

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/09-01/11**

Date: **22 May 2013**

TRIAL CHAMBER V

Before:
Judge Herrera Carbuccion, Presiding
Judge Robert Fremr
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

**Submissions of the Common Legal Representative for Victims on Partial Absence of
the Accused During Trial in Relation to Article 63(1) of the Rome Statute**

Source: **Wilfred Nderitu, Common Legal Representative for Victims**

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

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I. INTRODUCTION AND LEGAL BASIS FOR THE FILING

1. On 14th and 15th May 2013 a Status Conference was held in this case. Partial absence of the accused during trial was picked as a central theme under Agenda item C. The Ruto Defence submitted “that the competing interests that Article 63 seeks to protect” require “wider policy considerations.”¹ The Defence has further argued that “presence is met by the combination that we have put forward, appearance whenever necessary, actually surrendering to the Court in advance, and all other times being present through counsel”.² The Common Legal Representative for Victims “the CLR” makes these submissions in addition to his written submissions on the Article 63 Defence Request which he filed on 22nd April 2013. From the outset the CLR objects the request for partial absence of the accused during trial on the basis of Article 63(1) of the Rome Statute and submits that the principle in that Article leaves no doubt that an accused person is required to be physically present at the trial.

II. CORE OF THE SUBMISSIONS

2. At the Status Conference, the question was asked by His Honour Judge Fremr during the Status Conference on 15th May 2013 whether the CLR considered “even partial absence of the accused as a significant harm to the integrity of proceedings”³. To answer this question, the point of departure is to go to first principles and enquire what the fundamental assumption is supposed to be. It is the CLR’s submissions that the fundamental assumption is that an accused person shall be tried at the seat of the Court. It is for this reason that Article 62 provides that “[U]nless otherwise decided, the place of the trial shall be at the seat of the Court”. The general rule is that there shall therefore be a coinciding of location between an accused person, witnesses, all parties to the proceedings, and the judges. And, in the general situation, this coinciding of location will be at the seat of the Court. This general requirement does not admit of an interpretation allowing an accused person to be at a location other than the seat of the Court “unless otherwise decided” by the Court, or unless the accused brings himself within the narrow exception in Article 63.
3. The second issue to consider is the grounds upon which a request for absence is based. In this regard, it is submitted that the principle is that grounds upon which absence from

¹ ICC-01/09/11 T 22 CONF-ENG ET 14-05-2013 6/47, line 1

² ICC-01/09/11 T 23--CONF-ENG ET 15-05-2013 7/45, lines 21-23.

³ ICC-01/09-01/11-T-23-CONF-ENG, p. 5, lines 12 to 17

trial may be allowed must be *exceptional*, e.g., illness, death of a close relative, or other personal circumstances that are incapable of being avoided or prevented. Such circumstances must be without volition or conscious control.

4. Thirdly, even when allowed on *exceptional* grounds, absence of an accused person from trial is expected to be for an extremely short duration, so that there is no danger of adversely affecting the integrity of the proceedings⁴. Where absence of an accused person is expected to be for a long period, the Court would in the ordinary situation adjourn the proceedings in order to secure the physical presence of the accused and only then continue with the trial. It is submitted that it would be against the principle of allowing the absence of an accused from his own trial for the Court to adjourn the proceedings in order to accommodate the political commitments and/or ordinary family circumstances of the accused person.
5. Again on principle, and more importantly, it would be against principle for the Court to allow an accused to be absent from his own trial (and to continue with the trial) where the accused voluntarily or consciously decided to pursue political office in the full knowledge of the fact that he had been charged with international crimes before the Court, and of the rigours and competing demands between the requirements of the political office and of the Court.
6. The legislative history of the Rome Statute shows that the drafters and the delegations concerned themselves to strike an adequate balance between rule and exceptions.⁵ However, it is clear that the presence at trial is a general rule that can only be departed in exceptional cases defined within the Statute.

