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International
Criminal
Court

Original: **English**

No.**: ICC-01/09-02/11**
Date: **1 October 2013**

TRIAL CHAMBER V(B)

Before: **Judge Kuniko Ozaki, Presiding**
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR V. UHURU MUIGAI KENYATTA

Public Document

Victims' Response to "Defence Request for Conditional Excusal from Continuous Presence at Trial"

Source: **Common Legal Representative of Victims**

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

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I. Introduction

1. On behalf of the victims in this case, the Legal Representative of Victims ("Legal Representative") respectfully requests that the Trial Chamber deny the "Defence Request for Conditional Excusal from Continuous Presence at Trial", filed on 23 September 2013 ("Request").[1]
2. The Legal Representative wholly opposes the request of Uhuru Kenyatta ("the Accused") to be present at trial by video-link (i.e. the relief sought in paragraphs 38(ii) and 39 of the Request), and relies upon the reasons set out in the "Victims' Response to the 'Defence Request for Mr. Kenyatta to be Present During trial via Video-Link'" of 8 March 2013.[2]
3. In respect of the Accused's request to be absent from the courtroom for almost the entire trial, the Legal Representative submits in summary that:
    a. Article 63(1) imposes an obligation on the Accused to be present in the courtroom for the entire duration of the trial.
    b. Article 27(1) prohibits any preferential treatment for an accused based on official capacity. To permit an accused to be absent from the courtroom for almost all of his trial on the ground that he is Head of State or Government would violate this peremptory prohibition.
    c. The Trial Chamber's discretion to proceed with part of a trial in the absence of the accused is very restricted and does not extend to fundamentally altering the elements of a fair trial.
    d. The Accused's invocation of State interests is an unsound basis for the relief sought.
    e. An accused cannot argue in support of an application to be absent from the courtroom during trial the existence of circumstances where he has voluntarily and deliberately created those very circumstances.

[1] ICC-01/09-02/11-809.
[2] ICC-01/09-02/11-686.

f. The presumption of innocence and the obligation of all accused without discrimination to be present in the courtroom during trial are both imprescriptible elements of a fair trial.

g. The victims are opposed to the absence of the Accused from the courtroom.

h. Other Defence arguments in support of the relief sought have no basis.

II. Subject matter is directly linked to the victims' interests

4. The Trial Chamber has ruled: "[I]n accordance with Regulation 24(2) of the Regulations, the Chamber finds that the Common Legal Representative may file responses to documents but must first demonstrate that the subject matter at issue is directly related to the interests of victims."[3]

5. The subject matter of the Request is directly related to the interests of the victims. The victims have expressed directly to the Legal Representative, at a series of meetings in Kenya over the past few months, their total opposition to any arrangement which permits the Accused to absent himself from the courtroom during trial. They have expressed the view that *any* person, regardless of his political position, accused of participation in murder, rape or other serious crimes should be physically present in the courtroom for the entire trial. They have also expressed deep disappointment regarding the decision to permit Mr Ruto to be absent from almost all of his trial.

6. Further, if the Accused were given leave to be absent from almost all of his trial and, having been made aware of all or part of the evidence admitted at trial, elected not to return to The Hague for judgement, this could result in a stay of the proceedings, pending the Accused's arrest and delivery to the Court. This could delay the proceedings for many months, if not years, and

[3] ICC-01/09-02/11-498, para. 71.

could also delay the commencement of reparations proceedings. This delay would directly affect the victims' right to know the truth about the crimes committed against them, and to receive just reparation, within a reasonable time.

II. Procedural background

7. On 9 September 2013, the Defence applied orally for the Accused to be excused from attendance at trial.[4]
8. On 12 September 2013, the Chamber ordered the Defence to file any written submissions on excusal from continuous presence at trial by 23 September 2013, and ordered the Prosecution and the Legal Representative to file any response by 1 October 2013.[5]
9. On 23 September 2013, the Defence filed the Request.
10. An appeal by the Prosecution of Trial Chamber V(a)'s Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial ("Trial Chamber V(a)'s Decision")[6] is currently pending before the Appeals Chamber.

