

The legacy of the *Kenyatta* case: Trials *in absentia* at the International Criminal Court and their compatibility with human rights

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Summary

As a consequence of the African Union's pressure on the Assembly of States Parties (ASP) to the International Criminal Court (ICC), the ASP modified the Rules of Procedure of the ICC to permit the accused to be tried in absentia. This article examines the general requirements under which trials in absentia are possible in light of the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights and the European Convention on Human Rights, and whether the new in absentia provisions of the ICC are consistent with international fair trial standards developed by the Human Rights Committee, the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights and the European Court of Human Rights. The article demonstrates that the increasing acceptance of in absentia trials by international criminal courts tends to overlook the rights and roles of victims in international criminal proceedings. To this end, the article considers whether the macro-criminal character of international crimes may require that victims and witnesses have a public interest to trials in the presence of the accused.

Key words: *right to a fair trial; international criminal law; criminal proceedings; procedural rights; article 7 of the African Charter; article 6 of the European Convention*

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1 Introduction

On 5 December 2014, the office of the prosecutor of the International Criminal Court (ICC) withdrew the charges of crimes against humanity against Uhuru Kenyatta due to a lack of evidence.¹ Kenyatta, who became the President of Kenya after the ICC had confirmed the charges against him, is the second head of state who has been accused of crimes against humanity during his tenure.² Given his official position, it always was uncertain whether he actually would appear before the ICC. According to article 63(1) of the ICC Statute,³ an accused is obliged to appear and no provision existed explicitly providing for the absence of the accused during the trial.⁴ However, on 27 November 2013, a decision of the Assembly of States Parties (ASP) to the Rome Statute of the ICC adopted three additional rules to the existing Rules of Procedure and Evidence of the ICC.⁵ The new rules, which were applied for the first time in the case against William Ruto, Kenya's Deputy-President, charged in a separate case related to the post-election violence⁶ and the Kenyatta case, stipulate that the accused 'may submit a written request to the Trial Chamber to be excused only during part or parts of his or her trial'.⁷

2 Background

The procedural law of the ICC was changed because of a number of procedural and political events. Initially, during the pre-trial proceedings concerning his case, the accused, Ruto, argued that his duties as Deputy-President of Kenya would prevent him from standing trial and he, therefore, requested to be excused from continuous presence at his trial.⁸ Trial Chamber V(a) decided to grant Ruto's

1 Kenyatta, charged with crimes allegedly committed after the 2007/2008 Kenya elections, appeared before the ICC for the first time on 7 October 2014. The proceedings against his Vice-President, Ruto, were continued. On the history of the proceedings against Kenyatta, see Case Information Sheet, *Prosecutor v Kenyatta*, 15 December 2014, ICC-PIDS-CIS-KEN-02-013/14_Eng.

2 The first to appear was the Sudanese President, Omar al-Bashir.

3 Rome Statute of the International Criminal Court (ICC Statute), UN-Doc A/CONF.183/9 (1998).

4 Friman holds that 'trials *in absentia* are not provided for under any circumstances in the Statute'; H Friman 'Rights of persons suspected or accused of a crime' in RS Lee (ed) *The International Criminal Court: The making of the Rome Statute* (1999) 262.

5 Rule 134*bis*, Rule 134*ter* und Rule 134*quater*, Resolution ICC-ASP/12/Res.7, 27 November 2013, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res7-ENG.pdf (accessed 10 April 2015).

6 On the history of the proceedings against William Ruto, see Case Information Sheet, *Prosecutor v Ruto & Another* 18 September 2013, ICC-PIDS-CIS-KEN-01-012/13_Eng.

7 Rule 134*ter* (n 5 above).

8 Situation in the Republic of Kenya, Defence Request Pursuant to Article 63(1) of the Rome Statute, 17 April 2013, ICC-01/0901/11-685.

request with certain restrictions,⁹ but the Appeals Chamber suspended the decision in October 2013 on the basis that the Chamber had exceeded ‘the limits of its discretionary powers’. However, it did state that article 63(1) of the ICC Statute did not generally exclude the continuation of the proceedings in the partial absence of the accused.¹⁰ In October 2013, on the basis of article 16 of the ICC Statute, the African Union (AU) filed a request to the United Nations (UN) Security Council for the proceedings against Kenyatta and Ruto to be deferred.¹¹ This request was rejected by the UN Security Council.¹² As a result, the AU, of which 34 member states are state parties to the ICC, adopted a resolution which stated that ‘[n]o charges shall be commenced or continued before any international court or tribunal against any serving AU head of state or government’.¹³ To prevent further disputes regarding article 27 of the ICC Statute,¹⁴ as well as to prevent a feared mass withdrawal of African states from the Rome Statute, member states Botswana, Jordan and Liechtenstein initiated an amendment process in the ASP to implement new rules into the Rules of Procedure and Evidence of the ICC in order to excuse the accused from attending some of the proceedings under certain circumstances.¹⁵ This process finally led to the adoption of the new absence rules addressed in this article.¹⁶

