

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **22 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**

**Submissions of the Common Legal Representative for Victims on the Defence Request  
Pursuant 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:**

**The Office of the Prosecutor**

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Victims**

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

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

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## I. INTRODUCTION

1. On 17<sup>th</sup> April 2013, the Defence for Mr. William Samoei Ruto filed the “Defence Request Pursuant to Article 63(1) of the Rome Statute”<sup>1</sup>. In the request, the Defence seeks to have the Trial Chamber grant a waiver of Mr. Ruto’s presence at trial, and to vary the conditions of his summons to appear before the Court to provide that he attend the opening and closing of trial, judgment and all hearings at which his attendance is requested by the Trial Chamber.

## II. LEGAL BASIS FOR THE FILING

2. In the Defence Request, the Defence has made reference to its application pending before the Trial Chamber requesting that Mr. Ruto be allowed to participate in the proceedings by video-link on a case-by-case basis. The Defence has submitted that the current request be considered the primary request for relief and that the video-link request be considered the alternative request for relief. In the current request, direct reference has been made to the submissions made by the Common Legal Representative for Victims in relation to the request for participation by video-link. The Defence has made reference to the Common Legal Representative’s submissions in an attempt to bolster its arguments in the current request concerning waiver of presence at the trial.
3. The Common Legal Representative therefore files these submissions as additional submissions on the question of participation by video-link firstly because the two Defence requests are inextricably connected. Secondly, the Common Legal Representative files the submissions as they are therefore necessary with a view to enabling the Court effectually and completely to adjudicate upon and settle all questions involved in the two requests.

## III. CORE OF THE SUBMISSIONS

### *a. Presence During Trial: Right or Duty?*

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<sup>1</sup> ICC-01/09-01/11-685

4. It is submitted that the main question for consideration by the Court in the present Request is whether an accused person is tried in his presence as of right, or as a matter of obligation and established court practice.
5. Article 63 of the Rome Statute is entitled **“Trial in the presence of the accused”**. Article 63(1) of the Rome Statute is itself in the following terms:

“The accused shall be present during the trial.”

Article 63(2) then 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. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.”

6. From the foregoing, the following observations can be made from Article 63:
  - i. The presence of the accused during the trial of his case is a matter of duty, rather than one of choice;
  - ii. From the use of the words “If the accused, being present before the Court...” (emphasis added), the intention of the drafters of the Rome Statute was to leave no doubt that the presence of an accused person before the Court was a requirement;
  - iii. In order to ensure, so far as possible, that this requirement was complied with, it is only when the disruption of the trial is *continuous* that removal of an accused person from the Court may be considered. In other words, the Court is required to exercise utmost restraint before it can interfere with the requirement that an accused person be present before it;

- iv. The circumstances justifying such removal must be **exceptional**, and so even where an accused person disrupts the trial, it is far from automatic that such disruption will necessarily lead to his removal from the Court;
  - v. The Court must exhaust **other reasonable alternatives** before resorting to removing an accused person from the courtroom; and
  - vi. The removal is contemplated to be **“only for such duration as is strictly required”**. In other words, as soon as circumstances allowing an accused person to continue to be present during the trial have resumed, the accused should continue to maintain a physical presence in the courtroom.
7. In addition to the foregoing, the concept of a “right” connotes something which is due to a person by law or tradition or nature, the exercise of which the Court therefore ought not to interfere with. In the exercise of a right, the Court therefore would play a passive or merely facilitative role. The person in whom the right inheres would not seek leave of the Court prior to the exercise of the right, and would need to do no more than merely inform the Court of the election he is making. It is therefore submitted that the seeking of this Court’s leave by the Defence is *per se* the recognition of the absence of a right not to appear for the trial. The question of waiver of the so-called right does not therefore exist.
8. From the foregoing, it is submitted that an accused’s presence in court is a matter of legal duty. Indeed, if it were otherwise, then it would be expected, naturally, that many accused persons would *elect* to be tried *in absentia*.

