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TRIAL CHAMBER V

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

***THE PROSECUTOR v.
WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG***

Public

**Joint Defence Submissions on
Legal Basis for the Accused's Presence at Trial via Video Link**

Source: Defence for Mr. William Samoei Ruto
Defence for Mr. Joshua Arap Sang

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

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I. INTRODUCTION

1. During the status conference held in The Hague on 14 February 2013, the defence for Mr. Ruto and the defence for Mr. Sang (“the defence”) raised the possibility with the Trial Chamber that the accused be permitted, from time to time, to be present at trial via video link. The Presiding Judge ordered the defence to make a written submission on the issue, including the legal basis and the concrete modalities of such a request, by the end of the month.¹
2. The defence submits that it is within the discretion of the Trial Chamber, on a case-by-case basis, to authorize the accused to be present at trial via video link. The defence emphasises that it is not asking for a waiver of the accused’s presence at trial. Both Mr. Ruto and Mr. Sang intend to be present at all stages of the trial, be it in person or, if permitted, through video link. It is to be emphasised that video link is not an absence of an accused but rather presence at trial through other means.

II. APPLICABLE LAW

3. Article 63(1), found in Part 6 (“The Trial”) of the Rome Statute, reads, “The accused shall be present during the trial.” In establishing the right of the accused to be present at trial, the drafters of the Statute were conscious of avoiding trial *in absentia*,² subject to the limited exception of disruption of the trial by an accused’s misbehaviour.³ Article 67(1)(d) further enshrines the right of the accused to be present at trial, stating that this is a minimum guarantee which the accused should enjoy in full equality. Neither the Statute nor the Rules or Regulations of the Court specify the modalities through which the accused must be present at trial.
4. In cases of continued disruption, the Chamber may remove the accused. In which case it “shall make provision for him to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required” (Article 63(2)).

¹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-T-19, Status Conference Transcript, 14 February 2013, p.6.

² Triffterer, p. 1193-4.

³ Article 63(2). See also Triffterer, p. 1196.

⁴ For example, Article 61(2) which allows the Pre-Trial Chamber to hold a hearing in the absence of the person charged, provided that the charges on which the Prosecutor intends to seek trial when the person has waived his right to be present at trial.

⁵ See, *Prosecutor v. Gbagbo*, ICC-01/09-01/11-Pre-Trial Chamber, Decision on the fitness of Laurent Gbagbo to take

5. This reference to the accused having a right to be present is in contrast to the pre-trial stage, where for some proceedings it is either implicit or explicit that the accused would not be present.⁴
6. Rule 124 explicitly allows a suspect who is available, but wishes to waive his right to be present at the confirmation hearing, to submit a written request to the Pre-Trial Chamber to be absent. The Chamber must then satisfy itself that the suspect understands his or her right to be present and the consequences of waiver. By Rule 124(3), the Chamber may then authorize and make provision for the suspect to observe the hearing from outside the courtroom 'through the use of communications technology, if required.'⁵ This is done without prejudice to the suspect's right to submit written observations on issues before the Chamber (Rule 124(4)).
7. No such provision is specifically found relating to trial but the defence submits that it remains within the competence of a Trial Chamber to permit an accused to attend through video link and to determine the modalities of doing so. This arises from the inherent power that a court has to manage its proceedings, subject of course to such management being consistent with the fundamental object and purpose of the Statute. It is submitted that the mere absence of a particular rule dealing with link by video attendance does not in itself prevent a Chamber from extending such facility to the accused, particularly if that is done at the express wish and with the informed consent of an accused. The Rules themselves are not necessarily complete but to some extent, like Richard III, were, 'unfinish'd, sent before my time / Into this breathing world, scarce half made up'.⁶ It is submitted that the Chamber has a broad discretion to manage the trial in a manner that best suits the objective of fairness and expedition.

⁴ For example, Article 61(2) which allows the Pre-Trial Chamber to hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has waived his right to be present or fled.

