

THE UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

**A Critical Evaluation of the Cases of Kenyatta and Ruto before the
International Criminal Court**



Thesis submitted in partial fulfilment of the requirements for the award of an LLM degree

**UNIVERSITY of the
WESTERN CAPE**

DEBORAH MORAA ORINA

Student Number: 3469383

SUPERVISOR

PROF. DR. GERHARD WERLE

Date: 20 October 2014

Declaration

I, Deborah Moraa Orina, declare that 'A critical Evaluation of the Cases of Kenyatta and Ruto before the International Criminal Court' is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Signature:.....

Date:.....



Supervisor: Professor Gerhard Werle

Signature:.....

Date:.....

Acknowledgement

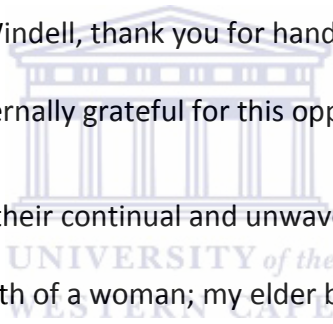
First, I would like to give thanks to the Almighty God who has been faithful to me in every way, for I can do all things through Christ who strengthens me. (Philippians 4:13)

Secondly, I would like to acknowledge the help and support of a number of people. My perpetual appreciation goes to my supervisor, Professor Gerhard Werle, for his invaluable guidance and inspiration. To Dr Moritz Vormbaum, I have utmost gratitude for your critical reviews and observations, and mostly for your promptness.

I would also like to thank Professor Fernandez and Dr Sosteness Materu for their informative observations. To Ms Farieda and Windell, thank you for handling administrative matters vital to the programme. To DAAD, I am eternally grateful for this opportunity.

Special thanks go to my family for their continual and unwavering support: my mother for relentlessly showing me the strength of a woman; my elder brother Mokaya for having unfaltering faith in me even when I did not believe in myself; my father, Abraham and Jaden for their constant love and friendship.

I am indebted to you all.



Abbreviations and Acronyms

ASP – Assembly of States Parties

AU – African Union

CIPEV – Commission of Inquiry into the Post-Election Violence

ICA – International Crimes Act

ICC – International Criminal Court

IREC – Independent Review Commission on the General Elections

OTP – Office of the Prosecutor

ODM – Orange Democratic Movement

PNU – Party of National Unity

PTC – Pre Trial Chamber

RPE – Rules of Procedure and Evidence

TJRC – Truth, Justice and Reconciliation Commission

UN – United Nations

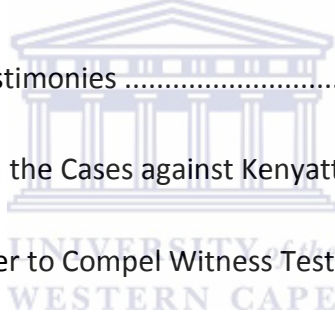
VWU – Victims and Witnesses Unit



Table of Contents

Declaration.....	i
Acknowledgement	ii
Abbreviations and Acronyms.....	iii
i. Prologue.....	1
ii. Research Design and Methodology.....	1
iii. Significance of the Research	2
iv. Chapter Outline.....	3
CHAPTER ONE: BACKGROUND TO THE SITUATION IN THE REPUBLIC OF KENYA AT THE ICC.....	4
1. Factual Background.....	4
2. The Commission of Inquiry into the Post-Election Violence (CIPEV).....	6
3. Referral of the Situation in the Republic of Kenya to the ICC	7
4. Confirmation of Charges	9
5. 2013 Elections and Subsequent Challenges at Trial	10
6. Evaluation	12
CHAPTER TWO: IMMUNITY, COURT ATTENDANCE AND PRESENCE AT TRIAL.....	14
1. Immunity for Sitting Heads of State under Customary International Law and under the Rome Statute.....	14
2. Application to the Kenyan Situation	17
3. Requirement for Court Attendance and Presence at Trial.....	19

4.	Amendments to Rule 134 of the Rules of Procedure and Evidence.....	23
4.1.	The Adoption of Rules 134 <i>bis</i> , <i>ter</i> and <i>quater</i>	23
4.2.	Proceedings based on Amended Rule 134.....	24
4.3.	The Trial Chamber’s Analysis of Amended Rule 134.....	26
4.4.	Status of the Proceedings with Regard to the Amended Rules	28
5.	Analysis	29
6.	Conclusion.....	33
CHAPTER THREE: WITNESS TESTIMONY AND DOCUMENTARY EVIDENCE.....		37
1.	Challenges with Witness Testimonies	37
1.1.	Witness Withdrawals in the Cases against Kenyatta and Ruto.....	37
1.2.	Does the ICC have Power to Compel Witness Testimony?	39
1.3.	Analysis.....	41
2.	Documentary Evidence and other Alternatives to Witness Testimonies.....	46
2.1.	Background.....	46
2.2.	State Party Cooperation	48
2.3.	Analysis.....	50
3.	Conclusion.....	53
CHAPTER FOUR: GENERAL CONCLUSIONS.....		55
1.	Political Impediments to Justice	55



2. Prosecutorial Inadequacies.....	56
3. Way Forward.....	58
4. Concluding Remarks.....	60
BIBLIOGRAPHY	62



i. Prologue

The International Criminal Court (hereafter 'ICC' or 'the Court'), in its fight against impunity is slated to put on trial, in conformity with Article 27 of the Rome Statute¹, an incumbent Head of State and his Deputy for crimes under Article 7 of the Statute. The President and Deputy President of the Republic of Kenya are currently accused of crimes against humanity before the ICC, for acts of violence perpetrated in the wake of the December 2007 presidential and parliamentary elections.

This research is a study of the ICC's conceptual framework and positive implementation of its mandate with respect to prosecuting Kenya's top leaders. By critically evaluating the cases against President Kenyatta and Deputy President Ruto, this research aims to assess the feasibility of such high-profile cases which have, in part, contributed to the hostility surrounding the Court in its fight against impunity. To this end, the factual and legal background, as well as the political context of the cases will be discussed.

ii. Research Design and Methodology

This research will undertake a qualitative assessment of the Kenyan proceedings at the ICC, in order to form a thematic analysis of the cases against President Kenyatta and Deputy President Ruto. It will also examine the scope and influence of international treaties, conventions and other international instruments, and decisions of international criminal tribunals and internationalised criminal courts, if desirable.

¹ Article 27 captions the irrelevance of official capacity in the application of the Rome Statute.

The methodology includes analysis of relevant ICC filings, decisions, orders and judgments, as well as any relevant precedence of the international criminal tribunals and internationalised criminal courts, where it seems feasible. Various writings on the subject of international criminal law and procedure will also be reflected where necessary.

iii. Significance of the Research

First, this research paper will contribute to analysing the impact being made by the ICC as a protector of human rights, considering the strong external criticisms, which portray the Court as a threat to the independence and sovereignty of African states.² Exposing the efforts being made by the ICC to curb rising criticisms, amidst political pressure and possible affluence may at best give a new policy perspective to African States and the African Union, and curb the perceptions that the ICC is a tool for neo-colonial interference in Africa.³

Secondly, the ICC is purging into relatively unfamiliar grounds in international criminal justice. Upholding its mandate to try both the incumbent Kenyan Head of State and his Deputy is a bold step by the Court, but a factor which is contributing to the development of international criminal law. A critical evaluation of the cases of President Kenyatta and Deputy President Ruto will therefore contribute to the academic writing in the field of international criminal law.

² See, for example, Opening and Closing remarks of Dr. Tedros Adhanom Ghebreyesus, Minister of Foreign Affairs of the Federal Democratic Republic of Ethiopia and Chairperson of the AU at the 15th Extraordinary Session of the Executive Council of the AU 11 October 2013. ‘... [T]he Court has transformed itself into a political instrument targeting Africa and Africans. ... We should not allow ICC to continue to treat Africa and Africans in a condescending manner.’

³ See i.e. Ainley K ‘The International Criminal Court on Trial’ (2011) 24 *Cambridge Review of International Affairs* No. 3 309-333; Hauschildt T ‘The International Criminal Court: A Western tool used to dominate Africa?’ available at <http://conflictandsecurity.com/blog/the-international-criminal-court-a-western-tool-used-to-dominate-africa/> (accessed 31 March 2014).

iv. Chapter Outline

The first chapter serves as the introductory part. It gives a brief background of the 2007/2008 post-election violence in Kenya, and illuminates the current status of the situation in the Republic of Kenya at the ICC. It includes a brief overview of the State sanctioned commission of inquiry, the referral of the cases to the ICC, and a synopsis of the materialization of the ICC in Kenya.

The second chapter deals with legal issues relating to the concept of official immunity under international law, how it is dealt with under the Rome Statute, and its relevance in the cases of Kenyatta and Ruto. The chapter delves into the Assembly of States Parties (ASP)'s twelfth session, on Amendments to the Rules of Procedure and Evidence (RPE), in particular, Rule 134*bis*, *ter* and *quarter*, allowing for excusal from presence during trial where extraordinary public duties demand the presence of the accused.

Other legal issues in the Kenyatta and Ruto cases, which are addressed in the third chapter, relate to witness compellability and documentary evidence. The chapter discusses the reverberations of withdrawal of key witnesses from testifying at the Kenyan trials against the top leaders. It also explores other avenues available in instances where oral evidence is unavailable, by primarily looking at documentary evidence. The chapter finally addresses the consequential obligations for cooperation imposed upon a State Party under Part 9 of the Statute.

The fourth and final chapter gives general conclusions based on the research.

CHAPTER ONE: BACKGROUND TO THE SITUATION IN THE REPUBLIC OF KENYA AT THE ICC

1. Factual Background

Immediately preceding Kenya's Presidential and parliamentary elections of 2007, violence erupted which resulted in the death of more than 1,200 victims, leaving hundreds others internally displaced.⁴ The violence was a result of an upsurge of deep rooted political tension across ethnic divides, which actualized in the aftermath of the elections whereby Raila Odinga, the opposition leader, was defeated by Mwai Kibaki of the ruling party, who retained his seat as President in an extremely dubious electoral process.⁵

The crisis in Kenya was met with numerous reactions from the international community calling for an amicable and expedient resolution to the conflict by the Government of Kenya. In fact, efforts to facilitate peaceful resolution of the crisis were made as early as the first weeks of January 2008. South Africa's Archbishop Desmond Tutu was the first external mediator to arrive in the country on 2 January 2008, barely three days into the violence.⁶ Tutu fostered for negotiations, appealing to the conflicting parties to submit to international mediation. His bid was partly successful, resulting in a commitment to mediation from the opposition, but failed to obtain Government concession for negotiations.⁷

⁴ IRIN humanitarian news and analysis 'In-depth: Kenya's post-election crisis' available at <http://www.irinnews.org/in-depth/76116/68/kenya-s-post-election-crisis> (accessed 30 April 2014).

⁵ On ethnic rivalry, see United Nations 'Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008' available at <http://blog.ushahidi.com/wp-content/uploads/2008/03/final-ohchr-kenya-report-19-march2008.pdf> (accessed 30 April 2014). For an in-depth account on the swearing-in ceremony, see 'Twilight Robbery, Daylight Murder' *the Economist* 3 January 2008 available at <http://www.economist.com/node/10438473> (accessed 30 April 2014).

⁶ See Kagwanja P & Southall R 'Introduction: Kenya- A Democracy in Retreat?' in Kagwanja P & Southall R (eds) *Kenya's Uncertain Democracy: The Electoral Crisis of 2008* (2010) (hereafter Kagwanja & Southall (2010)).

⁷ Kagwanja & Southall (2010).

Judging from the severity and escalation of violence in January 2008, the French Foreign and European Affairs Minister, Bernard Kouchner, appealed to the United Nations Security Council 'in the name of the responsibility to protect' to take action, before the violence in Kenya eventuated into a pernicious ethnic conflict.⁸ Regrettably, these and prior attempts at mediation were all in vain. There was neither successful umpire nor a common ground, and there was no likelihood of the violence ceasing.

Following the failure of the attempts aimed at amicable and peaceful settlement of the crisis, former Secretary General of the UN, Kofi Annan, heading the African Union Panel of Eminent Personalities (including Mozambique's Graca Machel and Tanzania's Benjamin Mukapa) was eventually accepted by the conflicting political parties, as the AU Chief Mediator.

Annan held several meetings as negotiator with both parties, and individually with each of the conflicting parties. These negotiations gave rise to the Kenya National Dialogue and Reconciliation Accord, which was signed on the 28 February 2008, and which provided for the post of prime Minister for the opposition's Raila Odinga, whereas retaining Mwai Kibaki as President.⁹ The agreement also gave rise to the creation of three commissions as a follow up of the ensuing events after the contested Presidential elections – the Commission of Inquiry into

⁸ See the International Coalition for the Responsibility to Protect 'The Crisis in Kenya' available at <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya> (accessed 30 April 2014); See also Sharma S 'The 2007-08 Post-Election Crisis in Kenya' in Hoffmann J & Nolkaemper A (eds) *Responsibility to Protect- From Principle to Practice* (2012).

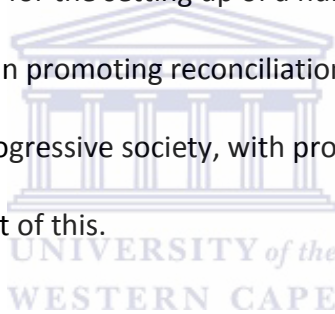
⁹ See The Christian Science Monitor 'Text of Kenya Power-Sharing Deal' 29 February 2008 available at <http://www.csmonitor.com/World/Africa/2008/0229/p25s01-woaf.html> (accessed 30 April 2014).

the Post-Election Violence (CIPEV)¹⁰, the Truth, Justice and Reconciliation Commission (TJRC)¹¹ and the Independent Review Commission on the General Elections (IREC)¹².

The signing of the Kenya National Dialogue and Reconciliation Accord thereby saw the end of the violence and restoration of calm and peace in the country. Consequently, the international envoys were congruously praised for 'diplomatic action under the Responsibility to Protect'.¹³

2. The Commission of Inquiry into the Post-Election Violence (CIPEV)

The signing of the Kenya National Dialogue and Reconciliation Accord on 4 March 2008, under the rubric 'Agenda Item 4', lobbied for the setting up of a number of commissions of inquiry to address justice and accountability in promoting reconciliation, as well as aiming to attain longer-term issues of building a progressive society, with proper governance and the rule of law.¹⁴ CIPEV was created as a result of this.



CIPEV was mandated, inter alia, to investigate the facts and circumstances surrounding the violence that followed the 2007 Presidential election, to investigate the conduct of state security agencies during the course of the violence and their handling of it, and to make recommendations as appropriate, concerning these and other matters to prevent future

¹⁰ Report on the Commission of Inquiry into the Post-Election Violence, Kenya (15 October 2008) (hereafter CIPEV Report).

¹¹ The Final Report on the Truth, Justice and Reconciliation Commission available at http://www.tjrckeny.org/index.php?option=com_content&view=article&id=573&Itemid=238 (accessed 5 May 2014).

¹² Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007 available at http://kenyastockholm.files.wordpress.com/2008/09/the_kriegler_report.pdf (accessed 5 May 2014).

¹³ See International Coalition for the Responsibility to Protect 'The Crisis in Kenya' available at <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya> (accessed 30 April 2014).

¹⁴ See The Kenya National Dialogue and Reconciliation: Building a Progressive Kenya – Our Common Vision, Views of Stakeholders, available at <http://www.kndr.co.ke/downloads/THE-KENYA-NATIONAL-DIALOGUE-AND-RECONCILIATION.pdf> (accessed 4 June 2014).

recurrence of large scale violence – including measures to bring about accountability for the perpetrators of the violence and to combat the persistent culture of impunity.¹⁵

The final report, published on 15 October 2008, stated that the culture of impunity, which has become the ‘hallmark of violence’, was at the heart of the post-election violence and other crimes outside the commission’s mandate.¹⁶ It recommended the creation of a Special Tribunal, with the mandate to investigate and prosecute the crimes that were committed during the post-election violence.¹⁷

Kenya, however, neither created the Special Tribunal as was recommended by the Commission of Inquiry, nor took up serious investigations into the post-election crisis. The Government showed no commitment to investigate and prosecute the crimes relating to the 2007/2008 post-election violence. As a matter of fact, in February 2009, the Kenyan parliament voted against the “Constitution of Kenya (Amendment) Bill 2009”, which would have seen the creation of a Special Tribunal as recommended by CIPEV, and no further action was taken in that regard.¹⁸

3. Referral of the Situation in the Republic of Kenya to the ICC

The chairman of the CIPEV, Justice Philip Waki, submitted a sealed envelope containing the names of the persons deemed to bear the greatest responsibility for the post-election violence,

¹⁵ CIPEV Report.

¹⁶ CIPEV Report.

¹⁷ CIPEV Report.

