

PARTIALLY DISSENTING OPINION OF JUDGE OZAKI

1. I agree with the portion of the disposition directing the Defence to refrain from using Mr Kenyatta's official title in its filings in this case.
2. I respectfully disagree with the decision of the Majority to grant the Defence's request for the accused to be conditionally excused from continuous presence at trial ('Request').

Preliminary matter – judicial economy

3. Prior to setting out my reasons on the substance of the Request, I will first briefly address the preliminary matter of judicial economy and the timing of the present Decision.
4. Unlike the Majority, I do not consider that judicial economy is solely a matter within the prerogative of the Chamber.¹ It is in the interests of all parties and participants that proceedings are conducted efficiently and with minimal burden on the Court's system and resources. Whereas it is ultimately a matter for the Chamber to determine whether a particular course of action will be in the interests of judicial economy, it is well within the prerogative if not the responsibility of all parties and participants to make submissions and requests on this point.
5. Furthermore, I find merit in the argument of the Prosecution and the Legal Representative² that it would be appropriate to wait for the Appeals Chamber ruling on the appeal against the decision of the majority in the

¹Majority decision, para.59.

²ICC-01/09-02/11-818, para. 33; Transcript of Hearing, 6 September 2013, ICC-01/09-02/11-T-22-ENG-ET, page 22 lines 13-18, page 24 lines 7-10.

Ruto case³ prior to determining the present Request as the former may well be dispositive of the latter. In my view, in order to avoid unnecessary further appeals litigation, it would indeed be preferable to have clarity from the Appeals Chamber as to the correct interpretation of the relevant provisions of the Statute prior to rendering a decision on the Request.

6. On the other hand, I also consider that it is of foremost importance to provide direction to the parties on this question prior to the impending commencement of trial. As no scheduling order has issued indicating when the Appeals Chamber will issue its ruling, I agree that the Chamber should determine the Request at this time despite the pending appeal in the *Ruto* case.

Requirement to be present at trial: interpretation of Article 63(1) of the Statute

7. I share the Majority's conclusion that Article 63(1) of the Statute imposes a duty on the accused to be present at trial and that such presence at trial is the "default position".⁴ Where I part company with the Majority is in respect of the inter-related findings that (i) Article 63(1) imposes no corollary obligation on the Chamber to require the accused's presence and (ii) that the Chamber retains a discretion, by virtue of Articles 64(2) and 64(6)(f), to set aside this duty and to excuse an accused from attending substantially all of the trial.⁵
8. According to Article 21 of the Statute, the applicable law of the Court is discerned in the first instance by reference to the Statute, the Elements of

³*The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Appeals Chamber, Prosecution appeal against the 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', 29 July 2013, ICC-01/09-01/11-831 (OA 5).

⁴Majority decision, para.124. See also *Ruto* Decision, para. 42, incorporated by reference into the Majority decision.

⁵Majority decision, para. 86. See also *Ruto* Decision, paras 43-44, 47, incorporated by reference into the Majority decision.

Crimes and the Rules of Procedure and Evidence. As the Appeals Chamber has stated,⁶ the interpretation of the provisions of the Statute is in turn governed by the Vienna Convention on the Law of Treaties. Article 31 of the Vienna Convention provides that a treaty shall be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

9. Invoking this principal rule of interpretation, in my view the correct interpretation of Article 63(1) of the Statute is that the accused is required to be continuously and physically present at trial. This is not a requirement that can be waived by the Chamber, subject to very limited exceptions.
10. The *ordinary meaning* of the provision, looked at on its own terms, clearly suggests that the presence of the accused is a requirement of the trial. Reading the provision in its *context* only strengthens support for this interpretation. Specifically, I agree with the submissions by the Prosecution⁷ and the Legal Representative⁸ as to the relevance of Articles 61(2)(a), 63(2), 67(1)(d), 58(1)(b)(i) and 58(7) of the Statute in understanding the meaning of Article 63(1) of the Statute. Additionally, Article 64(8)(a) clearly envisages the presence of an accused at the opening of trial for the purposes of being read the charges and taking a plea.
11. This interpretation is also consistent with *the object and purpose* of the Statute. According to the jurisprudence of the Appeals Chamber, the object may be derived “from the chapter of the law in which the particular

⁶*Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgment on the Prosecutor’s Application for Extraordinary Review of the Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, para. 33.

⁷ICC-01/09-02/11-818, paras 11 – 14.

⁸ICC-01/09-02/11-819, paras 12 – 13.

section is included” and purpose “from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty”.⁹ Having particular regard to the preamble, the general principles section, and the section governing trial proceedings, in my view the object and purpose can be summarised as ensuring an end to impunity for the perpetrators of serious violations of international criminal law, without distinction based on the capacity or seniority of those perpetrators, in accordance with the highest standards of justice.

12. I cannot accept the Majority view that the Statute’s aim of ending impunity compels a contrary interpretation of Article 63(1) of the Statute whereby the Chamber may in its discretion waive the requirement for an accused, who is voluntarily cooperating with the Court and not subject to arrest, to attend substantially all of the trial.¹⁰ In particular I am not convinced by what appears to be the underlying rationale of the Majority in arriving at this view, which is that this level of discretion must be recognised to prevent a future hypothetical scenario of a trial being indefinitely stalled if an accused absconds after an initial appearance.¹¹

13. Additionally, the clear statutory obligation on the Chamber, pursuant to Articles 21(3) and 27 of the Statute, is to treat all accused equally without distinction on the basis of official capacity or other status. While I agree with the Majority this does not compel identical treatment of, or the granting of identical relief to, all persons regardless of their particular circumstances¹² it does, in my view, prohibit special legal accommodation being granted to Mr Kenyatta simply by virtue of his position as President

⁹ICC-01/04-168, para. 33.

