

Joint Separate Opinion of Judge Erkki Kourula and Judge Anita Ušacka

1. We join the majority of the Appeals Chamber in reversing the decision of Trial Chamber V(a) (hereinafter: “Trial Chamber”) of 18 June 2013 entitled “Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial”¹ (hereinafter: “Impugned Decision”). However, we are unable to subscribe to the reasoning by which the majority reached their conclusions. In particular, we respectfully disagree with the majority’s finding that “the Trial Chamber did not err in law when it found that, in exceptional circumstances, the Chamber may exercise its discretion to excuse an accused, on a case-by-case basis, from continuous presence at trial”.

2. We would have addressed the first ground of appeal as articulated by the Prosecutor: whether the Trial Chamber erred in law in disregarding the attendance requirement under article 63 (1) of the Statute and by excusing Mr William Samoei Ruto (hereinafter: “Mr Ruto”) from attending substantially all of his trial. In the context of the present appeal, it is unnecessary to engage in an in-depth analysis of the legality of short absences of the accused, such as those that occurred in the cases of the *Prosecutor v. Jean Pierre Bemba Gombo* and the *Prosecutor v. Thomas Lubanga Dyilo*.² For present purposes, we limit ourselves to the observation that the above-mentioned absences of Mr Bemba and Mr Lubanga were manifestly different from the present scenario, first, and most importantly, because at all relevant times the accused persons in question were in detention, second, because their absences from trial were limited in duration, amounting, at most, to a few hours over the course of criminal trials spanning years, and third, because in each instance the parties and participants were agreed that proceedings should continue temporarily in the absence of the accused.

3. In our view, short absences from particular hearings of the nature referred to above may be considered to be *de minimis* in the context of the overall trial. In this sense, we would find that although the strict terms of article 63 (1) of the Statute do not appear to permit any absence of the accused during the trial, absences from

¹ 18 June 2013, ICC-01/09-01/11-777.

² *Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Hearing, 12 May 2009, ICC-01/04-01/06-T-172-Red3-ENG, pp. 1-2; *Prosecutor v. Jean-Pierre Bemba Gombo*, Transcripts of Hearings, 7 November 2011, ICC-01/05-01/08-T-183-Red-ENG, pp. 1-2; 12 April 2013, ICC-01/05-01/08-T-306-Red-ENG, p. 62; 17 June 2013, ICC-01/05-01/08-T-324-ENG, pp. 16-17; 17 June 2013, ICC-01/05-01/08-T-324bis-CONF-ENG, p. 1; 27 June 2013, ICC-01/05-01/08-T-331-CONF-ENG, pp. 2-3.

particular hearings or parts of hearings may be considered to be so insignificant that they do not amount to a violation of the fundamental requirement of presence. No rigid mathematical formula can be applied to determine with certainty the point at which it would become necessary to adjourn the trial rather than continue in the absence of the accused; a common sense approach must be adopted to the management of proceedings based on the facts of the particular case. However, the practical difficulties that may be encountered in enforcing the requirement established in article 63 (1) of the Statute to the strict letter of the law should not be used as a justification for interpreting article 63 (1) of the Statute so that it is found to provide the Trial Chamber with a general discretion to excuse an accused from presence at trial.

4. In the Impugned Decision, the Trial Chamber found that “an accused’s appearance at trial is an obligation, which can be enforced by means of arrest, if not voluntarily undertaken”,³ a conclusion which we endorse. However, the Trial Chamber went on to find that “the plain wording of [a]rticle 63(1) and the Statute taken as a whole make the accused the subject of the duty in question. [...] Beyond this duty upon the accused, the Chamber is not persuaded that the provision also imposes an equivalent duty upon the Chamber”.⁴ The Trial Chamber continued that,

In construing article 63(1), mindful of its general power to do justice under [a]rticle 64(6)(f), the Chamber will read the Statute as a whole. In doing so, the Chamber will, as noted earlier, have due regard to [a]rticle 64(2) that requires the trial to be fair and expeditious and ‘conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses’. What is called for then, for purposes of the present request, is an outcome that reflects a balance suitably calibrated to accommodate all the concerned interests.⁵

The balance found by the Trial Chamber in this instance resulted in the excusal of Mr Ruto, subject to two provisos, from attendance during all of the trial with the exception, *inter alia*, of the opening and closing statements, the presentation in person of the views and concerns of victims, the delivery of judgment, and any other attendance directed by the Chamber.⁶

³ Impugned Decision, para. 40.