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- 9 Situation in the Republic of Kenya, Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial, 18 June 2013, ICC-01/09-01/11-777 104.
 - 10 Situation in the Republic of Kenya, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber V(a), 25 October 2013, ICC-01/09-01/11-1066 1 46 63; see dissenting opinion of Judge Herrera. Hansen evaluates the decision of the chamber as a misinterpretation of art 63(1) of the ICC Statute; TO Hansen ‘Caressing the big fish? A critique of ICC Trial Chamber V(a)’s decision to grant Ruto’s request for excusal from continuous presence at trial’ (2013) 22 *Cardozo Journal of International and Comparative Law* 104.
 - 11 Art 16 of the ICC-Statute states: ‘No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect.’
 - 12 UN-Doc S/PV.7060 (2013).
 - 13 African Union ‘Extraordinary Session of the Assembly of the African Union’ 12 October 2013.
 - 14 Art 27 of the ICC Statute declares the official capacity of state officials irrelevant for the applicability of the Statute.
 - 15 See the statements of Botswana, Congo, Côte d’Ivoire, Ghana, Kenya, Namibia, Nigeria, Seychelles, South Africa, Tanzania, Tunisia and Uganda during the General Debate of the Twelfth Session of the Assembly of State Parties to the Rome Statute, 20–26 November 2013, http://www.icc-cpi.int/en_menus/asp/sessions/general%20debate/Pages/general%20debate%20_%20twelfth%20session.aspx; with regard to Article 27 ICC-Statute see the statement of Congo, 21 November 2013, https://www.icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-Congo-FRA.pdf (accessed 30 April 2016).
 - 16 Revised Proposal for a New Rule on the Question of Presence at Trial, including through Communications Technology, 6 November 2013 (unpublished).

3 Trials *in absentia* and international criminal procedure

Trials *in absentia* may be separated into cases in which the defendant is not at any time present during the trial (*nunquam praesens*), because he is a fugitive or detained and cannot be extradited, and those cases in which the defendant appears at first and only later remains absent from the trial (*semel praesens*).¹⁷ Despite the fact that only the former constellation is partly referred to as a 'real' trial *in absentia*,¹⁸ under the term '*in absentia*' the article considers all absence regulations of the ICC that provide for (even partial) absence of the accused during the trial. Consequently, the article does not address rules applying *in absentia* during pre-trial proceedings.¹⁹ While it can certainly be argued that the confirmation hearing at the ICC is of particular importance because it determines whether there are 'substantial grounds' to believe that the suspect committed the alleged crimes, the confirmation hearing is not a trial and the evidentiary threshold is noticeably lower compared to trial proceedings.²⁰ By contrast, the trial stage of the ICC concerns itself with the proving of facts and evidence needed to determine whether an accused is guilty of the charges. Therefore, the presence of the accused and, thus, his contribution to the truth-seeking process are more important during the trial stage of proceedings, it having the highest evidentiary threshold.²¹ This contribution, therefore, will be limited to the rules applicable during the trial procedure.

A comparative analysis of national criminal law comes to the simplistic conclusion that *in absentia* proceedings in a *common law* (adversarial) system are largely unusual, whereas they are commonly recognised in *civil law* systems that follow the inquisitorial system of

17 N Pons 'Some remarks on *in absentia* proceedings before the Special Tribunal for Lebanon in case of a state's failure or refusal to hand over the accused' (2010) 8 *Journal of International Criminal Justice* 1307 1310.

18 *Prosecutor v Nahimana & Others* 28 November 2007 98, ICTR-99-52-A; Special Tribunal for Lebanon, Rules of Procedure and Evidence, Rule 104, STL-BD-2009-01-Rev.6-Corr.1.

19 In accordance with art 61(1) of the ICC Statute, the confirmation hearing 'shall be held in the presence of the Prosecutor and the person charged'. However, art 61(2) of the ICC Statute stipulates that the Pre-Trial Chamber is authorised to hold a confirmation hearing in the absence of the defendant, when the Chamber is satisfied that all reasonable steps have been taken to secure the person's appearance and to inform him or her of the charges and the fact that such a confirmation hearing is to be held. See *Prosecutor v Katanga & Others* 11 July 2008 23, ICC-01//04-01/07.

20 W Schabas *The International Criminal Court* (2010) arts 61 & 736; E Trendafilova 'Fairness and expeditiousness in the International Criminal Court's pre-trial proceedings' in C Stahn & G Sluiter (eds) *Emerging practice at the ICC* (2008) 441 452.

21 Schabas (n 20 above) arts 63 & 750; M Marchesiello 'Proceedings before the pre-trial chambers' in A Cassese et al (eds) *The Rome Statute of the ICC: A commentary* (2002) 1231 1244.

criminal litigation.²² By contrast, in the statutes of international criminal tribunals there is no uniform approach to *in absentia* proceedings. Article 12 of the Charter of the International Military Tribunal (IMT),²³ on which basis the alleged fugitive and, in fact, already deceased Martin Bormann was sentenced to death on 1 October 1946,²⁴ explicitly regulated the absence of the accused, while the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) do not explicitly allow trials *in absentia*. Both *ad hoc* tribunals rather implicitly presume the presence of the accused and stipulate the right to be present as an individual right of the accused.²⁵ In spite of the wording and the legislative history of these *ad hoc* tribunals that seem to speak against the recognition of *in absentia* trials,²⁶ the statutes nevertheless entail no absolute prohibition of such trials.²⁷ Next to exceptional provisions in which the re-confirmation of the charge can be held in the absence of the accused (Rule 61 procedures),²⁸ both tribunals have in exceptional cases allowed trials *in absentia* in parts, when the accused remained absent and explicitly and voluntarily waived his right to be present after an initial appearance at the trial.²⁹ Mixed and hybrid tribunals, such as the Extraordinary Chambers in the Courts of Cambodia (ECCC)³⁰ or the Special Court for Sierra Leone (SCSL), permit trials in partial absence