¹⁸ State House Press Release 12 February 2009 available at <http://statehousekenya.go.ke/news/feb09/2009120201.htm> (accessed 4 June 2014).

to the former UN Secretary General, Kofi Annan, on 17 October 2008.¹⁹ Following the failed attempts by the Government of Kenya to establish a tribunal for the investigation and prosecution of the perpetrators of the post-election violence, on 9 July 2009, Annan handed over the said envelope to the Office of the Prosecutor of the ICC.²⁰

The then prosecutor, Louis Moreno Ocampo, announced his intention to request an authorization to open an investigation into the situation in the Republic of Kenya on 5 November 2009.²¹ He subsequently filed a request to commence official investigations into the situation in the Republic of Kenya on 26 November 2009,²² which was allowed by the ICC Pre-Trial Chamber on 31 March 2010.²³ Pursuant to Article 15 of the Rome Statute, Ocampo initiated *proprio motu* investigations – making Kenya the first *proprio motu* referral since the establishment of the ICC.

The suspects referred to the ICC prosecutor by Annan, later known as the ‘Ocampo six’ were: Uhuru Muigai Kenyatta, the incumbent President; Ambassador Francis Kirimi Muthaura, former head of civil service and secretary to the cabinet; Major General (Rtd) Mohammed Hussein Ali, former police Commissioner; William Samoei Ruto, formerly of the Orange Democratic Movement (ODM) and the incumbent Deputy President; Henry Kiprono Kosgey, ODM’s party leader; and journalist Joshua Arap Sang, affiliated with ODM.

¹⁹ Wambua M ‘How Kenya Handled Local Tribunal Process’ *Daily Nation* 17 September 2013, available at <http://mobile.nation.co.ke/News/How-Kenya-handled-local-tribunal-process--/-/1950946/1997172/-/format/xhtml/-/dwh96i/-/index.html> (accessed 4 June 2014).

²⁰ Waki Commission list of names in the hands of the ICC Prosecutor ICC-OTP-20090716-PR439 16 July 2009.

²¹ See Office of the Prosecutor of the International Criminal Court ‘Statement on the Situation in Kenya’ 14 August 2013 available at [http://www.iccnw.org/documents/14_August_2013_Statement_JCCD-SM_\(2\).pdf](http://www.iccnw.org/documents/14_August_2013_Statement_JCCD-SM_(2).pdf) (accessed 4 June 2014).

²² Request for authorization of an investigation pursuant to Article 15 ICC-01/09-3 26 November 2009.

²³ Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya ICC-01/19 31 March 2010.

The summonses to appear were issued on 8 March 2011, requiring Kenyatta, Muthaura and General Ali to make an initial appearance on 8 April 2011²⁴, and for Ruto, Kosgey and Arap Sang to appear on 7 April 2011²⁵.

4. Confirmation of Charges

Precisely one year after the Pre-Trial Chamber (PTC) authorised commencement of investigations into the situation in the Republic of Kenya, on 31 March 2011, the Government of Kenya lodged an admissibility challenge²⁶ based on jurisdictional issues relating to the new constitution,²⁷ arguing that it opened up possibilities for national pursuits of justice. The Court, however, rejected Kenya's arguments on the basis of a lack of evidence of a genuine and capable national legal process.²⁸

The charges against Kenyatta, Muthaura, Ruto and Arap Sang were confirmed by PTC II on 23 January 2012.²⁹ The charges against Kosgey and General Ali were not confirmed due to lack of sufficient evidence.

²⁴ Decision on Prosecutor's Application for Summonses to Appear for Francis Kirihi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali ICC-01/09-02/11-01 8 March 2011.

²⁵ Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang ICC-01/09-01/11-01 8 March 2011.

²⁶ Application on behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute ICC-01/09-01/11-19 31 March 2011.

²⁷ Constitution of the Republic of Kenya, 2010.

²⁸ See Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute ICC-01/09-01/11-101 30 May 2011; See also Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute ICC-01/09-02/11-96 30 May 2011.

²⁹ See Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute ICC-01/09-02/11-382-Red 26 January 2012; See also Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute ICC-01/09-01/11-373 23 January 2012.

On 11 March 2013, the current ICC prosecutor, Fatou Bensouda, filed a notification of withdrawal of the charges against Muthaura, citing lack of sufficient evidence to prove the case beyond a reasonable doubt.³⁰ This withdrawal halved the popularly referred to “Ocampo Six” into the “Bensouda Three”.

5. 2013 Elections and Subsequent Challenges at Trial

Within the course of the ICC proceedings, Uhuru Kenyatta and William Ruto formed a political alliance prior to the Presidential elections of March 2013 that resulted in their respective election as President and Deputy President of the Republic of Kenya. The election into office of Kenyatta and Ruto subsequently changed their status from ordinary accused persons to sitting Head of State and Deputy Head of State on trial for crimes against humanity before the ICC.

This change of status has attracted conflicting reactions, both in Kenya and the international community at large.³¹ Consequently, issues touching on the Presidential duties of a democratic state vis-a-vis the Court’s requirement for continuous presence at trial of all accused, regardless of official capacity or status, cannot be overlooked.³²

³⁰ See Decision on the withdrawal of charges against Mr Muthaura ICC-01/09-02/11-696 18 March 2013.

³¹ See, for example, Wamai N ‘The International Criminal Court and the Kenyan Election’ available at <http://gatescambridge.wordpress.com/2013/05/02/unintended-impacts-in-the-kenyan-election/> (accessed 14 July 2014); Mamdani M ‘Kenya 2013: The ICC Election’ available at <http://www.aljazeera.com/indepth/opinion/2013/03/20133982222657687.html> (accessed 14 July 2014); Perry A ‘Kenya’s Election: What Uhuru Kenyatta’s Victory Means for Africa’ 9 March 2013 available at <http://world.time.com/2013/03/09/kenyas-election-what-uhuru-kenyattas-victory-means-for-africa/> (accessed 14 July 2014). See also Kersten M ‘The ICC and Kenya Parting Ways? What it Means and What it Doesn’t’ 5 September 2013 and Russel A ‘2013: A Decisive Year for Kenya – and the ICC’ 3 January 2013 all available at <http://justiceinconflict.org/2013/09/05/icc-and-kenya-parting-ways-what-it-means-and-what-it-doesnt/> (accessed 14 July 2014).

³² See, in essence, the requirements under Articles 63(1) and 27 of the Rome Statute.

The status change has also led to numerous complications on the part of the Prosecution, with regard to witness withdrawal and a supposed lack of cooperation by the Government of Kenya. Some of the witnesses who were ready and willing to testify at the start of the proceedings later developed cold feet, and are now wary of testifying against their President and Deputy President. It is this challenge of evidence and witness withdrawal that has caused the numerous adjournment of the trial against President Kenyatta by Trial Chamber V(B).³³

Challenges of witness withdrawal and lack of sufficient evidence aside, the Court in general has faced external attacks of claims of political control and selectivity of cases.³⁴ The African Union, for instance, and some African leaders portray the Court as a tool for neo-colonial interference,³⁵ based on the fact that all situations currently active before the Court are from African States. Ultimately, the ICC is accosted to strike a balance between upholding its integrity to objectively fulfil its mandate, and consequently be seen to be acting in all equal fairness before the international community.

³³ See Public Redacted Version of 'Decision on Commencement Date of Trial' ICC-01/09-02/11-763-Red 20 June 2013; Decision Adjourning the Commencement of Trial ICC-01/09-02/11-847 31 October 2013; Order Vacating Trial Date of 5 February 2014, Convening a Status Conference, and Addressing other Procedural Matters ICC-01/09-02/11-886 23 January 2014; Decision on Prosecution's Application for a Finding of Non-compliance pursuant to Article 87(7) and for an Adjournment of the Provisional Trial Date ICC-01/09-02/11-908 31 March 2014; Order vacating trial date of 7 October 2014, convening two status conferences, and addressing other procedural matters ICC-01/09-02/11-954 19 September 2014 (hereafter Order vacating trial date of 7 October 2014).

³⁴ See i.e. Kersten M 'Missing the Mark: The ICC on its Relationship with the UN Security Council' 24 October 2012 available at <http://justiceinconflict.org/2012/10/24/missing-the-mark-the-icc-on-its-relationship-with-the-un-security-council/> (accessed 15 July 2014); On selectivity of cases see i.e. Murithi T 'The African Union and the International Criminal Court: An Embattled Relationship?' 8 (2013) *The Institute for Justice and Reconciliation*; DeGuzman M 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' 33 (2012) *Michigan Journal of International Law*.

³⁵ Echoing the sentiments of the African Union is a Speech by the President of Kenya, Uhuru Kenyatta, at the Extraordinary Session of the Assembly of Heads of State and Government of the African Union, Addis Ababa, Ethiopia, 12 October 2013 available at <http://www.statehousekenya.go.ke/speeches/uhuru/october2013/2013121001.htm> (accessed 31 March 2014).

6. Evaluation

It has been argued that Kenyatta and Ruto's run for top leadership, being indictees at the ICC was 'a key strategy to deflect the Court and to insulate themselves from its power' upon winning the elections.³⁶ However, Kenyatta maintains that his alliance with Ruto was geared at leading Kenya toward the path of peace and reconciliation.³⁷ From a legal point of view, these political arguments are overshadowed by the fact that the ICC is an independent, autonomous Court that holds individuals criminally responsible, as opposed to collective responsibility that can be attributed to States or Governments. In this regard, Kenyatta and Ruto, regardless of their statuses as President and Deputy President, are faced with individual criminal responsibility under Article 25(3) (a) of the ICC Statute, and are expected to account for their actions as private individuals, as opposed to their capacity as government officials.³⁸

It is noteworthy however to recount that the opening of the trial for Mr. Ruto triggered domestic reactions, which contradicted the expectations that actual trial at the ICC would transcend politicisation of the cases and ultimately prompt accountability for the post-election violence. The Kenyan parliament reactively passed a motion³⁹ to withdraw out of the Rome Statute. The legislators also resolved to repeal the International Crimes Act, the statute that

³⁶ See Mueller S 'Kenya and the International Criminal Court (ICC): Politics, the election and the law' 2014 8 *Journal of East African Studies* 25-42 (hereafter Mueller (2014)).

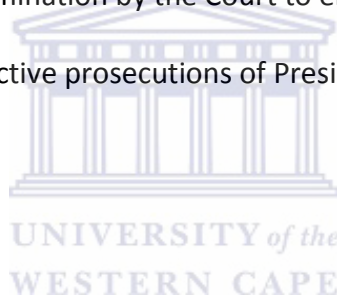
³⁷ See Opiyo D 'Kibaki, Raila should be on the ICC list, says Uhuru' *Daily Nation* 24 January 2013 available at <http://www.nation.co.ke/News/politic...z/-/index.html> (accessed 2 June 2014).

³⁸ See Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute ICC-01/09-02/11-382-Red 26 January 2012 (Kenyatta); Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute ICC-01/09-01/11-373 23 January 2012 (Ruto).

³⁹ See Motion to withdraw available at <http://www.parliament.go.ke/plone/national-assembly/business/order-paper/thursday-september-05-2013-at-2.30-p.m/view> (accessed 2 June 2014).

domesticates the Rome Statute.⁴⁰ Internationally, the AU voiced its determination to stage a mass withdrawal, evidenced by, *inter alia*, the application of several East African States, including Rwanda, Eritrea, Burundi, Tanzania and Uganda as *amici curiae* before the Appeals Chamber, in favour of Deputy President Ruto's excusal from attendance at trial on a full time basis.⁴¹

In summation, as elaborated in the subsequent chapters, the Kenyan cases at the ICC are clouded by numerous challenges, political or otherwise that threaten the viability of the Court as an international instrument of justice. Nonetheless, this political hostility has been partly matched by the unwavering determination by the Court to end impunity,⁴² albeit, several other challenges keep impeding the effective prosecutions of President Kenyatta and Deputy President Ruto.



⁴⁰ For more information on the motion to withdraw and proposed bill to repeal the International Crimes Act, see 'Parliament passes motion to withdraw Kenya from Rome Statute' available at <http://ntv.nation.co.ke/news2/topheadlines/parliament-passes-motion-to-withdraw-kenya-from-rome-statute/> (accessed 2 June 2014); See also Freehills H & Cannon A 'Kenya MPs approve motion to withdraw from the International Criminal Court,' 17 October 2013 available at <http://www.lexology.com/library/detail.aspx?q=b0192db0-c4e1-4315-8cf3-494785213739> (accessed 2 June 2014).

⁴¹ See Joint Amicus Curiae Observations of the United Republic of Tanzania, Republic of Rwanda, Republic of Burundi, State of Eritrea and Republic of Uganda on the Prosecution's appeal against the "Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial" ICC-01/09-01/11 17 September 2013.

⁴² This can be seen from the decisions and judgments issued by the Court upholding the rule of law regardless of looming political opposition i.e. the Appeals Chamber's reversal of the Trial Chamber's blanket excusal of Mr. Ruto from attending trial despite amici curiae applications from various African States in support of the Deputy President's full excusal from trial. The decision was welcomed by the Defence and the Government of Kenya as sensible, fair and just. See Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial" ICC-01/09-01/11-1066 25 October 2013.

CHAPTER TWO: IMMUNITY, COURT ATTENDANCE AND PRESENCE AT TRIAL

1. Immunity for Sitting Heads of State under Customary International Law and under the Rome Statute

Traditionally, the notion of State sovereignty was interpreted to mean supreme jurisdiction of nation-states in their territory.⁴³ Prior to the end of the 2nd World War (WWII), the territorial integrity of a State was deemed inviolable.⁴⁴ Certain officials and official conduct were insulated from the reach of international law, both in domestic and foreign courts.⁴⁵

Contemporary international criminal law, howbeit, dictates a disparate deviation from these traditional norms.⁴⁶ International crimes are deemed to affect the international community as a whole, which is why nation-states no longer have exclusive rights to decide on the immunity of their nationals who may be deemed violators of international law. Consequentially,



⁴³ See the Peace of Westphalia 24 October 1648, which emphasised States' legitimacy over territory.

⁴⁴ See the Charter of the United Nations (26 June 1945) Article 2(4) '[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity [...] of any state, [...]'.
⁴⁵ See, for example, *Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (Amnesty International and others intervening) (1998) 3 WLR 1456; *Regina v Bow Street Metropolitan Stipendiary Magistrate and others, ex Parte Pinochet Ugarte* (Amnesty International and others Intervening) (1999) 2 WLR 827 (hereafter 'ex parte Pinochet'). Pinochet's argument was that he was entitled to immunity from Prosecution as a former Head of State under Britain's State Immunity Act of 1978. The House of Lords, in the latter case, confirmed that Pinochet had no entitlement to state immunity. For a legal analysis of Re Pinochet, see, *inter alia*, Barker J.C., Warbrick C et al. 'The Future of Former Head of State Immunity after ex parte Pinochet' (1999) 48 INT'L & COMP. L. Q. 937 949; Bianchi A 'Immunity versus Human Rights: The Pinochet Case' (1999) 10 EJIL 237 277.

⁴⁶ Werle G *Principles of International Criminal Law* 2 ed (2009) para 649 (hereafter Werle (2009)). '[T]he principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court.' See *Prosecutor v. Charles Taylor* (Immunity from Jurisdiction) (31 May 2004) SCSL-03-01-I 62, 63, 65 (hereafter the 'Charles Taylor case').

international criminal conduct cannot be ascribed to the state, nor is the perpetrator immune from international scrutiny or sanctions.⁴⁷

This state of affairs was set in motion by the adoption of the Nuremberg Principles⁴⁸ by the United Nations, shortly after the end of WWII, which reinforced the concept of individual criminal responsibility, and the irrelevance of official capacity under international law.⁴⁹

Developing on these principles, and subsequent reinforcements,⁵⁰ it is now an established norm that individuals are held criminally responsible under international courts and tribunals for acts or omissions which constitute crimes under international law, irrespective of the official status of the perpetrator.⁵¹

This modern practice depicts a customary international law exception for prosecutions of international crimes committed by high-ranking Government or military officials before international courts and tribunals. For instance, the jurisprudence of the *ad hoc* international criminal tribunals, special courts and the ICC, support the emergence of this so-called norm.⁵²

⁴⁷ See Maogoto J 'Transforming Westphalian Sovereignty: Human Rights & International Justice as a Transitional Crucible' 2005 *Notre Dame Law Review* (hereafter Maogoto (2005)). On the responsibility of the state in international criminal law, see Werle (2009) paras 111, 112, 113.

⁴⁸ The Principles of International Law recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, adopted by the International Law Commission at its second session and submitted to the General Assembly as part of the Commission's report (1950) 2 *Yearbook of the International Law Commission* para 97 (hereafter 'Nuremberg Principles').

⁴⁹ Nuremberg Principles, Principle I, III.

⁵⁰ See, i.e., provisions of the Statutes of the *ad hoc* United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda, and the Rome Statute on the irrelevance of Head of State immunity.