⁵ See, *Prosecutor v. Gbagbo*, ICC-01/09-01/11, Pre-Trial Chamber, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, 2 November 2012, para. 102 ("As noted above, 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").

⁶ William Shakespear, *The Life and Death of Richard the Third*, Act 1, Scene 1.

8. Additionally, Article 64 of the Statute sets out the Functions and Powers of the Trial Chamber. Primary among these is the Trial Chamber's responsibility, stated in sub-article 2, 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". Significantly, the Trial Chamber, in the performance of its functions prior to or during the course of the trial, may, as necessary, exercise any of the functions of the Pre-Trial Chamber referred to in Article 61, paragraph 11, which states that the Trial Chamber shall be responsible for the conduct of subsequent proceedings and "may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings". It can therefore be argued that it is implicit that the Trial Chamber is as capable as the Pre-Trial Chamber to exercise its discretion and allow the accused to participate in the proceedings via video link.

III. SUBMISSIONS

9. This case, together with the parallel Kenyan case, presents the ICC with particular issues that have not been met by any court before. Both Mr. Ruto and Mr. Kenyatta have held and/or seek to hold high public office. Furthermore, the nature of this Court's jurisdiction is such that it is reasonable to propose that there may be future cases involving officials or politicians in high office whose absence from their duties would pose particular problems and where it would be reasonable for the Court to take a flexible view of their day to day attendance. Indeed, the case against Sudanese President Al-Bashir could present a similar problem, should he ever submit himself to the Court's jurisdiction. Allowing an accused to be present via video link from time to time would be a reasonable and flexible response to such problems, while remaining consistent with both the objects of the Court and the interests of an accused.
10. Video links are a recent and developing facility. They have made great strides even in the limited life of international criminal tribunals. Today's facilities are noticeably better than those even of a year or so ago. The recent status conference demonstrated that such a link was effective and fault free. The latter is a particular

consideration for a court. The defence well appreciates that a video link must be reliable and not break down to the inconvenience of the Chamber. The level of communication with Nairobi is sufficiently sophisticated. The defence exhorts the Chamber to have confidence in the video system – at least to the extent of accepting it as a viable alternative to physical presence until demonstrated to the contrary. A modern court is entitled to resort to modern methods.

11. Video links are not entirely novel of course. The practice of other international criminal tribunals has been to authorize the use of video link technology in some circumstances, at the request of the accused, such as for status conferences, or to enter a plea agreement, when the accused was on provisional release.⁷ On other occasions, the accused have been authorized to follow hearings via video link from detention where they had health concerns.⁸ At the Special Court for Sierra Leone, two convicts imprisoned in Rwanda were charged with contempt and participated in the entire trial proceedings via a video link established between Rwanda and Sierra Leone.⁹ On the national level video links are becoming increasingly employed, even when distance is not the problem it poses at the ICC.
12. The defence has applied to have the trial location moved to either Kenya or Tanzania. The precise logistics of the trial are still to be determined. In the event that trial remains in The Hague it is reasonable to ask the Chamber to consider the use of a video link from time to time. Its practical advantages are apparent. There may be portions of trial when the evidence is orientated towards one accused rather than the other. There may be times when relatively short hearings take place – the experience of the court will demonstrate that the court calendar may sometimes provide just a day or two of hearing in a week. There may be times

⁷ In *Cermak and Markac*, the two accused who were on provisional release were allowed to enter a plea on new charges via video link. *Prosecutor v. Cermak and Markac*, Trial Chamber, “Scheduling Order”, 7 December 2005, p. 2. See also, *Prosecutor v. Gotovina et al*, Trial Chamber, “Order Scheduling a Status Conference” 25 June 2007, p. 2 ; *Prosecutor v. Mico Stanisic*, “Order Scheduling a Status Conference and Further Appearance”, 12 November 2008, p. 3 ; *Prosecutor v. Stanisic and Simatovic*, “Order Re-Scheduling Further Appearance”, 14 March 2006, p. 2.

