

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **9 January 2014**

TRIAL CHAMBER V(A)

Before:

Judge Chile Eboe-Osuji, Presiding

Judge Olga Herrera Carbuca

Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

***IN THE CASE OF
THE PROSECUTOR***

v.

WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG

Public

**Response of the Common Legal Representative for Victims to the 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**

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. LEGAL BASIS FOR THE FILING AND CORE OF THE SUBMISSIONS

1. On 16 December 2013, the Ruto Defence filed the “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”¹ (hereinafter “the Ruto Defence Request”), seeking Mr. Ruto’s excusal from attending his trial, pursuant to Article 63(1) of the Rome Statute and Rule 134*quater* of the Rules of Procedure and Evidence.
2. In the “Decision on Victims’ Representation and Participation”², Trial Chamber V stated as follows:

“....in accordance with Regulation 24(2) of the Regulations, the Chamber finds that *the Common Legal Representative may file responses to documents but must demonstrate that the subject matter at issue is directly related to the interests of victims*. If the Chamber is not convinced of the link to victims’ interests, it will not consider the submission.” [Italics added]

3. The Common Legal Representative for Victims submits that the Ruto Defence Request impacts victims’ interests, firstly as both the Ruto Defence Request and the “Prosecution Response to Defence Request Pursuant to Article 63(1) and Rule 134*quater* for Excusal from Attendance at Trial for William Samoei Ruto”³ (“the Prosecution Response”) have in fact referred to victims’ interests in its own filing⁴. Moreover, the CLR submits that that he has previously made submissions on Defence requests of a substantially similar

¹ ICC-01/09-01/11-1124

² ICC-01/09-01/11-460

³ ICC-01/09-01/11-1135

⁴ See paras. 8, 34, 45 and (particularly) 47 of the Ruto Defence Request, and paras. 4, 35, 46, 47 and 49 of the Prosecution Response.

nature which the Trial Chamber has considered, and accordingly requests the Trial Chamber to consider these submissions alongside those of the parties. On 20 December 2013, Trial Chamber V(A) (“the Trial Chamber”) extended the time limit for the Prosecution’s response to the Ruto Defence Request until 9 January 2014.

4. From the outset, the CLR underscores the fact- as noted in the Ruto Defence Request⁵, and as codified in Rule 134^{quater}- that the question whether to demand personal physical presence of an accused person lies at the discretion of the Trial Chamber, and that that discretion is to be exercised only in limited and exceptional circumstances.
5. Two of the crucial questions to be answered in deciding whether or not to grant an excusal are: (i) whether such exceptional circumstances *as are envisaged by the Rule* exist; and (ii) whether alternative measures, including changes to the trial schedule or a short adjournment of the trial would be inadequate.
6. With regard to the question whether exceptional circumstances exist, the CLR submits that the Ruto Defence Request has merely sought a blanket excusal, both in terms of the open-endedness of the duration of the requested excusal, and in terms of the generality of the Request itself. To that extent, it is submitted that no attempt has been made to demonstrate the exceptionalness of the request. Indeed, it is submitted that the Ruto Defence has misinterpreted Rule 134^{quater} fundamentally and errs in particular by failing to substantiate the request with regard to the extraordinary duties of Mr. Ruto that would hinder him from attending the hearings at the Court. A mere reciting of his status as the Deputy President cannot suffice.

⁵ Paras. 3, 12, 20 and 22, ICC-01/09-01/11-1124

7. The Ruto Defence Request also commits the fundamental error of attempting to “shift” the burden of submitting substantiated requests for Mr. Ruto’s absence to the Trial Chamber. As conceptualized, the Ruto Defence Request contemplates a situation where it would be for the Trial Chamber to issue orders for an accused to be present on the Chamber’s own initiative and also to give reasons why an accused should be present at specific hearings.

8. As regards the question whether alternative measures such as changes to the trial schedule or short adjournments would be inadequate, the CLR submits that the Ruto Defence Request also fails this test, due to the general terms in which the Request has been couched. The inadequacy or adequacy of such measures can only be discerned through the making of a request for excusal that relates to real and specific factual circumstances arising in the course of the trial, but not in circumstances which have yet to arise, or are abstract. Indeed, sub-Rule 3 of Rule 134^{ter} of the Rules states that “[T]he Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question. Any absence must be limited to what is strictly necessary and must not become the rule.” Thus, before circumstances have arisen within the context of a “specific hearing”, a request for excusal cannot be entertained. Additionally, the Ruto Defence has failed to substantiate why Mr. Ruto cannot be present through the use of video technology from case-to-case.

9. In determining the Ruto Defence Request, it is necessary to bear in mind the context in which the Assembly of States Parties (“the ASP”) discussed and adopted amendments to the Rules, in seeking to derive the manifest intention of the ASP in adopting Rule 134^{quater}.