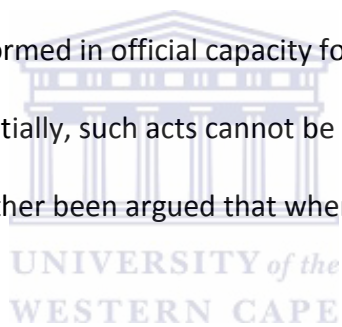
⁵¹ See Werle (2009) paras 112, and 657 referring to the case of *Prosecutor v Al Bashir* ICC (Pre-Trial Chamber) decision of 4 March 2009 paras 40 et seq.; '[t]he exclusion of immunity in customary international law will henceforth be significant primarily in regard to the possible trial of top representatives of non-state parties by the [ICC]'.

⁵² This position was affirmed by the International Court of Justice (ICJ) in the *Arrest Warrant of 11 April 2000 (Congo v Belgium)* (14 February 2002) International Legal Materials 536 (hereafter Arrest Warrant case). See Akande D 'International Law Immunities and the International Criminal Court' 98 (2004) *A. J. I. L.* 407 22, 23 (hereafter Akande (2004)) para 59 citing Arrest Warrant case para 61; '[T]he immunities enjoyed under international law... do not represent a bar to criminal prosecution in certain circumstances. ... [A]n incumbent or

The prosecution of Heads of States before international tribunals, special courts and the ICC is therefore a benchmark of the irrelevance of personal immunities in this level of prosecutions.⁵³

Accordingly, the statutes of the International Military Tribunal at Nuremberg⁵⁴, the International Criminal Tribunal for the former Yugoslavia⁵⁵, the International Criminal Tribunal for Rwanda⁵⁶ and the International Criminal Court⁵⁷ include provisions which clearly ascertain the irrelevance of immunities under the respective jurisdictions.

Proponents of this modern practice argue that under (functional) immunities *ratione materiae*⁵⁸, perpetrators of international crimes cannot shield themselves by claiming that their actions are as a result of acts performed in official capacity for the purpose of upholding immunity of State officials.⁵⁹ Essentially, such acts cannot be considered as being part of State or Governmental duties. It has further been argued that when it comes to the prosecution of



former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction'. The Special Court for Sierra Leone also affirmed this in the Charles Taylor Case; In *Re Pinochet*, the British House of Lords also affirmed this norm. See Akande (2004) para 65.

⁵³ See precedence set by the reasoning of the International Military Tribunal, in judgement of 1 October 1946, in *the Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany, Part 22* (1950) p 447. 'The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The [perpetrators] cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. [...] He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.'

⁵⁴ Akande (2004) para 65.

⁵⁵ Akande (2004) para 65; see also *Prosecutor v Milosevic* (Indictment) (22 May 1999) IT-99-37; see UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993 Article 7(2).

⁵⁶ Akande (2004) para 64; see United Nations Security Council, Statute of the International Criminal Tribunal for Rwanda (as amended 16 December 2009), 8 November 1994 Article 6(2).

⁵⁷ Akande (2004) para 65; see the Rome Statute Article 27.

⁵⁸ Functional immunity protects officials indefinitely for acts committed while in office, stretching beyond the duration of their tenure. See Werle (2009) para 647.

⁵⁹ See Werle (2009) paras 650, 652; see also Murungu *C Immunity of State Officials and Prosecution of International Crimes in Africa* (LLD thesis, University of Pretoria, 2011) (hereafter Murungu (2011)).

international crimes, the concept of *jus cogens* prevails over immunity, regardless of the fact that immunity is founded under customary international law.⁶⁰

Unlike functional immunities, (personal) immunities *ratione personae* shield select senior officials from both civil and criminal accountability, extending to international crimes such as war crimes or crimes against humanity 'before domestic courts'.⁶¹ The protection from prosecution under international law arose from the need to guarantee state sovereignty and maintain effective functioning of interstate relations.⁶² Accordingly, the maxim *par in parem non habet imperium*⁶³ is used antecedently to ensure that a given State does not sit in judgement over another.⁶⁴

2. Application to the Kenyan Situation

The Rome Statute, being a modern manifestation of international criminal law, is symbolic in embodying the irrelevance of official capacity in its application. Immunities, *ratione personae* or *ratione materiae*, as indicated earlier, have no place in the Statute. It is clearly stipulated in Article 27, that the Statute applies equally to all persons, without any distinction based on official capacity. Hence, in no case shall a Head of State or Government be exempted from criminal responsibility under the Statute, nor immunity be a bar to prosecution. The

⁶⁰ Werle (2009), Principles para 661 '[...] neither immunity under national law nor immunity under international law prevents prosecution of crimes under international law. [...] Prosecution by international courts is always possible [...]'; see also Murungu (2011).

⁶¹ See Werle (2009) para 648; Akande (2004) citing Arrest Warrant case paras 55, 58.

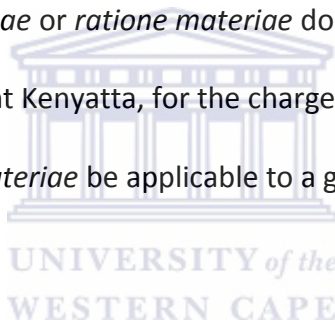
⁶² See Vienna Convention on Diplomatic Relations of 1961, 500 *UNTS* (1961) P 95 Article 39(2); Vienna Convention on Consular Relations of 1963, 596 *UNTS* (1963) p 261 Article 53(4).

⁶³ '[O]ne sovereign State is not subject to the jurisdiction of another State'. See Fox H 'The Law of State Immunity' 2 ed (2008) 57.

⁶⁴ For an extensive analysis of immunity in foreign States, see Whytock CA 'Foreign State Immunity and the Right to Court Access' (2013) 93 *Boston University Law Review* 2033, 2093.

constitution of Kenya also enshrines this very principle and denies presidential immunity for any crime the President might be prosecuted under any treaty, which Kenya is party to, and which prohibits such immunity.⁶⁵

President Kenyatta and Deputy President Ruto are charged with criminal responsibility as indirect co-perpetrators for the crimes against humanity of murder, deportation or forcible transfer of population and persecution.⁶⁶ In addition, Kenyatta is charged as an indirect co-perpetrator for the crime of rape and other inhumane acts.⁶⁷ As the rules of customary international law on personal immunities of Heads of State do not apply under the Rome Statute, immunities *ratione personae* or *ratione materiae* do not bar the exercise of jurisdiction by the ICC with respect to President Kenyatta, for the charges he is facing before the Court. Neither can immunities *ratione materiae* be applicable to a government official, in the case of Deputy President Ruto.



Both Kenyatta and Ruto can therefore, *de jure*, be held accountable before the ICC for the charges brought against them, just like any ordinary accused person, with no special rights and privileges attaching to their official capacities. Nonetheless, as can be seen from the conduct of the trials, their change of capacity from ordinary accused to President and Deputy President at trial has *de facto* given rise to practical challenges, some of which necessitate recognition of their official capacities 'as such'.

⁶⁵ Constitution of Kenya, 2010 Article 143(4).

⁶⁶ See the Rome Statute Articles 25(3)(a), 7(1)(a), 7(1)(d) and 7(1)(h).

⁶⁷ See the Rome Statute Articles 7(1)(g) and 7(1)(k).

As much as immunities do not bar the exercise of discretion by the Court, it is moot whether such immunities are, *de facto*, taking active part in the practicalities of ICC proceedings, in relation to the cases against President Kenyatta and Deputy President Ruto. For example, the Court has had to address numerous requests of excusal from court attendance from the defence, which requests arise from their ‘official statuses’ and, at the very least, are at variance with the Statute. As elaborated hereafter, the essence of the requests is the necessity of the accused to carry out their mandated public duties, which accordingly accord them, *prima facie*, ‘special rights and privileges’ customarily linked with immunities.

3. Requirement for Court Attendance and Presence at Trial

Under Article 63(1) of the Rome Statute, an accused person is *required* to be present during trial. Irrespective of the mandatory nature of this provision, before the commencement of the trial for Deputy President Ruto, and upon application by the defence for excusal from trial, the Trial Chamber ruled⁶⁸ that Ruto was excused from continuous physical attendance at trial, allowing him to only attend at key points. Although it observed that the general rule is one of continuous presence at trial, the Chamber, by 2:1 majority, noted that Ruto’s case warranted an exception to the general rule – the ‘exceptional circumstances’ arising from Ruto’s change of status from ordinary accused to Deputy Head of State, within the course of the ICC proceedings.⁶⁹

⁶⁸ Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial ICC-01/09-01/11-777 18 June 2013 (hereafter Excusal Decision).

⁶⁹ Excusal Decision.

The Trial Chamber's excusal decision in this case did not precisely encapsulate the Statute's definition of the 'exceptional circumstances' that will cause excusal of the accused from continuous attendance of trial. It reasoned that Article 27(1) of the Statute was not intended to limit the Chamber's discretion to grant 'special procedures' within the jurisdiction of the Court.⁷⁰ On the contrary, as argued by the Prosecution on appeal, the 'exceptional circumstances' test⁷¹ developed by the majority in its ruling, 'extends beyond the solitary exception' under Article 63(2).⁷²

Further, from the Prosecution's point of view, the Trial Chamber's decision amounted to a 'blanket excusal' since it was made *in abstracto* for the entirety of the proceedings, save for limited key sessions. Also, the decision was contentious, regarding the scope of the requirement for the accused to be present during trial.⁷³ The Prosecution questioned the Trial Chamber's determination that it was entitled to exercise discretion under Article 64(6)(f)⁷⁴ of the Statute, to allow for excusal of the accused from *continuous* presence at trial.⁷⁵ According to the Prosecution, the extent of the discretionary powers of the Trial Chamber to develop a

⁷⁰ See Excusal Decision para 98, 99.

⁷¹ The test on 'exceptional circumstances' developed by the Trial Chamber was intended to make an excusal reasonable. It included instances where the accused person has to carry out 'important functions of an extraordinary dimension'. See Excusal Decision.

⁷² Article 63(2), *inter alia*, gives instances where the accused may be removed from Court during trial, which measures are to be taken only in exceptional circumstances. See Prosecution appeal against the "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial" ICC-01/09-01/11-831 29 July 2013 (hereafter Prosecution's Appeal on Excusal).

⁷³ See Prosecution's Appeal on Excusal.

⁷⁴ 'In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary ... [r]ule on any other relevant matters.'

⁷⁵ Prosecution's Appeal on Excusal; see also Excusal Decision.

test for an excusal from attending *most* of the trial was contentious, in relation to the applicable law.⁷⁶

The Prosecution's contention is that the decision 'violates the principle of equal treatment under the law', in accordance with to Article 27(1) of the Statute on irrelevance of official capacity.⁷⁷ Moreover, the Trial Chamber's test posed a 'floodgates' problem, which was potentially an invitation for requests for excusal from accused persons who do not wish to attend trial.

From the above discontent with the Trial Chamber's excusal decision, it was a relief that, after issuing a suspensive order compelling Ruto to attend the trials continuously,⁷⁸ the Appeals Chamber reversed the Trial Chamber's decision.⁷⁹ The Appeals Chamber's judgment thereafter shunned further defence pleas for Ruto to be continuously excused from court attendance during trial, save for a partial adjournment for him to attend an interdenominational service.⁸⁰ Consequently however, the Trial Chamber has been lambasted for entertaining such requests at all, for it shows willingness to accommodate political power.⁸¹

The judgment by the Appeals Chamber concurred with the Prosecution that physical presence of the accused at trial is the general rule.⁸² However, contrary to the Prosecution's argument, the Appeals Chamber stated that the discretion was upon the Trial Chamber to make limited

⁷⁶ Prosecution's Appeal on Excusal.

⁷⁷ Prosecution's Appeal on Excusal.

⁷⁸ See Decision on the request for suspensive effect ICC-01/09-01/11-862 20 August 2013.

⁷⁹ Judgment on the appeal of the Prosecutor against the decision of Trial chamber V (a) of 18 June 2013 entitled "Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial" ICC-01/09-01/11-1066 25 October 2013 (hereafter Appeals Chamber Judgment on Excusal).

⁸⁰ Status Conference ICC-01/09-01/11-T-38-Red-ENG WT 27 September 2013.

⁸¹ See i.e. Mueller (2014).

⁸² See Appeals Chamber Judgment on Excusal; For Prosecution's argument, see Prosecution's Appeal on Excusal.

and strictly necessary exceptions based on case by case basis.⁸³ In this event, the Appeals Chamber's approach challenged a stricter interpretation, as opposed to a plain text reading of the Rome Statute. Endorsing such discretion gives room to a 'plethora of other potential political pleas by the defendants',⁸⁴ which is, to a large extent a true reflection of the practical challenges being faced by the Court in the proceedings relating to Kenyatta and Ruto.

By the time the Appeals Chamber issued its ruling, Kenyatta's defence had similarly filed requests for conditional excusal, which were pending before Trial Chamber V(B).⁸⁵ Kenyatta's major grounds on his plea to be excused from attending his own trial, albeit considerably late, centred upon his coming into power as Head of State ensuing the 2013 presidential elections.⁸⁶

On Kenyatta's request for conditional excusal, the Prosecution's argument was that the defence application lacked a basis in law, akin to his earlier requests to have a video-link trial.⁸⁷ The Prosecution maintained that there is no lacuna in Article 63(1) of the Rome Statute which requires the 'physical presence' of the accused on trial. Accordingly, the Rome Statute ought to be interpreted precisely in a plain text reading of the requirement as a 'fundamental requirement' or a 'condition' rather than a mere 'option'.⁸⁸

⁸³ Appeals Chamber Judgment on Excusal.

⁸⁴ See Mueller (2014).

⁸⁵ Defence Request for Conditional Excusal from Continuous Presence at Trial ICC 01/09-02/11-809 23 September 2013 (hereafter Request for Conditional Excusal).

⁸⁶ Request for Conditional Excusal.

⁸⁷ See Defence Request for Mr Kenyatta to be Present During Trial via Video Link ICC 01/09-02/11-667 28 February 2013; Prosecution's Response to the Defence Request for Conditional Excusal from Continuous Presence at Trial ICC-01/09-02/11-818 01 October 2013.

⁸⁸ See Prosecution's Response to the Defence Request for Conditional Excusal from Continuous Presence at Trial ICC-01/09-02/11-818 01 October 2013.

Similar to Ruto's application, in the the Kenyatta case, Trial Chamber V(B), in a 2:1 majority partly yielded to the defence request for conditional excusal, save for key sessions – a decision which was later overturned upon the Prosecution's application for reconsideration.⁸⁹ This manifest judicial discord and the incongruous rulings by Trial Chambers V(A) and V(B) aptly necessitated the need for a common ground on the question of excusal from trial.

4. Amendments to Rule 134 of the Rules of Procedure and Evidence

4.1. The Adoption of Rules 134*bis*, *ter* and *quater*

Being cognisant of the overwhelming excusal requests from Kenyatta and Ruto, and germane to the yielding dissonance amongst the ICC judges on the interpretation of Article 63 of the Statute, the Assembly of States Parties (ASP) was inclined to provide clarity on the Article. It adopted Resolution ICC-ASP/12/Res.7 on Amendments to the Rules of Procedure and Evidence on 27 November 2013 at the 12th plenary meeting, which accordingly gave room for excusal, based on specific mandatory regulations and representation by counsel.⁹⁰

Of importance to this research is the amendment of Rule 134*bis*, *ter* and *quater*. Rule 134*bis* allows for the presence of the accused through video link technology for part(s) of the trial.⁹¹

Rule 134*ter* gives the Trial Chamber discretion to allow for excusal under exceptional

⁸⁹ Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial ICC-01/09-02/11-830 18 October 2013; Partially Dissenting Opinion of Judge Ozaki ICC-01/09-02/11-830-Anx2 18 October 2013; Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial ICC-01/09-02/11-863 26 November 2013.

⁹⁰ See ICC-ASP/12/Res.7 available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res7-ENG.pdf (accessed 24 June 2014).

⁹¹ ICC-ASP/12/Res.7

circumstances whereas Rule 134*quater* allows for excusal of the accused from trial where extraordinary public duties demand the presence of the accused.⁹²

4.2. Proceedings based on Amended Rule 134

The passage of the amendments to the Rules of Procedure by the States Parties set a new pace for the defence to file fresh requests for excusal. Subsequently after the amendments, Ruto's defence filed a second application for excusal from continuous physical presence at trial, based on his 'extraordinary obligations at the highest national level'.⁹³ The request sought for Ruto to be excused from trial, and accordingly be represented by his counsel in his absence pursuant to Article 63(1) of the ICC Statute, and in accordance with the amended Rule 134*quater*.⁹⁴ The defence additionally requested that Ruto follow the proceedings via video technology where his physical presence is mandatory, and he cannot make it to The Hague.

The Prosecution opposed the defence application based on, *inter alia*, concerns about inconsistencies in the interpretation of Rule 134*quater* with the Rome Statute.⁹⁵ It supported its assertion by citing Article 51(5), which provides for supremacy of the Rome Statute in the event of a conflict with the Rules of Procedure and Evidence, any amendments or provisional rule. It

⁹² ICC-ASP/12/Res.7; Rule 134*quater* is imperative in assessing the proceedings relating to Kenyatta and Ruto. Part 1 of the Rule reads: '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 excused and to be represented by counsel only; the request must specify that the accused explicitly waives the right to be present at the trial'.

