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Date: 17 April 2013

**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**

**Defence Request pursuant to Article 63(1) of the Rome Statute**

**Source:** Defence for Mr. William Samoei Ruto

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

**The Office of the Prosecutor**

Fatou Bensouda, Prosecutor  
Cynthia Tai, Trial Lawyer

**Counsel for William Ruto**

Karim AA Khan QC, David Hooper QC  
Kioko Kilukumi, Shyamala Alagendra

**Counsel for Joshua Sang**

Joseph Kipchumba Kigen-Katwa  
Silas Chekera

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

**Registrar**

**Counsel Support Section**

**Deputy Registrar**

Didier Daniel Preira

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. INTRODUCTION

1. The right of an accused to be tried in his presence is an internationally recognised right.<sup>1</sup> It is also recognised, including in the practice of this Court, that an accused can waive the right to be present at trial provided his fair trial rights are otherwise guaranteed.<sup>2</sup> Having been fully informed of the implications, Mr William Samoei Ruto wishes to waive his right to be present at his upcoming trial.<sup>3</sup> Accordingly, the Defence for Mr Ruto (“Defence”) respectfully requests that the Trial Chamber grants Mr Ruto’s waiver and conducts the trial without requiring his attendance throughout the duration of proceedings. As detailed in paragraph 10 below, the Defence proposes that Mr. Ruto be permitted to attend the opening and closing of trial, judgement and any and all hearings at which his attendance is expressly requested by the Honourable Trial Chamber and any other sessions he may choose to attend.
  
2. Separate from Mr Ruto’s wish to waive his right to be continuously present, the Defence submits that granting the request would enable the Court to strike the correct balance in this unprecedented situation by allowing not only the trial but the governance of Kenya to continue unimpeded. The expectations of the Kenyan people and of the parties to these proceedings would, therefore, all be met. In addition, given that the Court’s writ extends principally to senior leaders, including Heads of State, Heads of Government and senior State Officials, granting the request would bolster the effectiveness of the Court by demonstrating that the Court’s framework can accommodate a flexible and pragmatic approach to surrendering to its jurisdiction and to participating in proceedings by those occupying high office who cooperate with the court. The

<sup>1</sup> See, e.g., the International Covenant on Civil and Political Rights, Article 14(3)(d); *Stoichkov v. Bulgaria* (App. No. 9809/02), Judgement, 24 March 2005, para. 56.

<sup>2</sup> See discussion below at paragraph 8. See also The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, prepared by the African Human Rights Commission in 2001, para. N(6)(c)(3) which provides that “[t]he accused may voluntarily waive the right to appear at a hearing, but such a waiver shall be established in an unequivocal manner and preferably in writing.”

<sup>3</sup> As stated at paragraph 10 below, Mr Ruto undertakes to attend the opening and closing of trial, judgement and all other hearings at which his presence is requested by the Trial Chamber.

Defence submits that this would serve to encourage cooperation by serving leaders, and, thus, enhance the Court's ability to pursue its important aims.<sup>4</sup>

3. The Defence acknowledges that there is a defence application currently before the Trial Chamber requesting that, on a case-by-case basis, Mr Ruto be considered present at trial via video link.<sup>5</sup> However, since filing those submissions on 28 February 2013, circumstances have significantly changed. On 4 March 2013, Mr Ruto was democratically elected the Deputy President of Kenya. On 9 April 2013, Mr Ruto was sworn in to office. Mr Ruto is now a sitting deputy head of State. In view of this change in circumstances, the Defence have further reflected on how to render meaningful and effective the rights and obligations of an accused under the Statute. The Defence, therefore, submits this filing and requests that it be considered the primary request for relief and that the video link request be considered the alternative request for relief.

## II. SUBMISSIONS

### **(a) The right of an accused to be present at trial and waivers thereof**

4. Article 63(1) of the Rome Statute ("Statute") gives expression to the right of an accused to be present at trial, providing that "[t]he accused shall be present during the trial." The origins of this right are clearly rooted in the framework of an accused's fair trial rights and, thus, the Defence submits, is a right which an accused may waive provided his fair trial rights are otherwise guaranteed.
5. Within this Court's regime, this is evidenced, first, by the fact that Article 67 of the Statute, which provides for the "Rights of the accused", states that an accused

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<sup>4</sup> According to the Statute's Preamble, the aims of the Court are, *inter alia*, "to put an end to impunity" and to ensure that "the most serious crimes of concern to the international community as a whole must not go unpunished".