⁴ Impugned Decision, paras 42-43.

⁵ Impugned Decision, para. 47.

⁶ Impugned Decision, p. 52.

5. In our view, the Trial Chamber erred in law when it found that article 63 (1) of the Statute does not impose a duty on the Chamber. Pursuant to article 21 (1) of the Statute, the Trial Chamber is bound to apply “[i]n the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence”. Article 63 (1) of the Statute regulates the presence of the accused at trial and this provision was binding on the Trial Chamber in deciding on Mr Ruto’s request for excusal. For the reasons set out hereunder, we would have found that article 63 (1) of the Statute establishes a requirement that the accused be present during the trial and that the Trial Chamber erred in law when it found that, in exceptional circumstances, the Chamber may exercise its discretion to excuse an accused, on a case-by-case basis, from continuous presence at trial.

6. The interpretation of provisions of the Statute is governed by the Vienna Convention on the Law of Treaties, article 31 of which dictates that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose”.⁷ In our view, the ordinary meaning of article 63 (1) of the Statute is clear and unambiguous: “[t]he accused shall be present during trial”. The use of the word “shall” clearly establishes that the presence of the accused is a requirement of the trial.

7. This interpretation is confirmed when article 63 (1) of the Statute is read in its context. First, exceptions to the requirement that the accused be present are explicitly set out in the Statute, most notably in article 63 (2) thereof, which deals with the removal of a continuously disruptive accused.⁸ Second, the possibility for the accused

⁷ In its judgment of 13 July 2006 in the case of the *Prosecutor v. Thomas Lubanga Dyilo*, the Appeals Chamber held the following: “The interpretation of treaties, and the Rome Statute is no exception, is governed by the Vienna Convention on the Law of Treaties (23 May 1969), specifically the provisions of articles 31 and 32. The principal rule of interpretation is set out in article 31 (1) that reads: 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”. See “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, ICC-01/04-168 (OA 3), para. 33.

⁸ Article 63 (2) of the Statute provides as follows: “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”. It is noted that a number of provisions also provide for the holding of an *ex parte* hearing, if necessary, in the absence of the accused, but that these are not relevant to the present appeal. See in particular, article 72 (7) of the Statute (“Protection of national security information”), rule 74 (4) (“Self-incrimination by a witness”) and rule 88 (“Special measures”) of the Rules of Procedure and Evidence. See also article 76 (4) (“Sentencing”) of the Statute and rule 144 of the Rules of Procedure and Evidence (“Delivery of the decisions of the Trial Chamber”).

to waive his or her right to be present at the confirmation hearing is explicitly set out in article 61 (2) (a) of the Statute.⁹ There is no analogous provision whereby the accused could waive his or her right to be present during the trial. The silence of the Statute in this regard is not particularly surprising, given the existence of a provision mandating the presence of the accused during the trial. It may be observed that articles 63 (2) and 61 (2) (a) of the Statute, explicitly provide for the absence of the accused and clearly regulate the consequences of the accused's absence in those cases and any related impact on the exercise of his or her rights,¹⁰ demonstrating that the Statute does not allow for the introduction of a further unwritten exceptions to the requirement of presence. Third, article 58 (1) (b) and 58 (7) of the Statute allow the Pre-Trial Chamber to issue a warrant of arrest “[t]o ensure the person’s appearance at trial” or a summons to appear if “a summons is sufficient to ensure the person’s appearance”. It is clear that excusing an accused from the obligation to attend trial would make a warrant or summons issued on this basis redundant. Fourth, article 67 (1) (d) of the Statute incorporates the right of the accused to be present at trial. The inclusion of this provision setting out the right of the accused to be present would be entirely redundant if article 63 (1) of the Statute were interpreted as itself encapsulating such a right. As a result, we understand that both provisions are aimed at different things and that the inclusion of article 67 (1) (d) of the Statute further emphasises the fact that article 63 (1) of the Statute establishes a requirement that the accused be present.