¹⁰Majority decision, para.90. See also Ruto Decision, para. 44, incorporated by reference into the Majority decision.

¹¹Majority decision, paras 64, 90 and 108. See also Ruto Decision, para. 44, incorporated by reference into the Majority decision.

¹²Majority decision, paras 112-115.

of Kenya. Therefore, I must dissent from the opinion of my colleagues to the extent that a contrary impression may be conveyed.

14. I further note that I find no conflict between the presumption of innocence and the obligation on an accused to attend trial. I do not agree with the Majority that the requirement of an accused's presence at trial is only a question of judicial control.¹³ In my view, the fairness and integrity of the proceedings are also implicated.

15. Finally, I disagree with the Majority's reading of the *travaux préparatoires*. In my view these secondary sources, to which it is appropriate to have recourse for the purposes of confirmation, support an interpretation of Article 63(1) of the Statute which would prevent the Chamber from granting the Request on the terms sought by the Defence or granted by the Majority. In particular, as submitted by the Prosecution,¹⁴ the drafting history reveals that the drafters intentionally rejected a proposal that presence at trial be established as a general principle and incorporated only one specific exception to ongoing physical presence of the accused at trial, namely that codified in Article 63(2).

Exception: scope of Chamber's discretion

16. As indicated above, I consider that Article 64(2) and (6)(f) of the Statute nonetheless does reserve a limited discretionary power for the Chamber which would permit granting an accused, irrespective of his or her official status, a conditional excusal from presence at trial in certain exceptional circumstances. Given that this discretion arises from an inherent power of the Chamber it should be restrictively interpreted. Moreover, any such excusal would represent an exception to the requirement for presence

¹³Majority decision, para.124.

¹⁴ICC-01/09-02/11-818, paras 8–9, 12.

under Article 63(1) of the Statute and therefore should be exercised in a manner which does not render that provision meaningless.

17. Determinations regarding excusal should only be considered on a case by case basis, considering presence of the accused at trial as a whole and taking into account factors including the fairness and expeditiousness of the proceedings, the stage of proceedings, the rights of the accused under Article 67 of the Statute, the impact on victims and witnesses and the reason submitted to justify such an excusal. It is a question of fact and degree in each circumstance. Consequently, temporary absences due to truly exceptional circumstances – such as occurred in the *Bemba* case¹⁵ – or indeed to allow for the handling of national tragedy such as the recent attack at Westgate in Nairobi¹⁶ – could be appropriate.
18. Additionally, in each instance, the Chamber should satisfy itself that the accused's decision not to be present at trial is made voluntarily, knowingly and unequivocally.

Video-Link

19. Turning to the portion of the Request seeking permission for Mr Kenyatta to participate in the trial by means of video-link, and notwithstanding the limited manner in which the request for this relief was pleaded, I consider it useful to set out my views on the issues raised. In my opinion, Article 63(1) of the Statute requires the physical presence of the accused in the courtroom. Although the Defence submissions¹⁷ have sought to draw a parallel with the situation of victims and witnesses who may, in certain circumstances, be permitted to testify *via* video-link, it is noted that

¹⁵See e.g. ICC-01/05-01/08-T-183-Red-ENG CT WT, pages 1-2; ICC-01/05-01/08-T-306-Red-ENG WT, page 62; ICC-01/05-01/08-T-324-ENG ET WT, pages 16-17.

¹⁶ICC-01/09-01/11-T-35-ENG ET WT and ICC-01/09-01/11-T-37-Red-ENG WT.

¹⁷ICC-01/09-02/11-T-26-ENG ET WT, page 24, line 22- page 25, lines 4, 21-23.

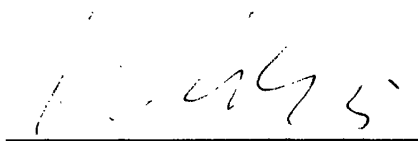
specific provision is made for the presentation of victim and witness evidence by “electronic or other special means” in Article 68(2) of the Statute.

20. Notwithstanding this finding of a requirement of physical presence, and on similar reasoning to that applied at paragraphs 16 and 17 above, I consider that the Chamber retains a limited discretionary power to permit an accused to participate by means of video-link where this is specifically justified by the circumstances. However, where such discretion is exercised it represents an exception to the general requirement of physical presence and any such determination should again be made on a case-by-case basis.

Conclusion

21. Finally, it is necessary to note that I find portions of the Majority decision reasoning to be repetitive, irrelevant to the question before the Chamber (including the use of selective quotations from various authorities) and/or, in some cases, incorrect. In my opinion, the Chamber should confine itself to consideration of the specific legal and/or factual matters before it. Additionally, while there may be a place for proper policy considerations in the context of legal decision making, it is important to make a distinction between such proper policy considerations and the *realpolitik* of the day. Therefore, although I have not individually identified above all elements of the Majority decision with which I disagree, such silence should not be interpreted as representing agreement.
22. For the foregoing reasons, without prejudice to subsequent specific requests for excusal being raised for consideration on a case by case basis, I would not have granted either the primary or alternative relief sought in the Request.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to read 'K. Ozaki', is written above a solid horizontal line.

Judge Kuniko Ozaki, Presiding Judge

Dated 18 October 2013

At The Hague, the Netherlands