III. Submissions

a. Article 63(1) imposes a requirement on an accused to be physically present in the courtroom during the entire trial

11. The Defence's assertion that the aim of Article 63(1) of the Statute is to protect the right of an accused to be present at trial, and to prevent trials *in absentia*,[7] is only partly correct. The plain language of Article 63(1)[8] unambiguously

[4] ICC-01/09-02/11-T-26-ENG, pp 17-21 and 24-25.
[5] Email sent by a Legal Officer for Trial Chamber V(b) to the parties and the Legal Representative on 12 September 2013.
[6] *The Prosecutor v. Ruto and Sang* ICC-01/09-01/11-777.
[7] ICC-01/09-02/11-809, para. 24.
[8] Article 63(1): "The accused shall be present during the trial."

reflects an *obligation* on the accused to be physically present in the courtroom for the entire trial.

12. This interpretation is reinforced by the existence of an express provision permitting an accused to be absent from the confirmation hearing (Article 61(2)(a)), an option which is not available at trial. Furthermore, the express inclusion of a right to be present at trial in Article 67(1)(d) suggests that Article 63(1) cannot be merely repetitive of the very same right.

13. The interpretation that Article 63(1) imposes an obligation on the Accused to appear for trial is also reinforced by the fact that the Trial Chamber is expressly permitted to continue trial in the absence of an accused only in one circumstance: that of continuous disruption by the accused within the courtroom (Article 63(2)). Other provisions which support the view that Article 63(1) imposes an obligation on the accused to appear for trial include Article 58(1)(b)(i)[9] and Article 58(7).[10]

14. The Statute, read as a whole, does not envisage that a person accused of participation in a campaign of murder, rape and other crimes against his own citizens will be at liberty in the State in which the crimes were committed, in geographical proximity to the surviving victims of the alleged crimes but far from the courtroom, for almost all of the trial. Rather, it envisages that such accused will be physically present in the courtroom for the entire trial.

15. Furthermore, the Majority in Trial Chamber V(a)'s Decision considered that Article 63(1) creates an obligation on the accused to appear for trial.[11] Judge Herrera Carbuccia, in dissent, observed that "[p]ursuant to Article 63(1) of the Rome Statute […], the presence of the accused during the trial is required",

[9] The Pre-trial Chamber may issue a warrant of arrest "[t]o ensure the person's appearance at trial".
[10] "If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear."
[11] *The Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777, para. 40.

and that the "word 'shall'" used in Article 63(1) of the Statute, denot[es] a *requirement* and not an *option*".[12]

16. For these reasons, the conclusion that Article 63(1) expresses an obligation on the accused to be physically present in the courtroom for the duration of trial is indisputable.

b. Article 27(1) requires equal treatment in all procedural aspects of the Statute

17. The opening sentence of Article 27(1) of the Statute reads: "The Statute shall apply equally to all persons *without any distinction based on official capacity*".[13] This prohibits any preferential treatment for an accused based on official capacity. It requires that all provisions of the Statute, including the Article 63(1) obligation to be present at trial, be applied to all accused without distinction based on official capacity.

18. The principle of equality of treatment of all accused is *ius cogens*.[14] To permit an accused to be absent from the courtroom for almost all of his trial on the ground that he is Head of State or Head of Government would violate this peremptory prohibition.

19. Article 27(1) of the Rome Statute reflects a right to equality before the law, a profoundly fundamental human right, recognised at least since 1793.[15] This right has been reflected in modern human rights instruments. The Universal Declaration of Human Rights states: "All are equal before the law and are entitled without any discrimination to equal protection of the law."[16] This is echoed in the International Covenant on Civil and Political Rights ("ICCPR"): "All persons shall be equal before the courts and tribunals." The ICCPR also

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[12] ICC-01/09-01/11-777-Anx2, paras. 3-4, emphasis added.
[13] Emphasis added.
[14] Inter-American Court of Human Rights Advisory Opinion No.OC-18/03 "Legal Status and Rights of Undocumented Migrants," para. 101, where the court said: "Accordingly, this Court considers that the principle of equality before the law, equal protection before the law, and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws."
[15] Article 3 of the Declaration of the Rights of Man and Citizen of 1793 provides: "Tous les hommes sont égaux par la nature et devant la loi." ("All men are equal by nature and before the law.")
[16] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III), Article 7.

sets forth a number of minimum rights for accused persons, which must be respected "in full equality".[17]

20. The same right to equality before the law is reflected in the statutes of the International Criminal Tribunal for the former Yugoslavia ("ICTY"),[18] the International Criminal Tribunal for Rwanda ("ICTR"),[19] the Special Court for Sierra Leone ("SCSL"),[20] and the Special Tribunal for Lebanon ("STL").[21]

21. No provision of those human rights instruments, or of the Rome Statute or the Statutes of the *ad hoc* Tribunals, even remotely suggests that an accused can be treated preferentially because of his official capacity.