⁹ Article 61 (2) (a) of the Statute provides as follows: “The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, 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: (a) Waived his or her right to be present; or (b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held”.

¹⁰ Article 63 (2) of the Statute allows for the removal of an accused “only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required”. The Trial Chamber is also required to make provision for the accused to observe the trial and instruct counsel from outside the courtroom. In the event that the accused waives his right to be present at the confirmation hearing, rule 124 of the Rules of Procedure and Evidence sets out the necessary and attendant guarantees for the rights of the accused: the accused must submit a written request to the Pre-Trial Chamber, which must satisfy itself that the person concerned understands the right to be present at the hearing and the consequences of waiving this right. Rule 124 (3) of the Rules of Procedure and Evidence provides that the Pre-Trial Chamber may authorise and make provision for the person to observe the hearing from outside the courtroom through the use of communications technology, while rule 124 (4) of the Rules of Procedure and Evidence specifies that waiver of the right to be present does not prevent the Pre-Trial Chamber from receiving written observations on issues before the Chamber from the person concerned. Rule 126 of the Rules of Procedure and Evidence regulates the conduct of the confirmation hearing in the absence of the person concerned.

8. Turning to the object and purpose of the Statute, we find that this also supports the conclusion that the presence of the accused is required during the trial. The Court was established with the primary aim of bringing an end to impunity and ensuring the effective prosecution of the perpetrators of the most serious crimes of concern to the international community as a whole. In order for a case to reach trial, the Pre-Trial Chamber must have confirmed the charges, determining that there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Therefore, accused persons on trial before the Court face extremely serious charges in relation to which a relatively high evidentiary threshold has been found to have been met. It is worthwhile to note that, in this particular case, Mr Ruto is on trial for his alleged commission of the crimes against humanity of murder, deportation or forcible transfer of population and persecution under article 7 (1) (a), (d) and (h) of the Statute respectively.¹¹ In interpreting article 63 (1) of the Statute, it seems indisputable that the establishment of the presence of the accused as a requirement is consistent with the gravitas of the proceedings and their importance from the perspective of the victims of the alleged crimes and the international community as a whole.

9. Other factors mitigating in favour of the presence of the accused during the trial have been articulated by the majority of the Appeals Chamber at paragraph 49 of the judgment and we will not repeat them here. Suffice it to add two observations in order to underline the heightened importance of the presence at trial of a person accused of international crimes. First, such trials are inherently complex, generally entailing a lengthy presentation of evidence on the part of the Prosecutor and the defence. In the case of accused persons alleged to be indirectly criminally responsible for a particular crime, much of these evidentiary hearings are devoted to proving or disproving the existence of a complicated legal and factual nexus between the person and the crimes. It is axiomatic that the presence of the accused at these hearings is important to facilitate his or her ongoing participation in the defence of the case against him or her. Second, it is important that the accused is present in order to allow the judges to have the opportunity to observe all parties, including the accused, as the evidence is presented.

¹¹ Pre-Trial Chamber II, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 23 January 2012, ICC-01/09-01/11-373, p. 138.

10. On the basis of the above reasoning, we would have found that the ordinary meaning to be given to article 63 (1) of the Statute in its context and in the light of its object and purpose is clear: the accused is required to be present during the trial.

11. As the meaning of article 63 (1) of the Statute is clear there is no need to have recourse to the *travaux préparatoires*, in order to confirm or determine its meaning; in particular, regarding the latter there is no suggestion that the interpretation set out above would lead to a manifestly unreasonable or absurd result.¹² However, given the short period of time that has elapsed since the negotiations of the Statute were concluded, the *travaux préparatoires* may yet serve as a useful reference. In this context, a wholesale departure from the intention of the drafters in order to give effect to a creative interpretation of the Statute would appear to be an inappropriate arrogation of the legislative function by the judiciary.

12. The drafting history of the Statute confirms the interpretation of article 63 of the Statute set out above. In this regard, we disagree with the majority's resort to the *travaux préparatoires* in order to support its conclusion at paragraph 54 that "part of the rationale for including article 63 (1) of the Statute was to reinforce the right of the accused to be present at his or her trial and, in particular, to preclude any interpretation of article 67 (1) (d) of the Statute that would allow for a finding that the accused had implicitly waived his or her right to be present by absconding or failing to appear for trial".

