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TRIAL CHAMBER V

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

**SITUATION IN THE REPUBLIC OF KENYA
IN THE CASE OF THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA AND
UHURU MUIGAI KENYATTA**

Public Document
**Victims' Response to the "Defence Request for Mr. Kenyatta to be Present During
trial via Video Link"**

Source: **Victims' Legal Representative**

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

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I. Introduction

1. The Common Legal Representative for Victims (“Legal Representative”) submits below his response relating to the “Defence Request for Mr. Kenyatta to be Present During Trial via Video Link” (“Defence Request”), which was notified to the Legal Representative on 28 February 2013.¹ The Defence for Mr. Kenyatta requested the Trial Chamber to permit Mr. Kenyatta to participate in his trial by means of video link from Kenya on a regular basis. The Defence Request appears to envisage Mr. Kenyatta participating at trial while at liberty in Kenya. The Legal Representative opposes the Defence Request.
2. In summary, the Legal Representative submits that:
 - a. There is no legal basis in the Court’s regulatory structure to permit an accused to be ‘present’ at his trial by video link while at liberty in the country in which the alleged crimes were committed. Article 63(1) of the Rome Statute (“Statute”) requires the physical presence of the accused in the courtroom during trial. Article 63(2) is the *lex specialis* governing the participation of an accused at trial by video link, and it is inapplicable in the present circumstances.
 - b. The States Parties were well aware of the existence of video link and videoconference technology, and the Statute and Rules permit the use of such technology in carefully defined circumstances. Permitting an accused to participate in his trial by video link while at liberty near the location of the alleged crimes is not one of them. If the Statute or the Rules of Procedure and Evidence (“Rules”) had been intended to permit an accused to be ‘present’ at his trial by video link while at liberty in the country in which the alleged crimes were committed, they would have so provided.

¹ ICC-01/09-02/11-667. Confidential Annex A to the Defence Request, described in paragraph 2 of the Defence Request as ‘containing information from the Registry designated as “highly confidential”’, was not notified to the Common Legal Representative.

- c. The provisions in the regulatory structure of the Special Tribunal for Lebanon (“STL”) permitting an accused to participate in his or her trial by video link are not applicable to, or binding on, the Court.
- d. A review of the law and practice of other international criminal tribunals reveals that there is no general rule in international criminal law to permit an accused to be ‘present’ at his trial by video link, except where the accused is in detention at the seat of the tribunal and in ill-health.
- e. Even if the Trial Chamber were to find that there is a sound legal basis to permit an accused at liberty in the situation country to participate in his trial by video link, discretionary issues do not weigh in favour of granting the Defence Request. In particular, certain choices and statements made by Mr. Kenyatta cast doubt on his declared willingness to fully co-operate with the ICC as President of Kenya, and this in turn gives rise to an enhanced risk that, if permitted to participate in his trial by video-link, he will not surrender to ICC custody when ordered to do so. A key component of any criminal justice system is that “all are equal before the law”.² To create an exception to this for better-known individuals or those in high office accused of the most serious of crimes would not only deprive the particular proceedings of their full weight, but would weaken the process of justice overall.

II. Procedural History

- 3. On 23 January 2012, the Pre-Trial Chamber issued, by majority, the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (“Confirmation Decision”), confirming the charges against Mr. Muthaura and Mr. Kenyatta.

² Universal Declaration of Human Rights, Art. 7.

4. On 14 February 2013, Mr. Kenyatta attended a status conference via video link. During the hearing, the Chamber stated that should the Defence wish to pursue "the possibility of accused being permitted to use video link from Kenya as a means of participation in the trial on a regular basis,"³ it must file "full written submissions in that regard, including the legal basis and practical modalities of this request."⁴
5. On 28 February 2013, the Defence for Mr. Kenyatta filed the Defence Request.