<sup>5</sup> ICC-01/09-01/11-629.

shall be entitled “to be present at the trial” as one of the minimum guarantees, subject only to Article 63(2) which deals with the removal of a disruptive accused. Article 63(1) can, therefore, be seen as the functional expression of the accused’s stated fair trial right. It is also evidenced by an analysis of the Statute’s underlying *travaux préparatoires*. Such an analysis establishes that the central concern surrounding the drafting of Article 63 was trials *in absentia* and the need to protect the rights of an accused in relation to the same.<sup>6</sup> During the Rome Conference, various options were canvassed regarding whether or not trials *in absentia* should be permitted at the Court<sup>7</sup> but the debate on the issue basically divided down civil and common law lines.<sup>8</sup> Opponents of the concept of trials *in absentia* “took the ‘principled view’, holding that *in absentia* hearings were inadmissible in all cases, subject to a single exception of disruption of trial by the accused. They feared that these would degenerate into show trials and quickly discredit the new court.”<sup>9</sup> In the end, no compromise on the issue of *in absentia* trials proved possible. However, the Statute makes no provision for such trials,<sup>10</sup> but does enshrine the accused’s right to be tried in his presence. Therefore, given that Article 63’s foundations are founded upon the rights of the accused, there is nothing in the argument that Article 63 should be construed as an obligation rather than a right.<sup>11</sup> This conclusion is further supported by the fact that, as discussed below, it can be assumed that the article has been effectively interpreted in the *Bemba* trial as a right capable of waiver.

<sup>6</sup> 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), pp. 53-54, 297-299, 303-304.

<sup>7</sup> See, e.g., Proposal for article 63 submitted by Egypt, Iraq, the Libyan Arab Jamahiriya, Oman, Qatar, the Sudan and the Syrian Arab Republic, UN Doc. A/CONF.183/C.1/WGPM/L.15 (25 June 1998); Proposal Submitted by Malawi for article 63, UN Doc. A/CONF.183/C.1/WGPM/L.16 (25 June 1998); Proposal for article 63 submitted by Columbia, UN Doc. A/CONF.183/C.1/WGPM/L.17 (25 June 1998).

<sup>8</sup> William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010, p. 754.

<sup>9</sup> *Ibid.*

<sup>10</sup> There is a distinction to be drawn between “true” trials *in absentia* where trials of accused who have not yet been arrested or have fled the jurisdiction of the Court take place in the absence of the accused (as at the Special Tribunal for Lebanon) and trials where the accused has appeared in person before the relevant court and is otherwise available but, for reasons such as sickness or disruption, does not attend proceedings. See Statute, Article 63(2) for trials in the absence of a disruptive accused. See also *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgement (AC), 28 November 2007, para. 98, where the ICTR Appeals Chamber concludes that the expression “*in absentia*” refers to an accused who has not yet been arrested by the Tribunal.

<sup>11</sup> *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgement (AC), 28 November 2007, footnote 74.

6. Similarly, the right of an accused to be present at trial has also been treated by the *ad hoc* tribunals and at the Special Court for Sierra Leone as part of an accused's fair trial rights.<sup>12</sup> Of note is the ICTR Appeals Chamber's recognition that the fundamental aim of the right is to protect against "any interference which would prevent [an accused] from effectively participating in his own trial".<sup>13</sup>
7. However, in proceedings which are not trials *in absentia*,<sup>14</sup> there are recognised exceptions to the right including an exception based on waiver. In addition to establishing that the right of an accused person to be present at trial is not absolute (and, indeed, can be waived), these exceptions also establish that the physical presence of an accused during proceedings is not required to ensure fairness.
8. Dealing first with the waiver exception, it is established in the practice of this Court that an accused who is otherwise available but who wishes to absent himself from trial proceedings may do so. In the *Bemba* case, rather than adjourn proceedings, Trial Chamber III has authorised Accused Bemba's absence from trial proceedings on at least two occasions and proceedings have continued in his absence.<sup>15</sup> Trial Chamber III granted these authorisations notwithstanding the absence of an express provision dealing with waiver at the trial stage of

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<sup>12</sup> See Statute of the ICTY, Article 21(4)(d); Statute of the ICTR, Article 20(4)(d); Statute of the Special Court for Sierra Leone, Article 17(4)(d). See also *Prosecutor v. Milošević*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, para. 13 ("If a defendant's right to be present for his trial – which, to reiterate, is listed in the same string of rights and indeed in the same clause as the right to self-representation – may thus be restricted on the basis of substantial trial disruption, the Appeals Chamber sees no reason to treat the right to self-representation any differently.")