⁹³ 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 ICC-01/09-01/11-1124 16 December 2013 (hereafter Ruto Defence Request under Rule 134*quater*).

⁹⁴ Ruto Defence Request under Rule 134*quater*.

⁹⁵ Prosecution Response to Defence Request pursuant to Article 63(1) and Rule 134*quater* for excusal for attendance at trial for William Samoei Ruto ICC-01/09-01/11-1135 8 January 2014 (hereafter Prosecution Response to Ruto Defence Request under Rule 134*quater*).

argued that the defence request contradicted the plain text of Rule 134quater, stating that the defence wanted a blanket excusal, which was not envisaged by the amended rule.⁹⁶

The Prosecution further contended that, the envisaged interpretation of Rule 134quater by the defence would lead to inconsistencies as it violates some provisions of the Rome Statute and in fact, that such reading would be *ultra vires* the Rome Statute.⁹⁷ The Prosecution supported its argument by citing Article 63(1), noting the Appeal's Chamber's ruling in its earlier judgment, which overturned the Trial Chamber's excusal decision.⁹⁸

The Prosecution also raised concerns about violation of the 'equal treatment principle' under Article 21(3). Its assertion was that the defence's reading of Rule 134quater in the request is incompatible with the Statute, since it accords certain persons privilege based on their 'status' as high public officials.⁹⁹ Developing on this assertion, the Prosecution alluded to Article 27(1), connoting the irrelevance of official capacity of the accused in the application of the Rome Statute. Accordingly, a reading of Rule 134quater based on the defence's interpretation would 'create a regime under which two accused seeking the same relief in the same procedural posture would be treated differently, based only on official capacity.'¹⁰⁰

⁹⁶ Prosecution Response to Ruto Defence Request under Rule 134quater.

⁹⁷ Prosecution Response to Ruto Defence Request under Rule 134quater.

⁹⁸ Prosecution Response to Ruto Defence Request under Rule 134quater referring to Appeals Chamber Judgment on Excusal. Article 63(1) of the Rome Statute requires the presence of the accused during trial.

⁹⁹ Prosecution Response to Ruto Defence Request under Rule 134quater. Article 21(3) stipulates that the Statute and the Rules should be applied consistently with internationally recognized human rights 'without any adverse distinction' based on, *inter alia*, the 'status' of an individual.

¹⁰⁰ Prosecution Response to Ruto Defence Request under Rule 134quater.

4.3. The Trial Chamber's Analysis of Amended Rule 134

On 15 January 2014, the Trial Chamber called for a status conference in which it issued an oral ruling conditionally excusing Deputy President Ruto from continuous attendance at trial.¹⁰¹ This was followed by reasons stating the conditions upon which the excusal was based, and precisely outlining the instances in which the presence of the accused at trial is mandatory.¹⁰²

In its reasoning, the Chamber rebutted the Prosecution's assertions of inconsistency of Rule 134*quater* with the Rome Statute, contending that the Prosecution was referring to the defence's interpretation of the rule, rather than the interpretation of the rule itself.¹⁰³ The Chamber duly stressed on the significance of distinguishing between the defence's interpretation and interpretation of the rule itself, based on Article 51(5) of the Statute.¹⁰⁴

On Article 63(1) and the judgment of the Appeals Chamber,¹⁰⁵ the Trial Chamber asserted that some of the limitations set by the Appeals Chamber on the discretion of granting excusal are reflected in the new rules, notably Rule 134*ter*. It however noted and acknowledged the absence of some of the Appeals Chamber's requirements on Rule 134*quater*, stating that the omission by the States Parties was deliberate, so as to give further clarity and consistence to Article 63(1) of the Statute.¹⁰⁶

¹⁰¹ See Order scheduling a status conference ICC-01/09-01/11-1141 10 January 2014.

¹⁰² Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater* ICC-01/09-01/11-1186 18 February 2014 (hereafter Reasons for the Decision on Ruto Defence Request under Rule 134*quater*).

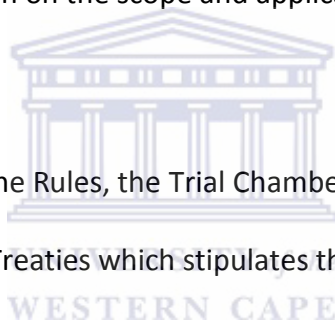
¹⁰³ Reasons for the Decision on Ruto Defence Request under Rule 134*quater*.

¹⁰⁴ 'In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail'.

¹⁰⁵ Appeals Chamber Judgment on Excusal referred to by the Prosecution in its response. See Prosecution Response to Ruto Defence Request under Rule 134*quater*.

¹⁰⁶ Reasons for the Decision on Ruto Defence Request under Rule 134*quater*.

The Chamber further acknowledged the absence in the Statute's *travaux préparatoires*, of instances where the question of excusal from attending trial would arise in circumstances where the accused is, in principle, present for the trial, but had waived the right to be present. It noted that the Appeals Chamber's judgment aimed to embrace some of the instances that were not foreseeable or covered in the drafting up of the Statute, and that, to complement this, the ASP codified the Appeals Chamber's interpretation into Rule 134ter, and adopted Rule 134quater, to be applied in specific situations not contemplated by the *travaux préparatoires*.¹⁰⁷ The Trial Chamber duly asserted that the incorporation of these rules by the States Parties clarified their position on the scope and application of Article 63(1) of the Rome Statute.¹⁰⁸



With respect to interpretation of the Rules, the Trial Chamber invoked Article 31(3) (a) of the Vienna Convention on the Law of Treaties which stipulates that in the interpretation of treaties, in addition to the context, one must take into consideration 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions'. It maintained that since Rules 134ter and quater were adopted by the States Parties as part of a Resolution, the Rules can be regarded as a 'subsequent agreement' in relation to the scope and application of Article 63(1) of the Rome Statute.¹⁰⁹

The Trial Chamber, referring to the Appeals Chamber's judgment on excusal, emphasised the importance of the Rules as 'an instrument for the application of the Statute'. It stressed that

¹⁰⁷ Reasons for the Decision on Ruto Defence Request under Rule 134quater; For the appeals chamber interpretation see Appeals Chamber Judgment on Excusal referred to by the Prosecution in its response. See Prosecution Response to Ruto Defence Request under Rule 134quater.

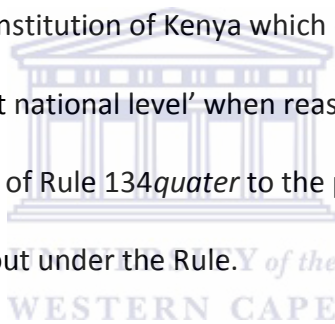
¹⁰⁸ Reasons for the Decision on Ruto Defence Request under Rule 134quater.

¹⁰⁹ Reasons for the Decision on Ruto Defence Request under Rule 134quater.

the adoption of the amendments, more so Rule 134*quater* was meant to provide ‘greater clarity’ to Article 63, explicitly to cover specific persons whose mandate fall upon the fulfilment of ‘extraordinary public duties at the highest national level’.¹¹⁰

With respect to assertions on the inconsistency of Rule 134*quater* with other provisions of the Statute, the Chamber pointed out that the rule only focusses on the functions which a person is mandated to do, rather than the person’s characteristics or ‘status’. It reiterated that Rule 134*quater* brings out the distinction between accused persons who have a mandate to ‘fulfil extraordinary public duties at the highest national level’ and ordinary accused persons.¹¹¹

Noting the requirements of the Constitution of Kenya which call upon the accused to fulfil ‘extraordinary duties at the highest national level’ when reasonably expected, the Chamber concluded that, for the application of Rule 134*quater* to the present case, Deputy President Ruto meets the requirements set out under the Rule.¹¹²



4.4. Status of the Proceedings with Regard to the Amended Rules

On 24 February 2014, the Prosecution filed a request pursuant to Article 82(1)(d) for leave to appeal the Trial Chamber’s decision granting Deputy President Ruto excusal from trial under Rule 134*quater*.¹¹² It asked for an interlocutory appeal premised on whether the Trial Chamber’s interpretation of Rule 134*quater* was consistent with Articles 63(1), 21(3) and 27(1) of the Statute. The Prosecution’s further concern was that, if the Chamber’s interpretation of

¹¹⁰ Reasons for the Decision on Ruto Defence Request under Rule 134*quater*; This was also laid down by the Appeals Chamber in its judgment on excusal, See Appeals Chamber Judgment on Excusal referred to by the Prosecution in its response.

¹¹¹ Reasons for the Decision on Ruto Defence Request under Rule 134*quater*.

¹¹² Prosecution’s application for leave to appeal the decision on excusal from presence at trial under Rule 134*quater* ICC-01/09-01/11-1189 24 February 2014 (hereafter ‘Prosecution’s application for leave to appeal’).

Rule 134*quater* was correct, whether the Rule, on its own terms, permits the Chamber to conditionally excuse Deputy President Ruto subject to the conditions imposed in the Trial Chamber's ruling.¹¹³

The Trial Chamber, by majority, rejected the Prosecution's request for leave to appeal, contending that, pursuant to Article 82(1)(d), there is no reason to resolve the issues raised by the Prosecution 'at this stage'.¹¹⁴ The Chamber's decision seems to have halted the litigation on the applicability of Article 63(1) and the amended Rule 134*quater* on the trial of Deputy President Ruto. Since Kenyatta's trial has been once again vacated, the issue of the amended Rules seems to have been put to rest.¹¹⁵

5. Analysis

In assessing the legality of the ASP's Resolution adopting amendments to Rule 134, and how the Court has dealt with these amendments, the provisions of the Rome Statute which are most likely to be conflicted by the amended Rules must be recalled. Article 51(4) explicitly requires the Rules of Procedure and Evidence, or any amendments thereto to be consistent with the Statute. Under Article 51(5), in case of any conflict between the Rules of Procedure or amendments thereof, and the Rome Statute, the Statute takes supremacy.

¹¹³ Prosecution's application for leave to appeal; see Reasons for the Decision on Ruto Defence Request under Rule 134*quater*.

¹¹⁴ Decision on 'Prosecution's application for leave to appeal the decision on excusal from presence at trial under Rule 134*quater*' ICC-01/09-01/11-1246 2 April 2014; see also Dissenting Opinion of Judge Olga Herrera Carbuccion ICC-01/09-01/11-1246Anx 2 April 2014.

¹¹⁵ See Order vacating trial date of 7 October 2014.

The irrelevance of immunity under Article 27(2) is a vital aspect, but of particular interest is the equality of application of the Statute with no distinction based on ‘official capacity’ under Article 27(1), which stipulates that;

‘[t]his Statute shall apply equally without any distinction based on official capacity. In particular, official capacity as a Head of State [...], shall in no case exempt a person from criminal responsibility under this Statute [...].’

Nonetheless, changes to Rule 134, in practice, give rise to a situation where an accused is ‘privileged’ due to his ‘status’, which deviates from the principle of equality,¹¹⁶ as further espoused in Article 21(3) of the Statute.

Of course, the Trial Chamber has discretion, under Article 64(6)(f), to rule on any relevant matter arising prior to, or in the course of trial. Rule 134~~ter~~ builds on this provision, but it is imperative to note that the discretion is qualified to ‘exceptional circumstances’, and only on a case-by-case basis. The Trial Chamber’s exercise of discretion can be seen from its determination of the excusal of Deputy President Ruto pursuant to Rule 134~~quater~~. By exercising discretion, the Chamber listed the ‘anticipated’ functions of the office of the Deputy President as espoused in the Constitution of Kenya, rather than focussing on regular extraordinary duties peculiar to Ruto.¹¹⁷ Its conclusion that Ruto meets the requirements set out under Rule 134~~quater~~, by looking broadly at the anticipated functions the Deputy President

¹¹⁶ See Hansen T ‘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 (July 2013) 22 *Cardozo Journal of International and Comparative Law*.

¹¹⁷ See Reasons for the Decision on Ruto Defence Request under Rule 134~~quater~~.

ought to fulfil under the Constitution, rather than on a case-by-case basis, seems farfetched from what can ordinarily be understood as extraordinary or 'exceptional'.¹¹⁸

Personal attendance at trial is the general rule under Article 63(1) of the Statute. An accused person is *required* to be physically present continuously during trial. Changes to Rule 134 have however created exceptions to this general rule, which were neither envisaged under Article 63(2) of the Statute,¹¹⁹ nor by the Appeals Chamber, making it possible for 'qualified' trials to be conducted in the absence of the accused.

Before the adoption of the amended Rule 134, the Appeals Chamber had already given its interpretation on the issue of excusal.¹²⁰ The new Rules, to some extent, reflect the interpretation of the Appeals Chamber in its judgment, albeit, some notable parts of the limitations given in the judgment are left out.¹²¹ For instance, Rule 134*ter* can be said to be an import of the intentions of the Appeals Chamber, whereas Rule 134*quater* is contradictory, in as much as it leaves out some crucial parts of the Appeals Chamber's judgment.

The Trial Chamber's assertion that this was done deliberately to give further clarity and consistence to Article 63(1) of the Statute is implausible.¹²² By omitting some of the crucial parts of the Appeals Chamber's judgment, the Rule clearly contradicts the precedence of the

¹¹⁸ Keeping in mind Article 27(1) of the Statute, the Trial Chamber seems to have limited the scope of this provision to the 'removal of immunity' based on official capacity. In essence, the *whole* Statute applies equally without differentiation, including other matters arising out of trial. See Reasons for the Decision on Ruto Defence Request under Rule 134*quater*; see also Article 63(1) of the Rome Statute and Rule 134*quater* of the RPE.

¹¹⁹ Under Article 63(2), the exceptional circumstances which may lead to the progressing of trial in the absence of the accused are limited and only temporal.

¹²⁰ See Appeals Chamber Judgment on Excusal.

¹²¹ The omitted requirements are: i. [T]he absence must not become the rule; ii. [T]he absence must be limited to that which is strictly necessary; iii. [T]he decision as to whether the accused may be excused from attending part of [the] trial must be taken on a case-by-case basis.

¹²² See Reasons for the Decision on Ruto Defence Request under Rule 134*quater*.

Court as laid down by the Appeals Chamber. Further, recalling the provisions of Article 51(5), it is debatable whether the new Rule can still override the Appeals Chamber's interpretation.

It is logical to presume that the intention of the States Parties in amending Rule 134 was that the new rules will be consistent with the Statute. Nevertheless, since there is a clear deviation in Rule 134*quater* from the Appeals Chamber's judgment – which is an interpretation of the underlying provisions of the Rome Statute – and as such, the new rules cannot be reconciled with that interpretation, then the presumption is revoked. On account of that, it is contended that Rule 134*quater* is incompatible with the provisions of Article 63(1) of the Statute.

Article 63(2) gives instances where an accused can be excused from an ongoing trial, in which case the Trial Chamber is authorised to make provision for the accused to observe trial from outside the courtroom through the use of communications technology. Notwithstanding that, the defence has overstretched this provision by requesting Kenyatta and Ruto to be excused from physically attending trial, and instead 'be present' through the use of video-link, *ultra vires* Article 63(2).¹²³ This engenders the question whether 'presence at trial' via video link satisfies the requirement of presence under Article 63(1) of the Statute.

This question was seemingly answered by the States Parties through the adoption of Rule 134*bis* which, as seen earlier, allows for the accused to be 'present' via video link technology for part(s) of the trial. A plain reading of Rule 134*bis*, per contra, is irreconcilable with Article

¹²³ See i.e. Defence Request for Mr Kenyatta to be Present During Trial via Video Link ICC-01/09-02/11-667 28 February 2013; Defence Request Pursuant to Article 63(1) of the Rome Statute ICC-01/09-01/11-685 17 April 2013; Defence Request for Conditional Excusal from Continuous Presence at Trial ICC-01/09-02/11-809 23 September 2013. The defence for Ruto even alludes to Article 63(2) in support of the request for trial via video link. See Joint Defence Submissions on Legal Basis for the Accused's Presence at Trial via Video Link ICC-01/09-01/11-629 28 February 2013.

63(1) of the Statute which requires the *physical* presence of the accused during trial. It is hence unfathomable why the States Parties could adopt such a rule, which is *prima facie* inconsistent with the provisions of the Statute. Deferentially, the Trial Chamber's explanation that the States Parties' intention was to capture situations not contemplated by the *travaux préparatoires* does not justify the inconsistencies of the rules with the underlying provisions of the Statute.¹²⁴

Lastly, bearing in mind Article 51(5), in practice, it is yet to be seen how the Trial Chamber will interpret Rule 134bis in conformity with Article 63 of the Rome Statute. For instance, if the accused continuously disrupts the trial, Article 63(2) provides for the use of communications technology as a remedy and alternative to the accused person's physical presence in the courtroom. Given that 'presence' via video link is already an alternative to having the physical presence of the accused in the courtroom, it is speculative how the Chamber can handle instances analogous to those envisaged in Article 63(2) under exceptional circumstances, where the accused is 'present' via video link.