⁸ *Prosecutor v. Stanisic and Simatovic*, Trial Chamber, “Order Establishing a Procedure for the Monitoring of and Reporting on the Accused Stanisic’s Ability to Attend Court in Person and/or to Participate in the Court Proceedings Via Video-Conference Link”, 8 May 2008, p. 2-3 ; *Prosecutor v. Stanisic and Simatovic*, Trial Chamber, “Order on the Monitoring of and Reporting on the Health of the Accused Stanisic”, 29 April 2008, p. 2 ; *Prosecutor v. Stanisic and Simatovic*, Trial Chamber “Corrigendum to Second Decision Amending Modalities for Trial”, 7 September 2009, para. 5.

⁹ *Prosecutor v. Bangura et al*, Trial Chamber “Scheduling Order for a Pre-Trial Conference Pursuant to Rule 73bis and Order for Submissions”, 1 May 2012, p. 2-3.

when the court is occupied with legal arguments. An accused may fall ill in Kenya, but be able to follow the trial through video link.

13. This is to be weighed against the practicalities of trial far from Kenya. The journey time to and from Nairobi is a day's flight, plus an hour or two's time difference. Both accused have professional and family interests centered in Nairobi and also the Rift Valley – a five hours drive from Nairobi, or a one hour flight to Eldoret. Depending on the outcome of Monday's elections, or their subsequent 'run-off', Mr. Ruto may become the Deputy President of Kenya. It is reasonable to seek to have some balance between such obligations and his duties to this Court, duties that it is important to note he has consistently observed and will continue to do so.
14. There are financial considerations too. Mr. Ruto is funding his own defence, which is a significant financial burden. Mr. Sang is supported by the legal aid scheme of the court, which would directly benefit from savings made by his not having to be present in person at the Chamber where such was not deemed necessary by the Chamber due to his presence by video link.
15. The Trial Chamber has the ability to exercise its discretion and allow the accused to be present at trial through video link rather than in person. The defence submits that such an accommodation will assist in making the trial both fair and expeditious. It will also take into account the accused's right to private and family life, and to public and political life, as is well entrenched in international human rights treaties and conventions.¹⁰
16. Detailed modalities will need to be established, in conjunction with the Registry. The defence proposes that should either of the accused wish to request authorization to be present at any portion of the trial via video link, that the defence will then have to submit an application to the Chamber, sufficiently far in advance, detailing the period of time requested for the video link and the reasons for the request. It would also be understood that the Chamber would have the power to rescind any such order and require the physical attendance of an accused

¹⁰ See for instance, Article 5 of the Charter on Human Rights and Freedoms and Article 8 of the European Convention on Human Rights. Also see, *Prosecutor v Haradinaj et al*, No. IT-04-84-PT, *Decision on Defence Motion on Behalf of Ramush Haradinaj to Request Re-Assessment of Conditions of Provisional Release Granted 6 June 2005* (12 October 2005), on the right of persons under provisional release to a public and political life.

at short notice. It would also be understood that counsel instructed for the defence would of course be present in the Chamber and would have full authority of the accused to conduct the case.

17. The defence submits that the Registry is best-placed to offer submissions as to the concrete modalities for any possible video link, especially given that the Registry rather successfully coordinated the attendance of Mr. Ruto and his counsel at the 14 February status conference via video link from Nairobi. The defence would simply request that the accused be allowed to have counsel present at the video link location as well as in Court, and that a suitable and confidential communication line be available between the two locations. This would be in addition to the video link and an additional support to it. In the estimation of the defence, this was appropriately catered for during the status conference.

IV. RELIEF REQUESTED

18. The defence requests the Trial Chamber to authorize, in principle, the use of video link technology to ensure the accused's right to be present at trial is effectuated. Any specific application should be made and considered on a case-by-case basis.



David Hooper, QC
On behalf of William Samoei Ruto
Dated this 28th day of February 2013
In London



Joseph Kipchumba Kigen-Katwa
On behalf of Joshua Arap Sang
Dated this 28th Day of February 2013
In Nairobi