<sup>13</sup> *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgement (AC), 28 November 2007, para. 107.

<sup>14</sup> *Supra*, footnote 10.

<sup>15</sup> For the first occasion, see ICC-01/05-01/08-T-183-Red-ENG CT WT, pp. 1-2. In relation to the second occasion, on 12 April 2013 and during the public session part of proceedings, Accused Bemba asked for authorisation to be absent from part of the afternoon proceedings that day. His request was granted and proceedings continued in his absence.

proceedings in the Court's legal instruments.<sup>16</sup> The approach of Trial Chamber III is similar to that followed by the Trial Chambers at the *ad hoc* tribunals where statutory silence on the issue of waiver<sup>17</sup> has not prevented the Chambers from recognising that it is open to an accused to waive his right to be present at trial, including when an accused is unwell.<sup>18</sup> The Rules of Procedure and Evidence at the Special Court for Sierra Leone also support the fact that an accused can waive his right to be present at trial. Rule 60(A)(i) and (B) of these Rules provide that an accused cannot be tried in his absence unless he has made his initial appearance, has been afforded the right to appear at his own trial, but refuses to do so and the Judge or Trial Chamber is satisfied that the accused has, expressly or impliedly, waived his right to be present. Set against this legal context, it is clear that it is competent for an accused to waive his right to be present at trial. In this regard, the Defence submits that when dealing with waiver all that is required is that the Trial Chamber satisfy itself that the waiver is free and unequivocal, is given with full knowledge of the implications and that the accused's fair trial rights are otherwise protected.<sup>19</sup>

9. Other recognised exceptions to the right to be present at trial are: (i) where the trial is disrupted by the accused's own behaviour;<sup>20</sup> and (ii) at this Court, where an accused who is otherwise available to the Court submits to the Pre-Trial

<sup>16</sup> The approach of Trial Chamber III is contrary to the Prosecution's submissions at ICC-01/09-01/11-660, para. 12. The Defence submits that the Prosecution's approach is, in any event, overly rigid. Trial Chamber III has evidently taken a more flexible and practical approach.

<sup>17</sup> The Defence acknowledges that the ICTR's Rules of Procedure and Evidence now make provision for trial in the absence of the accused where an accused refuses to appear but has made his initial appearance (see Rule 82*bis*).

<sup>18</sup> See *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgement (AC), 28 November 2007, para. 107 ("It clearly emerges from the aforementioned concurring instruments and jurisprudence that, however firmly the right of the accused to be tried in his presence may be established in international law, that did not [...] preclude the beneficiary of such right from refusing to exercise it"); *Prosecutor v. Zigiranyirazo*, ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006, para. 14; *Prosecutor v. Barayagwiza*, ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, 2 November 2000, paras. 5-7. Of note is the fact that the *Barayagwiza* decision was rendered before the inclusion of Rule 82*bis* in the ICTR's Rules of Procedure and Evidence. See also, e.g., *Prosecutor v. Stanisić*, IT-03-69-T, Absence from Court for Mr Stanisić, 8 June 2012.

<sup>19</sup> *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgement (AC), 28 November 2007, para. 109. These requirements are similar to those set out in Rule 124(2) of the Rules of Procedure and Evidence.

<sup>20</sup> Statute, Article 63(2). See also the Rules of Procedure and Evidence of the ICTY, Rule 80(B); and the Rules of Procedure and Evidence of the ICTR, Rule 80(B).