22. The position is exactly the contrary. The Article 27(1) prohibition on the preferential treatment of an accused based on official capacity constitutes an insurmountable obstacle to the granting of any favours by a Trial Chamber to an accused on the basis that he has constitutional duties to discharge as Head of State or Government.

23. The Article 27(1) prohibition on preferential treatment is reinforced by Article 21(3), which requires that the application and interpretation of *inter alia* the Statute, Elements of Crimes and Rules of Procedure and Evidence must be "… consistent with internationally recognised human rights, and be without any adverse distinction founded on grounds such as gender [...], age, race, colour, language, religion or belief, political or other opinion, national ethnic or social origin, wealth, birth or other status".

24. It is also notable that the opening sentence of Article 27 of the Rome Statute contains a more explicit prohibition on preferential treatment for those in official capacity than other similar statutes.

25. The SCSL, ICTR and ICTY Statutes, for example, state: "The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal

[17] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 14(3).
[18] ICTY Statute Article 21(1).
[19] ICTR Statute Article 20(1).
[20] SCSL Statute Article 17(1).
[21] STL Statute Article 16(1).

responsibility nor mitigate punishment."[22] This partly reflects Principle III of the Nuremberg Principles, which states, "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law."[23]

26. Article 27 of the Rome Statute not only repeats the basic principles that official capacity at the time of the offence does not relieve the accused of criminal responsibility, nor mitigates punishment, but adds a clear guarantee of procedural equality to all accused: "This Statute shall apply equally to all persons without any distinction based on official capacity."

27. It is apparent that each and every provision of the Statute, whether procedural or substantive, including the Article 63(1) obligation that "[t]he accused shall be present during the trial", apply to the Accused, regardless of his official capacity. Reading Article 27(1) alongside Article 63(1), the position is clear: first, every accused must be present at trial. Second, this applies equally to all accused without any distinction based on official capacity.

c. Trial Chamber's discretion does not extend to fundamentally altering the elements of a fair trial

28. The Request refers to the Trial Chamber V(a) Decision's interpretation of Article 64(6)(f) as containing a residual power and discretion to do "what is fair, reasonable and just in the particular circumstances confronting the Chamber."[24] Trial Chamber V(a) considered that this discretion could be used to excuse an accused from continuous presence at trial, on a case-by-case basis.[25] The Majority stated: "The exceptional circumstances that would make such excusal reasonable would include situations in which an accused has

[22] ICTY Statute Article 7(2), ICTR Statute Article 6(2), SCSL Statute Article 6(2).
[23] *Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal,* Yearbook of the International Law Commission, 1950, vol. II.
[24] *The Prosecutor v. Ruto and Sang* ICC-01/09-01/11-777, para. 33.
[25] *Ibid.*, para. 49.

important functions of an extraordinary dimension to perform", [26] and considered that "…the demands of the office of the executive vice president of a State may meet the requirements of the test, depending on what those functions are."[27] The Defence submits that the Chamber should exercise this discretion in light of the duties that President Kenyatta must perform as Head of State, citing his duties in the Constitution of Kenya.[28]

29. The Legal Representative respectfully disagrees with the Majority in the Trial Chamber V(a) Decision.

30. The discretionary power of the Trial Chamber in Article 64(6)(f) is residual, and does not apply to areas of law which are unambiguously covered by other provisions of the Statute. Article 64(1) makes clear that the powers of the Trial Chamber set out in the article "shall be exercised in accordance with this Statute […]". Therefore, the clear and direct nature of Article 63(1) means that the physical presence of the accused at trial is a fundamental requirement of the trial process which the Trial Chamber is required to uphold.