III. Submissions

The subject matter at issue is directly related to the interests of victims

6. The Legal Representative respectfully submits that the Defence Request warrants observations from the victims participating in this case. The personal interests of the victims are directly affected by the possibility of having Mr. Kenyatta attend trial via video link from Kenya.
7. Article 68(3) of the Statute provides that:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
8. Regulation 24(2) of the Regulations of the Court ("Regulations") provides that, subject to any order of the Chamber, victims and their legal representatives may file a response to any document "when they are permitted to participate in the proceedings in accordance with article 68, paragraph 3, and rule 89, sub-rule 1."
9. The Trial Chamber has ruled that "in 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."⁵

³ ICC-01/09-02/11-T-22-ENG, page 5, lines 5-7.

⁴ ICC-01/09-02/11-T-22-ENG, page 5, lines 7-9.

⁵ ICC-01/09-02/11-498, para. 71.

10. During a series of meetings with victim participants in late January and early February 2013, the Legal Representative discussed a number of possible scenarios relating to the practicalities of trial. One issue discussed was that one or both of the accused might seek leave to 'attend' the trial via video link from Kenya, rather than in person. The victims were strongly opposed to permitting either of the accused to participate in trial by video link. In short, they expressed the view that *any* person accused of participation in murder, rape or other serious crimes should be physically present in court. They also raised fears that the accused would not physically surrender themselves to the Court in the event of conviction, or might abandon the trial prior to conviction. In particular, the victims raised deep concerns that Mr. Kenyatta, if elected President of Kenya, would seek to avoid attending trial and, acting in co-operation with William Ruto, would seek to delay or to collapse the ICC process.
11. The subject matter is directly related to the interests of the victims. If Mr. Kenyatta were given leave to 'attend' trial by video link and, having heard all or part of the evidence of the Prosecution, elected not to continue to participate by video link, this would likely result in a stay of the proceedings, pending Mr. Kenyatta's arrest and delivery to the Court. Alternatively, Mr. Kenyatta might participate in the entire trial by video link and then refuse to surrender himself in the event of a conviction. Either eventuality could delay the proceedings for many months, if not years, as has occurred in the case of President Bashir of Sudan. Granting the Defence Request could therefore significantly affect the interest of the victims in seeing this trial commence and conclude as expeditiously as possible. Furthermore, any delay in the conclusion of the trial process would delay the commencement of reparations proceedings, which directly affects the victims' right to just and expeditious reparation for the harm that they have suffered.

12. For these reasons, the Legal Representative submits that the subject matter at issue is directly related to the interests of victims, and, on behalf of the victims, sets forth the submissions below.

Article 63(1) requires physical presence of the accused in the courtroom

13. Article 63(1) of the Rome Statute states: “The accused shall be present during the trial”.⁶ No reference is made in Article 63(1) to communications technology. A great portion of the Defence Request is devoted to an attempt to read into the simple and unambiguous language of Article 63(1) an implicit reference to the circumstance of an accused following his trial through the use of communications technology.⁷
14. No such interpretation of Article 63(1) is necessary. The Rome Statute expressly contemplates the possibility of an accused following his trial through the use of communications technology, and it does so in Article 63(2).

This subsection provides:

If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

15. Article 63(2) refers to the removal of the accused and his observing the trial and instructing counsel “from outside the courtroom”. This suggests that the words “present” in Article 63(1) and “presence before the Court” in Article 63(2) contemplate the physical presence of the accused inside the courtroom.
16. Furthermore, the words “through the use of communications technology” appear in Article 63(2) but not in Article 63(1). This suggests that the presence of the accused at the trial required by Article 63(1) is not satisfied by the use of communications technology.

⁶ Rome Statute, Article 63(1). The French version reads: “L'accusé est présent à son procès.”

⁷ ICC-01/09-02/11-667, paras 16-18.