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- 22 R Rabinovitch 'Universal jurisdiction *in absentia*' (2004) 28 *Fordham International Law Journal* 500 526. In the United States, trials in (partial) absence of the accused are possible. See *Crosby v United States* 506 US 255 262 (1993).
- 23 Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT) (1951) 82 UNTS 279, art 12.
- 24 W Schabas 'In *absentia* proceedings before international criminal courts' in G Sluiter & S Vasiliev *International criminal procedure: Towards a coherent body of law* (2008) 335 335.
- 25 Art 21(4) lit d of the ICTY Statute (which is identical to art 20(4) lit d of the ICTR Statute) stipulates that '[t]he accused shall be entitled to the following minimum guarantees, in full equality: (d) to be tried in his presence ...'; Statute of the International Criminal Tribunal for the former Yugoslavia, September 2009.
- 26 AL Quintal 'Rule 61: The voice of the victims screams out for justice' (1998) 36 *Columbia Journal of Transnational Law* 723 743. The UN Secretary-General highlighted the negative attitude of the Security Council towards *in absentia* trials during the establishment of the *ad hoc* tribunals, UN-Doc S/25704 para 101.
- 27 H Friman 'Trying cases at the international criminal tribunals in the absence of the accused?' in S Darcy & J Powderly *Judicial creativity at the international criminal tribunals* (2010) 340.
- 28 This proceeding, however, does not produce a final, binding verdict. See AB Stankovic 'Guilty until proven: Rule 61 of the ICTY' (2010) 14 *Touro International Law Review* 95; K Ambos 'The structure of international criminal procedure: 'Adversarial', 'inquisitorial' or mixed?' in M Bohlander *International criminal justice* (2007) 457.
- 29 Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor v Blaskic* 29 October 1997, ICTY-IT-95-14-AR 59. Decision on Defence Counsel Motion to Withdraw; *Prosecutor v Barayagwiza*, 2 November 2000, ICTR-97-19-T 6.
- 30 Art 35(2)(d) of the new ECCC Statute; Law on the Establishment of the Extraordinary Chambers, 27 October 2004; art 81(4) ECCC Internal Rules (Rev 8) 3 August 2011.

of the accused under special circumstances.³¹ In recent years, the Special Tribunal for Lebanon (STL), which is the only international criminal court that allows proceedings in the complete absence of the accused, encountered a lot of criticism.³² This was caused by the fact that under the Statute of the STL, trials *in absentia* can be conducted not only if the accused has voluntarily and in writing waived his right to be present or is not extradited by government agencies, but even if he is a fugitive or cannot be found for any other reason.³³

4 Trials *in absentia* and their compatibility with human rights

Fair trial guarantees constitute the elementary level of protection during criminal proceedings and can particularly be found in article 14 of the International Covenant on Civil and Political Rights (ICCPR),³⁴ article 6 of the European Convention on Human Rights (ECHR) and article 7 of the African Charter on Human and Peoples' Rights (African Charter).³⁵ The fact that international human rights treaties only impose obligations upon their state parties leads to the situation that international criminal courts are, whether directly or not, neither bound by human rights treaties nor by the case law of human rights courts.³⁶ However, according to article 21(1)(b) of the ICC Statute, the judges of the ICC may take into account human rights treaties such as the ICCPR and the ECHR as a secondary source

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- 31 Art 17(4)(d) of the SCSL Statute reflects the wording of art 14(3)(d) of the ICCPR, which states that the defendant must be present during the trial. Statute of the Special Court for Sierra Leone, 16 January 2002, 2178 UNTS 138, Annex. However, art 60 of the Rules of Procedure allows the resumption of the proceedings if the accused has already participated in the process. SCSL Rules of Procedure and Evidence <http://www.rscsl.org/Documents/RPE.pdf> (accessed 10 April 2015).
- 32 See P Gaeta 'To be (present) or not to be (present): Trials *in absentia* before the Special Tribunal for Lebanon' (2007) 5 *Journal of International Criminal Justice* 1165.
- 33 On condition that all reasonable steps have been taken to secure his or her appearance before the tribunal and to inform him or her about the charges. See art 22(1)(c) of the Statute of the Special Tribunal for Lebanon, 30 May 2007, UN-Doc S/RES/1757/ (2007). According to art 22(3) of the STL Statute, in case of a conviction *in absentia*, the accused has the right to be retried in his or her presence. This 'solution' is criticised by W Jordash & T Parker 'Trials *in absentia* at the Special Tribunal for Lebanon: Incompatibility with international human rights law' (2010) 8 *Journal of International Criminal Justice* 487 498.
- 34 International Covenant on Civil and Political Rights 1966, 999 UNTS 171.
- 35 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2013) 29. The African Charter has been ratified by 53 out of 54 member states of the AU.
- 36 See art 1 of the ECHR; art 2(1) of the ICCPR.

of law for the interpretation of the Statute.³⁷ In accordance with article 21(3) of the ICC Statute, the judges even have a *duty* to apply and interpret the Statute and the Rules of Procedure and Evidence in keeping with ‘internationally-recognised human rights’.³⁸ Consequently, the ICC cannot ignore the minimum standards for trials *in absentia* developed by human rights case law.