31. Insofar as there exists a residual discretion in international criminal law generally for the Trial Chamber to allow proceedings to continue in the absence of the accused, there are only two circumstances which appear to have been approved: (1) the accused is in custody and requires medical treatment of short duration;[29] and (2) the accused is in custody, has been

[26] *Ibid.,* para. 49.
[27] *Ibid.,* para. 50.
[28] ICC-01/09-02/11-809, paras. 29 and 30.
[29] See e.g. *Prosecutor v. Laurent Gbagbo*, 2 November 2012, ICC-02/11-01/11-286-Red, para. 102, where the Pre-Trial Chamber stated: "…adjustments will need to be made in order to enable Mr Gbagbo to participate fully at the confirmation of charges hearing. These adjustments may include, inter alia, shorter court sessions, the provision of appropriate facilities for Mr Gbagbo to rest during breaks, the possibility for Mr Gbagbo to excuse himself from all or part of the proceedings and to follow them via video-link if he so wishes." Note that this arose in the context of a confirmation hearing (which permits the absence of the suspect) rather than a trial (which does not). In the case of Milan Simić before the ICTY, the accused participated in his sentencing hearing towards the end of the process via trial link because of his health condition. The Trial Chamber expressly noted, however, that during this period Mr. Simić filed a total of 25 waivers of his right to be present in court. (*Prosecutor v. Milan Simić*, Sentencing Judgement, Case No. IT-95-92-S, 17 October 2002, para. 8.) In the case of Jovica Stanišić at the ICTY, the trial proceeded in the absence of the accused on a number of occasions, sometimes with an express waiver by the accused and sometimes when the accused declined to waive his right to be present. (Judgement in *Prosecutor v Jovica Stanišić and Franko Simatović* IT-03-69-T pp 2436-2437). Gbagbo, Simić and Stanišić were all in custody in The Hague at the relevant time.

informed of his right and obligation to be present at trial, and refuses to attend the courtroom.[30]

32. In every case where trial proceeded in the absence of the accused, the accused was in custody, either in The Hague or in Arusha. There is not a single instance in any international tribunal of an accused being permitted to be absent from trial at liberty in the state where the alleged crimes were committed.

33. The ICTR and ICTY Appeals Chamber has affirmed the accused's ability to waive or forfeit the right to be present at trial. However, the ICTY/ICTR Appeals Chamber's pronouncements were made in the context of accused who were in custody in The Hague or in Arusha, and therefore did not pose a flight risk, and were not at large in the situation country in geographical proximity to surviving victims.[31] To reiterate, at no stage did the ICTR/ICTY Appeals Chamber suggest that an accused can elect, with the Trial Chamber's consent, to spend almost the entire trial at liberty in the country where the alleged crimes were committed. The existence of such a choice for the accused would undoubtedly strike many victims of mass crimes as repugnant to their notion of a fair trial.

34. No other circumstances permitting that the trial proceed in the absence of the accused have been recognised at any international criminal tribunal, setting

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[30] Radovan Karadžić boycotted the Prosecution's opening statement at the commencement of his trial, which was heard in his absence while the accused was in custody in The Hague. See *Prosecutor v. Karadžić* IT-95-5/18-1: Transcript of 27 October 2009, pp 510-511, where the Presiding Judge said : "I note that although the right of an accused person to be present during his trial is a fundamental one, it is well recognised that this right is not absolute. Moreover, when the accused himself chooses not to exercise his right to be present, a Chamber can consider such a choice as a waiver of that right. In this case, although the accused has duly been informed of the commencement of the trial, he has chosen not to exercise his right to be present." Karadžić's absence was short-term, and he has attended his entire trial to date, apart from the Prosecution's opening statement.

[31] See the discussion in *Nahimana et al. v Prosecutor* (Judgment) 28 November 2007 [ICTR Appeals Chamber] para. 107; *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006, para. 14; *Prosecutor v Edouard Karemera et al.*, Case No. ICTR-98-44-AR73.10 Decision on Nzizorera's interlocutory appeal concerning his right to be present at trial, 5 October 2007. In all cases at the ICTR where trial proceeded in the absence of the accused, the accused were detained in custody in Arusha.

aside the Special Tribunal for Lebanon, which, unlike the ICC, expressly permits trial *in absentia*.[32]