17. Article 63, read as a whole, requires the accused's physical presence in the courtroom⁸ and sets out the circumstances in which the accused may follow the trial from outside the courtroom.⁹
18. Article 63(2) is the *lex specialis* for the participation of an accused at trial through the use of video link technology. It envisages that an accused may be permitted to follow his trial by video link, while detained in custody, after he has been removed from the courtroom for continuously disruptive conduct. Clearly, this is not applicable in the present circumstances.
19. The States Parties were certainly aware of the existence of "video link technology with transcontinental capabilities"¹⁰ when the Statute and Rules were adopted. The Rules contain express provision for a witness to give testimony at trial by video link,¹¹ and for hearings relating to reduction of sentence to take place by videoconference.¹²
20. This demonstrates that the technological possibilities of video link and videoconference, even over great distances, was expressly contemplated by the States Parties and they made due provision for the circumstances in which this technology should be used. The participation at trial by video link of an accused at liberty, in the country in which the alleged crimes were committed, was not a circumstance that was included.
21. It is submitted that this omission was not accidental. Had the States Parties wished that an accused should be permitted to participate in his trial by video link from the country in which the alleged crimes were committed, and where the accused is at liberty, they would expressly have provided for such a possibility in the Statute or in the Rules.

⁸ Article 63(1).

⁹ Article 63(2).

¹⁰ Defence Request, par. 21.

¹¹ ICC Rules of Procedure and Evidence, Rule 67; Rule 87.3(c).

¹² ICC Rules of Procedure and Evidence Rule 224.

22. Furthermore, the Defence Request has not identified any statement by any party contained in the *travaux préparatoires*¹³ of the Rome Statute which suggests an intention to permit attendance of an accused person at trial by video link while at liberty in the country where the crimes were committed. The Defence Request does not identify any jurisdiction anywhere in the world which permits such an arrangement.
23. The Trial Chamber should give effect to the plain meaning of Article 63: it requires the physical presence of the accused in the courtroom during trial, except in the circumstances provided for in Article 63(2).

Obiter dictum in Gbagbo is not applicable

24. While it was not raised in the Defence Request, the Legal Representative notes that the Pre-Trial Chamber in *Gbagbo* raised *obiter* the possibility of the accused Laurent Gbagbo following the proceedings at the confirmation of charges hearing by video link.¹⁴
25. The Legal Representative notes several factors which distinguish that *obiter* statement from the present circumstances: firstly, it arose in the context of an application in which the defence had submitted that the state of health of the accused made him unfit to stand trial, and was therefore related to humanitarian considerations which might apply in the case of an accused who might be in ill health. Secondly, it arose in the context of confirmation hearings, rather than trial proceedings. Thirdly, Mr Gbagbo is in custody in The Hague and it was envisaged that he would participate in the confirmation hearings by video link while in custody.
26. In the present case, there is no suggestion that Mr. Kenyatta is not in good health. Second, he seeks to participate in 'the trial' by video link, rather than in

¹³ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998, Vol. III, A/CONF.183/13(Vol. III),

¹⁴ 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."

the confirmation hearings, and, to re-iterate, Article 63(1) requires him to be present at ‘the trial’. Third, Mr. Kenyatta seeks to participate in his trial by video link from the country in which the alleged crimes were committed, and where he would be at liberty, and very possibly the President of Kenya. These are entirely different circumstances from the *Gbagbo* case. Therefore, the decision in *Gbagbo* is not authority for the assertion that Article 63(1) permits an accused to participate in his trial by video link from the country in which the alleged crimes were committed and where he is not in custody.

Under ICTR case law, ‘presence’ at trial implies physical presence in the courtroom

27. The Appeals Chamber of the International Criminal Tribunal for Rwanda (“ICTR”) has taken the unambiguous position that to be “present” at trial means to be physically present in the courtroom. In *Zigiranyirazo*, the ICTR Appeals Chamber considered the right (rather than the obligation) of an accused to be present at his trial. Its observations concerning the meaning of “presence” are nevertheless instructive:

The Appeals Chamber considers that the physical presence of an accused before the court, as a general rule, is one of the most basic and common precepts of a fair criminal trial. The language and practical import of Article 20(4)(d)¹⁵ of the Statute are clear. First, as a matter of ordinary English, the term “presence” implies physical proximity.¹⁶ A review of the French version of the Statute leads to the same

¹⁵ Article 20(4)(d) of the ICTR Statute provides that an accused has a right “to be tried in his or her presence.”