4.1 Trials *in absentia* under the ICCPR

In article 14(3)(d) of the ICCPR the right of the accused to be present at the trial is explicitly stated.³⁹ From the wording of the Covenant, it may be concluded that *in absentia* trials are generally not permissible under the ICCPR.⁴⁰ The meaning of article 14(3)(d) of the ICCPR is explained further in General Comment 13 of the Human Rights Committee (HRC), which makes it clear that ‘[w]hen exceptionally for justified reasons trials *in absentia* are held, strict observance of the rights of the defence is all the more necessary’.⁴¹

Even though the HRC leaves the exact meaning of ‘justified reasons’ open, it is clear that, although *in absentia* proceedings are not *per se* impermissible within the sphere of the ICCPR, they are only possible in exceptional cases.⁴² In *Mbenge v Zaire*, the HRC further states that trials *in absentia* are possible in the interests of justice, provided that the accused has unequivocally waived his right to be present.⁴³ Such a waiver is, in the opinion of the HRC in *Maleki v Italy*, only permissible if the court has fulfilled its obligations, particularly with regard to the procedures for summoning and informing the defendants, and if the court can prove that the summons to appear has, in fact, reached the accused.⁴⁴ The lack of such proof, from the viewpoint of the HRC, constitutes a breach of the right to be present and, according to article 14 of the ICCPR, cannot be remedied by a representative that appears to speak for the accused.⁴⁵

37 Art 21(1) of the ICC Statute states: ‘The Court shall apply ... (b) in the second place, where appropriate, applicable treaties and the principles and rules of international law ...’ Due to a lack of differentiation in art 21(1)(b) between international and regional treaties, the inclusion of non-universal treaties is possible. ICC Situation in the DRC ICC-01/04-101-Corr 17 January 2006 para 51.

38 Art 21(3) of the ICC Statute states: ‘The application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights.’ D Akande ‘Sources of international criminal law’ in A Cassese et al (eds) *The Oxford companion to international criminal justice* (2009) 47.

39 Art 14(3) of the ICCPR states: ‘In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (d) to be tried in his presence and to defend himself in person or through legal assistance of his own choosing.’

40 UN Secretary-General, UN-Doc S/25704 para 101.

41 HRC, General Comment 13, art 14, 13 April 1984, UN-Doc HRI/GEN/1/Rev 1 (1994) para 11.

42 M Nowak *CCPR commentary* (2005) art 14 para 62.

43 *Mbenge v Zaire* 16/1977, 25 March 1983, UN-Doc CCPR/C/OP/2 (1990) 14.1.

44 *Maleki v Italy* 699/1996, 27 July 1999, UN-Doc CCPR/C/66/D/699/1996 9.4.

45 HRC General Comment 32, art 14, 23 August 2007, UN-Doc CCPR/C/GC/32 36.

4.2 Trials *in absentia* under the African Charter on Human and Peoples' Rights

In article 7, the African Charter does not expressly include a right to be present at trial. However, it recognises rights which could not exist without the accused being present or at least on notice of the proceedings, such as the right to have one's case heard and the right to be defended by counsel of one's choice.⁴⁶ While the African Charter does not provide direction in this respect, it seems that the drafters of the Charter did not overlook the right of the accused to be present at trial; they rather considered it as an implied right.⁴⁷ Moreover, it should be noted that, according to article 60 of the African Charter, the African Commission on Human and Peoples' Rights (African Commission)⁴⁸ must take into account other international human rights instruments, a provision that enables the Commission to be inspired, *inter alia*, by the provisions of article 14 of the ICCPR when interpreting the trial guarantees laid down in article 7 of the African Charter. The African Commission did this when specifying that the right to be present is part and parcel of the right to a fair trial.

While a survey of the jurisprudence of the African Commission shows that the question of trials *in absentia* has been considered in only a few cases, the Commission in the case *Avocats Sans Frontières v Burundi*⁴⁹ held that the right to defend oneself implies an accused's presence at each stage of the proceedings.⁵⁰ Unfortunately, this decision says little about which measures must be taken in case an accused is tried *in absentia*. The African Commission should have seized the opportunity to clarify this question. However, in order to close the gap between the explicit provisions in the African Charter and the case law of human rights bodies relating to trials *in absentia*, the African Commission in its Principles and Guidelines on the Right to

46 Art 7(1) of the African Charter states: 'Every individual shall have the right to have his cause heard. This comprises (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and custom in force; ... (c) the right to defence, including the right to be defended by counsel of his choice.'

47 See also *Thomas v Tanzania* 005/2013, 20 November 2015 92.

48 The African Commission is the regional treaty oversight body established under the African Charter. The Commission has mandatory jurisdiction over inter-state (art 54 of the African Charter) and individual (art 55 of the African Charter, as interpreted by the African Commission) petitions. On the African Commission generally, see R Murray 'African Commission on Human and Peoples' Rights' in R Wolfrum (ed) *Max Planck encyclopaedia of public international law* (2014) <http://opil.ouplaw.com/home/EPIL> (accessed 30 April 2016).

49 *Avocats Sans Frontières (on behalf of Bwampamyé) v Burundi* (2000) AHRLR 48 (ACHPR 2000) paras 27-29.

50 As above.

a Fair Trial and Legal Assistance in Africa (Fair Trial Guidelines) notes:⁵¹

- (i) In criminal proceedings the accused has the right to be tried in his or her presence.
- (ii) The accused has the right to appear in person before the judicial body. The accused may not be tried *in absentia*. If an accused is tried *in absentia*, the accused shall have the right to petition for a reopening of the proceedings upon a showing that inadequate notice was given, that the notice was not personally served on the accused, or that his or her failure to appear was for exigent reasons beyond his or her control. If the petition is granted, the accused is entitled to a fresh determination of the merits of the charge.
- (iii) The 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.