Chamber a written, informed waiver requesting that he not attend the confirmation hearing.<sup>21</sup>

**(b) Mr Ruto's request to waive his right to be present at trial**

10. Mr Ruto has voluntarily surrendered to the jurisdiction of the Court. Specifically, Mr Ruto is cooperating with the Court, is actively participating in proceedings, and has attended before the Court on various occasions. It is in these particular circumstances and against a background of established past compliance and future promised compliance that Mr Ruto respectfully requests that he be permitted to waive his right to be present at trial. The Defence advises that Mr Ruto has been informed of the implications of his request and that his waiver is freely and unequivocally given. Further, Mr Ruto's waiver is submitted in order that he be permitted to discharge his constitutional duties to the Kenyan people. Mr Ruto does not seek the grant of a blanket waiver but undertakes to attend the opening and closing of trial, judgement and all other hearings at which his attendance is requested by the Trial Chamber, or sessions he may choose to attend.

**(c) The Trial Chamber should exercise its discretion to grant Mr Ruto's request**

11. Clearly, as evidenced by Trial Chamber III in *Bemba*, the Trial Chamber has the discretionary power to grant Mr Ruto's waiver. The Defence acknowledge that Trial Chamber III did not specify the basis on which the waiver was granted. But the Defence submits that the Trial Chamber's broad trial management powers can be safely assumed to provide the requisite legal basis. Specifically, Article 64 of the Statute provides that a "Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and

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<sup>21</sup> Statute, Article 61(2)(a); Rules of Procedure and Evidence, Rule 124.



due regard for the protection of victims and witnesses”.<sup>22</sup> This Article also provides that, “in performing its functions prior to trial or during the course of a trial, a Trial Chamber may, as necessary: (a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11; and [...] (f) Rule on any other relevant matters.”<sup>23</sup> The Defence recalls that a Pre-Trial Chamber has the power to grant an accused’s request to waive his presence at confirmation.<sup>24</sup> This power is clearly “relevant and capable of application”<sup>25</sup> during the trial phase of proceedings given there is nothing in the Statute which categorically and explicitly prevents it.<sup>26</sup>

12. The Defence submits that, for the following reasons, it is in the interests of justice that the Trial Chamber exercise its discretionary powers to grant Mr Ruto’s request to waive his presence at trial.

13. *First*, if the Trial Chamber grants Mr Ruto’s request, his other fair trial rights will be protected and will ensure that he can otherwise continue to actively participate in proceedings. Specifically, Mr Ruto will be represented in the courtroom at all times by counsel of his choosing in receipt of instructions;<sup>27</sup> counsel will be present to examine witnesses on Mr Ruto’s behalf, to raise legal arguments and objections and to pursue Mr Ruto’s instructed line of defence;<sup>28</sup> Mr Ruto will be able to communicate freely with his lawyers in confidence and to conduct privileged communications;<sup>29</sup> and Mr Ruto will be able to follow proceedings whenever he chooses, using the ICC External Parties Network which will provide

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<sup>22</sup> Statute, Article 64(2).

<sup>23</sup> Statute, Article 64(6)(a) and (f).

<sup>24</sup> *Supra*, para. 9.

<sup>25</sup> Statute, Article 61(11): “Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, 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.”

<sup>26</sup> *Contra* the Prosecution’s submissions at ICC-01/09-01/11-660, para. 13.

<sup>27</sup> Statute, Article 67(1)(d).

<sup>28</sup> Statute, Article 67(1)(e).

<sup>29</sup> Statute, Article 67(1)(b).

him with access to live transcripts, real-time evidence and filings.<sup>30</sup> Video streaming is also available via the Court's website.

14. In addition, Lead Defence Counsel would brief Mr Ruto on proceedings on a regular basis and keep the situation under constant review in order to advise when, in his professional opinion, it was anticipated Mr Ruto's attendance would be appropriate in view of either the nature of the evidence to be heard or the legal arguments to be made. This would be in addition to the Trial Chamber's own power to request Mr Ruto's attendance at any hearings.
15. *Second*, granting Mr Ruto's request will have no effect on the rights of any of the other parties to these proceedings. As explained above, the right to be present at trial is a right accorded to an accused and no one else. When an accused is unable to attend trial, the safeguards which are implemented are those which seek to guarantee an accused's fair trial rights. This is clearly because no other parties' interests are at issue. If an accused is not physically present, the reality is that nothing changes. The accused remains on trial and the trial proceeds in the normal course with evidence being presented and challenged. While the Defence does not accept that the use of video link would have any serious impact on the progress of the trial, Mr Ruto's current request would clearly have no negative effect on the expeditious conduct of proceedings.<sup>31</sup>
16. *Third*, in this case, there is no question of the Court's authority being undermined – Mr Ruto would remain subject to the Court's jurisdiction and bound by the conditions of the decision issuing the summons to appear,<sup>32</sup> subject to a minor alteration to take account of this request.<sup>33</sup> Indeed, as stated in paragraph 2 above, the Defence submits that by granting Mr Ruto's request, the Court's authority and

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<sup>30</sup> These will be provided via Transcend and Ringtail software and the Court Records programme.