6. Conclusion

It has been argued that the new amendments seek to remake the court akin to the inadequate judicial systems that it seeks to complement.¹²⁵ By amending Rule 134, the ASP is said to have been politically motivated, which is a blow to the integrity of the Court, its philosophical

¹²⁴ See Reasons for the Decision on Ruto Defence Request under Rule 134quater.

¹²⁵ Njonjo Mue, at the 12th Assembly of State Parties of the International Criminal Court (20-28 November 2013) The Hague, The Netherlands available at <http://kptj.africog.org/njonjo-mues-remarks-at-the-asp/> (accessed 20 July 2014).

foundations and the victims, who ought to be the key interest group of the Court.¹²⁶

Consequently, this indicates the Court's volatility, in that, it is capable of swaying easily to the 'whims of the mighty'.¹²⁷ Civil rights activists echo these sentiments by asserting that the States Parties disregarded the rule of law, replacing it with the rule of politics.¹²⁸

In this case, as much as the States Parties claim the amendments to have been a 'compromise', the external political pressure is undeniable.¹²⁹ Essentially, the amendments were made at a time that the AU had mounted pressure on possible mass withdrawal of African States from the Rome Statute. Consequently, the amendments by the ASP depict a concession on the embedment of politics and diplomacy in international criminal law, as opposed to a genuine legal concern.

The President of the ASP, Ambassador Tiina Intelmann, however, digresses. Contrary to the concerns raised above, she believes that the so-called compromise by the States Parties will not weaken the integrity of the court.¹³⁰ She argues that the amendments had to be done in appreciation of the new situations which have arisen and which have to be considered as the

¹²⁶ See Musau N 'Mixed Fortunes for Kenya at ICC Meeting' *The Star* 30 November 2013 available at <http://www.the-star.co.ke/news/article-145571/mixed-fortunes-kenya-icc-meeting> (accessed 14 July 2014) (hereafter Musau (2013)).

¹²⁷ See Musau (2013).

¹²⁸ Musau (2013), quoting George Morara, Vice Chair of the Kenya National Commission for Human Rights; 'by succumbing to Kenya's diplomatic pressure, states parties are setting themselves on a collision course with the court, "especially where the adopted amendments to Rule 134 are expected to bring the court under the ambit of political considerations." [...] the ASP has thrown the rule of law out of the window and replaced it with the rule of politics'.

¹²⁹ For political pressure, see i.e., Extraordinary Session of the Assembly of the African Union 12 October 2013 Addis Ababa, Ethiopia available at <http://summits.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20 E 0.pdf> accessed 26 July 2014.

¹³⁰ Musau (2013), quoting Ambassador Tiina Intelmann.

court grows, and hopes that they will not negatively affect the victims whose interests stand at the heart of the Court.¹³¹

In light of this, and as much as one might endorse some of the criticisms directed against the ‘un-procedural’ adoption of these rules due to political pressure, one must also take into consideration other circumstances which may have led to the amendment of the Rule 134. The Rome Statute, in its adoption of Article 63(1) which requires the continuous presence of the accused person at trial clearly did not envision a situation whereby an incumbent President and his Deputy have to simultaneously face trial before the Court. To require an incumbent Head of State and his deputy to simultaneously continuously attend trial under Article 63(1), whereas domestically, their mandate obligates their physical presence in their respective State Party would not only be a blow to the Court’s integrity, but also to State sovereignty.

In practice therefore, it would be quite an overstretch to put both the President and his Deputy simultaneously on trial. Besides the expectations of the Court to enforce the provisions of the Rome Statute by requiring the presence of the accused during trial, the obligations appurtenant to Kenyatta and Ruto, as top leaders of Kenya, being a democratic State, cannot be ignored. This unforeseeable situation is therefore seen to have necessitated the States Parties’ ‘compromise’ in coming up with Rule 134*bis*, *ter* and *quater*.

So far, however, the interpretation of the amended rules depicts some form of ‘privilege’ to the top leaders, which is ordinarily not available to accused persons. Consequently, although there is no immunity under the Rome Statute based on official capacity, it is debatable whether,

¹³¹ Musau (2013), quoting Ambassador Tiina Intelmann.

through the amended Rule 134, the ‘privileges’ that can now be enjoyed by the top leaders customarily associate with immunities. Ultimately, the deliberations of the Court reflect highly on its integrity and independence from political interference. The Trial Chambers are therefore, in such high-profile cases, constricted to cautiously construe the amended Rules.



CHAPTER THREE: WITNESS TESTIMONY AND DOCUMENTARY EVIDENCE

1. Challenges with Witness Testimonies

1.1. Witness Withdrawals in the Cases against Kenyatta and Ruto

The Prosecution describes the circumstances surrounding the case against Ruto as ‘exceptional and precarious’.¹³² Although not explicitly referred to in this particular scenario, the same seemingly applies to the case against Kenyatta. In its confidential application to Trial Chamber V(A) to add new witnesses, irrespective of the expiry of the deadline for disclosure of witnesses’ identity, the Prosecution contended that there is an atmosphere of intimidation in Kenya, which has had a ‘chilling effect on its current witnesses, as well as anyone intending on cooperating with the Court’.¹³³ It further disclosed that two of its ‘most critical’ witnesses were unwilling to testify, attributing their reluctance to security concerns.¹³⁴

Judging from the Prosecution’s filings, witness testimony has turned out to be acutely unreliable. Numerous witnesses have recanted their testimonies, inclusive of key witnesses, citing, *inter alia*, security concerns and unwillingness or fear to testify against the President or the Deputy President. The Prosecution’s notification to Trial Chamber V(B) of the withdrawal of three witnesses from its list of witnesses of July 2013, for example, indicates that some

¹³² See the Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date ICC-01/09-01/11-762 3 June 2013 referring to a confidential Prosecution application.

¹³³ Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date ICC-01/09-01/11-762 3 June 2013 referring to a confidential Prosecution application.

¹³⁴ Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date ICC-01/09-01/11-762 3 June 2013 referring to a confidential Prosecution application.

witnesses' reluctance to cooperate with the Court relates to security concerns.¹³⁵ These withdrawals are what necessitated the Prosecution to otherwise seek the Trial Chamber's authorisation to add witnesses to its list of witnesses, who were not contemplated to testify at trial.¹³⁶

Additionally, on 19 December 2013, the Prosecution filed a notification of removal of a witness from its list of witnesses, requesting Trial Chamber V(B) to yet again adjourn the provisional trial opening date for Kenyatta.¹³⁷ The Prosecution disclosed that the witnesses it intended to remove from its list of witnesses admitted having provided false evidence regarding the crucial part of its case against Kenyatta. In the interim, another witness had autonomously demonstrated a lack of willingness to testify at the same trial.¹³⁸

These instances crippled the Prosecution's evidence, resulting in its request for further adjournment in the case against Kenyatta, to enable it to undertake 'additional investigative steps', which will determine if it has an arguable case.¹³⁹ Although the Prosecution admitted to the case having posed 'significant investigative challenges', relying on Article 54(1)¹⁴⁰, it remained optimistic that if the proposed investigative steps were pursued, this will bring

¹³⁵ See Public redacted version of the 16 July 2013 Prosecution notification of withdrawal of witnesses ICC-01/09-02/11-773-Red 18 July 2013.

¹³⁶ Public redacted version of the Prosecution's request to add two witnesses to its witness list ICC-01/09-02/11-805-Red2 17 September 2013; see also Decision on Prosecution request to add P-548 and P-66 to its witness list ICC-01/09-02/11-832 23 October 2013.

¹³⁷ Prosecution notification of witness withdrawal and request for adjournment.

¹³⁸ Prosecution notification of witness withdrawal and request for adjournment.

¹³⁹ Prosecution notification of witness withdrawal and request for adjournment.

¹⁴⁰ Article 54(1)(a) and (b) empowers the prosecutor, in order to establish truth, to extend the investigations and to take appropriate measures in ensuring effective investigation and prosecution of cases before the Court.

accountability to the perpetrators of the post-election violence, and enable the victims to achieve justice.¹⁴¹

1.2. Does the ICC have Power to Compel Witness Testimony?

Following the withdrawal of numerous witnesses from testifying, inclusive of key witnesses, the Prosecution made a request to Trial Chamber V(A) to summon seven witnesses who had recanted their testimony and were no longer cooperating.¹⁴² In supplementary requests, the Prosecution added two witnesses to the relief it earlier sought for witness summonses, amounting to nine witnesses.¹⁴³ Since the witnesses' evidence is paramount to the Prosecution's case, and it had exhausted all possible avenues of legitimate persuasion to secure their cooperation in vain, the Prosecution urged the Trial Chamber to request Kenya's assistance in compelling the witnesses' testimony.¹⁴⁴

The Prosecution's request was granted on 30 April 2014, regardless of the lack of express provisions in the Rome Statute on the issue of compellability of witnesses who are not within the reach of the Court.¹⁴⁵ The Trial Chamber unanimously adjudicated that it had the power to compel witness testimony, and obligated the witnesses requested by the Prosecution, to testify

¹⁴¹ Prosecution notification of witness withdrawal and request for adjournment; see in comparison, Prosecution notification of withdrawal of charges against Muthaura.

¹⁴² Prosecution's request under art 64(6)(b) and art 93 to summon witnesses ICC-01/09-01/11-1120-Red2 2 December 2013 (hereafter Prosecution's request to summon witnesses)

¹⁴³ See Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation ICC-01/09-01/11-1274-Corr2 30 April 2014 (hereafter Decision compelling witness testimony); Decision on Prosecutor's Second Supplementary Request to Summon a Witness ICC-01/09-01/11-1377-Red 19 June 2014.

¹⁴⁴ Prosecution's request to summon witnesses.

¹⁴⁵ See Decision compelling witness testimony.

via video link at a location in Kenya.¹⁴⁶ This decision was grounded upon Article 64(6)(b) of the Statute, which empowers the Court to *require* the attendance and testimony of witnesses, if necessary, through the assistance of States Parties.

Significantly, the Trial Chamber, by majority, also requested the Government of Kenya's assistance in compelling attendance of the witnesses, by all means applicable under the laws of Kenya. The majority's opinion was dissented by one judge on the finding that the Government of Kenya was legally obligated to enforce the said summonses, pursuant to Article 93(1)(b) of the Statute, (which enjoins States Parties to comply with the requests of the Court for the taking of evidence, including witness testimonies), and Article 93(1)(l) (which encompasses any other assistance as may be required by the Court in relation to facilitating investigations and prosecutions).¹⁴⁷

As anticipated, the defence impugned the Trial Chamber's decision in its entirety, and consequently applied for leave to appeal.¹⁴⁸ The Trial Chamber, by 2:1 majority, allowed the defence to appeal on whether the Court has power to compel witness testimony, and whether the Government of Kenya, as a State Party to the Rome Statute is obligated to cooperate with the Court in serving summonses compelling the testimony of witnesses.¹⁴⁹ Significantly, on 9

¹⁴⁶ See Decision compelling witness testimony.

¹⁴⁷ See Dissenting Opinion of Judge Herrera Carbuca on the 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation' ICC-01/09-01/11-1274-Anx 29 April 2014.

¹⁴⁸ See Defence application for leave to appeal the 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation' ICC-01/09-01/11-1291 5 May 2014.

¹⁴⁹ Decision on defence applications for leave to appeal the "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation" and the request of the Government of Kenya to submit *amicus curiae* observations ICC-01/09-01/11-1313 23 May 2014; see also Defence appeal against the "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation" ICC-01/09-01/11-1345 5 June 2014.

October 2014, the Appeals Chamber unanimously upheld the Trial Chamber's decision, dismissing the appeals.¹⁵⁰

Even before the Appeals Chamber's judgment though, the recommencement of the proceedings against Ruto and his co-accused in early September confirmed that the Government of Kenya had complied with the Court's request for assistance by securing the testimony of the compelled witnesses. The Government had reactively arranged for the compelled witnesses to testify via video-link from a secure location in Kenya, thus conceding to the compulsive powers of the Court and the consequential State Party obligations.

1.3. Analysis

The attendance and testimony of witnesses, production of documents and other evidence is required under Article 64(6)(b) of the Statute.¹⁵¹ To be able to exercise its powers upon the witnesses, the Court may rely upon the assistance and cooperation of States Parties, where necessary. More precisely, States Parties are enjoined under Article 86, in line with the provisions of the Statute, to fully cooperate with the Court in the investigation and prosecution of crimes within their jurisdiction.

In complementing the provisions of the Statute, Rule 65 of the Rules of Procedure and Evidence provides that a witness who *appears* before the Court can be compelled by the Court to give testimony, although there is no provision for witnesses whose appearance is not within the

¹⁵⁰ Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation ICC-01/09-01/11-1598 9 October 2014.

¹⁵¹ Article 64(6)(b) of the Statute states that the Trial Chamber may, as necessary 'require the attendance and testimony of witnesses ... by obtaining, if necessary, the assistance of States as provided [under the] Statute'.

reach of the Court. To this end, Rule 193 advances the securing of witnesses' appearance, yet qualifies it to the persons who have been sentenced by the Court. It only provides for the temporary transfer of a person *sentenced* by the Court from the State of enforcement to the seat of the Court, whose testimony is deemed necessary.¹⁵²

Notwithstanding that, the Chamber's competence to compel the attendance of witnesses, though not expressly provided for under the Rome Statute, can be inferred from the 'compulsive' character of Article 64(6)(b) of the Rome Statute.¹⁵³ The Rome Statute expands the scope of the powers of the Court, giving it international legal personality and discretion to enforce its powers on, inter alia, the territory of any State Party.¹⁵⁴ To enhance enforceability of these powers, Article 21 encapsulates the applicable law, putting in the first place, the Statute, Elements of Crime and its Rules of Procedure and Evidence. In addition, it allows for the Court to derive its force from, in appropriate circumstances, applicable treaties and the principles and rules of international law.¹⁵⁵

More so, it would be illogical for the Court to be deprived of powers to impose obligations upon witnesses, whereas, the domestic criminal jurisdictions of which it is intended to complement provide for powers of subpoena in their laws. The Kenyan International Crimes Act (ICA) for instance reflects, under Section 80(1) and (2), that the law of Kenya will apply for the purposes

¹⁵² See Rule 193(1) of the RPE.

¹⁵³ See the argument advanced by the Prosecution in Prosecution's request to summon witnesses.

¹⁵⁴ See Articles 4(1), (2) of the Rome Statute.

¹⁵⁵ See the Rome Statute Article 21(1).

of taking evidence,¹⁵⁶ pursuant to Article 93(1)(b) of the Rome Statute. Section 80(1) provides that:

‘The applicable law with respect to compelling a person to appear before a Judge under section 78 or 79 and to give evidence or answer questions ... is the law [of Kenya], which law shall apply with any necessary modifications.’

If the ICC lacks the power to compel witnesses, Section 80(4) of the ICA would qualify the discretion under Section 80(1). As clearly stated:

‘Notwithstanding subsection (1), a person who is required under section 78 or 79 to give evidence ... is *not* required to give any evidence, or to produce any document or article, that the person could not be compelled to give or produce in the investigation being conducted by the Prosecutor or the proceedings before the ICC.’¹⁵⁷

However, having established that the Court indeed has discretion to infer compellability powers, the qualification under Section 80(4) of the ICA is rendered moot.

Be that as it may, the enforcement of the Chamber’s decision compelling witness testimony through the relevant authorities within the Government of Kenya presents significant challenges signified by, *inter alia*, the Attorney General’s vehement opposition of the resultant request for State Party cooperation.¹⁵⁸ Furthermore, there is no express provision under the

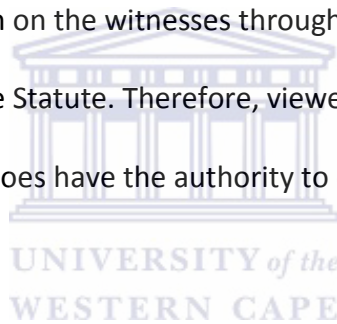
¹⁵⁶ See, *inter alia*, the Criminal Procedure Code, Cap 75 Laws of Kenya, (2009) Section 144, and the Evidence Act, Cap 80 Laws of Kenya, (2009) Section 128 which allow for compellability of witness (irrespective of the danger of self-incrimination for the Evidence Act).

¹⁵⁷ International Crimes Act, Act No. 16 of 2008 Laws of Kenya, Section 80(4).

¹⁵⁸ See The Government of the Republic of Kenya’s Observations under Rule 103 in relation to the Defence Appeal against the Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation ICC-01/09-01/11-1406 25 June 2014 (hereafter Observations by the Government of Kenya under Rule 103); Clarification to the Republic of the Government of the Republic of Kenya’s Observations under Rule 103 in

laws of Kenya, with particular reference to the ICA, which imposes such an obligation upon the Government of Kenya.

