Ground of Appeal: The Majority did not Err by Finding the Establishment of Exceptional Circumstances Warranting Mr. Ruto’s Excusal from Continuous Presence at Trial

A: The Prosecution’s argument is a re-hash of the arguments made in Ground 1

29. As implicitly acknowledged by the Prosecution by its reference to its arguments made in relation to its first ground of appeal, the argument made under this heading is a re-hash of those made in ground one.⁵⁷ Suffice it to say, for the reasons stated above, the Majority did not err in law when it found that Article 63(2) is not the solitary exception to Article 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.

B: The test does not violate the principle of equal treatment

30. Contrary to the Prosecution’s submissions,⁵⁸ the Majority’s test does not violate the legal principle that all persons are to be treated equally under the law. The Defence questions the Prosecution’s reliance on Article 27 the purpose of which, as the Majority rightly identifies, is to exclude head of State immunity.⁵⁹ Nevertheless, a simple analysis of the Majority’s reasoning shows that the

⁵⁶ ICC-01/09-01/11-713, para. 11; ICC-01/09-01/11-T-23-Red-ENG, pp. 6-8.

⁵⁷ Appeal, para. 34.

⁵⁸ *Ibid.*, paras. 35-36.

⁵⁹ *Ibid.*, para. 36.

Prosecution's arguments can be easily dismissed without any need to refer to Article 27.

31. In articulating a test for the excusal of any accused from continuous presence at trial, the focus of the Majority was not on the official position of an accused.⁶⁰ Rather, the test articulated by the Majority is whether an accused can demonstrate "exceptional circumstances" which justify the exercise of the Trial Chamber's discretion under Article 64(6)(f).⁶¹ While the Majority found "exceptional circumstances" arising where an accused occupies the office of the executive Vice President of State, this was identified simply as one example of such exceptional circumstances and relevant in this particular case.⁶² The Majority did not exclusively define "exceptional circumstances" by reference to an accused's official position. This is clearly established by the Majority's statements that "[t]he 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" and "[i]t 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."⁶³
32. The irrelevance of an accused's official position to the basic test is further demonstrated by the fact that, while the threshold for "exceptional circumstances" is set high, the situations which may fall within its scope are clearly broad. This is evident from the plain language of the test itself, as highlighted above. For example, arguably, if a spouse or young child of an accused fell seriously ill, such a situation could be advanced by that accused as amounting to "exceptional circumstances". Such an application would be determined by the Trial Chamber on its merits. It must also be borne in mind that various other accused before this Court have already been excused from

⁶⁰ *Contra* Appeal, para. 35.

⁶¹ Decision, para. 49.

⁶² *Ibid.*, para. 49.

⁶³ *Ibid.*, para. 49 (emphasis added).

continuous presence at trial, albeit that the periods of absence were shorter than those granted in this case, without any reference being made to “official positions”. As already noted above, in *Bemba*, the accused’s absence from trial proceedings was excused on four occasions and proceedings continued in his absence. Mr. Bemba’s absence was not an aberration. It must have been – and was – based on the discretionary judicial power which permits absence from trial notwithstanding the terms of Article 63 of the Statute. This example combined with a proper reading of the Decision establishes that no question of the differential treatment of accused based on official position, or indeed on any basis, arises. All accused can avail themselves of a request to be excused from continuous presence at trial provided they can show exceptional circumstances – a test that will be determined on a case by case basis. Accordingly, no error of law is made by the Majority.

C: The “floodgates” argument is without foundation and does not identify any appealable error

33. Despite condemning the Majority for allegedly pursuing its own policy preferences,⁶⁴ a criticism the Defence submits is without merit, in its final argument, the Prosecution argues that the Appeals Chamber should adopt the Prosecution’s own policy view of the Article 63(1) issue.⁶⁵ Indeed, the Prosecution’s final argument is pure policy and fails to identify any appealable error made by the Majority.⁶⁶ This is not sufficient reason to overturn a decision on appeal. A margin of deference must be given to Trial Chambers to ensure a fair trial. A Trial Chamber’s decision can only be dismissed if it has fallen into clear error of fact or law or has abused its discretion. Given that neither basis is argued by the Prosecution under this head, its arguments should be ignored.

⁶⁴ Appeal, paras. 4, 24.

⁶⁵ *Ibid.*, paras. 37-39. As argued above, the Prosecution’s proposed policy conflicts with the law expressly agreed upon by the States Parties (see *supra*, para. 15).