⁴ It ought to be common ground that the Court has power to allow the absence of an accused person from his own trial in appropriate circumstances. At p. 20, line 24, of the transcript of (Day 2) of the Status Conference (ICC-01/09-01/11-T-23-CONF-ENG), it has been suggested by Defence Counsel Karim Khan that the CLR has submitted that the accused's presence at his trial is "clear cut" (in the CLR's understanding, the suggestion being that the absence of an accused person from the trial is not allowed). For the avoidance of doubt, the CLR's position is that the presence of an accused person at his own trial is a requirement unless he comes within the exceptions contemplated by Article 63, namely, where he is removed from the courtroom due to his disruption of the proceedings, or where on other exceptional grounds (e.g., illness) the Court in exercise of its residual jurisdiction departs from the general principle requiring his attendance and dispenses with his physical presence.

⁵ M. Cherif Bassiouni *The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute* (Volume 2); Art 63 page 446-458.

The Rome Statute as well as the Text transmitted by Drafting Committee to Plenary Committee knows only one exception for the absence at trial stage: disruption of trial (Article 63(2)). The drafters consciously took a very narrow approach. Previous documents included other options for the absence of the accused. Referring to the ILC draft, the 1998 Preparatory Committee (page 447) made the following comment:

“There appear, in essence, to be three options regarding trials in absentia which have emerged to date, in addition to the ILC draft (A/51/22, vol. II). NB: The ILC text as such could be deleted since it seems to have been superseded by options that were developed as a consequence of the discussions at the Preparatory Committee.”⁶

The Ad hoc Committee 1995 (ILC draft)⁷ reads:

“The rule that the accused should be present during the trial was widely endorsed. Some delegations which invoked, *inter alia*, constitutional reasons, argued that the rule should not be accompanied by any exceptions. For others, exceptions should only be permitted in clearly specified circumstances.”

7. On a different note, His Honour Judge Eboe-Osuji raised the question⁸ as to how “extremely negative impact on how the Court is perceived”, given the fact that the Rome Statute itself expressly recognizes such a relief for confirmation hearings. The Judge posed the question why denial of leave to be absent (rather than allowing an accused person’s absence) would not itself then be seen to have an extremely negative impact on how the Court is perceived. It is submitted that the answer to the Judge’s question is twofold: firstly, the traditional model of criminal litigation requires the physical

⁶ ILC draft

“1. As a general rule, the accused should be present during trial

2. The Trial Chamber may order that the trial proceed in the absence of the accused if:

- (a) the accused is in custody, or has been released pending trial, and for reasons of security or ill-health of the accused it is undesirable for the accused to be present;
- (b) the accused is continuing to disrupt the trial; or
- (c) the accused has escaped from lawful custody under this statute or has broken bail.”

Compare also: Also under Zuothen Draft Art 56 (37)

Also Decisions taken by the Prep committee at its session held 4 to 14 Aug 97

⁷ Bassiouni page 457.

⁸ ICC-01/09-01/11-T-23-CONF-ENG, p. 6, lines 15 to 24

presence of an accused person in the courtroom. Secondly, the confirmation hearing is itself an exception from the traditional model, and the person against whom allegations have been made at that stage has the status of “suspect”, rather than of an “accused person”. The quantum of rights at that stage is consistent with that status. The traditional model of criminal litigation presupposes the incremental diminution of personal liberty in order to insure the integrity of the entire criminal process. It is for this reason, for instance- to take this to the extreme- that an accused person who is eventually convicted for serious crimes would not be sentenced to probation.