***b. Article 67 of the Rome Statute:***

9. The Defence has sought to rely on Article 67(1)(d) of the Rome Statute in an attempt to show the existence of a right on the part of accused not to be present at his own trial. Article 67(1) provides that in the determination of any charge, an accused person shall be entitled to a public hearing, having regard to the provisions of the Statute, to a fair hearing conducted impartially, and to various minimum guarantees, in full equality, including the following:

- (d) “Subject to Article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;”

10. It is the Common Legal Representative's submission that the proper interpretation of the above provision is that an accused person cannot be removed from the courtroom during the trial except for reasons given, and following the procedure set out in Article 63(2). Put in another way, his presence during the trial is guaranteed except if he continuously disrupts the proceedings and measures to remove him from the courtroom are taken following the laid down procedure. This, it is submitted, does not amount to the same thing as a right not to be present. It is, so to speak, “freedom from removal from court”, rather than “freedom to be absent from court”. To that extent, it cannot be seen as “the functional expression of the accused's stated fair trial right”<sup>2</sup> as submitted by the Defence.

**c. *The Bemba Case:***

11. The Defence has also made reference to two instances in the *Bemba* case where the Trial Chamber waived the personal presence of the accused during trial. In the earlier of the two instances<sup>3</sup>, the reason for Mr. Bemba's absence for court proceedings in the morning was a medical appointment “which he wished to keep” and which he had had “for some time”. His Counsel informed the Court that Mr. Bemba would attend the afternoon proceedings.

12. Clearly, the circumstances in that case were in almost every sense different from those which the Court is now being asked to sanction in the Defence request. Firstly, the reason for the accused's physical absence was compelled by his state of health, rather than being a voluntary absence. To that extent, it was exceptional. Secondly, the duration of the absence from the courtroom was very short, and therefore unlikely to have any or any adverse consequence on the integrity of the proceedings

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<sup>2</sup> ICC-01/09-01/11-685, Defence Request Pursuant to Article 63(1) of the Rome Statute filed on 17<sup>th</sup> April 2013

<sup>3</sup> Proceedings of 7<sup>th</sup> November 2011, ICC-01/05-01/08-T-183-Red-ENG CT WT

in the absence of the accused. Thirdly, the alternative would have been for the Court to adjourn the proceedings in order to secure the physical presence of the accused, which was not considered to be necessary in view of the fact that the Chamber had received prior communication from the Defence in respect to the absence, and the Prosecution had also sent communication stating that it understood the reasons and had no objection to proceeding with the questioning of a witness in the absence of the accused. In the more recent instance in the *Bemba* case (on 12<sup>th</sup> April 2013), the situation involved no more than absence “from part of the afternoon proceedings”.<sup>4</sup>

13. It is submitted that the discretion of the Court to dispense with the physical presence of an accused person is available only in the limited situations where there are exceptional and compelling grounds for the physical absence of the accused, and that such discretion is at any rate not exercisable by the Court as a matter of course.

*d. The Special Court for Sierra Leone:*

14. The Defence also refers to Rule 60(A) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone. It is worthwhile to set out below the Rule in question. It provides as follows:

An accused may not be tried in his absence, unless:

- i. the accused has made his initial appearance, has been afforded the right to appear at his own trial, but refuses so to do; or
- ii. the accused, having made his initial appearance, is at large and refuses to appear in court.

15. From the wording of the Rule, it is observed that while the Special Court for Sierra Leone recognizes trial in the absence of an accused person, such absence can only be correctly characterized as the product of “refusal” to comply with a requirement, rather than “the making of an election” in respect of a right freely available to the accused. This distinction is important since the court can only proceed with the trial after it has satisfied itself that the accused has, expressly or impliedly, waived his

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<sup>4</sup> Footnote 15, ICC-01/09-01/11-685, Defence Request Pursuant to Article 63(1) of the Rome Statute

right to be present at the trial. It is submitted that the use of the word “refuses” in Rule 60(A) in relation to an accused person is designed to place a duty on the part of the court to ensure that it enquires into the reasons for failure to appear in court, and to satisfy itself that the failure amounts to “refusal” before the court can proceed to order that the matter proceeds.

16. Again, it is discernible from the wording of the Rule that the general rule is that “an accused may not be tried in his absence”, and that the exception is that he may be tried in his absence if he refuses to appear at his own trial. That said, it is submitted that failure to appear at one’s own trial in circumstances amounting to refusal cannot be said to be a “right”, to the extent that such a situation is diametrically opposed to the basic principle that an accused person should not be tried in his absence. At any rate, given that the Rome Statute does not itself go so far as to expressly recognize the trial of an accused person in his absence outside the provisions of Articles 63 and 67, any such absence cannot be a matter of right and, even if otherwise available, would have to be backed by another provision either in the Statute or in the Rules of Procedure and Evidence.

