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TRIAL CHAMBER V(B)

Before: **Judge Kuniko Ozaki, Presiding Judge**
Judge Robert Fremr
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 Conditional Excusal from Continuous Presence at Trial

Source: **The Office of the Prosecutor**

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

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Introduction

1. The Defence's "Request for Conditional Excusal from Continuous Presence at Trial" ("Application")[1] should be rejected because it lacks a basis in law. In plain and unambiguous terms, Article 63(1) of the Statute demands that the Accused be present at trial. When read in the context of the Statute as a whole, Article 63(1) establishes that the Accused's presence at trial is a fundamental condition that cannot be set aside simply because its application would inconvenience the Accused. In the face of such clear and unambiguous language in a controlling statutory provision, there is no merit to the Defence argument that the Trial Chamber has the discretion to put aside the Court's statutory law and to reach a decision at odds with the legislative intent of the States Parties. In sum, there is no legal basis for the Chamber to grant the relief sought in the Application, which requires that the Application be denied.

2. Further, as a matter of judicial economy, the Prosecution respectfully suggests that it would be appropriate for the Trial Chamber to defer any ruling upon the Application until the Appeals Chamber has disposed of the appeal[2] against the "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial" ("Impugned Decision") in the *Ruto & Sang* case.[3]

3. The Prosecution maintains its arguments made in its response[4] to the Defence application to be present at trial via video-link,[5] and submits that that request – now argued in the alternative[6] – should also be rejected.

[1] ICC-01/09-02/11-809.
[2] ICC-01/09-01/11-831.
[3] ICC-01/09-01/11-777.
[4] ICC-01/09-02/11-703
[5] ICC-01/09-02/11-667.

Submissions

I. The Application lacks a legal basis

The Statute precludes excusal of the Accused from continuous presence at trial.

4. Article 63(1) provides that "[t]he accused *shall* be present during the trial" (emphasis added). Contrary to the provisions of other international courts and tribunals, the presence of an accused at trial before the Court is not just a right, but also a requirement of the trial. As Judge Herrera Carbuccia noted recently in her dissenting opinion to the Impugned Decision, "[p]ursuant to Article 63(1) [...], 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*".[7]

5. The presence of an accused at trial is a fundamental *requirement* or a *condition* of the trial that cannot be set aside, in the same way that trials must be heard by a three-Judge Bench,[8] and may take place only if a Pre-Trial Chamber has confirmed the charges.[9]

6. A contextual interpretation of the Statute supports this plain text reading. A 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

[6] ICC-01/09-02/11-809, para. 4.
[7] ICC-01/09-01/11-777-Anx2,("Dissenting"),paras.3-4,(emphasis added).
[8] Articles 39(2)(b)(ii)-and-74(1).
[9] Article 61(7)(a)-and-(11).

being given effect to by its provisions".[10] That is the situation here – Article 63(1) speaks directly to the issue at hand and forecloses the possibility of the relief sought in the Application. In these circumstances, Article 63(1) compels the Chamber to deny the Application.

The drafting history of Article 63(1) demonstrates that the Accused's presence at trial is required at trial

7. The Appeals Chamber has held that the *travaux préparatoires* may be used to "confirm[...] the meaning of a statutory provision".[11] The *travaux* 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 Application assumes.

8. Contrary to the Application, the *travaux preparatoires* do not show that Article 63(1) "protect[] the right of an accused to be present at trial".[12] The attendance requirement codified in Article 63(1) was maintained without significant variation throughout the Statute's negotiating history.[13] 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.[14] In its final incarnation in the Statute, the "express language" of Article 63(1) signals the "significant importance [...] placed on

[10] ICC-01/04-168OA3,para.39.
[11] ICC-01/04-168OA3,para.40; ICC-01/04-01/07-522OA3,paras.37,50; ICC-01/04-169,para.81.
[12] ICC-01/09-02/11-809, para. 24.
[13] 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)*, 49thSess.,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.
[14] *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N.GAOR, 50thSess.,Supp.No.22,U.N.Doc.A/50/22 (1995),p.34.

the presence of the Accused during trial".[15] 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.[16] This deletion 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.[17]

9. The drafting history of Article 63(1) further clarifies its meaning. The drafters considered the possibility of permitting an accused to be absent from trial but rejected it due to opposition to trials *in absentia*. In the end, they included only one exception to the presence-at-trial requirement (for a disruptive accused), which is not applicable here. Thus, pursuant to Article 63(1), the Accused is required to attend his trial.