¹⁶ The original footnote reads: ‘See, e.g., The Oxford English Dictionary, Second Edition, Volume XII, p. 393 (for the definition of “presence”: “The fact or condition of being present; the state of being before, in front of, or in the same place with a person or thing; being there; attendance, company, society, association. Usually with *of* or possessive indicating the person or thing that is present.”), p. 395 (for the definition of “present”: “An adjective of relation; expressing a local or temporal relation to a person or thing which is the point of reference [...] Being before, beside, with, or in the same place as the person to whom the word has relation; being in the place considered or mentioned; that is here (or there) [...]”); Black’s Law Dictionary, Eighth Edition, (for the relevant definition of “presence”: “The state or fact of being in a particular place and time [...]. Close physical proximity coupled with awareness [...]”). See also *United States v. Navarro*, 169 F.3d 228, 234-239 (5th Cir. 1999) (interpreting the plain meaning of “presence” as requiring the physical presence of a defendant in court).’

conclusion, in particular in the context of the phrase “*être présente au procès*”,¹⁷ conveying unambiguously that Article 20(4)(d) refers to physical presence *at the trial*.¹⁸

28. The ICTR Appeals Chamber noted that the express provisions contained in its procedural structure which provide for the use of video link illustrate that participation via video link is not “presence”. The Appeals Chamber stated:

Rule 65*bis* of the ICTY Rules of Procedure and Evidence illustrates very clearly that participation via video link is not considered presence.¹⁹ The same distinction between actual presence and constructive presence via video link, which is evident in Rule 65*bis* of the ICTY Rules, also appears in the Statute of the International Criminal Court²⁰ and the Rules of Procedure and Evidence of the Special Court for Sierra Leone.²¹

29. In its analysis of relevant domestic law, the Appeals Chamber cited *Riggins v. Nevada*,²² which emphasises the benefit to the trier of fact of observing the accused in person during trial. This point is highly relevant to consideration of the Defence Request. The relevant portion reads :

¹⁷ Emphasis in the original decision.

¹⁸ The original footnote reads : ‘Le Nouveau Petit Robert, p. 1768 (for the definition of “présente” : “*Qui est dans le lieu, le groupe se trouve la personne qui parle ou de laquelle on parle*”); Gerard Cornu, *Vocabulaire Juridique*, p. 664 (“*Qui se trouve ou se trouvait à un moment donné en un lieu déterminé. [...] Qui concourt en personne l’accomplissement d’un acte ou au déroulement de la procédure. [...]*”).’

¹⁹ The original footnote reads : ‘Rule 65*bis*(C) of the ICTY Rules provides in pertinent part: “With the written consent of the accused, given after receiving advice from his counsel, a status conference under this Rule may be conducted: (i) in his presence, but with his counsel participating either via tele-conference or video-conference; or (ii) in Chambers in his absence, but with his participation via tele-conference if he so wishes and/or participation of his counsel via tele-conference or video-conference.”’

²⁰ The original footnote reads: ‘*See* Statute of the International Criminal Court, Article 63 (“(1) The accused shall be present during the trial. (2) If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.”).’

²¹ The original footnote reads: ‘The Appeals Chamber notes that Article 17(4)(d) of the Statute of the Special Court for Sierra Leone is identical to Article 20(4)(d) of the Tribunal’s Statute. Notably, similar to the International Criminal Court, Rule 80(B) of the Rules of Procedure and Evidence for the Special Court in Sierra Leone envisions an accused’s participation in his or her trial by video-link only after he or she has been removed for persistently disruptive conduct. This Rule provides in pertinent part: “In the event of removal, where possible, provision should be made for the accused to follow the proceeding by video-link.”’