35. Furthermore, apart from the recent Trial Chamber (V)(a) Decision, there is no jurisprudence to suggest that a Trial Chamber has any discretion to relieve an accused of his obligation to attend trial on the ground of official capacity.
36. To set aside the requirement of presence at trial on the basis that the Accused is a serving Head of State with onerous state responsibilities would be a dangerous precedent. It raises the question of what other fundamental fair trial requirements set out in the Statute might also be set aside for the same reason.
37. The potential domino effect is alarming. For example, it might be argued in future cases that a serving Head of State or Government should not be required to divert his attention away from his or her constitutional duties to the rigours of the confirmation process, even if it was conducted in his or her absence.
38. Further, if a serving Head of State were to be convicted and sentenced to a term of imprisonment, it is arguable that the Trial Chamber should suspend that sentence until his or her term of office has been completed so that he or she might be free to fulfil important constitutional duties. And if such an accused should be repeatedly re-elected, or should come from a constitutional system that does not provide for democratic elections, the Trial Chamber should arguably suspend the sentence until he or she has ceased to be Head of State or Government, however long that might be.
39. All these speculative outcomes might seem fanciful, but they flow directly from the proposition that a serving Head of State or Government is entitled to preferential treatment due to his need to discharge constitutional functions in his own State.

[32] STL Statute Article 22(1).

d. The Accused's invocation of State interests is an unsound basis for the relief sought

40. The Request is based primarily on the argument that the Accused should be excused from attending trial in order to perform the duties of Head of State under the Constitution of Kenya. For example, the Defence asserts that "It 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]

41. It is therefore clear that it is primarily the interests of the *State*, rather than the Accused, which are raised in the Request.

42. In these circumstances, it is for the State concerned, and not the Accused (who is of course being prosecuted as an individual and not as a representative of the State), to assert the existence of State interests which might be affected by ongoing proceedings at the Court. If the State wishes to assert the existence of such interests, it is incumbent on the State make a Rule 103 request setting forth its observations and identifying the precise statutory basis for the relief that it seeks. Kenya has filed no such request. In any event, even if Kenya had done so, the Statute does not envisage a Trial Chamber permitting an accused to be absent from the courtroom for almost the entirety of his trial, and to be at liberty in the State in which the alleged crimes were committed, in order to satisfy constitutional duties within a State.

43. Furthermore, State interests are not included in Article 64(2), which requires the Trial Chamber to "…ensure that a trial is fair and expeditious and is conducted with full respect for the rights of *the accused* and due regard for the protection of *victims and witnesses*." Had the drafters of the Rome Statute intended that the interests of the State of nationality of the accused, or of the State in which the alleged crimes were committed, or of any other State, should be among those to be taken into account in guaranteeing the fairness of trial, they would have included State interests in Article 64(2).

[33] ICC-01/09-02/11-809, para. 30. See also paras. 31-35 of the Request.

e. An accused seeking to be absent from trial cannot rely on circumstances that he has voluntarily and deliberately created after committal for trial

44. An accused person seeking relief from a court must present a valid basis for the relief sought. It is clear that an accused, seeking to be relieved of his obligation to appear for trial, cannot pray in aid the existence of circumstances, which he has knowingly and voluntarily brought into being after being committed for trial.

45. Consider this sequence of events:

    a. The Accused has known since the promulgation of the Constitution on 27 August 2010 the "extensive duties of the President"[34] set out in the Constitution, and has also known the principal function of the Deputy President is as follows: "The Deputy President shall be the principal assistant of the President and shall deputise for the President in the execution of the President's functions".[35]

    b. The Accused has known since at least 2010 that presidential elections were due to take place in Kenya in either late 2012 or 2013 and that, under the Constitution of Kenya 2010, the President elected as a result would hold office for a term of five years, i.e. from 2013 until 2018.

    c. On 23 January 2012, charges were confirmed against the Accused and Mr Ruto, and they were committed for trial.[36] The Accused resigned as Finance Minister on 26 January 2012. From then on, the Accused and his advisers were certainly aware that both he *and* Mr Ruto would have to spend a considerable portion of the period between 2013 and 2018 on trial and in person in The Hague.

[34] Request, para. 30.
[35] Article 147 (1), Constitution of Kenya 2010.
[36] ICC-01/09-02/11-382-Red.

d. The Accused subsequently decided to run as a candidate in the 2013 presidential election. In October 2012, he chose Mr Ruto as his running mate, for Deputy President.

e. That is to say, the Accused knew before he announced his candidacy for President, and before he chose Mr Ruto as his candidate for Deputy President, that both he and Mr Ruto would have to spend a considerable portion of the period between 2013 and 2018 in person on trial in The Hague. He also knew that, if elected, they both would have state responsibilities to discharge, as respectively President and Deputy President of Kenya.

f. In September 2013, six months after becoming President, the Accused in the Request asked the Trial Chamber to relieve him from the obligation to be present at trial, praying in aid, *inter alia,* "his constitutional duties ... the exceptional nature of President Kenyatta's position ... his responsibilities to his State ... the exceptional roles and responsibilities of an incumbent Head of State ... important political duties."[37]

46. Without in any way entering into the domestic political debate, this sequence of events does not compel the inference that the Accused has sincerely attempted to arrange his affairs in a manner best suited to ensure his full co-operation with the Court while he is President of Kenya.