8. It is submitted that Article 63 is contained in the Rome Statute in order to avoid what would otherwise be a “phantom trial”, a trial apparently sensed but having no physical reality. This, it is submitted, is the “extremely negative impact” that the proceedings and the Court would suffer if absence were allowed at the trial stage. This “extremely negative impact” goes to the root of the “integrity of the proceedings” in more ways than one.
9. One of the ways in which the integrity of the proceedings would be affected is due to the fact that the process of establishing the truth is best assured when an accused and his accuser meet face-to-face, and the quality of testimony given in the proceedings necessarily suffers when either the witness or the accused or both of them are not in the courtroom, in full view of each other. The Court, having a duty to ensure an accused person’s fair trial rights (notwithstanding the accused’s own notion that his fair trial rights have been preserved through effective legal representation), is obligated to ensure the presence of the accused person at his own trial.
10. In addition to this, as there is also an international (public) interest in cases involving crimes against humanity, the obligation to be present also derives from the imperative to avoid misjudgement. A reopening of the case due to a failure on the part of the Court to ensure the accused’s own fair trial rights would grossly violate victims’ interests. In this regard, it should be remembered that fairness of the entire process cuts across to other parties and participants in the proceedings and does not rest solely with the accused person.
11. Another way in which the absence of an accused person from his own trial negatively impacts the proceedings is discerned when one considers that the Court as an institution is only as effective as the confidence placed in it by the consumers of justice (who include victims) and by the peoples, cultures and governments of the world who follow

its workings (the general public). A reduced confidence rating would result in lower levels not only of moral support for the Court by the public, but also of financial and other forms of support by States Parties and other organizations and institutions. This would in turn adversely impact the overall administration and delivery of justice.

12. Regarding the question whether it is the duty of an accused person, or the duty of both the accused and the Court to ensure the accused person's physical presence at the trial⁹, it is the CLR's submission that this duty is placed both on the accused person and on the Court, with the latter having an overriding duty to ensure the former's attendance, and to take such measures as are appropriate in the event of absence without justifiable cause.
13. With regard to Article 27 of the Rome Statute, the CLR submits that while the provision primarily deals with the question of immunity, it is relevant to the issue at hand in that it also enunciates a more fundamental principle: equality of all natural persons before the law, subject generally only to Articles 25 and 26 of the Statute. This principle is of crucial importance when the Court has to deal with how to achieve procedural fairness for all accused persons appearing before it. It is submitted that leave of absence from the courtroom on the grounds stated by the Defence is inconsistent with the substratum of this principle as political office does not protect any accused person before the Court from any procedures in connection with the criminal process.
14. The CLR also submits that the principle of presumption of innocence is not violated when permanent presence of an accused person in the courtroom is ordered. The presumption of innocence is not violated because Article 63(1) provides for a lawful and legitimate limitation when the evidentiary threshold is met. With the decision confirming charges, the requirement was fulfilled. Indeed, permanent physical presence at trial is well-established practice under national and international law. In many jurisdictions both nationally and in international *ad hoc* tribunals, the accused in a regular case rules are in place which allow for lawful detention of the accused during trial stage as opposed to being required to personally attend trial.
15. In the final analysis, the CLR submits that the Chamber does not have the power to go beyond the clear wording of the Statute and to grant partial absence of the accused. It is further submitted that Articles 64(6) and 61(11) do not apply. The provision that the Chamber "may exercise any function of the Pre Trial Chamber that is relevant and

⁹ ICC-01/09-01/11-T-23-CONF-ENG, p. 8, lines 12 to 16. The question was asked by Judge Eboe-Osui.

capable of application in those proceedings” are simply out of context. Accordingly, the CLR does not consider that the application for excusal from physical attendance has satisfied the exception to the application of Article 63 which would entitle the Court to dispense with his personal presence at the trial.

III. PRAYER SOUGHT

16. For the above reasons, the Common Legal Representative respectfully requests the Trial Chamber considers these observations alongside the submissions of other parties and participants, and to make appropriate orders in the circumstances.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Wilfred Nderitu', with a long horizontal flourish extending to the right.

WILFRED NDERITU
Common Legal Representative for Victims

Dated this 22nd day of May 2013
At Nairobi, Kenya