²² *Riggins v. Nevada*, 504 U.S. 127, 142 (1992) (Kennedy, J., concurring)

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. This assumption derives from the right to be present at trial, which in turn derives from the right to testify and rights under the Confrontation Clause. [...] At all stages of the proceedings, the defendant's behavior, 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.²³

30. Similarly, in the present case, the Trial Chamber is likely to gain valuable insights from its observation of Mr. Kenyatta during the testimony of critical witnesses and during the presentation of important documentary evidence. To permit him to participate in the trial by video link would deprive the Trial Chamber of those significant insights.

STL explanatory memorandum is of little assistance

31. The Defence relies heavily on the explanatory memorandum of the President of the STL in support of its view that “presence at trial can be satisfied by an accused’s participation via video link”.²⁴ Specifically, the Defence relies on an assertion in that explanatory memorandum where the President of the STL stated that the STL Rules of Procedure and Evidence (“RPE”) envisage the possibility for a suspect or any accused not to be held in custody in The Hague during the pre-trial proceedings and during the trial itself.²⁵
32. The Explanatory Memorandum is relevant to the consideration of the meaning of provisions which already exist in the STL’s regulatory structure, rather than to infer the existence of provisions which do not exist in the ICC’s regulatory

²³ *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006. Internal citations omitted.

²⁴ ICC-01/09-02/11-667, paragraph 20.

²⁵ ICC-01/09-02/11-667, paragraph 21, quoting the explanatory memorandum of the President of the STL.

structure. The STL President explained that the main purpose of the Explanatory Memorandum was “to express the President’s view as to the principal procedural problems likely to arise before the STL and the rationale underpinning their solutions in the RPE.”²⁶

33. It is clear from the STL RPE and the Memorandum itself that the President in the commentary cited in the Defence Request was referring to Rules 104²⁷ and Rule 105²⁸ of the STL RPE, which expressly and clearly provide for the participation of the accused at trial by video conference. Neither Rule binds the ICC. The ICC Statute and Rules do not contain any express provision for an accused to participate in his trial by audio visual means, other than that set out in Article 63(2). Therefore, the Explanatory Memorandum relating to the STL RPE offers little assistance in interpreting the provisions of the Rome Statute and the Rules.

34. Similarly, the Extraordinary Chambers in the Courts of Cambodia’s (“ECCC”) regulatory structure contains express provision for an accused to participate at trial by video link; this sub-rule was adopted in the context of an 87-year-old accused who was in poor health and in custody during trial.²⁹ In the same vein, Rule 81 *bis* of the International Criminal Tribunal for the former Yugoslavia’s (“ICTY”) Rules of Procedure and Evidence, cited in the Defence Motion, which permits the trial Chamber to order that “proceedings” be conducted by way of video-conference link, has no equivalent at the ICC. The existence of these sub-rules in the regulatory structures of those courts does

²⁶ STL President, Explanatory Memorandum, para. 7.

²⁷ STL RPE Rule 104: “Proceedings shall not be in absentia if an accused appears before the Tribunal in person, by video-conference, or by Counsel appointed or accepted by him.”

²⁸ STL RPE Rule 105: “Upon authorisation of the Pre-Trial Judge or of the Trial Chamber, the accused may participate in hearings via video-conference provided that his counsel attends the hearings in person.”

²⁹ ECCC Internal Rule 81(5) provides as follows: “Where, due to health reasons or other serious concerns, the Accused cannot attend in person before the Chamber but is otherwise physically and mentally fit to participate, the Chamber may either continue the proceedings in the Accused’s absence with his or her consent or, where the Accused’s absence reaches a level that causes substantial delay and, where the interests of justice so require, order that the Accused’s participation before the Chamber shall be by appropriate audio-visual means.” This amendment to the Internal Rules was adopted in 2011 after concerns were raised about the health of the accused Ieng Sary, who, unlike Mr. Kenyatta, was 87 years old, in poor health and was in detained in custody at the ECCC Detention Centre in Cambodia: *Trial Chamber Decides that Accused Ieng Sary Is Fit and May Be Ordered to Participate by Video-Link* (Nov. 30, 2012), at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>. See also: Decision on accused Ieng Sary to Stand Trial, Case 002, E238/9, 26 November 2012, page 9.

not imply the existence of a general rule in international criminal law permitting an accused to be “present” at his trial by video link while at liberty in the State in which the crimes were committed.