While not legally binding, this clarification by the Fair Trial Guidelines made an important contribution to the substantive basis of the right to be present at trial and partly goes beyond the scope of major international human rights instruments, such as the ICCPR and the ECHR, as will be shown below.⁵²

Unlike the African Commission, the African Court on Human and Peoples' Rights (African Court)⁵³ issues binding judgments. In a decision on 20 November 2015 in the case of *Thomas v Tanzania*, the African Court held that Tanzania violated due process rights under article 7(1)(c) of the African Charter and article 14(3)(d) of the ICCPR by trying the applicant *in absentia*.⁵⁴ The applicant, Thomas, was tried *in absentia* as he was hospitalised during the defence case at the trial court and was denied the opportunity of explaining his absence. The African Court interpreted article 7 of the African Charter in light of article 14(3)(d) of the ICCPR and adopted the view that article 7(1)(c)

51 See Guidelines Part N(6)(c), http://www.achpr.org/files/instruments/principles-guidelines-right-fair-trial/achpr33_guide_fair_trial_legal_assistance_2003_eng.pdf (accessed 28 April 2016). These principles are not legally binding and are based on art 45(c) of the African Charter mandating the African Commission 'to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African states may base their legislation'.

52 The American Convention on Human Rights, in art 8(2)(d), only refers to 'the right of the accused to defend himself personally'.

53 The African Court was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 9 June 1998, entered into force 25 January 2004) (1999) 20 HRLJ 269. The mandate of the African Court is to ensure the protection of human and peoples' rights on the continent and to complement and reinforce the functions of the African Commission. The Court has jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the African Charter, the Protocol and any other relevant human rights instrument ratified by the states concerned. To date, 29 African states have ratified the Protocol. See generally F Viljoen 'African Court on Human and Peoples' Rights' in Wolfrum (n 48 above).

54 *Thomas v Tanzania* (n 47 above) 90-92 161.

required that the applicant be present to defend himself.⁵⁵ Given the 'serious nature of the offence that the applicant has been charged with, the fact that the magistrate had granted the applicant bail on the basis of his serious ill health and that he was unrepresented', the Court was of the view that the trial court should have given him the opportunity to defend himself.⁵⁶ The African Court concluded that Tanzania had violated the right to be represented provided for in article 7(1)(c) of the African Charter.

4.3 Trials *in absentia* under the European Convention

While article 6 of the ECHR⁵⁷ contains no provision that expressly requires the continuous presence of the accused, the European Court assumes that the presence requirement is an integral part of a fair trial.⁵⁸ This stems from the scheme of article 6 of the ECHR according to which the process guarantees of the accused in article 6(3) provide constitutive elements of the fair trial principle in article 6(1) of the Convention.⁵⁹ Accordingly, the European Court in *Colozza v Italy* points out that it seems difficult to imagine how some of the process guarantees contained in article 6(3) of the ECHR, such as the right of the accused to defend himself in person (article 6(3)(c)) or the right to examination of witnesses on his behalf (article 6(3)(d)), could be realised in the absence of the accused.⁶⁰ Although the right to be present at trial traditionally is inferred from article 6(3) of the ECHR,⁶¹ trials *in absentia* are not generally prohibited under the Convention and are recognised by European Court jurisprudence.⁶² The Court determined that trials *in absentia* must be attended by minimum safeguards in order to respect the fundamental rights of the accused. It must be ensured that:⁶³

- (i) the accused was fully aware of the proceedings and the charges against him,⁶⁴
- (ii) the accused has expressly and 'in an unequivocal manner' waived his right to be present;⁶⁵

55 *Thomas v Tanzania* 88 91.

56 *Thomas v Tanzania* 93.

57 Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS 5.

58 *Colozza v Italy* 9024/80 12 February 1985 27; *Poitrimol v France* 14032/88, 12 November 1993 31.

59 *Goddi v Italy* 8966/80, 9 April, 1984 28.

60 *Colozza* (n 58 above) 27.

61 C Grabenwarter & K Pabel *Europäische Menschenrechtskonvention* (2012) 446.

62 *Krombach v France* 29731/96, 13 February 2001 85; *Friman* (n 27 above) 340.

63 *Pelladoah v Netherlands* 16737/90, 22 September 1994 34-36.

64 *Colozza* (n 58 above) 28-29.

65 As above.

- (iii) the right of the accused to be represented by a counsel during the absence of the accused remains unaffected,⁶⁶
- (iv) the right of the accused to be present cannot be forfeited and he or she has the opportunity to return to the proceedings at any time.

The European Court in *Ekbatani v Sweden* held that if the trial *in absentia* is conducted in breach of these cumulative conditions, the accused in the case of his later appearance is entitled to a retrial.⁶⁷ Otherwise, the proceedings in his absence constitute a violation of the Convention. However, the presence of the accused cannot be dispensed with if the court is aware that the accused is in custody due to criminal proceedings led against him in a foreign country.⁶⁸ In the opinion of the European Court, the waiver of the right to be present can be accomplished expressly or tacitly,⁶⁹ with the restriction that an implicit waiver should not be inferred solely from the absence of a fugitive accused,⁷⁰ and will only be considered if the defendant is definitely aware of the ongoing proceedings in his absence and reasonably could have foreseen what the legal consequences of his conduct would be.⁷¹

In light of the above case law, article 6 of the ECHR does not prevent a person from waiving of his own free will and the entitlement to the guarantees of a fair trial.⁷² Thus, the fundamental *right* of the accused in article 6(3) of the ECHR to take part in the trial is not of an absolute character and should, therefore, not be confused with a *duty* to appear.⁷³ Nevertheless, the European Court indicates that⁷⁴

[i]t is of capital importance that a defendant should appear, both because of his right to a hearing and because of the need to verify the accuracy of his statements and compare them with those of the victim – whose interests need to be protected – and of the witnesses.

Hereby, the European Court acknowledges that, besides the subjective right of the accused to a hearing, the interests of victims and witnesses as well as the public interest in ascertaining the truth ('it must not run counter to any important public interest')⁷⁵ exist, which can only be achieved in the presence of the accused.⁷⁶ The procedural significance of the presence of the accused for a fair trial,

66 *Van Geyseghem v Belgium* 26103/95, 21 January 1999 33-34; *Pelladoah* (n 63 above) 33 40.