It would, nevertheless, be in vain for the Court to have the powers to compel witnesses if it lacks the competence to enforce such power. The Rome Statute comprehensively captures forms of cooperation with regard to witnesses and evidence under Article 93. More specifically, the Statute provides that 'States Parties shall ... [facilitate] the *voluntary* appearance of persons as witnesses or experts before the Court'.¹⁵⁹ Regardless of the use of the term 'voluntary' appearance, recalling the scope of the powers of the Court, it is legally plausible for the Court to enforce its orders of compulsion on the witnesses through engaging State Party cooperation under Article 93(1)(b) and (l) of the Statute. Therefore, viewed in the context of the statutory framework as a whole, the Court does have the authority to compel witnesses to appear before it.



Ultimately, in enforcing the summonses, the likelihood for the 'compelled' witnesses to turn 'hostile' cannot be ruled out, keeping in mind the Chamber's duty to rule on the probative value and veracity of their testimony.¹⁶⁰ The reopening of the trial against Ruto has, in fact, seen the Prosecution applying to the Chamber to declare hostile some of the compelled witnesses,¹⁶¹ which calls into question the credibility of the compelled witness' testimony. It is therefore open to speculation whether the testimony obtained by way of subpoena will

relation to the Defence Appeal against the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation ICC-01/09-01/11-1431 14 July 2014.

¹⁵⁹ Rome Statute Article 93(1)(e).

¹⁶⁰ See the Rome Statute Article 69(4).

¹⁶¹ See International Justice Monitor 'Prosecution Applies for Witness 604 to be Declared Hostile' available at <http://www.ijmonitor.org/> (accessed 7 September 2014).

advance or detract the Prosecution case, and more importantly, its consequential effect on the interests of the victims.

Aside from provisions on testimony, the Rome Statute also caters for the security of victims and witnesses before the Court. Article 68 of the Statute provides for the protection of victims and witnesses and their participation in the proceedings. It reads, *inter alia*, '[t]he Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses'.¹⁶² For this purpose, the Court put up a Victims and Witnesses Unit (VWU) which provides protective measures and security arrangements, counselling and other appropriate assistance for witnesses who appear before it, and others who are at risk on account of their testimony.¹⁶³

Given that a substantial number of witnesses who have withdrawn or recanted their testimonies cite security concerns, the practicalities of the Kenyan cases seemingly controvert the work of the VWU. Since its mandate covers the protection of witnesses, including Prosecution witnesses, one would expect that once the Prosecution had determined its list of witnesses, it would timely and effectively collaborate with the VWU to ensure their utmost protection. Nonetheless, the situation on the ground seems to indicate that this was hardly the case.

The laws of Kenya similarly cater for witness protection by creating a Witness Protection Agency, whose object and purpose is to provide special protection to witnesses facing potential

¹⁶² Rome Statute Article 68(1).

¹⁶³ For more information on the Victims and Witnesses Unit of the Court, see Summary Report on the Round Table on the Protection of Victims and Witnesses Appearing Before the International Criminal Court 29 and 30 January 2009; Summary Report on the Seminar on Protection of Victims and Witnesses Appearing Before the International Criminal Court 24 November 2010.

risk or intimidation due to their cooperation with the Prosecution.¹⁶⁴ Pursuant to Section 20(11)(xi) of the ICA, the ICC may make a request for assistance, inter alia, in the protection of victims and witnesses. So far, however, with regard to ICC victims and witnesses, the Agency's effectiveness has not been put into practice.

Further, it has been alleged that some of the witnesses who developed cold feet in testifying were intimidated or threatened by the accused or their conduits. In relation to these allegations, the summons issued against the accused were conditioned upon, inter alia, restraint from 'corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, or tampering with or interfering with the Prosecution's collection of evidence'.¹⁶⁵ None of these allegations have been substantiated against any of the accused persons, save for the Pre-Trial Chamber granting the Prosecutor's request for judicial assistance to obtain evidence for investigations against one Walter Osapiri Barasa, for the offence of attempting to corrupt three ICC witnesses.¹⁶⁶

2. Documentary Evidence and other Alternatives to Witness Testimonies

2.1. Background

Withdrawal of witnesses certainly has adverse effects on oral evidence, although it does not affect the production of documentary evidence. In light of the considerably large number of witness withdrawals, the Prosecution has had to resort to other avenues available in securing

¹⁶⁴ See The Witness Protection (Amendment) Act, Kenya (2010) Sections 3A, 3B(1).

¹⁶⁵ See Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali ICC-01/09-02/11-01 8 March 2011.

¹⁶⁶ See Warrant of Arrest for Walter Osapiri Barasa ICC-01/09-01/13-1-US-Exp 2 August 2013, issued under seal but unsealed on 2 October 2013 (ICC-01/09-01/13-1-Red2).

sufficient evidence for trial. Evidence could be secured without entirely relying on the compelled testimony, which, as speculated, has turned out to be mostly unreliable.¹⁶⁷

In lieu of viva voce testimony, the Prosecution may, *inter alia*, use prior recorded testimony, as espoused in Rule 68 of the Rules of Procedure and Evidence.¹⁶⁸ Where the witnesses are uncooperative or hostile, for example, the Prosecution could try to utilise the information obtained during investigations and witness interrogations as evidence. To this end, the Prosecution may, pursuant to the provisions of Rule 68, present any video or audio evidence which may have been recorded in the course of its investigations. However, such evidence would not have the same quality as viva voce testimony as the possibility of further interrogations of the witness in court is not given. Further, where a witness admits to have initially given false testimony, such an alternative would, obviously, not be reliable.

In the case against Kenyatta, the Prosecution has shifted its focus from witness testimony to actively engaging the cooperation of the Government of Kenya, to secure vital documents and other information relating to the accused. It initially made a request to the Government on April 2012, seeking assistance in the provision of financial and other records of the then four

¹⁶⁷ See Maliti T 'Witness 516 is declared a hostile prosecution witness' (25 September 2014) available at <http://www.ijmonitor.org/2014/09/witness-516-is-declared-a-hostile-prosecution-witness/> (accessed 28 September 2014); Maliti T 'Second Former Prosecution Witness Declared Hostile' (18 September 2014) available at <http://www.ijmonitor.org/2014/09/second-former-prosecution-witness-declared-hostile/> (accessed 28 September 2014).

¹⁶⁸ Alongside the amendments to Rule 134 discussed in the previous chapter, the ASP, via resolution ICCASP/12/Res7, allowed an amendment to Rule 68 to cater for previously recorded audio or video testimony. This would see the admissibility of the testimony of witnesses not present before the Court to give oral testimony pursuant to Rule 68(c) and (d).

accused persons subsequent to the confirmation of charges.¹⁶⁹ Owing to a seeming reluctance to comply with its requests, the Prosecution was inclined to call upon the Trial Chamber to make a finding of non-compliance, and refer the situation in the Republic of Kenya to the ASP.¹⁷⁰ It evoked Article 87(7) of the Rome Statute,¹⁷¹ alleging that, despite numerous requests for financial and other records of the accused which are relevant and critical to the case, the Government had become ‘intransigent’.¹⁷²

2.2. State Party Cooperation

As a follow up to a revised request filed by the Prosecution in accordance with the Chamber’s instructions¹⁷³, and submissions by both the Prosecution and the Government of Kenya, Trial Chamber V(B) convened a status conference on 9 July 2014¹⁷⁴ to discuss the status of cooperation, and other arising matters pertinent to the Kenyatta case. This status conference was a captivating unfolding of events as the Attorney General of the Republic of Kenya and the lead counsel for the defence team for Kenyatta, on the one hand, attempted to refute allegations of non-cooperation by the Prosecution and the Legal Representative of Victims, on the other hand.

¹⁶⁹ See Prosecution application for a finding of non-compliance pursuant to Article 87(7) against the Government of Kenya ICC-01/09-02/11-866-Conf-Exp 29 November 2013 reclassified as ICC-01/09-02/11-900 12 February 2014 (hereafter Prosecution application for a finding of non-compliance).

¹⁷⁰ See Prosecution application for a finding of non-compliance.

¹⁷¹ ‘In the event of failure to comply with a request to cooperate by a State Party, the Court may make a finding to that effect and refer the State to the Assembly of State Parties or, where the matter was referred to the Court by the Security Council, to the Security Council.’

¹⁷² See Prosecution application for a finding of non-compliance.

¹⁷³ See Decision on Prosecution’s Applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional date ICC-01/09-02/11-908 31 March 2014.

¹⁷⁴ See scheduling order and agenda for status conference on 9 July 2014 ICC-01/09-02/11-929 4 July 2014.

From the presentations of the parties, two areas of contention were palpable: the specificity, relevance and necessity of certain information sought in the Prosecution's revised request, and the relevant time period to be covered by the Prosecution's requests.¹⁷⁵ This resulted in a request from the Chamber for the relevant parties to file written submissions addressing these issues.¹⁷⁶ Consequently, contrary to the allegations of the defence and the Government of Kenya, the Chamber found that the Prosecution's revised request conforms to the 'requirements of relevance, specificity and necessity for the purposes of a cooperation request'¹⁷⁷ pursuant to the provisions of the Statute.

The Prosecution's 'revised request' contains interconnected requests, i.e., the tax returns of the accused are key to identifying any land registration numbers, motor vehicles and other properties owned by him.¹⁷⁸ According to the Attorney General and the defence, what the Prosecution primarily asks, is for the Government of Kenya to go on a 'fishing expedition'.¹⁷⁹ The Government claims that Kenyatta's tax returns are protected by law and cannot be released, contending that the Prosecution is outsourcing to them the work of the

¹⁷⁵ See i.e. Transcript on Status Conference ICC-01/09-02/11-T-30-ENG 9 July 2014 p 7 line 20, p9 line 13.

¹⁷⁶ See Transcript on Status Conference ICC-01/09-02/11-T-30-ENG 9 July 2014 p9 line 13, p36 line 13, and p37 line 22; Prosecution written submissions in compliance with the order made by the Chamber in the course of proceedings on 9 July 2014 ICC-01/09-02/11934-Conf-Exp 11 July 2014 (no public version available); The Government of the Republic of Kenya's Submissions pursuant to the Order for Submissions given by the Trial Chamber at the Status Conference of 9 July 2014 ICC-01/09-02/11-934-Conf-Exp 17 July 2014 (no public version available). The filing of submissions by the Government of Kenya outside the prescribed time could be seen as an indicator of its unwillingness to cooperate.

¹⁷⁷ Decision on the Prosecution's revised cooperation request ICC-01/09-02/11-937 29 July 2014.

¹⁷⁸ See Transcript on Status Conference ICC-01/09-02/11-T-30-ENG 9 July 2014 p16 line 19.

¹⁷⁹ See Transcript on Status Conference ICC-01/09-02/11-T-30-ENG 9 July 2014 p 17 line 6, p 22 line 8, p 23 line 2 p 35 line 8.

investigators.¹⁸⁰ By virtue of this, though apocryphal, the Government's stand is that there is no land, title or property registered under the name of the accused.¹⁸¹

This has, yet again, resulted in an indefinite vacation of the trial against Kenyatta,¹⁸² awaiting determination by the Trial Chamber on the status of the case. In its application for postponement, the Prosecution admitted that it lacks sufficient evidence to prove the accused's alleged criminal responsibility beyond a reasonable doubt.¹⁸³ Regardless, it contended that it would be 'inappropriate' to withdraw the charges, owing to the Government of Kenya's 'failure to cooperate', and the accused's 'status' as Head of the Government of Kenya. Consequently, the Defence for Mr Kenyatta wants the proceedings to be terminated.¹⁸⁴

2.3. Analysis

Under Article 86 of the Rome Statute, States Parties are required to cooperate fully with the Court during investigation and prosecution of cases. Pursuant to Articles 54(2)(a) and 87(1)(a) of the Statute, the Court, by extension the Prosecution, is empowered to request such cooperation. States Parties are specifically required to give any assistance which may facilitate the investigation and prosecution of the crimes under the jurisdiction of the Court, provided such information is not prohibited by domestic law.¹⁸⁵ Further, Article 88 of the Statute

¹⁸⁰ See Transcript on Status Conference ICC-01/09-02/11-T-30-ENG 9 July 2014 p12 line 16, p15 line 21.

¹⁸¹ See Transcript on Status Conference ICC-01/09-02/11-T-30-ENG 9 July 2014 p10 line 6.

¹⁸² See Order vacating trial date of 7 October 2014.

¹⁸³ See Prosecution notice regarding the provisional trial date ICC-01/09-02/11-944 5 September 2014 (hereafter Prosecution Notice).

¹⁸⁴ Defence Response to 'Prosecution notice regarding the provisional trial date' (ICC-01/09-02/11-944) and Request to Terminate the Case against Mr Kenyatta ICC-01/09-02/11-945-Red 10 September 2014.

¹⁸⁵ See the Rome Statute Article 93(l).

obligates States Parties to have procedures under national law which will enhance cooperation with the Court.

The Kenyan International Crimes Act incorporates Article 93(1)(i) of the ICC Statute, which requires States Parties, by use of domestic law, to provide assistance in form of ‘records and documents’, including official records and documents. The ICA provides that, a request for assistance under Article 93(1)(i) of the ICC Statute may be forwarded to the relevant agency, if it relates to an investigation being conducted by the ICC Prosecutor, and the document sought is, or may be in Kenya.¹⁸⁶

For a request under Article 104(1) to proceed, the ICA gives a reservation of consent by the Attorney General,¹⁸⁷ and states that no person has the power to *require* the production of a document or record.¹⁸⁸ Even if this may be the case, under Article 86 of the Rome Statute, the use of the term ‘required’ shows that the nature of obligations under this Article is mandatory. The ICA further acknowledges the powers of the Court to refer the situation to the ASP, and expressly advises the Attorney General to take this factor into account, but only in matters pertaining to the protection of national security and third party information.¹⁸⁹ Nonetheless, the reservation under Section 104(3) of the ICA would not deter a referral to the ASP under Article 87(7) of the Rome Statute, if need be.

¹⁸⁶ Section 104(1) ICA.

¹⁸⁷ Approval by the Attorney General is highly unlikely. See his responses in the Status Conference ICC-01/09-02/11-T-30-ENG 9 July 2014 p11 line 9, p12 line 2, p16 line3, p19 line 14, p22 lines 1, 8, p26 line 16, p29 line 19, p34 line 18.

¹⁸⁸ Section 104(3) ICA.

¹⁸⁹ Section 158 ICA.

Article 93(3) of the Rome Statute requires a State Party, which is unable to comply with its obligations due to some domestic prohibition, to ‘promptly consult with the Court’ in trying to resolve the matter. So far, the Government of Kenya has insisted that it is fully cooperating with the Court despite the Prosecution’s allegations of non-cooperation. Although it claims that the tax returns requested by the Prosecution are protected by law, it has made no effort to consult with the Court in accordance with Article 93(3) of the Statute. This implies that there is no prohibition to fulfilling the Prosecution’s revised request.

Further, the Trial Chamber is enjoined, under Article 64(2) of the Statute, to ensure that ‘a trial is fair and expeditious’, and is conducted, inter alia, with ‘full respect for the rights of the accused’. In order to fulfil this function, the Trial Chamber may confer with the parties, by way of status conferences.¹⁹⁰ In the event the documents requested by the Prosecution are considered to be irrelevant by the State Party, the Chamber may accordingly make a ruling, or give appropriate directions to the parties during such status conference. This may be seen as a safety function by the Court, which protects States Parties from exaggerated cooperation requests from the Prosecution.

Since the Trial Chamber ruled that the Prosecution’s revised request meets the requirements of relevance, specificity and necessity¹⁹¹, the Government of Kenya is bound by its obligations for cooperation, to avail the information requested by the Prosecution, which can be done without necessarily violating domestic law. Domestic law should facilitate, rather than impede the execution of cooperation requests by the Court. Recognising that there may be rights to privacy

¹⁹⁰ Rule 132(2) RPE.

¹⁹¹ See Decision on the Prosecution’s revised cooperation request ICC-01/09-02/11-937 29 July 2014.

and confidentiality under Kenyan law, it is incumbent upon the Government to obtain the requisite legal permission to enable it fulfil its obligations to the Court.¹⁹² Otherwise, the Court may be inclined to, in accordance with Article 87(7) of the Statute, refer the matter to the ASP.

3. Conclusion

Even though not expressly stated, the statutory framework of the ICC adequately captures the issue of witness compellability, and consequential requests for State Party cooperation. Being a complementary mechanism, the provisions of the Rome Statute cannot be interpreted in a way that deprives the Court such primary powers, which are ordinarily available under domestic law.

In relation to witness withdrawals, the Prosecution can be criticised for ignoring signs that most of the witnesses on its list were unreliable.¹⁹³ The lack of preparedness by the Prosecution is demonstrated by, inter alia, the numerous withdrawals of witnesses from testifying before the Court. Largely, the proceedings reveal an inadequate prosecutorial strategy, dating back to the inception of the Kenyan cases, which, at this stage, cannot be cured.

Although the Government of Kenya purports to be cooperating with the Court, claiming that it is the Prosecution's requests which lack precision, the Government is, in fact, procrastinating.