The Statute, taken as a whole, further demonstrates that the Accused is required to be present at trial

10. 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.

11. Under the exception of Article 63(2), 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".[18] Moreover, Article 63(2) states that a disruptive accused may be removed from the courtroom "only for such duration as strictly required".

[15] Khan & Dixon, *Archbold:International Criminal Courts Practice, Procedure And Evidence* (3rd ed.,Sweet-&-Maxwell,2009),p.522, margin-no.8-40.
[16] *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.
[17] ICC-01/09-01/11-777, para.49.
[18] Emphasis added.

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.

12. 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 "replac[ement]"[19] 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.

13. 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.

14. Article 67(1)(d) establishes that an accused has a right "to be present at trial".[20] 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)

[19] Roy Lee(ed.), *The International Criminal Court: the making of the Rome Statute: issues, negotiations and results* (Martinus-Nijhoff-Publishers,1999),p.261.
[20] 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.

demonstrates that the drafters viewed the two as distinct concepts: 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 Application proceeds on the erroneous assumption that the requirement codified in Article 63(1) is coextensive with the right codified in Article 67(1)(d).[21]

15. Presence at trial means physical presence. The necessity for the Accused to be physically present at trial was recently referred to by Trial Chamber IV in *Banda and Jerbo*, when ruling on the conditions of summonses to appear:

> [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.[22]

16. The case law of other international courts and tribunals has also associated presence of the accused with "physical presence". For example, the Appeals Chamber of the International Criminal Tribunal for Rwanda has held that according to Article 20(4)(d) of the Statute "to be present at trial means to be *physically present* in the courtroom".[23] The same Chamber noted that Rule 65*bis* of Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia illustrates that participation at trial via video link is not "presence" and that other international, regional, and

[21] *See* ICC-01/09-02/11-809, paras 24 ("the aim of this provision is to protect the right of an accused to be present at trial"), 37 ("President Kenyatta is satisfied that he will be able adequately to manage his defence by delegating responsibility to his legal team, who are in receipt of full instructions.")
[22] ICC-02/05-03/09-455 para 21. (emphasis added).
[23] 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).

national systems share the view that the right to be present at trial implies physical presence.[24]

17. In sum, the Court's regulatory framework is unambiguous on the issue of presence of Accused at trial. It makes it clear that the Accused is required to be physically present at trial, and that the only time an accused may not be present is when he or she continuously disrupts the trial and has to be removed from the courtroom.

Article 64(6)(f) does not permit an exercise of discretion to excuse the Accused from attending trial

18. The Application relies on the Impugned Decision, which held that the Trial Chamber has the "discretion" to set aside the requirements of Article 63(1) and to excuse an accused holding high office from attending trial on a continuous basis.[25] In the Prosecution's view, the Impugned Decision fails to support the Application for the simple reason that it was wrongly decided. As explained in its brief before the Appeals Chamber, which has yet to rule on the appeal, the Majority of Trial Chamber V(a) erred when it held that the Chamber had the "discretion" to excuse Mr Ruto from attending trial in spite of Article 63(1), which requires him to attend.[26]

19. The Chamber's "general power" under Article 64(6)(f) – relied upon in the Impugned Decision and the Application as a basis for setting aside the attendance requirement codified in Article 63(1) – does not permit it to discard controlling statutory requirements (*i.e.*, Article 63(1)). Whatever discretion Article 64(6)(f) may afford a Trial Chamber, it does not permit a Chamber to disregard unambiguous statutory requirements. The States

[24] The Prosecutor v. Protais Zigiranyirazo, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006, para. 12.
[25] *See* ICC-01/09-02/11-809, paras 29-31 (citing ICC-01/09-01/11-777).
[26] ICC-01/09-02/11-831, paras 23-27.

Parties expect all provisions of the Statute to be given effect – particularly those such as Article 63(1), which are unambiguous on their face and leave little or no room for judicial interpretation.