67 *Ekbatani v Sweden* 10563/83, 16 May 1988 31; *Poitrimol* (n 58 above) 31.

68 *FCB v Italy* 12151/86, 28 August 1991 30.

69 *Sejdovic v Italy* 56581/00, 1 March 2006 86.

70 *Zana v TUR* 18954/91, 25 November 1997 70.

71 *Sejdovic* (n 69 above) 86.

72 *Colozza* (n 58 above) 29.

73 *Ekbatani* (n 67 above) 29.

74 *Krombach* (n 62 above) 86; *Van Geyseghem* (n 65 above) 33.

75 *Sejdovic* (n 69 above) 86.

76 *Crosby* (n 22 above); M Gardner 'Reconsidering trials *in absentia* at the Special Tribunal for Lebanon' (2011) 43 *George Washington International Law Review* 100.

thus, goes beyond the protection of the accused's individual rights. Although it cannot be assumed that the right to be present has the same procedural importance as the right to a public trial – which is clearly designed to serve both the interests of the accused and the public itself⁷⁷ – the right of the accused to be present at the trial also includes general public interests which cannot be determined exclusively by the accused. This factor plays a significant role for the subsequent evaluation as to whether the new rules satisfy the requirements of a fair trial.

5 New *in absentia* rules of the International Criminal Court

During the negotiations on the Rome Statute of the ICC, the inclusion of *in absentia* provisions to the procedural law of the Court was highly controversial.⁷⁸ Due to a particular skepticism in respect of *in absentia* trials by representatives of the common law system, the majority of states dismissed the implementation of *in absentia* rules into the legal framework of the trial proceedings.⁷⁹ Pursuant to article 63(1) of the ICC Statute, the required presence of the accused ('the accused shall be present during the trial') has not permitted trials to be held *in absentia* for any reason so far,⁸⁰ with the exception that the accused, in accordance with article 63(2) of the ICC Statute, can be removed from the courtroom in the event of a repeated disturbance.⁸¹ In addition to the accused's *obligation* to appear before the court in article 63(1), the presence of the accused is stipulated as a fundamental *right* in article 67(1)(d) of the ICC Statute.⁸² Some detailed exceptions from these principles are contained in the ICC Statute, which are limited to the pre-trial and appeal proceedings: Article 61(2)(a) stipulates that the suspect may waive his or her right to be present at the confirmation of charges hearing, and article 83(5) allows the promulgation of the appeal decision in the absence of the

77 Grabenwarter (n 61 above) 447-448.

78 E Hofstetter *Das Verfahrensrecht internationaler Strafgerichte zwischen common law und civil law* (2005) 86.

79 W Schabas 'Article 63' in O Triffterer (ed) *Commentary on the Rome Statute* (2008) paras 9-10.

80 GJ Shaw 'Convicting inhumanity *in absentia*: Holding trials *in absentia* at the International Criminal Court' (2012) 44 *George Washington International Law Review* 107 117 129; Friman (n 4 above) 262; Hansen (n 10 above) 104. As already mentioned (n 9 above), Trial Chamber V(a) and the Appeals Chamber in the *Ruto* case held that Art 63(1) was compatible with the partial absence of the accused.

81 On the condition that the accused can follow the proceedings by means of communications technology, see art 63(2) of the ICC Statute.

82 Art 67(1)(d) of the ICC Statute states: 'The accused shall be entitled ... to the following minimum guarantees, in full equality (d) ... to be present at the trial'. Judgment on the Appeal of the Prosecutor against the decision of Trial Chamber V(a); *Ruto* (n 6 above) 25 October 2013, ICC-01/09-01/11-1066 para 40.

accused.⁸³ Reflecting the distinct nature of these stages in the proceedings,⁸⁴ the absence of the accused during the trial stage is clearly ruled out in article 63(1) of the ICC Statute.⁸⁵

The first amended provision, Rule 134*bis*, allows defendants to maintain a virtual presence through video technology.⁸⁶ Under Rule 134*ter*, the accused now has the right to 'submit a written request to be excused and to be represented by counsel only during part or parts of his or her trial', provided that he or she has been duly summoned.⁸⁷ The Trial Chamber may grant such a request if 'exceptional circumstances' justify the decision, 'alternative measures would be inadequate', and the defendant has 'explicitly waived his or her right to be present'. The new regulation emphasises that 'any absence must be limited to what is strictly necessary and must not become the rule'. The third amendment, Rule 134*quater*, creates its own excusal regime for the accused, who is 'mandated to fulfil extraordinary public duties at the highest national level'. The request of such a person shall be granted by the Trial Chamber 'if alternative measures are inadequate', if it can be determined that an excusal 'is in the interests of justice', and if 'the rights of the accused are fully ensured'.

5.1 Knowledge-related obligations of the Court *vis-à-vis* the accused

As mentioned above, the HRC, the European Court and the Fair Trial Guidelines of the African Commission stipulate that in order to meet the notice requirements, a court must verify that the accused has

83 Other exceptions are found in arts 72(7)(a)(i) and 76(4) of the ICC Statute.

84 Marchesiello (n 21 above) 1231 1244; Schabas (n 20 above) 754-755.

85 Hansen (n 10 above) 104; Friman (n 4 above) 262.

86 Rule 134*bis* states: '(1) An accused subject to a summons to appear may submit a written request to the Trial Chamber to be allowed to be present in the courtroom through the use of video technology during part or parts of his or her trial.' Rule 134*ter* states: '(1) An accused subject to a summons to appear may submit a written request to the Trial Chamber to be allowed to be excused and to be represented by counsel only during part or parts of his or her trial.' Rule 134*quater* states: '(1) An accused subject to a summons to appear who is mandated to fulfil extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be allowed to be excused and to be represented by counsel only; the request must specify that the accused specifically waives the right to be present at the trial. (2) The Trial Chamber shall consider the request expeditiously and, if alternative measures are inadequate, shall grant the request where it determines that it is in the interest of justice and provided that the rights of the accused are fully ensured.'