10. In the first place, it is submitted that the amendments to the Rule were intended to

that an accused person shall be present at his trial, the presumption of innocence, etc) *vis-à-vis* practical challenges that a Trial Chamber may be confronted with when an accused person before the Court also has duties at the highest national level that may impede him from attending his own trial.

11. The fact that the ASP legislator did not consider changing Article 63(1) of the Rome Statute, but rather introduced Rule 134*quater* to the Rules of Procedure and Evidence, which are inferior to the Statute, is consistent solely with the conclusion that the legislative intention was to define certain exceptions to the rule, to the basic principle that the accused, whatever status he or she has, shall be present during trial. All new Rules from Rule 134*bis* to 134*quater* have, *per se*, an exceptional character. Hence Rule 134*quater* must be interpreted in that way that it is consistent with the general principle of presence at trial in the limits defined by the Appeals Chambers decision.
12. The purpose of adopting these amendments, it is submitted, was therefore to empower a Trial Chamber to deal, in an *exceptional* way, with this *exceptional* situation. The amendments were never intended to displace well-established principles based on ideology, and create new “principles” derived from *ad hoc* practical solutions based on pragmatism. The amendments were never intended, for instance, to create inequality in terms of the quantum of the rights of accused persons before the Court or the rights, *inter se*, of accused persons charged jointly in one case. Nor were they intended to undermine the principle of irrelevance of official capacity. This is something which needs to remain at the back of the mind of the interpreter of Rule 134*quater* in interpreting this provision.
13. Based on the argument above, the CLR submits that the phrase “*mandated to fulfill extraordinary public duties at the highest national level*” in sub-Rule 1 of Rule 134*quater* must

be given a restricted interpretation. That Mr. Ruto as Deputy President of the Republic of Kenya fulfills “public duties” is hardly in question, but two questions arise in connection with the phrase “mandated to fulfill extraordinary public duties at the highest national level”. These are:

- i. When are Mr. Ruto’s duties said to be at “the highest national level”?; and
- ii. Can all the duties he performs be termed as “extraordinary”?

14. So far as the sub-phrase “the highest national level” is concerned, it is the CLR’s submission that the plain and natural meaning of the sub-phrase is the level of Head of State or Government, rather than the level of Deputy Head of State or Government. It is submitted that this was the manifest meaning intended by the ASP, given the context in which the Rules were amended. Sub-Rule 1 of Rule 134^{quater} does not therefore avail Mr. Ruto *per se*, and the Defence is required to demonstrate that Mr. Ruto is “mandated” to fulfill duties at “the highest national level” before he can be excused from his trial under this provision. These arise under Article 147(1), (2), and (3) of the Constitution of Kenya, which provide as follows:

147 (1) The Deputy President shall be the principal assistant of the President and shall deputise for the President in the execution of the President’s functions.

(2) The Deputy President shall perform the functions conferred by this Constitution and any other functions of the President as the President may assign.

(3) Subject to Article 134⁶, when the President is absent or is temporarily incapacitated, and during any other period that the President decides, the Deputy President shall act as the President.

⁶ Article 134 itself is in the following terms:

- 134.** (1) A person who holds the office of President or who is authorised in terms of this Constitution to exercise the powers of the President —
- (a) during the period commencing on the date of the first vote in a presidential election, and ending when the newly elected President assumes office; or
 - (b) while the President is absent or incapacitated, or at other times contemplated in Article 147 (3), may not exercise the powers of the President specified in clause (2).
- (2) The powers referred to in clause (1) are—
- (a) the nomination or appointment of the judges of the superior courts;
 - (b) the nomination or appointment of any other public officer whom this Constitution or legislation requires the President to appoint;
 - (c) the nomination or appointment or dismissal of Cabinet Secretaries and other State or Public officers;
 - (d) the nomination or appointment or dismissal of a high commissioner, ambassador, or diplomatic or consular representative;
 - (e) the power of mercy; and
 - (f) the authority to confer honours in the name of the people and the Republic.

The substantive functions of the President are set out in Article 132 as follows:

- 132.** (1) The President shall—
- (a) address the opening of each newly elected Parliament;
 - (b) address a special sitting of Parliament once every year and may address Parliament at any other time; and
 - (c) once every year—
 - (i) report, in an address to the nation, on all the measures taken and the progress achieved in the realisation of the national values, referred to in Article 10;
 - (ii) publish in the *Gazette* the details of the measures and progress under sub-paragraph (i); and
 - (iii) submit a report for debate to the National Assembly on the progress made in fulfilling the international obligations of the Republic.
- (2) The President shall nominate and, with the approval of the National Assembly, appoint, and may dismiss—
- (a) the Cabinet Secretaries, in accordance with Article 152;
 - (b) the Attorney-General, in accordance with Article 156;
 - (c) the Secretary to the Cabinet in accordance with Article 154;
 - (d) Principal Secretaries in accordance with Article 155;
 - (e) high commissioners, ambassadors and diplomatic and consular representatives; and
 - (f) in accordance with this Constitution, any other State or public officer whom this Constitution requires or empowers the President to appoint or dismiss.