20. 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. It is not, as the Application implies,[27] a "trump all" provision that enables a Trial Chamber to deviate from clear statutory provisions. As Judge Pikis observed,

> The 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.[28]

Bemba does not support the Defence's request

21. The Prosecution recognises that in the *Bemba* case, Mr Bemba was permitted to be absent for a total of four court sessions.[29] In total, Mr Bemba has been absent for less than a handful of hours in a trial that is approaching its third anniversary. This practice fails to support the relief sought in the Application because in this instance, the Defence is not requesting limited relief similar to that granted to Mr Bemba. Rather, the Application requests Mr Kenyatta to be absent for all of his trial, other than the opening, closing, and the Chamber's verdict. This relief cannot possibly be reconciled with the

[27] ICC-01/09-02/11-809, para 28.
[28] ICC-01/04-01/07-521 OA5, para. 19 (dissenting opinion of Judge Pikis).
[29] *See* ICC-01/05-01/08-T-183-Red-ENG CT WT, pp. 1-2 (Trial Chamber III presenting no objection to the accused's absence for one morning session); ICC-01/05-01/08-T-306-Red-ENG WT, p. 62 (noting Mr Bemba's absence for the afternoon session); ICC-01/05-01/08-T-324-ENG ET WT, pp. 16-17 (noting that the time of the hearing was not convenient for Mr Bemba, and asking Defence counsel if the trial could proceed in his absence). The trial later proceeded in his absence. *See* ICC-01/05-01/08-T-324bis-CONF-ENG, p. 1; *see also* ICC-01/05-01/08-T-131-Red-ENG CT WT, pp. 9-10 (indicating Mr Bemba's absence from the courtroom for a matter of minutes).

text of Article 63(1), which requires that "[t]he accused shall be present during the trial".

Ad hoc jurisprudence does not support the Application

22. International and domestic precedents are inapposite for the simple reason that, while the jurisdictions 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. "[C]ourts must operate within the legal material they are given",[30] and where "clarity of the [relevant] provisions, viewed in their context, admits of no doubt [...] the Court must apply these as they stand".[31]

Mr Kenyatta's public office cannot be a basis to grant the Application

23. The stated basis for the Defence's decision, at this late stage, to file an application to excuse Mr Kenyatta's attendance throughout his trial is his "election as President of the Republic of Kenya".[32] The Defence asserts that "[i]t is a matter of fundamental importance to Kenya that the issue of attendance at trial is addressed in a way that permits its Head of State fully to discharge his constitutional duties".[33] These policy arguments, which are replicated throughout the Application, should have no bearing on the Chamber's assessment and can be summarily discarded. As the Prosecution has argued before the Appeals Chamber, Article 63 is "exhaustively dealt with"[34] in the Statute's text, which precludes the Chamber from referring to other sources of law or to policy dictates to assist in its analysis. Judge Anita

[30] John Merrills, *The development of international law by the European Court of Human Rights* (Manchester University Press, 1993), p. 232.
[31] International Court of Justice, *LaGrand Case*, ICJ Reports 2001, 466 at 494, para. 77.
[32] ICC-01/09-02/11-809, para 3.
[33] ICC-01/09-02/11-809, para. 30. See also arguments in paras 31, 32, 34.
[34] ICC-01/09-01/11-831, para. 32, citing to ICC-01/04-01/06-772 OA 4, para. 34.

Usacka explained the point in her dissenting opinion to a recent grant of leave to five countries to submit *amicus curiae* observations in the appeal against the Impugned Decision, wherein she confirmed that "[t]he present appeal raises questions of an entirely legal nature related to the scope and function of article 63 of the Statute".[35]

24. In the Prosecution's submission, Article 63(1) establishes no exception for individuals, such as the Accused, who may prefer not to attend trial because they have responsibilities elsewhere. Indeed, granting the Application on the basis of the Accused's duties as the President of Kenya would violate the bedrock legal principle that all persons are to be treated equally under the law.

25. This principle of equal treatment is reflected in Article 27(1), which provides that the "Statute shall apply to all persons without any distinction based on official capacity". While it is correct that one of the functions of Article 27(1) is to foreclose head of state 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 does not speak in terms of immunity from prosecution, but instead requires that "this Statute shall apply to all persons without any distinction [...]". This 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.