87 Although the wording of the new rules seemed to be in conflict with art 63(1) of the ICC Statute ('The accused shall be present'), Trial Chamber V(a) affirmed the compatibility of the two standards; Reasons for the Decision on Excusal from Presence at Trial under Rule 13*quater*, 18 February 2014, ICC-01/09-01/11-1186 para 60; Hansen evaluates the decision of the chamber as a misinterpretation of art 63(1) of the ICC Statute; Hansen (n 10 above) 104. For a more extended critique of this case, see AS Knottnerus 'Extraordinary exceptions at the International Criminal Court: The (new) rules and jurisprudence' (2014) 13 *The Law and Practice of International Courts and Tribunals* 261 268.

been fully informed of the proceedings.⁸⁸ On this point, Rule 134*ter* and Rule 134*quater* are designed in such a way as to guarantee that the accused is fully aware of the ongoing investigations and charges raised against him, but voluntarily wishes not to be present during the proceedings. At least at that stage of the proceedings, it can reasonably be assumed that the request of the accused to be excused from parts of his trial implies the accused's knowledge of the charges against him. In accordance with the requirements developed by human rights case law,⁸⁹ the Court under Rule 134*ter* has fulfilled its duties to inform and summon the accused.

5.2 General disposability of the accused

The European Court observed that the presence requirement cannot be waived if the Court is aware that the accused is in custody due to criminal proceedings led against him in a foreign country.⁹⁰ Keeping in mind the legislative history of the new rules and taking the decision of the Appeals Chamber in the *Ruto* case as a benchmark for the amendments, it seems to suggest that such a situation was not intended by the amendment of the state parties. This is also reflected in the wording of Rule 134*ter*, that 'any absence must be limited to what is strictly necessary and must not become the rule'. Hypothetical scenarios that are covered by the new rules, therefore, differ from cases in which the accused, although he is aware of the proceedings against him, sees no way of participating because he is, for example, imprisoned and not extradited by the imprisoning state.⁹¹ Nevertheless, a situation in which the accused, despite the existence of an objective obstacle that precludes his appearance, waives his right, is still possible under Rule 134*ter*. Beginning a trial under such conditions would certainly undermine the right of the accused and the fairness of the proceedings. Indeed, the discretion of the chamber to determine the extent of the accused's absence is limited by Rule 134*ter* to 'part or parts of his or her trial', which appears suitable to impeding an excessive enlargement of the accused's absence. According to this, the rule can certainly not be understood as a blanket excusal making the 'accused's absence the general rule and his presence an exception'.⁹² Notwithstanding this, *Ruto's* defence following the amendment of the rules argued that Rule 134*quater* would allow an accused to be excused from all trial hearings as long as the accused would be mandated to full extraordinary public duties

88 *Maleki* (n 44 above) 9.4.

89 *Colozza* (n 58 above) 28 29.

90 *FCB* (n 68 above) 30.

91 This scenario is covered by art 22(1)(c) of the STL Statute (n 33 above).

92 Judgment on the Appeal of the Prosecutor (n 10 above) para 63.

at the highest national level.⁹³ The Trial Chamber did not follow this view, and reasoned that such an unconditioned excusal would undermine the 'interests of justice, given the active participation of victims in the proceedings'.⁹⁴ On this ground, the chamber stated that Ruto had to be present at all trial hearings in which victims present their views in person.⁹⁵ However, Ruto was excused from all other hearings, except closing statements, the delivery of the judgment and the days of hearings following a judicial recess, as set out in Regulation 19*bis* of the Regulations of the Court.⁹⁶ According to the legislative history, the wording and the recent case law of the ICC's new rules assume an accused who at least is partially present at the trial proceedings (*semel praesens*).

5.3 Waiver

Rules 134*ter* and 134*quater* clearly exclude situations in which the defendant cannot be found, is a fugitive or it cannot be ascertained whether or not he wishes to participate in the procedure. Due to this higher level of protection, the dispute as to whether the judges were entitled to assume a voluntary absence or an unauthorised absence as an implicit waiver is irrelevant. However, in practice, the waiver provision ('the accused has explicitly waived his or her right to be present') may lower standards of protection. According to Rule 134*ter* and Rule 134*quater*, the waiver must be 'explicit' but need not be written or obtained following legal advice. It is, however, difficult to guarantee a waiver has been understood when it can be made without the accused persons having received prior legal advice or having otherwise obtained full knowledge of the consequences of such a waiver. The European Court and the Fair Trial Guidelines of the African Commission emphasised that the waiver must be 'attended by minimum safeguards commensurate to [the waiver's] importance' and will only be considered if the defendant is definitely aware of the ongoing proceedings in his absence and could have reasonably foreseen the legal consequences of his conduct.⁹⁷ It is, therefore, doubtful that the wording of the new rules reaches the necessary standard.

93 Situation in the Republic of Kenya, Defence Request Pursuant to Article 63(1) of the Rome Statute and Rule 134*quater* of the Rules of Procedure and Evidence to excuse Mr William Samoei Ruto from attendance at trial, 16 December 2013 01/09–01/11 29.