35. The most that can be said is that there is an emerging practice of permitting an accused who is in ill-health and in custody at the seat of the tribunal to follow proceedings by video link. The participation of Jovica Stanisic at trial at the ICTY falls into this category. It is the only example from the ICTY or the ICTR of an accused participating *at trial* (rather than at pre-trial or plea hearings) by video link cited in the Defence Request.³⁰ Stanisic was an elderly accused who was in poor health and followed a portion of his trial by video link while in custody in The Hague during trial. That precedent is of limited relevance to the situation of Mr. Kenyatta.

SCSL contempt trial is of little relevance to the Defence Request

36. The Defence Request refers to a trial for contempt held by the Special Court for Sierra Leone (“SCSL”).³¹ In that trial, the video link arrangement was put in place to deal with a truly exceptional situation, and it was a case relating to contempt of court rather than to the far more serious crimes alleged in the present case.
37. Two of the accused participated by video link. This was because two of the accused were in custody in Rwanda and could not be released, and the other two were in custody in Sierra Leone. In her judgement, the Single Judge said:

The Trial involved two Accused who were resident in Kigali and two accused who were resident in Freetown. ... Neither of the Accused in Kigali could travel to Freetown nor to any other location and, likewise, the Accused in Freetown could not travel to Kigali. In order to have all four Accused hear the evidence, the trial was conducted by way of video link between Freetown and Kigali. Counsel and the Court also

³⁰ Defence Request, paragraph 24.

³¹ *The Independent Counsel v Hassan Papa Bangura, Samuel Kargbo, Santigie Borbor Kanu, Brima Bazzy Kamara*, SCSL-11-02, 25 September 2012, Trial Chamber II. See also Defence Request at paragraph 23.

travelled between Freetown and Kigali order to have evidence adduced in both locations.³²

38. This exceptional, if not unique, case does not provide authority for the position that the Rome Statute contemplates an accused attending trial for crimes against humanity by video link while at liberty in the situation country.
39. Furthermore, technical problems meant that the SCSL trial took place in what the Single Judge described as 'frustrating conditions'.³³ Her assessment on this point illustrates the technical problems which threaten to frustrate the orderly and expeditious conduct of trial. The Single Judge wrote :

The logistics of the video link involved frequent break downs for reasons outside the control of the Court and the Special Court's technical staff. This led to innumerable delays and frustrating breaks in the normal flow of evidence.³⁴

40. While the video link between Kenya and the Netherlands is somewhat better than that between Rwanda and Sierra Leone, there is no doubt that breaks in the audio or video elements of the link between The Hague and Arusha could well result in delays and breaks in the normal flow of evidence during trial.

Discretionary factors do not favour granting the Defence Request

There are no valid exceptional circumstances

41. Even if the Trial Chamber finds that there is a sound legal basis to permit an accused to participate in the trial from the situation country by video link, a finding which would create an unfortunate precedent and would dilute the Court's deterrent effect, such relief should not be granted in this case.

³² *The Independent Counsel v Hassan Papa Bangura, Samuel Kargbo, Santigie Borbor Kanu, Brima Bazzy Kamara*, SCSL-11-02, 25 September 2012, Trial Chamber II, Single Judge, Judgement, paragraph 10.