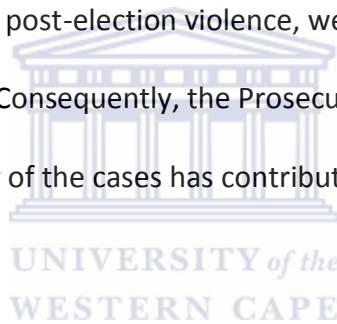
There is no likelihood of the Attorney General divulging any information which might be incriminatory to Kenyatta. The President is the only person who may remove the Attorney

¹⁹² See Article 99(1) Rome Statute.

¹⁹³ See i.e. the issues raised by the Defence in Public redacted version of the 13 January 2014 'Defence Response to the Prosecution's "Notification of the removal of a witness from the Prosecution's witness list and application for an adjournment of the provisional trial date"' (ICC-01/09-02/11-878-Conf) ICC-01/09-02/11-878-Red 24 January 2014.

General from office. Therefore, with regard to matters relating to Kenyatta, even in his personal capacity as an accused before the ICC, the powers of the Attorney General as a representative of the Government of Kenya are curtailed. This unfortunately implies that, any attempts by the Prosecution to obtain incriminatory evidence which may strengthen its case against Kenyatta are in vain.

Arguably, the question which lingers in the minds of many Kenyans, as well as other observers captivated by the proceedings is whether the then ICC Prosecutor, Louis Ocampo, indicted the proper parties. It is ostensible that the main contenders for the presidential seat¹⁹⁴ in the elections of 2007, which led to the post-election violence, were not even questioned about their involvement in the violence. Consequently, the Prosecution's rash investigations and underestimation of the complexity of the cases has contributed to dashing the victims' hope of ever receiving justice.



¹⁹⁴ The 2007 contestants for the Kenyan Presidential seat were former President, Mwai Kibaki, and his main opponent, Raila Odinga.

CHAPTER FOUR: GENERAL CONCLUSIONS

1. Political Impediments to Justice

The challenges discussed in the previous chapters have been attributed to, inter alia, the change of status of the accused persons from ordinary accused to Head of State and Deputy Head of State, which transformed their cases to 'high-profile'. Accordingly, the election into office of Kenyatta and Ruto respectively, in the course of the ICC proceedings, has had numerous political implications on their cases, both locally and internationally.

First, the change of status necessitated a 'compromise' by the ASP in the form of amendments to the Rules of Procedure and Evidence. This move has been criticised as being not only politically motivated, but also aimed towards 'two standards of justice'.¹⁹⁵ The amendments are also seen to have accorded the accused some kind of 'privilege', ordinarily not available to other accused persons. However, it is acknowledged that, it was necessary to find a way to prevent a 'power vacuum' situation where the Head of State and his Deputy are simultaneously absent from the State Party (Kenya), and to allow the proceedings to continue.

Secondly, the accused's official capacity has been used to frustrate the proceedings, in relation to witness testimony, by creating a climate of fear and intimidation in Kenya. Kenyatta's conduct and attitude towards the Court,¹⁹⁶ for example, being in a position of influence as Head of State, has potentially contributed to an adverse atmosphere to Prosecution investigations, as well as fostered hostility towards victims and witnesses cooperating with the Court.

¹⁹⁵ See Musau (2013); See also the Sentinel Project 'Equality of Impunity?' 6 December 2013 available at <https://thesentinelproject.org/2013/12/06/equality-of-impunity/> (accessed 6 October 2014).

¹⁹⁶ This attitude can be adduced from Kenyatta's Speech at the Extraordinary Session of the Assembly of Heads of State and Government of the African Union.

Thirdly, Kenyatta's coming into power as the Head of State has contributed to the supposed lack of cooperation by the Government of Kenya with the Court. In support of this argument, it is considered that compliance of international (treaty) obligations by a State necessitates actions, on the part of an individual in their capacity as 'organs of the State'.¹⁹⁷ Kenyatta, in his capacity as Head of State, is in a position of influence and, accordingly, is entitled to act on behalf of the Government of Kenya. He therefore has a responsibility to ensure the compliance of the Government with its obligations to fully cooperate under the Rome Statute.

However, even though the records being requested by the Prosecution from the Government of Kenya relate to Kenyatta in his personal capacity, rather than as the Head of State, it can be argued that this 'dual status' gives rise to the possibility of a conflict of interests. International criminal justice does not stop at the interests of the victims. It also explicitly caters for the rights of the accused, given the principle of presumption of innocence. As an accused person, Kenyatta is accordingly protected from self-incrimination under Article 55 of the Statute, and neither can he be compelled to act under Part 9 of the Statute, which relates to matters of international cooperation.¹⁹⁸ The burden of proof remains on the Prosecution, and at no point does it shift to the defence.

2. Prosecutorial Inadequacies

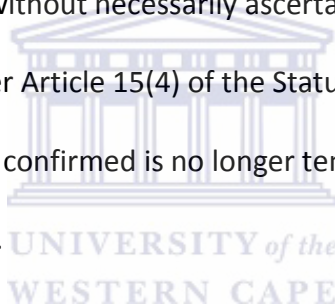
The Prosecution has been lax in conducting a full and thorough investigation of the Kenyan situation, even prior to confirmation of the charges against the accused persons. Under Article

¹⁹⁷ See Kelsen H *Principles of International Law* (2003) p 116; see also Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) para 4.

¹⁹⁸ Rome Statute Article 55(2).

54(1)(a) of the Statute, the Prosecution is required to extend its investigations 'to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under [the] Statute'. The Prosecution is further required to ensure the *effective* investigation and prosecution of crimes within the jurisdiction of the Court.¹⁹⁹ The Kenyan cases however reveal an inadequacy or failure by the Prosecution to effectively investigate the cases, pursuant to its obligations under Article 54(1) of the Statute.²⁰⁰

Regardless of it being a *proprio motu* investigation, there is no indication that the Prosecution instigated independent investigations into the Kenyan situation. Instead, the Prosecution relied heavily on evidence handed to it, without necessarily ascertaining its foundations, since it had 'reasonable basis to proceed' under Article 15(4) of the Statute. Clearly, the basis upon which the charges against Kenyatta were confirmed is no longer tenable, given that the Prosecution is unable to proceed the case to trial.



Further, despite admitting to having insufficient evidence against Kenyatta, the Prosecution remains adamant that it will not withdraw the charges,²⁰¹ even if the information it seeks from the Government of Kenya may or may not yield significant evidentiary value in the case. In fact, the Prosecution itself concedes that the possibility of obtaining sufficient relevant evidence is

¹⁹⁹ Rome Statute Article 54(1)(b).

²⁰⁰ On Prosecution negligence, see, for example, Decision on defence application pursuant to Article 64(4) and related requests (Concurring Opinion of Judge Christine Van den Wyngaert) ICC-01/09-02/11-728-Anx2 26 April 2013.

²⁰¹ See the Prosecution notice regarding the provisional trial date ICC-01/09-02/11-944 5 September 2014.

highly speculative.²⁰² Neither has it shown any realistic prospect of otherwise securing conclusive evidence that could fulfil the minimum threshold of the charges at trial.

3. Way Forward

In spite of the identified failures on the part of the Prosecution, considering the political impediments identified above, it has to be appreciated that the Kenyan cases have presented unique circumstances, which go beyond the Prosecution's control. Consequently, in the case against Kenyatta, as far as the Prosecution is concerned, any prospects of proceeding depend upon cooperation by the Government of Kenya, which has reached a 'deadlock'.²⁰³ For the interests of justice therefore, the Trial Chamber is tasked to choose an appropriate course of action; to either adjourn the proceedings *sine die* as requested by the Prosecution, or terminate the case, as requested by the Defence.²⁰⁴

The peculiar nature of the case presents a dilemma to the Court. Were the proceedings to be indefinitely adjourned, it would be prejudicial to the accused to have a pending criminal case, with which the Prosecution admits to having no evidence. Additionally, that course of action would still not guarantee cooperation by the Government of Kenya. Such an adjournment would unnecessarily engage the resources of the Court in a 'speculative' matter, where the Prosecution has no way of ascertaining whether the information it requests for would further its case. Alternatively, if the proceedings were to be terminated, the Court may be seen to have

²⁰² See i.e. Transcript on Status Conference ICC-01/09-02/11-T-27-ENG ET WT 5 February 2014 p10 line 22 p11 line 9, 22.

²⁰³ Transcript on Status Conference ICC/01/09-02/11-T-31-Red-ENG WT 7 October 2014 p11 line 7, p48 line 23.

²⁰⁴ See Prosecution notice regarding the provisional trial date ICC-01/09-02/11-944 5 September 2014; Defence Response to Prosecution notice regarding the provisional trial date (ICC-01/09-02/11-944) and Request to Terminate the Case against Mr Kenyatta ICC-01/09-02/11-945-Red 10 September 2014; see also Transcript on Status Conference ICC/01/09-02/11-T-32-ENG ET WT 8 October 2014.

set precedence that obstruction of evidence by a State Party is a viable strategy to have charges against an accused person withdrawn.

It is regrettable that, in the event the case is withdrawn, and the Prosecution allowed to initiate fresh investigations, there is an enormous risk of deterioration of the evidence and potential prejudice to victims and witnesses, owing to the long duration that has already elapsed.

Further, the alternative of terminating the charges, with no possibility of initiating fresh proceedings, would have adverse effects on the entire justice process in Kenya, given that there has been no credible process of domestic prosecutions. It is only fair that since there were two sides to the post-election violence, perpetrators from both ends be held accountable.

Unfortunately, the Prosecution has neither statutory provisions nor jurisprudence to support its request for a *sine die* adjournment of the case. In light of the speculative nature of its request, keeping in mind Article 55 and 67(1)(c) of the Statute which secure the rights of an accused, and pursuant to Regulation 60 of the Regulations of the Prosecution, it would be commendable for the case to be terminated. Such termination should, howbeit, be without prejudice to any charges which may be brought against the accused on substantially the same evidence, with regard to the same subject matter.

Further, for the interests of justice, the Chamber should, at the earliest opportunity, rule on the matter of cooperation by the Government of Kenya, and, if found to be uncooperative, refer the matter to the ASP for appropriate action. It is not desirable for critical issues such as the status of the proceedings against an accused person, or issues relating to State Party

cooperation, to be in limbo before a Court of such magnitude as the ICC, or any court of law, for that matter.

4. Concluding Remarks

The most important aspect of the proceedings against President Kenyatta and Deputy President Ruto is that, they have set precedence. The proceedings affirm the fact that immunity should not be used to develop a culture of impunity for international crimes. Aside from putting a former Head of State on trial, by continuing criminal proceedings against an incumbent Head of State and his Deputy, the ICC has affirmed the customary law principle that no one can be above the rule of law. Notwithstanding the criticisms and opposition of the Court by the AU,²⁰⁵ African leaders who are involved in crimes of an international character have been made aware that their actions are under scrutiny by the ICC.

However, the pressure that has been exerted upon the Court by the Kenyan cases has revealed numerous weaknesses within the ICC regime. For instance, challenges relating to witness withdrawals reveal inadequacies of witness protection and preservation of evidence. Further, the challenges surrounding cooperation requests upon State Parties reveal a major shortcoming of the Court as an international justice mechanism. Since the Court has no power to ensure State Party compliance, just as securing arrests, reliance on a State Party's willingness to cooperate appears to be the Court's 'Achilles' heel'. Even in cases of non-cooperation, there is

²⁰⁵ See Opening and closing remarks of Dr. Ghebreyesus, at the 15th Extraordinary Session of the Executive Council of the AU.

no definite policy for retributive action or sanctions which would arise from an adamant failure by a State Party to cooperate, like the case of Chad.²⁰⁶

Ultimately, the Kenyan situation has contributed, both beneficially and detrimentally, to the image of the court. On the one hand, the Court has reaffirmed that sitting Heads of States must respect the rules of international criminal law, and that their 'status' cannot be a bar to prosecution. On the other hand, regrettably, at this stage, it seems that such high-profile prosecutions can be easily thwarted by those in high echelons of Government i.e. by withholding evidence, or contributing to an unwillingness of witnesses or the Government to cooperate with the Court.

Regardless of these weaknesses, instead of mounting hostility towards the Court, States Parties are urged to reinforce their support of the Court, toward a common goal of eradicating the culture of impunity, and fostering ultimate justice to the victims. In establishing the AU, African leaders committed to condemn and reject impunity.²⁰⁷ Such commitment must not therefore be reversed, by weakening the one institution able to deliver justice, in relation to persons bearing the greatest responsibility for atrocities of an international character, in Kenya or abroad. Undermining the ICC proceedings would only foster a lack of accountability.

²⁰⁶ See Report of the Bureau on non-cooperation (ICC-ASP/11/29) 1 November 2012; see also Assembly procedures relating to non-cooperation (ICC/ASP/10/Res.5, annex).

²⁰⁷ Constitutive Act of the African Union, Adopted by the Thirty-sixth Ordinary Session of the Assembly of Heads of State and Government 11 July 2000 Lome, Togo Article 4(o).

BIBLIOGRAPHY

1. Primary Sources

Legislation

- **International**

Assembly procedures relating to non-cooperation ICC/ASP/10/Res.5, annex.

Charter of the United Nations signed at the conclusion of the United Nations Conference on International Organization 26 June 1945 San Francisco, available at

<https://treaties.un.org/doc/publication/ctc/uncharter.pdf> (accessed 20 October 2014).

Constitutive Act of the African Union, Adopted by the Thirty-sixth Ordinary Session of the Assembly of Heads of State and Government 11 July 2000 Lome, Togo, available at

<http://www.peaceau.org/uploads/au-act-en.pdf> (accessed 20 October 2014).

Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

ICC-ASP/12/Res.7 available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res7-ENG.pdf (accessed 24 June 2014).

Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, Rome UN Doc A/CONF. 183/9.

The Principles of International Law recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, adopted by the International Law Commission at its second session and submitted to the General Assembly as part of the Commission's report (1950) 2 *Yearbook of the International Law Commission*.

UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993.

United Nations Security Council, Statute of the International Criminal Tribunal for Rwanda (as amended 16 December 2009), 8 November 1994.

Vienna Convention on Consular Relations of 1963, 596 *UNTS* (1963).

Vienna Convention on Diplomatic Relations of 1961, 500 *UNTS* (1961).

- **Republic of Kenya**

Criminal Procedure Code, Cap 75 Laws of Kenya, (2009).

Evidence Act, Cap 80 Laws of Kenya, (2009).

International Crimes Act, Act No. 16 of 2008 Laws of Kenya.

The Constitution of the Republic of Kenya, 2010.

The Witness Protection (Amendment) Act, Kenya (2010).

Cases

Prosecutor v Al Bashir ICC (Pre-Trial Chamber) decision of 4 March 2009.

Regina v Bow Street Metropolitan Stipendiary Magistrate and others, ex Parte Pinochet Ugarte (Amnesty International and others Intervening) (1999) 2 WLR 827.

Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International and others intervening) (1998) 3 WLR 1456.

Judgment of the Nuremberg International Military Tribunal 1946 (1947) 41 AJIL 172

Prosecutor v Milosevic (Indictment) (22 May 1999) IT-99-37.

Prosecutor v. Charles Taylor (Immunity from Jurisdiction) (31 May 2004) SCSL-03-01-I.

Arrest Warrant of 11 April 2000 (Congo v Belgium) (14 February 2002) International Legal Materials 536.

Filings of the ICC

- **Appeals Chamber**

Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled “Decision on Mr. Ruto’s Request for Excusal from Continuous Presence at Trial” ICC-01/09-01/11-1066 25 October 2013.

Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 17 April 2014 entitled “Decision on Prosecutor’s Application for

Witness Summonses and resulting Request for State Party Cooperation ICC-01/09-01/11-1598 9 October 2014.

- **Trial Chamber V(A)**

Decision on ‘Prosecution’s application for leave to appeal the decision on excusal from presence at trial under Rule 134*quater*’ ICC-01/09-01/11-1246 2 April 2014; see also Dissenting Opinion of Judge Olga Herrera Carbuccion ICC-01/09-01/11-1246Anx 2 April 2014.

Decision on defence applications for leave to appeal the “Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation” and the request of the Government of Kenya to submit *amicus curiae* observations ICC-01/09-01/11-1313 23 May 2014.

Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial ICC-01/09-01/11-777 18 June 2013.

Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date ICC-01/09-01/11-762 3 June 2013.

Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation ICC-01/09-01/11-1274-Corr2 30 April 2014.

Decision on the request for suspensive effect ICC-01/09-01/11-862 20 August 2013.

Dissenting Opinion of Judge Herrera Carbuccion on the 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation' ICC-01/09-01/11-1274-Anx 29 April 2014.

Order scheduling a status conference ICC-01/09-01/11-1141 10 January 2014.

Reasons for the Decision on Excusal from Presence at Trial under Rule 134quarter ICC-01/09-01/11-1186 18 February 2014.

- **Trial Chamber V(B)**

Decision Adjourning the Commencement of Trial ICC-01/09-02/11-847 31 October 2013.