47. In particular, the tension between the Accused's obligation to be physically present at trial in The Hague and his current constitutional duties was manifestly foreseeable to the Accused and his advisers since well before the Accused announced his intention to run for election.[38]

[37] Request, paras. 30-36.
[38] The Accused acknowledged this conflict in a presidential debate on 11 February 2013, dismissing criticism from rival presidential candidate Raila Odinga as to whether he could run Kenya "by Skype from The Hague", and reportedly saying: "I will be able to handle the issue of clearing my name while at the same time ensuring that the business of Kenya continues" (See FT.com, *Kenya holds its first presidential debate*, 11 February 2013).

48. Further, it is only fair to note that the Accused could have arranged his affairs in a manner which would reduce, rather than exacerbate, the effect of the ongoing trials on State interests. His choice of Mr Ruto as his candidate for Deputy President is particularly curious in this context.

49. As a general principle, an accused cannot very well assert that he should be relieved from attendance at court due to circumstances which he brought into being through his own voluntary actions. In light of the sequence of events set out above, and in light of the peremptory prohibition on discrimination in the application of any provision of the Rome Statute between different accused persons on the basis of official capacity, there is no valid basis to grant preferential treatment to the Accused.

f. The presumption of innocence and the obligation of all accused without discrimination to be present in the courtroom during trial are both imprescriptible elements of a fair trial.

50. The Defence invokes the presumption of innocence as an argument in support of the relief it seeks.[39] In the Trial Chamber V(a) Decision, the Majority also referred to the presumption of innocence enjoyed by the accused in Article 66(1) of the Statute.[40]

51. However, the presumption of innocence in the Rome Statute applies to all accused, and all accused have an obligation under the Rome Statute to attend the entire trial in person. Nowhere in the Statute is there any suggestion that the presumption of innocence displaces the obligation to be present at trial.

52. Further, when assessing the importance of the presumption of innocence, it is important to recall that the Pre-Trial Chamber has found there are substantial grounds to believe that the Accused is individually criminally responsible as an indirect co-perpetrator under article 25(3)(a) of the Statute for crimes including murder, deportation, rape and persecution. It is apparent from its

[39] Request, para. 33.
[40] *The Prosecutor v. Ruto and Sang* , ICC-01/09-01/11-777, para. 48.

decision that those crimes were committed in circumstances of great brutality, involving thousands of victims.[41]

53. Jurisdictions across the world require the accused to be present at trial for serious (referred to in some common law jurisdictions as "indictable") offences, while nonetheless giving full respect to the presumption of innocence.[42] In the United States, for example, an accused is required to be present at every trial stage, from the initial appearance to sentencing; the accused may only be absent with the court's permission for minor offences (those "punishable by fine or by imprisonment for not more than one year, or both").[43] Similarly, in *R. v. Jones*, the House of Lords confirmed that "the law of England and Wales has recognized the right of a defendant to attend his trial and, in trials on indictment, has imposed an obligation on him to do so".[44]

54. Physical presence in the courtroom is a vital element in enabling the trier of fact to observe the Accused throughout the trial. In a United States Supreme Court case, one of the Judges observed:

> "It is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table… At all stages of the proceedings, the defendant's behaviour, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial."[45]

55. In England and Wales, a Judge of the Crown Court recently stated: "Moreover, juries very properly rely on their observation of the defendant, not only when she gives evidence (if she does so) but throughout the trial as

[41] ICC-01/09-02/11-382-Red.
[42] Some countries, including Kenya, expressly exempt a serving Head of State or Head of Government from criminal proceedings during their term in office. If the Rome Statute contained such a provision, the Trial Chamber would be obliged to enforce it. However, the Rome Statute contains precisely the opposite provision: Article 27.
[43] Federal Rules of Evidence, Rule 43.
[44] *R v. Jones* [2003] 1 AC 1 (HL), *per* Lord Bingham, para. 6. See also para. 10 of Lord Bingham's judgement.
[45] *Riggins v Nevada*, 504 U.S. 127 (1992), *per* Kennedy J at page 142.

all the evidence is given. Adversarial trials have always depended in part on these conditions being present in the court room."[46]

56. To allow the Request would deny the Chamber the full benefit of observing the Accused's demeanour and expressions throughout the trial, in particular during the testimony of insider witnesses or witnesses with whom the Accused or his close associates are alleged to have had direct interaction.