*e. The Special Tribunal for Lebanon:*

17. Unlike the Special Tribunal for Lebanon, the ICC does not have any provision for *in absentia* trials of accused persons. In such cases, it is the accused person who waives his right (rather than seeks approval of the Tribunal) not to be present at his own trial.
18. From the foregoing, it does appear that the requirement for an accused person to be present during the trial is one which, by virtue of the Rome Statute, was intended to be jealously guarded by the Court.

*f. Stoichkov v. Bulgaria:*

19. To term the trial of an accused person in his presence a “right”, and “an internationally recognized right” without recognizing the restrictions as to the exercise of this procedure as the Defence has done in its submissions, is misleading. In *Stoichkov v. Bulgaria*, the European Court of Human Rights itself stated that the Code of Criminal Procedure allowed *in absentia* trials “in certain limited



circumstances". These related to situations where the trial *in absentia* would not hamper the ascertaining of the truth and the accused was outside the territory of Bulgaria, if:

- i. his residence was unknown; or
- ii. he could not be summoned because of other reasons; or
- iii. he had been duly summoned and had not indicated a good cause for his failure to appear.

In addition to this, in cases where the offence carried a term of imprisonment, the case could be heard *in absentia* only if the accused's residence in the country was unknown and had not been established after a thorough effort to locate him". Clearly then, the circumstances for the holding of such trials were totally different from those obtaining in the present circumstances.

***g. "Participation Lethargy", and the Broader Ends of Justice:***

20. As submitted in the Common Legal Representative's filing relating to the Defence request for participation in the proceedings via video-link, there are certain crucial issues that are sought to be safeguarded through a trial where an accused person is physically present. In particular, it is only through such proceedings that a full appreciation of the process of discovery of the truth is assured. Giving assent to the procedure sought by the Defence would not be in the best interests of the participating victims in the case, and is likely to result in "participation lethargy" by victims and witnesses in other cases that may come before the Court from time to time. Victim participation therefore stands to be seriously whittled down as the accused's own participation in such circumstances is likely to be seen as merely symbolic. This will therefore ultimately not be in the broader interests of justice and the work of the Court. It is worth bearing in mind that unlike in the *ad hoc* Tribunals and the Special Court for Sierra Leone, victim participation before the ICC has been recognized both by the Rome Statute and Rules of Procedure and Evidence, but also by the Court itself as a matter of practice. The Common Legal Representative therefore submits that contrary to the Defence assertion that "the reality is that nothing changes" if request is granted, the trial process and the Court's authority and effectiveness both stand to be undermined.

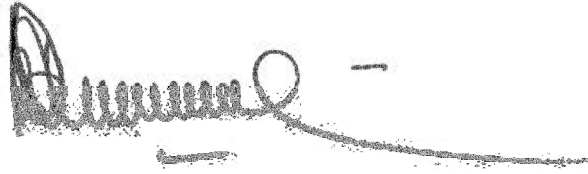
*h. Due Regard for the Protection of Victims and Witnesses:*

21. As we have submitted in an earlier part of this filing, the Court's discretion in allowing proceedings to continue in the absence of an accused person is limited to situations where there are exceptional and compelling grounds for such physical absence only. It is further submitted that the Court does not possess any "broad trial management powers" under Article 64 of the Rome Statute which can avail the Defence. Firstly, the functions and powers set out in Article 64 are required to be exercised "in accordance with this Statute and the Rules of Procedure and Evidence", by virtue of paragraph 1 of that Article. Secondly, for the Defence to properly invoke Article 64, it would be necessary to demonstrate how ensuring the physical *presence* of the accused would adversely affect his rights, particularly his right to a fair and expeditious trial. The test is therefore not how the rights of the accused would continue to be preserved in his absence from the courtroom, but how his rights would not be assured if he were present in the courtroom. Thirdly, the Defence would need to also show that physical absence from the courtroom would be consistent with "due regard for the protection of victims and witnesses". It is submitted that such protection should be reckoned in a purposive way to include not merely physical protection, but measures that minimize apprehension and disinclination on the part of victims and witnesses in relation to their participation in the proceedings.

**IV. PRAYER SOUGHT**

22. For the foregoing reasons, the Common Legal Representative requests the Trial Chamber to deny the Defence Request.

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 22<sup>nd</sup> day of April 2013  
At Nairobi, Kenya