³³ *The Independent Counsel v Hassan Papa Bangura, Samuel Kargbo, Santigie Borbor Kanu, Brima Bazzy Kamara*, SCSL-11-02, 25 September 2012, Trial Chamber II, Single Judge, Judgement, paragraph 15

³⁴ *The Independent Counsel v Hassan Papa Bangura, Samuel Kargbo, Santigie Borbor Kanu, Brima Bazzy Kamara*, SCSL-11-02, 25 September 2012, Trial Chamber II, Single Judge, paragraph 14

42. The Defence Request reveals no exceptional circumstances justifying the participation of Mr. Kenyatta at trial by video link: in particular, he is not in ill-health; he is not elderly; and he is not in custody in a third country and thus prevented from travelling to The Hague.
43. The Defence instead argues for the use of video link “particularly in the circumstances when an accused resides in a country external to the seat of the Court”.³⁵ This scenario is scarcely exceptional in international criminal proceedings. As far as the Legal Representative is aware, it is identical to the situation for every person who has stood trial at the ICC, ICTY and ICTR to date.
44. The Defence Request does not make any effort to explain exactly why Mr. Kenyatta wishes to participate in his trial by video link, rather than in person. Particularly conspicuous by its absence is any discussion about Mr. Kenyatta’s campaign, reported around the world, to become the next President of Kenya, and how the application might be related to his duties as President.
45. Also strikingly absent from the Defence Request is any helpful indication of how (assuming that Mr. Kenyatta takes office as President of Kenya and Mr. William Ruto as Vice President of Kenya) Mr. Kenyatta intends to co-ordinate state duties with Mr. Ruto, who will be standing trial in The Hague at the same time as Mr. Kenyatta. Such information would have been of assistance to the Trial Chamber in assessing the Defence Request .

Granting the Defence Request would result in an enhanced flight risk

46. The risk of flight would be significantly enhanced if the Defence Request were to be granted. If Mr. Kenyatta were to choose during trial not to continue to participate in his trial, the Court will be exclusively reliant on the Kenyan authorities to arrest Mr. Kenyatta. If Mr. Kenyatta becomes the President of Kenya, the chances of such an arrest during his term of office are negligible. It is relevant to recall that Mr. Kenyatta, if confirmed as President of Kenya, will

³⁵ Defence Application, paragraph 18.

be, *inter alia*, the Head of State and Government, the Commander-in-Chief of the Kenya Defence Forces and the chairperson of the National Security Council.³⁶

47. The question of flight risk therefore merits particularly close attention in the case of Mr. Kenyatta. As Mr. Kenyatta hears the prosecution's witnesses and considers the evidence against him,³⁷ there is a real and substantial possibility that he will conclude that his chances of acquittal are slim, and that he has every incentive to seek to avoid arrest and a long term of imprisonment.

48. The Trial Chamber might very reasonably conclude that Mr. Kenyatta's incentive to cease to co-operate with the Court will increase as he hears first-hand the evidence against him,³⁸ especially if he holds the office of President of Kenya with all its attendant powers and influence. It is also relevant, in considering flight risk, that Mr. Kenyatta has not denied that he has access to considerable wealth.

49. In assessing the sincerity of Mr. Kenyatta's declared wish to continue to fully co-operate with the Court, which is relevant to an assessment of flight risk, the following sequence of events is relevant:

- a. Mr. Kenyatta has known for several years that presidential elections were scheduled to take place in Kenya in either late 2012 or 2013 and that, under the Constitution of Kenya 2010, the next President shall hold office for a term of five years, i.e. from 2013 until 2018.
- b. He has also known since 2010 that the principal function of the Deputy President, as set out in the Constitution of Kenya, 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".³⁹

³⁶ Article 131, Constitution of Kenya, 2010.

³⁷ *Prosecutor v. Milutinović et al.*, Case no. IT-05-87-AR65.2, Decision on interlocutory appeal of denial of provisional release during the winter recess, 14 December 2006, para. 15.

³⁹ Article 147 (1), Constitution of Kenya 2010.