13. At the outset, it is necessary to differentiate between the debate that arose during the drafting process in relation to the possibility of holding a trial *in absentia* and the establishment of a requirement that the accused should be present during the trial. As acknowledged by the majority, this basic requirement of presence was the point of departure during the negotiations.¹³ Even delegations that supported the creation of broader exceptions to the rule, or the possibility of holding trials *in*

¹² Article 32 of the Vienna Convention on the Law of Treaties provides that "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable".

¹³ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, Working Group on Procedural Matters, *Working Paper on Article 63*, A/CONF.183/C.1/WGPM/L.67, 9 July 1998.

absentia were in agreement that the general rule should remain that the accused would be present.¹⁴

14. The second noteworthy point which may be derived from the *travaux préparatoires* is that, although proposals for other exceptions to the requirement of presence of the accused were extensively discussed, none were ultimately agreed upon.¹⁵ It is significant that the necessity of clearly and specifically articulating any exception to the requirement that the accused be present at trial and the consequences of the accused's absence was frequently underlined during the drafting process.¹⁶

15. It may be observed that, had the intention of the drafters been to preclude the possibility of holding a trial *in absentia*, it would have been possible to frame a provision in those terms, leaving discretion to the Court to excuse an accused person in other circumstances. On the contrary, the drafters agreed on the insertion of an explicit provision requiring the accused to be present during the trial, to which only one exception was articulated. In this case, it is the terms of article 63 of the Statute as ultimately agreed upon that provide the clearest and most obvious point of reference

¹⁴ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, Working Group on Procedural Matters, *Proposal for Article 63 Submitted by Colombia*, A/CONF.183/C.1/WGPM/L.17, 25 June 1998; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, Working Group on Procedural Matters, *Proposal Submitted by Malawi for Article 63*, A/CONF.183/C.1/WGPM/L.16, 25 June 1998; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, Working Group on Procedural Matters, *Proposal for Article 63 Submitted by Egypt, Iraq, the Libyan Arab Jamahiriya, Oman, Qatar, the Sudan and the Syrian Arab Republic*, A/CONF.183/C.1/WGPM/L.15, 25 June 1998; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, Working Group on Procedural Matters, *Working Paper on Article 63*, A/CONF.183/C.1/WGPM/L.67, 9 July 1998.

¹⁵ Yearbook of the International Law Commission 1994, Volume II Part Two, *Report of the Commission to the General Assembly on the work of its forty-sixth session*, A/CN.4/SER.A/1994/Add.1 (Part 2), pp. 53-54; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Addendum to Report of the Preparatory Committee on the Establishment of an International Criminal Court*, A/CONF.183/2/Add.1, 14 April 1998, pp. 101-102; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, Working Group on Procedural Matters, *Working Paper on Article 63*, A/CONF.183/C.1/WGPM/L.67, 9 July 1998.

¹⁶ Yearbook of the International Law Commission 1994, Volume II Part Two, *Report of the Commission to the General Assembly on the work of its forty-sixth session*, A/CN.4/SER.A/1994/Add.1 (Part 2), pp. 53-54; General Assembly Official Records, Fiftieth Session, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, Supplement No. 22 (A/50/22), para. 164; General Assembly, Official Records Fifty-first Session, *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I* (Proceedings of the Preparatory Committee during March-April and August 1996), Supplement No. 22 (A/51/22), para. 254; United Nations, General Assembly, Preparatory Committee on the Establishment of an International Criminal Court, *Press Release L/2798* (16 August 1996).

as to the intention of the drafters. In our view, the introduction through creative interpretation of further unwritten exceptions to the requirement that the accused be present, subject to a number of ill-defined conditions, goes against the express will of the drafters and the explicit provisions of the Statute.

16. Therefore, on the basis of the reasoning set out above, we would have found that the Trial Chamber erred in law in finding that, in exceptional circumstances, the Chamber may exercise its discretion to excuse an accused, on a case-by-case basis, from continuous presence at trial. Having found that no such discretion exists, it would have been unnecessary to address the second ground of appeal raised by the Prosecutor.

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



Judge Anita Ušacka

(on her own behalf and on behalf of Judge Erkki Kourula)

Dated this 25th day of October 2013

At The Hague, The Netherlands