94 Situation in the Republic of Kenya, Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*, 18 February 2014 01/09–01/11 57 74.

95 n 87 above, 63.

96 As above.

97 *Poitrimol* (n 58 above) 31.

5.4 Presence of the accused as ‘public interest’ and ‘interests of justice’?

According to the European Court in *Håkansson v Sweden*, a waiver of the right to take part in the trial ‘must not run counter to any important public interest’.⁹⁸ Similarly, the HRC in *Mbenge v Zaire* took the ‘interests of justice’ as a yardstick for assessing the admissibility of trials *in absentia*.⁹⁹ Even though the European Court and the HRC do not specify what is meant by ‘public interest’ or ‘interests of justice’, it could be argued that *in absentia* trials are possible as long as a reasonable balance between the rights of the accused and other public interests can be created. With regard to proceedings of international criminal law, one of the main public interests, next to the constitution of a *judicial* record, is probably to create a *public* record that promotes peace and reconciliation between the former parties to the conflict.¹⁰⁰ In addition, the macro-criminal character of international crimes, in contrast to most national offences, is of particular relevance in international proceedings that may require that the public also has an interest – though not a right as does the accused – to trials in the presence of the accused.

If and how international criminal justice can contribute to the consolidation of peace is significantly influenced by the extent to which victims are given the opportunity to tell their story in the presence of the accused and thereby to create an uncontradicted historical record.¹⁰¹ This was also recognised by the Appeals Chamber when it reversed the Trial Chamber’s decision on Ruto’s excusal request by stating that the accused ‘is not merely a passive observer of the trial, but the subject of the criminal proceedings and, as such, an active participant therein’.¹⁰² The Chamber further held that the presence of the accused is not only important for his proper rights, but also that ‘[i]t is through the process of confronting the accused with the evidence ... [that] the fullest and most comprehensive record of the relevant events may be formed’.¹⁰³ If the accused is absent, this prospect runs the risk of losing its benefits from the presentation of a one-sided narrative.¹⁰⁴

98 *Håkansson v Sweden* 171-A, 21 February 1990 66.

99 *Mbenge v Zaire* 16/1977, 25 March 1983, UN-Doc CCPR/C/OP/2 (1990) 14.1: ‘Proceedings *in absentia* are in some circumstances ... permissible in the interest of the proper administration of justice.’

100 *Prosecutor v Karadzic* Decision on Appointment of Counsel and Order on Further Trial Proceedings, 5 November 2009, ICTY-IT-95-5/18-T para 20.

101 S Zappalà *Human rights in international criminal proceedings* (2005) 126; FP King ‘Public Disclosure in Rule 61 Proceedings before the International Criminal Tribunal for the Former Yugoslavia’ (1997) 29 *NYU Journal of International Law and Policy* 523 552.

102 Judgment on the Appeal of the Prosecutor (n 10 above) para 49; see also S Trechsel & S Summers *Human rights in criminal proceedings* (2005) 253.

103 Trechsel & Summers (n 102 above).

104 Stankovic (n 28 above) 115.

Furthermore, given the increasing role of victims in international criminal proceedings and the respective recognition of the European Court that, in addition to the subjective right of the accused to be present, the interests of victims and witnesses 'need to be protected',¹⁰⁵ it seems contradictory to focus solely on the expediency aspect of *in absentia* proceedings. Therefore, from the victims' and witnesses' perspectives as well as from a general public interest in addressing international crimes, the settlement of guilt and sustained injustice in the presence of the accused appears as a prerequisite for overcoming collective trauma.¹⁰⁶ Public prosecution does not exclusively belong to the prosecutor and the accused; rather, it belongs to the victims, and its aim is to arrive at truth and justice. Such legitimate public interests basically speak in favour of an extensive presence of the accused at trial, as it serves both the interests of the accused, and those of the victims and witnesses. It follows that the scope of the new provisions must, in particular, be assessed in light of a more general right to a fair trial by considering the victim's point of view. Consequently, it remains to be seen how judges will implement the new rules when making decisions on granting a request for absence from the proceedings, for instance, witnesses' testimonies.

6 Conclusion

In response to the reservations of Kenya and other African states concerning the trials against Ruto and Kenyatta, the ASP decided to amend the Rules of Procedure and Evidence of the ICC. Although the procedural amendments largely correspond to the requirements developed by human rights case law, the increasing acceptance of *in absentia* trials by international courts tends to overlook the specificities and purposes of international criminal proceedings. The restrictions of trials in the absence of the accused should not, therefore, focus solely on the question of whether the disputed procedure satisfies the rights of the defence, but also on how the court takes into consideration the interests of the public, especially of victims and witnesses.¹⁰⁷ In addition, international criminal courts, in particular the ICC, are dependent on the acceptance by the public, which also serves as a safeguard against the possible abuse of judicial power. If the ICC loses the recognition of the public, it also loses its political legitimacy. Apart from the fact that the relaxing restrictions against trials *in absentia* may serve to enhance the effectiveness and feasibility of international criminal trials, in the long term it is crucial that the principles and

105 *Krombach* (n 62 above) 86; *Van Geyselghem* (n 65 above) 33.

106 *Karadzic* (n 100 above) para 20.

107 Situation in the Republic of Kenya, Prosecution's Observations on Defence Request Pursuant to Article 63(1) of the Rome Statute'; *Ruto* (n 6 above) 1 May 2013, ICC-01/0901/11-713 para 11.

purposes of international criminal justice remain untouched. This is the only way in which the confidence of victims in the administration of justice by the ICC can be strengthened.