26. 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

[35] ICC-01/09-01/11-942-Anx, para. 4.

equal treatment under the law, regardless of a person's "status". For this reason, there is no merit to the Defence argument that Mr Kenyatta's attendance at trial should be excused in "light of the duties [he] must perform as Head of State on behalf of the people of Kenya on a daily basis".[36]

II. Granting the application would be contrary to the interests of justice

27. The Application ignores the policy implications if the relief requested therein were to be granted. In the Prosecution's submission, a decision to excuse Mr Kenyatta from attending trial would invite a flood of excusal applications from accused who do not wish to attend their own trials. Almost every accused will be able to present a reason why he or she has "important and extraordinary" functions to perform and should be excused from attending the trial. While Mr Kenyatta's position as Kenya's President may be different from the average case seen so far at the Court, 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.

28. For example, a government minister may assert that he/ she is the only person constitutionally authorised to perform the functions of that office, which would suffer if he or she were required to attend the trial; and 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 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, a medical practitioner of rare skill and specialty may assert that his attendance at trial would disadvantage his patients.

[36] ICC-01/09-02/11-809, para 29.

29. It is to be noted that the Court was designed in the first place as an institution to try those most responsible for grave crimes, which will inevitably include many persons who are also the highest ranking officers or highest placed politicians. It is conceivable then that it may often become the case that accused before this court would seek excusal from trial attendance on the grounds of the "extraordinary" circumstances that require them to be somewhere else to attend to their duties.

30. Physical participation of an accused at trial serves the important function of demonstrating the seriousness of the charges levied against the accused and seriousness and integrity of the proceedings - and the Court - as a whole. It is of crucial importance to ensure that justice is not only done but is seen to be done, particularly given the wide public interest in the case. It is difficult to imagine how the proceedings in this case would be perceived as genuine and as having integrity by the general public if the Accused were to be conspicuously absent from courtroom for the duration of trial. Thus, granting this request would run contrary to the interests of justice.

31. In this regard, there is no merit to the Defence assertion that "the purpose of these proceedings is the evidential investigation of facts and the determination of issues in the case, which do not require President Kenyatta's continuous presence".[37] This argument ignores that the Accused's presence at trial is one manner through which the Chamber is able to assess the veracity of the evidence, and thereby establish the "facts [and] issues in the case".[38] In the same way that the presence of a testifying witness permits the Chamber to assess the veracity her testimony by reference to her demeanour and conduct while testifying, the Accused's courtroom demeanour and conduct during the presentation of evidence,

[37] ICC-01/09-02/11-809, para 33.
[38] ICC-01/09-02/11-809, para 33.

and particularly any reaction thereto, may assist the Chamber in evaluating the evidence. In the Prosecution's submission, this is one reason why the Article 63(1) presence requirement exists in the Statute, and another reason why it should not be lightly set aside, as the Application requests.

32. Finally, there is no merit to the submissions of the Defence during the hearing of 6 September 2013 that Mr Kenyatta's attendance at trial would be akin to an "attempt to punish an innocent man", and that it is a "concept of dragging someone before a court every day so they become some kind of spectacle is not something that this honourable institution is[…] party to."[39] After a full confirmation hearing, a Pre-Trial Chamber of this Court committed Mr Kenyatta to trial. The Court's statutory requirements now require that Mr Kenyatta present himself before the Court for a full trial on those charges. Those statutory requirements are unambiguous and do not enable the Court to excuse him from such attendance on the basis of the high office he now holds. Requiring Mr Kenyatta's presence at trial is not a "spectacle"; it is the faithful application of the law agreed to by the States Parties.

III. The Application need not be ruled upon until the Appeals Chamber disposes of the *Ruto* appeal.

33. The Application seeks relief over and above that granted by the Majority of Trial Chamber V(a) in the Impugned Decision – namely, a ruling excusing Mr Kenyatta from attending any of the presentation of evidence in his trial.[40] In the circumstances, it is foreseeable that the Appeals Chamber's ruling on the pending *Ruto* appeal will be dispositive of the Kenyatta Application. As a matter of judicial economy, the Prosecution respectfully suggests that it would be appropriate for the Trial Chamber to defer any

[39] ICC-01/09-02/11-T-26-ENG ET WT, p. 19, lines 22-25.
[40] ICC-01/09-02/11-809, para 38.

ruling upon the Application until the Appeals Chamber has disposed of the *Ruto* appeal.

Conclusion

34. For the reasons set forth above, the Prosecution respectfully requests that the Chamber dismiss the Application.

Fatou Bensouda,
Prosecutor

Dated this 1st day of October, 2013
At The Hague, The Netherlands