

## Dissenting Opinion of Judge Herrera Carbuccia

### A. Introduction

1. I respectfully disagree with my colleagues, who have granted the defence's request, allowing Mr Ruto to be absent from trial "within the limits of certain conditions", and with the exception of some procedural moments during trial (*i.e.* opening statements, closing statements, delivery of the judgment, etc.).
2. I hereby give the succinct reasons for my dissent.

### B. *The Principle: the accused shall be present during the trial regardless of his official capacity*

3. Pursuant to Article 63(1) of the Rome Statute ("Statute"), the presence of the accused during the trial is required, subject to the exceptional circumstance explicitly contained in paragraph 2 of that same provision.<sup>1</sup>
4. The presence of the accused is a fundamental right enshrined in Article 67(1)(d) of the Statute, a guarantee of due process provided for in internationally recognised human rights law,<sup>2</sup> but also an obligation of the accused and a procedural requirement, which is reflected by the

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<sup>1</sup> Friman concludes that "trials *in absentia* are not provided for under any circumstances in the Statute". H. Friman, 'Rights of Persons Suspected or Accused of a Crime', in R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (1999), p. 262. See also Shaw, who writes that "aside from the exceptional case where the accused is a disruption, the Rome Statute does not permit trials to be held in absentia for any reason": G. Shaw, 'Convicting Inhumanity *in Absentia*: Holding Trials *in Absentia* at the International Criminal Court', (2012) 44 *Geo. Wash. Intl'l L. Rev.* 107, at pp. 117 and 129.

<sup>2</sup> International Covenant on Political and Civil Rights (1976) Article 14(3)(d); American Convention on Human Rights (1979) Article 8(2)(d); and European Convention on Human Rights (1953) Article 6(3)(c).

word “shall” used in Article 63(1) of the Statute, denoting a requirement and not an option.<sup>3</sup>

5. The unequivocal wording of Article 63(1) of the Statute contrasts with Article 61(2)(a) of the Statute, which clearly stipulates that the suspect may waive his or her right to be present at the confirmation of charges hearing. Moreover, Rules 123, 124, 125 and 126 of the Rules of Procedure and Evidence are detailed provisions which set the strict legal framework in which the confirmation of charges can be held in the absence of the suspect. No such provisions exist for trial because this is clearly ruled out in Article 63(1) of the Rome Statute, subject to the one exception of the disruptive accused person. This reflects the distinct nature of these two stages in the proceedings. The confirmation of charges hearing is limited in scope, and has a lower evidentiary threshold. In fact, the decision of the Pre-Trial Chamber is not *per se* an appealable decision.<sup>4</sup> On the contrary, trial proceedings are broader in scope, have the highest evidentiary threshold, and are in essence, of an oral and adversarial nature. Moreover, all decisions taken under Articles 74, 75 and 76 of the Statute are automatically appealable, which reflects their significance and potential impact on the rights of the accused person.
6. Pursuant to Article 64 of the Statute, the Chamber shall exercise its functions in accordance with the Statute, in a fair and impartial manner, and thus require the presence of the accused during the entirety of the trial proceedings. The interests of the victims and those of the Prosecution are aligned in this regard, as the absence of the accused could significantly affect the fairness of the proceedings.

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<sup>3</sup> The official Spanish version of the Statute provides “*El acusado estará presente durante el juicio*”. If this were a possibility and not a requirement, Article 63(1) of the Statute would read in Spanish “*El acusado podrá estar presente durante el juicio*”. Likewise, the official French version of the Statute reads: “*L’accusé est présent à son procès*”, which also reflects the compulsory nature of the provision.

<sup>4</sup> Article 82(1)(d) of the Statute.

7. The Chamber has the duty to ensure that all accused are treated fairly and impartially. Pursuant to Article 21(3) of the Statute, all accused must be treated equally, without making 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. Moreover, the first sentence of Article 27 of the Statute clearly states that the “Statute shall apply equally to all persons without any [favourable or unfavourable] distinction based on official capacity”. Article 63(1) of the Statute mandates that the “accused shall be present at trial”. Read jointly, these two provisions dictate that all accused persons shall be present at trial, regardless of their official capacity. Pursuant to the above Statutory provisions, as well as internationally recognised human rights,<sup>5</sup> all persons shall be equal before courts and tribunals and no accused should be accorded privileged treatment, as equality under the law is a fundamental value of the administration of justice. Mr Ruto should not be given a different legal status on the basis of his personal position as Deputy President of the Republic of Kenya.
8. I also consider that it is in the best interests of the accused to be physically present in court. International criminal trials are complex in nature and proceedings may evolve unexpectedly, beyond any projection the accused or his counsel may have at this moment in time, when the trial has not yet commenced. The presence of the accused is thus essential, as only he can instruct his counsel at all stages of the trial proceedings.<sup>6</sup>

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<sup>5</sup> See International Covenant on Civil and Political Rights (1976), Article 14(1).

<sup>6</sup> See for example the complex and extended case history of the case against Thomas Lubanga before this Court. Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, paras 10-21.

*C. The Exception: the accused may be absent during specific moments during trial, if certain conditions are met*

9. Notwithstanding the general principle above, taking into consideration Mr Ruto's personal circumstances,<sup>7</sup> as well as the fact that he has voluntarily appeared before this Court on several occasions, I consider that Mr Ruto's absence may be permissible in some specific and limited instances, where objective and reasonable circumstances exist, and only if the accused personally requests authorisation for his absence to the Chamber.<sup>8</sup>
10. Pursuant to Article 64(2) of the Statute, the Chamber could grant such an exceptional procedural measure, insofar as the absence of the accused does not affect the fairness and expeditiousness of the proceedings. Moreover, in accordance with Article 67 of the Statute, the Chamber must determine in each instance that the accused's decision to be absent from trial has been made voluntarily, knowingly and unequivocally. This determination cannot be made *in abstracto*, for the entirety of the trial proceedings, but must be evaluated on a case-by-case basis, taking into consideration the specific circumstances of particular stages of the trial proceedings and the impact that these may have on the fundamental rights of the accused enshrined in Article 67 of the Statute. In essence, to grant a "once and for all" request of the accused to waive his right to be present in trial would be contrary to the Chamber's duty to safeguard the rights of the accused at all stages of the trial proceedings and to ensure that the trial is fair.

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<sup>7</sup> Defence Request pursuant to Article 63(1) of the Rome Statute, 17 April 2013, ICC-01/09-01/11-685, para. 3.

<sup>8</sup> See for example Prosecutor v Bemba, Transcript of 7 November 2011, ICC-01/05-01/08-T-183-Red-ENG, pages 1-2; Prosecutor v Gbagbo, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, 2 November 2012, ICC-02/11-01/11-286-Red.

11. When deciding on specific requests, the Chamber could take into consideration factors such as: a) the witnesses' schedule (*i.e.* whether hearings will be held on a daily basis or in an intermittent manner during a period of time; or b) whether the presence of the accused is indispensable (*i.e.* a witness needs to identify the accused during the testimony). Moreover, submissions of the Prosecution, as well as the views and concerns of victims, should be sought in each instance.



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Judge Olga Herrera Carbuca

Dated 18 June 2013

At The Hague, The Netherlands