⁶⁶ *Ibid.*

34. If the Appeals Chamber is minded to consider the Prosecution's arguments notwithstanding the above criticisms, then they should be dismissed because they fail to appreciate the high threshold set by the Trial Chamber and are based on speculation as to the test's future potential application.
35. Paragraph 49 of the 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. However, the Prosecution appears to have no confidence in a Trial Chamber's ability to apply this exacting test. Even if, taking the Prosecution's submissions at their highest, the Decision were to invite "a flood of excusal applications",⁶⁷ then clearly this does not mean that all applications will be granted. The Prosecution simply speculates about the potential effect the Decision will have on trial proceedings at the Court and the Trial Chambers' ability to control same.
36. If speculation is to be permitted, then as a counterweight to the Prosecution's submissions, consideration should be given to the potential advantages that the Decision offers as articulated by the Majority at paragraphs 44 to 46 of the Decision which include judicial efficiency and permitting the trial of an accused who deliberately absconds to continue. The 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".⁶⁸
37. Additionally, and building on the Prosecution's submissions that it "focuses its investigations on persons who bear the greatest responsibility for the most serious crimes under the Statute",⁶⁹ the Defence recalls its own submissions that granting Mr. Ruto's request has the potential to bolster the effectiveness of the Court by demonstrating that the Court's framework can accommodate a flexible

⁶⁷ Appeal, para. 37.

⁶⁸ Decision, para. 44.

⁶⁹ Appeal, para. 38.

and pragmatic approach to surrendering to its jurisdiction and to participating in proceedings by those occupying high office.⁷⁰ The Defence submits that this would serve to encourage cooperation by serving leaders, and, thus, enhance the Court's ability to pursue its important aims.⁷¹

38. In sum, the Prosecution's floodgates argument should be dismissed as entirely policy driven and does not properly identify an appealable error on the part of the Majority.

V. The Request for Suspensive Effect is without merit

39. The absurdity and inconsistency in the Prosecution's approach to Article 63(1) is thrown into stark relief by the arguments advanced seeking the suspensive effect of the Decision. Applying the Prosecution's approach to Article 63(1), if Mr. Ruto were to miss even one day of trial, this "would create an irreversible situation",⁷² namely "the possibility of the trial being nullified due to the lack of a necessary condition under the Statute"⁷³ and, if the Decision is overturned, the trial having to re-start in Mr. Ruto's presence.⁷⁴
40. These arguments are clearly without foundation as is evidenced by the *Bemba* case. As stated above, on at least four occasions, rather than adjourn proceedings, Trial Chamber III authorised Mr. Bemba's absence from trial for reasons other than those contemplated in Article 63(2) and proceedings continued in his absence.⁷⁵ At no time did the Prosecution object to Mr. Bemba's absence or raise any concerns about the legality of his absence, its potential to nullify proceedings or even indicate it might result in the need to recall those witnesses heard in his absence.

⁷⁰ ICC-01/09-01/11-685, para. 2.

⁷¹ According to the Statute's Preamble, the aims of the Court are, inter alia, "to put an end to impunity" and to ensure that "the most serious crimes of concern to the international community as a whole must not go unpunished".

⁷² Appeal, paras. 40, 42.

⁷³ *Ibid.*, para. 41.

⁷⁴ *Ibid.*, para. 42.

⁷⁵ See ICC-01/05-01/08-T-183-Red-ENG CT WT, pp. 1-2; ICC-01/05-01/08-T-306-Red-ENG WT, p. 62, lines 22-24.

41. In addition, the likelihood is that a decision will be rendered by the Appeals Chamber in a period which proves negligible when compared with the likely overall length of the actual trial. In the Appeal, the Prosecution argues that absences of limited duration are permissible.⁷⁶ Accordingly, applying the Prosecution's own logic when seeking to distinguish *Bemba* to the request for suspensive effect, the request should be dismissed.

VI. Relief Requested

42. As more fully argued above, the Defence requests the Appeals Chamber to:

- (a) dismiss the request for suspensive effect;
- (b) dismiss the Appeal on all grounds; and
- (c) confirm the Decision.

43. The Defence also requests that the Appeals Chamber hold an oral hearing on the Appeal.

Respectfully submitted,



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Lead Counsel for Mr. William Samoei Ruto

Dated this 8th Day of August 2013
At Nairobi, Kenya

⁷⁶ Appeal, paras. 30-31.