- (3) The President shall—

15. The CLR submits that this fulfilling of public duties at “the highest national level” arises under the Constitution when the Deputy President “deputizes” (in the sense of “replacing” or “substituting”, as opposed to merely “assisting”) the President in the execution of his functions under Article 147(1), and automatically upon the President’s absence or temporary incapacitation, or through the President’s own voluntary act in deciding that the Deputy President shall act as President under Article 147(3). Any other functions that may be conferred on the Deputy President that do not go to the extent of his “acting as”, “replacing”, or “substituting” the President would not be duties fulfilled at “the highest national level”. It is submitted that the purpose of the amendments was not to benefit individuals, but to ensure the efficient performance of the sovereign functions of states.
16. As an alternative, the CLR submits that should the Trial Chamber find that the sub-phrase “the highest national level” extends to include the level of Deputy Head of State or Government, there is nevertheless the need to safeguard against the possible extrapolation of the sub-phrase, as a liberal construction of this sub-phrase is likely to lead to an absurd result. This derivation from specific individuals to other individuals,

(a) chair Cabinet meetings;
 (b) direct and co-ordinate the functions of ministries and government departments; and
 (c) by a decision published in the *Gazette*, assign responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary, to the extent not inconsistent with any Act of Parliament.

(4) The President may –

(a) perform any other executive function provided for in this Constitution or in national legislation and, except as otherwise provided for in this Constitution, may establish an office in the public service in accordance with the recommendation of the Public Service Commission;
 (b) receive foreign diplomatic and consular representatives;
 (c) confer honours in the name of the people and the Republic;
 (d) subject to Article 58, declare a state of emergency; and
 (e) with the approval of Parliament, declare war.

(5) The President shall ensure that the international obligations of the Republic are fulfilled through the actions of the relevant Cabinet Secretaries.

or to a general class of individual or individuals, may, if not judicially defined, ultimately include any member of a government or parliament or other elected or nominated government official, which could hardly have been the intention of the ASP⁷.

17. Further to the foregoing, the CLR submits that the Ruto Defence Request has made no attempt to demonstrate what public duties Mr. Ruto envisages to perform at “the highest national level” or what specific circumstances were prevailing at the time the Request was made that would justify his being excused from his own trial. To that extent, the Request fails to satisfy the meaning contemplated by the phrase “mandated to fulfill extraordinary public duties at the highest national level” in sub-Rule 1 of Rule 134^{quater}.

18. In connection with the question whether the public duties that Mr. Ruto performs are “extraordinary”, it is submitted that “extraordinary” duties are those duties of an official that serve an unusual or special function in addition to the regular duties of that official. In this regard, when Mr. Ruto, as Deputy President, deputizes for- in the sense of “assisting in the ordinary course of events”, rather than “replacing” or “substituting”- the President, his duties would not be extraordinary and therefore would not be such as to entitle his excusal.

19. While it is conceded that “Article 63 (1) of the Statute does not operate as an absolute bar in all circumstances to the continuation of trial proceedings in the absence of the accused” as held by the Appeals Chamber, it is submitted that, in principle, the absence of an accused person in a criminal trial must be the exception rather than the rule. As

⁷ The question could arise, for instance, whether the duties of the Chief of General Staff of the Armed Forces in a given country (being the topmost military commander in an executive position) can be said to be fulfilling duties at “the highest national level”.

held by the Appeals Chamber and reiterated in the Defence Request, the Trial Chamber's discretion to excuse an accused person is "limited".

20. In addition to the arguments above, blanket excusal of an accused person should not be allowed by the Trial Chamber as it undermines the morale and participation of victims and witnesses, and the overall administration of justice. The latter is the bedrock of the Court's own legitimacy, while the former is the *sine qua non* for any effective judicial system. This has been submitted by the CLR in previous filings relating to Defence requests for excusal or attendance via video-link, and observed by the Appeals Chamber in the decision on Mr. Ruto's previous request for excusal.⁸ The Ruto Defence Request has not provided any substantive counterargument to the conclusion that excusal must leave the morale and participation of victims and witnesses, and the overall administration of justice intact.

21. Further, Rule 134^{quater} (2) provides that excusal shall not be granted where other reasonable alternatives are adequate. The plain text itself suggests that the legislator did not have in mind that the accused would be excused by the Judges for all hearings. In fact, the requirement in this provision to the effect that a decision on an excusal request "shall be taken with due regard to the subject matter of the specific hearings in question and is subject to review at any time" emphasizes the temporal and transient nature of excusal.

II. PRAYER SOUGHT

Accordingly, the Common Legal Representative respectfully requests the Trial Chamber to reject the Ruto Defence Request.

⁸ ICC-01/09-01/11-1066 OA 5

Respectfully submitted,

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

WILFRED NDERITU
Common Legal Representative for Victims

Dated this 9th January 2014

At Nairobi, Kenya