57. As far as the Legal Representative has been able to determine, there is no rule in any common law jurisdiction that the obligation of an accused to appear for trial when charged with serious offences is in any way supplanted by the presumption of innocence. Rather, the two go hand in hand: the accused is obliged to attend trial, and he is also entitled to a presumption of innocence. Both are fundamental and imprescriptible requirements of a fair trial.

g. The victims are opposed to the absence of the Accused from the courtroom

58. The Majority in Trial Chamber V(a) said that consideration should also be given to the concerns of victims and witnesses when considering the presumption of innocence.[47]

59. It is therefore appropriate to communicate to this Chamber the interests of the victims in this case. As noted above, at meetings attended by the Common Legal Representative and victims in recent months, the issue of whether the Accused should be obliged to attend trial has frequently arisen. Such questions are generally raised either by the victims themselves on the basis of what they have learned from the radio, print media or the television, or by the Legal Representative in the context of orally updating the victims on recent procedural developments in the present case and on related procedural developments in the *Ruto & Sang* case.

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[46] *R v D(R)*: Judgment of H.H. Judge Peter Murphy, 16 September 2013, para.30, available at: <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/The%20Queen%20-v-%20D%20(R).pdf> [Accessed 1 October 2013]. This case concerned the wearing of the niqaab by a defendant during proceedings in Crown Court. Although the Judge ultimately ruled that the accused need not remove her niqaab throughout the trial, except for when she testified, he clarified that this was solely due to the principle of freedom of religion, a fundamental right of the accused. Similar considerations do not arise in the present case.

[47] *The Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777, para. 48.

60. The Legal Representative can report to the Chamber that among the hundreds victims he has met in this case, there is trenchant opposition from the vast majority to the absence of the Accused from the courtroom with the Trial Chamber's consent. The victims appear to consider the presence of the Accused in the courtroom to be a vital element of a fair trial.

61. Further, the victims frequently report to the Legal Representative their lack of faith in the impartiality of the Kenyan court system. They state that they consider that those who are rich or powerful can easily evade justice in Kenya. In contrast, the victims of this case frequently express a fervent and sincere faith in the ICC. Many of them appear to see the Court as a beacon of impartiality, which will treat all accused persons equally, regardless of their station, wealth or power. To depart from that principle would risk sending an unfortunate message to the victims of this case and to others that this Court is not impartial, and that powerful accused are in fact treated preferentially at the ICC.

h. Other defence arguments in support of the relief sought have no basis

62. Further, the Defence arguments that "the case presented on behalf of President Kenyatta at the confirmation of charges hearing has been demonstrated by subsequent evidence in possession of both parties as having been correct",[48] is unsubstantiated. The Defence had an opportunity to appeal the confirmation decision and it did so; the decision was upheld.[49]

63. Neither the presumption of innocence,[50] nor the Accused's belief in the merits of his defence,[51] nor the expected duration of the trial,[52] are unique to this case: they apply to almost all accused standing trial before the ICC or any international tribunal. Whether taken either alone or together, they do not

[48] Request, para. 34.
[49] Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", ICC-01/09-02/11-425.
[50] *Ibid.*, para. 33.
[51] *Ibid.*, para. 34.
[52] *Ibid.*, para. 33.

constitute a valid basis to excuse the Accused from being present at trial. If they did, almost every accused standing trial before the Court would have to be offered the option of spending almost the entire trial far from the courtroom and at liberty in the situation country, in close geographic proximity to survivors of the alleged crimes.

IV. Relief

64. For the foregoing reasons, the Common Legal Representative respectfully submits that the Request should be denied.

Respectfully submitted,

Fergal Gaynor
Common Legal Representative of Victims

Dated on this 1st day of October 2013

At Nairobi, Kenya