- c. Charges were confirmed against Mr. Kenyatta and Mr. Ruto on 23 January 2012⁴⁰, and they were committed for trial. From then on, Mr. Kenyatta was 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.
- d. In spite of these facts, Mr. Kenyatta in October 2012 chose Mr. Ruto as his running mate, for Deputy President, in the 2013 presidential election. That is to say, Mr. Kenyatta knew when he chose Mr. Ruto as his candidate for Deputy President in October 2012 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 while (if successfully elected) they both would have heavy state responsibilities to discharge as President of Kenya and Deputy President of Kenya respectfully.
50. This sequence of events does not compel the inference that Mr. Kenyatta has truly 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. His choice of Mr. Ruto as his candidate for Deputy President is particularly inexplicable in this context.
51. Mr. Kenyatta has not provided to the Trial Chamber any explanation as to why he chose to run for election, knowing that he would be obliged to be physically present in The Hague for much of the next presidential term. Nor has he explained why he chose Mr. Ruto as his candidate for Deputy President, knowing that Mr. Ruto would also be obliged to be physically present in The Hague for much of the next presidential term.
52. Furthermore, both Mr. Ruto and Mr. Kenyatta are reported to have made statements in public which throw considerable doubt on the sincerity of their proclaimed willingness to attend trial at The Hague, if they become President and Vice-President of Kenya.

⁴⁰ ICC-01/09-02/11-382.

53. According to news reports, Mr. Kenyatta said on 30 January 2013 in Nairobi: “I can assure you that the government will function even as we attend court sessions. You should trust us with your votes because this would be an endorsement to our leadership and a vote of no confidence to the Court itself.” This incident was reported in print and online in *The Daily Nation* newspaper in Kenya.⁴¹ A later article, also published in *The Daily Nation*, records his words as follows: ‘Mr. Kenyatta insisted that a vote for him and Mr. Ruto “would be an endorsement of our leadership abilities and a vote of no confidence in the ICC”’.⁴²
54. For his part, Mr. Ruto was quoted in *The Daily Nation* on the occasion of the launching of his joint campaign with Mr. Kenyatta in October 2012 as having said this: “‘We believe in building a coalition that will bring healing to the nation and to lay a solid base for a round one win. It will be a direct referendum on Uhuru and me and The Hague issue.’”⁴³
55. If even the general tenor of these statements has been correctly reported, they raise considerable concerns in relation to flight risk. If Mr. Kenyatta and Mr. Ruto believe that the presidential vote is, in part, a referendum on the ‘Hague issue’ or that a vote for the Kenyatta/Ruto coalition is a ‘vote of no confidence in the Court’, the logical inference to draw from recent preliminary presidential election results is that Mr. Kenyatta and Mr. Ruto now have a valid mandate from the people of Kenya not to co-operate with the Court.
56. These factors, taken together, weigh against granting the Defence Request.
57. In summary, the Legal Representative submits that the Rome Statute requires the physical presence of Mr. Kenyatta in the courtroom during trial; there is no legal basis to permit an accused at liberty in the State where the crimes were allegedly committed to participate in his trial by video link; there is no

⁴¹ See ‘ICC will not affect my regime, says Uhuru’, *The Daily Nation*: <http://elections.nation.co.ke/news/ICC-will-not-affect-my-regime-says-Uhuru/-/1631868/1680382/-/etfqkn/-/index.html>.

⁴² See ‘Uhuru allays fears of power vacuum over Hague trial’, *The Daily Nation*: <http://elections.nation.co.ke/news/Uhuru-allays-fears-of-power-vacuum-over-Hague-trial/-/1631868/1681156/-/1050691z/-/index.html>

⁴³ See ‘Uhuru, Ruto for joint ticket’, *The Daily Nation*: <http://www.nation.co.ke/News/politics/Uhuru-Ruto-for-joint-ticket/-/1064/1538366/-/py51qfz/-/index.html>

valid exceptional circumstance which would justify permitting Mr. Kenyatta to participate in trial by video link; and the discretionary factors described above weigh against the granting of the Defence Request.

IV. Relief sought

58. For the foregoing reasons, the Legal Representative, on behalf of the victims, requests the Trial Chamber to deny the Defence Request.

Respectfully submitted,

A handwritten signature in cursive script, reading "Fergal Gaynor", is positioned above a horizontal line.

Fergal Gaynor

Common Legal Representative for Victims

Dated this 8th day of March 2013 at Killaloe, Ireland