<sup>31</sup> *Contra* the submissions of the Common Legal Representative for the Victims at ICC-01/09-01/11-657, paras. 11 and 12.

<sup>32</sup> ICC-01/09-01/11-01.

<sup>33</sup> *Contra* the submissions of the Common Legal Representative for the Victims at ICC-01/09-01/11-657, paras. 9 and 10.

effectiveness would be significantly enhanced in this and future cases and encourage serving senior state officials exercising constitutional duties in future cases to voluntarily submit to the court's jurisdiction.

17. *Fourth*, when Mr Ruto's request is considered in its proper legal context – as a right of an accused capable of being waived – it is clear, contrary to what some have erroneously suggested, that there is no question of drawing the Trial Chamber into Kenyan politics.<sup>34</sup> Rather, Mr Ruto – who is entitled to the presumption of innocence - is simply making a reasoned and practical request in view of the unique position in which he finds himself, a serving deputy head of State seeking to balance his constitutional responsibilities to the people of Kenya and his oath of office, with his personal commitment to cooperate with the court and comply with any and all orders of the Trial Chamber as he proceeds to clear his name.

#### **(d) Practical Modalities**

18. Should the Trial Chamber grant Mr Ruto's waiver, the Defence submits that in order for the Trial Chamber to keep the situation under review, the Defence could submit a pro forma waiver signed by Mr Ruto to the Court on a regular basis confirming Mr Ruto's continued informed consent to the waiver.

#### **(e) The proper interpretation of Article 63**

19. The Defence observes that this is the first time that Article 63 and its import has been judicially considered. The Defence also notes that the term "present" as used in Article 63(1) is not defined anywhere in the Court's legal instruments. Contrary to the Prosecution's position, the Defence submits that there is nothing in Article 63(2) of the Statute which means that the term "present" in Article 63(1) means

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<sup>34</sup> *Contra* ICC-01/09-01/11-657-Anx, para. 18.

physical presence.<sup>35</sup> Article 63(2) simply deals with the situation where presence takes physical form. Further, construing the term in accordance with the purpose of the article – to protect the right of an accused to be present at his trial and to prevent trials *in absentia* – similarly does not require physical presence during trial in the circumstances of this case. Rather, where, as here, an accused is cooperating with the Court, has attended before the Court on various occasions and whenever required and undertakes to continue to attend hearings whenever required, then, at the accused's request, the accused's presence could be constituted for the purposes of Article 63(1) by his presence through his counsel in receipt of instructions.<sup>36</sup>

20. Underlying all the Defence submissions is the argument that Article 63(1) contains a right which is enshrined primarily for the accused's benefit but, provided the accused's fair trial rights are otherwise protected, is open to a flexible interpretation and one which can be used to promote the Court's aims.

### III. REQUEST FOR RELIEF

21. The Defence respectfully requests the Trial Chamber to:

- (a) grant Mr Ruto's request to waive his presence at trial; and
- (b) vary the conditions of Mr Ruto's summons to appear before the Court to provide that he attend the opening and closing of trial, judgement and all hearings at which his attendance is requested by the Trial Chamber.

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<sup>35</sup> *Contra* ICC-01/09-01/11-660, para. 4.

<sup>36</sup> If such an interpretation were to be given to the term by the Trial Chamber, the fair trial rights of the accused would still be protected as the protections identified in paragraphs 13-14 would apply. The arguments set out in paragraphs 15-17 would also apply in this situation.

22. In the alternative, the Defence requests that the Trial Chamber authorise, in principle, the use of video link technology to ensure the accused's right to be present at trial is effectuated.<sup>37</sup>

Respectfully submitted,



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Karim A. A. Khan, QC  
Lead Counsel for H.E. William Samoei Ruto  
Deputy President of the Republic of Kenya

Dated this 17<sup>th</sup> day of April 2013  
At The Hague, The Netherlands

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<sup>37</sup> ICC-01/09-01/11-629, para. 18.