Decision on defence application pursuant to Article 64(4) and related requests (Concurring Opinion of Judge Christine Van den Wyngaert) ICC-01/09-02/11-728-Anx2 26 April 2013.

Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial ICC-01/09-02/11-830 18 October 2013.

Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial ICC-01/09-02/11-830 18 October 2013 (Partially Dissenting Opinion of Judge Ozaki) ICC-01/09-02/11-830-Anx2 18 October 2013.

Decision on Prosecution's Application for a Finding of Non-compliance pursuant to Article 87(7) and for an Adjournment of the Provisional Trial Date ICC-01/09-02/11-908 31 March 2014.

Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial ICC-01/09-02/11-863 26 November 2013.

Decision on the Prosecution's revised cooperation request ICC-01/09-02/11-937 29 July 2014.

Order Vacating Trial Date of 5 February 2014, Convening a Status Conference, and Addressing other Procedural Matters ICC-01/09-02/11-886 23 January 2014.

Order vacating trial date of 7 October 2014, convening two status conferences, and addressing other procedural matters ICC-01/09-02/11-954 19 September 2014.

Public Redacted Version of 'Decision on Commencement Date of Trial' ICC-01/09-02/11-763-Red 20 June 2013.

Scheduling order and agenda for status conference on 9 July 2014 ICC-01/09-02/11-929 4 July 2014.



- **Pre-Trial Chamber**

Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute ICC-01/09-01/11-101 30 May 2011.

Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute ICC-01/09-02/11-96 30 May 2011.

Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute ICC-01/09-01/11-373 23 January 2012.

Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute ICC-01/09-02/11-382-Red 26 January 2012.

Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang ICC-01/09-01/11-01 8 March 2011.

Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali ICC-01/09-02/11-01 8 March 2011.

Decision on the withdrawal of charges against Mr Muthaura ICC-01/09-02/11-696 18 March 2013.

Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya ICC-01/19 31 March 2010.

Warrant of Arrest for Walter Osapiri Barasa ICC-01/09-01/13-1-US-Exp 2 August 2013, issued under seal but unsealed on 2 October 2013 (ICC-01/09-01/13-1-Red2).

- **Office of the Prosecutor**

Prosecution appeal against the "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial" ICC-01/09-01/11-831 29 July 2013.

Prosecution application for a finding of non-compliance pursuant to Article 87(7) against the Government of Kenya ICC-01/09-02/11-866-Conf-Exp 29 November 2013 reclassified as ICC-01/09-02/11-900 12 February 2014.

Prosecution notice regarding the provisional trial date ICC-01/09-02/11-944 5 September 2014.

Prosecution notification of withdrawal of charges against Francis Kirimi Muthaura ICC-01/09-02/11-687 11 March 2013.

Prosecution Response to Defence Request pursuant to Article 63(1) and Rule 134quater for excusal for attendance at trial for William Samoei Ruto ICC-01/09-01/11-1135 8 January 2014.

Prosecution's application for leave to appeal the decision on excusal from presence at trial under Rule 134quater ICC-01/09-01/11-1189 24 February 2014.

Prosecution's request under art 64(6)(b) and art 93 to summon witnesses ICC-01/09-01/11-1120-Red2 2 December 2013.

Prosecution's Response to the Defence Request for Conditional Excusal from Continuous Presence at Trial ICC-01/09-02/11-818 01 October 2013.

Prosecution's supplementary request under article 64(6)(b) and article 93 to summon a further witness ICC-01/09-01/11-1118-Conf-Red with confidential annexes 1-6 19 February 2014.

Public redacted version of the 16 July 2013 Prosecution notification of withdrawal of witnesses ICC-01/09-02/11-773-Red 18 July 2013.

Public redacted version of the Prosecution's request to add two witnesses to its witness list ICC-01/09-02/11-805-Red2 17 September 2013; see also Decision on Prosecution request to add P-548 and P-66 to its witness list ICC-01/09-02/11-832 23 October 2013.

Request for authorization of an investigation pursuant to Article 15 ICC-01/09-3 26 November 2009.

- **Kenyatta Defence**

Defence Request for Conditional Excusal from Continuous Presence at Trial ICC 01/09-02/11-809 23 September 2013.

Defence Request for Mr Kenyatta to be Present During Trial via Video Link ICC 01/09-02/11-667 28 February 2013.

Defence Response to 'Prosecution notice regarding the provisional trial date' (ICC-01/09-02/11-944) and Request to Terminate the Case against Mr Kenyatta ICC-01/09-02/11-945-Red 10 September 2014.



- **Ruto Defence**

Defence appeal against the "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation" ICC-01/09-01/11-1345 5 June 2014.

Defence application for leave to appeal the 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation' ICC-01/09-01/11-1291 5 May 2014.

Defence Request pursuant to Article 63(1) of the Rome Statute and Rule 134quater of the Rules of Procedure and Evidence to excuse Mr. William Samoei Ruto from attendance at trial ICC-01/09-01/11-1124 16 December 2013.

Defence Request Pursuant to Article 63(1) of the Rome Statute ICC-01/09-01/11-685 17 April 2013.

Joint Defence Submissions on Legal Basis for the Accused's Presence at Trial via Video Link ICC-01/09-01/11-629 28 February 2013.

- **Government of Kenya**

Application on behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute ICC-01/09-01/11-19 31 March 2011.

Clarification to the Republic of the Government of the Republic of Kenya's Observations under Rule 103 in relation to the Defence Appeal against the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation ICC-01/09-01/11-1431 14 July 2014.



The Government of the Republic of Kenya's Observations under Rule 103 in relation to the Defence Appeal against the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation ICC-01/09-01/11-1406 25 June 2014.

- **Amici Curiae**

Joint Amicus Curiae Observations of the United Republic of Tanzania, Republic of Rwanda, Republic of Burundi, State of Eritrea and Republic of Uganda on the Prosecution's appeal against the "Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial" ICC-01/09-01/11 17 September 2013.

- **Transcripts**

Transcript on Status Conference ICC-01/09-02/11-T-31-Red-ENG WT 7 October 2014.

Transcript on Status Conference ICC-01/09-02/11-T-32-ENG ET WT 8 October 2014.

Transcript on Status Conference ICC-01/09-01/11-T-38-Red-ENG WT 27 September 2013.


Transcript on Status Conference ICC-01/09-02/11-T-27-ENG ET WT 5 February 2014.

Transcript on Status Conference ICC-01/09-02/11-T-30-ENG 9 July 2014.

Policy Briefs and Reports

Murithi T 'The African Union and the International Criminal Court: An Embattled Relationship?'

8 (March 2013) *The Institute for Justice and Reconciliation* Policy Brief available at

 <http://www.ijr.org.za/publications/pdfs/IJR%20Policy%20Brief%20No%208%20Tim%20Miruthi.pdf> (accessed 15 July 2014).

Report of the Bureau on non-cooperation (ICC-ASP/11/29) 1 November 2012 available at

http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-29-ENG.pdf (accessed 15 July 2014).

Report of the Independent Review Commission on the General Elections held in Kenya on 27

December 2007 available at

http://kenyastockholm.files.wordpress.com/2008/09/the_kriegler_report.pdf (accessed 5 May 2014).

Report on the Commission of Inquiry into the Post-Election Violence, Kenya (15 October 2008)
available at

http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf (accessed 4 June 2014).

Summary Report on the Round Table on the Protection of Victims and Witnesses Appearing Before the International Criminal Court 29 and 30 January 2009 available at http://www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report_ENG.pdf (accessed 20 October 2014).

Summary Report on the Seminar on Protection of Victims and Witnesses Appearing Before the International Criminal Court 24 November 2010 available at <http://www.icc-cpi.int/NR/rdonlyres/08767415-4F1D-46BA-B408-5B447B3AFC8D/0/ProtectionseminarSUMMARY.pdf> (accessed 20 October 2014).

The Final Report on the Truth, Justice and Reconciliation Commission available at http://www.tjrkenya.org/index.php?option=com_content&view=article&id=573&Itemid=238 (accessed 5 May 2014).

The Kenya National Dialogue and Reconciliation: Building a Progressive Kenya – Our Common Vision, Views of Stakeholders, available at <http://www.kndr.co.ke/downloads/THE-KENYA-NATIONAL-DIALOGUE-AND-RECONCILIATION.pdf> (accessed 4 June 2014).

United Nations 'Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008'
available at <http://blog.usahidi.com/wp-content/uploads/2008/03/final-ohchr-kenya-report-19-march2008.pdf> (accessed 30 April 2014).

2. Secondary Sources

Books

Fox H 'The Law of State Immunity' 2 ed (2008) Oxford: Oxford University Press.

Kelsen H *Principles of International Law* (2003) London: LexisNexis.

Werle G *Principles of International Criminal Law* 2 ed (2009) The Netherlands: TMC Asser Press.

Chapters in Books

Kagwanja P & Southall R 'Introduction: Kenya- A Democracy in Retreat?' in Kagwanja P & Southall R (eds) *Kenya's Uncertain Democracy: The Electoral Crisis of 2008* (2010) London and New York: Routledge.

Sharma S 'The 2007-08 Post-Election Crisis in Kenya' in Hoffmann J & Nolkaemper A (eds) *Responsibility to Protect- From Principle to Practice* (2012) The Netherlands: Amsterdam University Press.

Articles

Ainley K 'The International Criminal Court on Trial' (2011) 24 *Cambridge Review of International Affairs* No. 3 309-333.

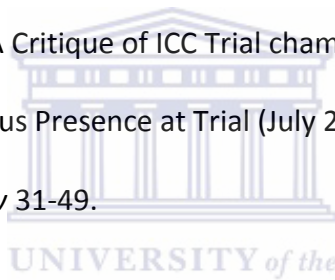
Akande D 'International Law Immunities and the International Criminal Court' 98 (2004) *A. J. I. L.* 407-433.

Warbrick C & McGoldrick D (eds) 'The Future of Former Head of State Immunity after ex parte Pinochet' (1999) 48 *INT'L & COMP. L. Q.* 937-949.

Bianchi A 'Immunity versus Human Rights: The Pinochet Case' (1999) 10 *EJIL* 237-277.

DeGuzman M 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' 33 (2012) *Michigan Journal of International Law* 265-320.

Hansen T '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 (July 2013) 22 *Cardozo Journal of International and Comparative Law* 31-49.



Maogoto J 'Transforming Westphalian Sovereignty: Human Rights & International Justice as a Transitional Crucible' 2005 *Notre Dame Law Review* 1379-84.

Mueller S 'Kenya and the International Criminal Court (ICC): Politics, the election and the law' 2014 8 *Journal of East African Studies* 25-42.

Whytock CA 'Foreign State Immunity and the Right to Court Access' (2013) 93 *Boston University Law Review* 2033-2093.

Theses

Murungu C *Immunity of State Officials and Prosecution of International Crimes in Africa* (LLD thesis, University of Pretoria, 2011 available at <http://upetd.up.ac.za/thesis/available/etd-01252012-112603/> (accessed 14 July 2014).

Media Reports and Speeches

Extraordinary Session of the Assembly of the African Union 12 October 2013 Addis Ababa, Ethiopia available at

<http://summits.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20E%20.pdf> (accessed 26 July 2014).

ICC-Waki Commission list of names in the hands of the ICC Prosecutor ICC-OTP-20090716-PR439 16 July 2009.



Motion to withdraw available at <http://www.parliament.go.ke/plone/national-assembly/business/order-paper/thursday-september-05-2013-at-2.30-p.m/view> (accessed 2 June 2014).

Njonjo Mue, at the 12th Assembly of State Parties of the International Criminal Court (20-28 November 2013) The Hague, The Netherlands available at <http://kptj.africoq.org/njonjo-mues-remarks-at-the-asp/> (accessed 20 July 2014).

Office of the Prosecutor of the International Criminal Court 'Statement on the Situation in Kenya' 14 August 2013 The Hague, available at

[http://www.iccnw.org/documents/14_August_2013_Statement_JCCD-SM_\(2\).pdf](http://www.iccnw.org/documents/14_August_2013_Statement_JCCD-SM_(2).pdf) (accessed 4 June 2014).

Opening and Closing remarks of Dr. Tedros Adhanom Ghebreyesus, Minister of Foreign Affairs of the Federal Democratic Republic of Ethiopia and Chairperson of the AU at the 15th Extraordinary Session of the Executive Council of the AU 11 October 2013 available at www.au.int/en/content/extraordinary-session-assembly-african-union (accessed 1 October 2014).

Speech by His Excellency Hon. Uhuru Kenyatta, C.G.H., President and Commander in Chief of the Defence Forces of the Republic of Kenya at the Extraordinary Session of the Assembly of Heads of State and Government of the African Union, Addis Ababa, Ethiopia, 12 October 2013 available at <http://www.statehousekenya.go.ke/speeches/uhuru/october2013/2013121001.htm> (accessed 31 March 2014).

State House Press Release 12 February 2009 available at <http://statehousekenya.go.ke/news/feb09/2009120201.htm> (accessed 4 June 2014).

Newspapers

'Parliament passes motion to withdraw Kenya from Rome Statute' available at <http://ntv.nation.co.ke/news2/topheadlines/parliament-passes-motion-to-withdraw-kenya-from-rome-statute/> (accessed 2 June 2014).

'Twilight Robbery, Daylight Murder' *The Economist* 3 January 2008 available at

<http://www.economist.com/node/10438473> (accessed 30 April 2014).

Musau N 'Mixed Fortunes for Kenya at ICC Meeting' *The Star* 30 November 2013 available at

<http://www.the-star.co.ke/news/article-145571/mixed-fortunes-kenya-icc-meeting> (accessed 14 July 2014).

Opiyo D 'Kibaki, Raila should be on the ICC list, says Uhuru' *Daily Nation* 24 January 2013

available at <http://www.nation.co.ke/News/politic...z/-/index.html> (accessed 2 June 2014).

Wambua M 'How Kenya Handled Local Tribunal Process' *Daily Nation* 17 September 2013,

available at <http://mobile.nation.co.ke/News/How-Kenya-handled-local-tribunal-process--/-/1950946/1997172/-/format/xhtml/-/dwh96i/-/index.html> (accessed 4 June 2014).

Internet sources

Freehills H & Cannon A 'Kenya MPs approve motion to withdraw from the International Criminal Court,' 17 October 2013 available at

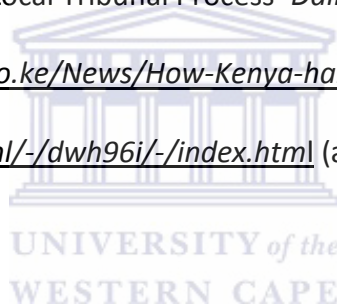
<http://www.lexology.com/library/detail.aspx?q=b0192db0-c4e1-4315-8cf3-494785213739>

(accessed 2 June 2014).

Hauschildt T 'The International Criminal Court: A Western tool used to dominate Africa?' 21

May 2013 *Conflict and Security* available at [http://conflictandsecurity.com/blog/the-](http://conflictandsecurity.com/blog/the-international-criminal-court-a-western-tool-used-to-dominate-africa/)

[international-criminal-court-a-western-tool-used-to-dominate-africa/](http://conflictandsecurity.com/blog/the-international-criminal-court-a-western-tool-used-to-dominate-africa/) (accessed 31 March 2014).



International Coalition for the Responsibility to Protect 'The Crisis in Kenya' available at <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya> (accessed 30 April 2014).

International Justice Monitor 'Prosecution Applies for Witness 604 to be Declared Hostile' available at <http://www.ijmonitor.org/> (accessed 7 September 2014).

IRIN humanitarian news and analysis 'In-depth: Kenya's post-election crisis' available at <http://www.irinnews.org/in-depth/76116/68/kenya-s-post-election-crisis> (accessed 30 April 2014).

Kersten M 'Missing the Mark: The ICC on its Relationship with the UN Security Council' 24 October 2012 available at <http://justiceinconflict.org/2012/10/24/missing-the-mark-the-icc-on-its-relationship-with-the-un-security-council/> (accessed 15 July 2014).

Kersten M 'The ICC and Kenya Parting Ways? What it Means and What it Doesn't' 5 September 2013 available at <http://justiceinconflict.org/2013/09/05/icc-and-kenya-parting-ways-what-it-means-and-what-it-doesnt/> (accessed 14 July 2014).

Maliti T 'Witness 516 is declared a hostile prosecution witness' (25 September 2014) available at <http://www.ijmonitor.org/2014/09/witness-516-is-declared-a-hostile-prosecution-witness/> (accessed 28 September 2014).

Maliti T 'Second Former Prosecution Witness Declared Hostile' (18 September 2014) available at <http://www.ijmonitor.org/2014/09/second-former-prosecution-witness-declared-hostile/> (accessed 28 September 2014).

Mamdani M 'Kenya 2013: The ICC Election' 15 March 2013 available at

<http://www.aljazeera.com/indepth/opinion/2013/03/20133982222657687.html> (accessed 14 July 2014).

Perry A 'Kenya's Election: What Uhuru Kenyatta's Victory Means for Africa' 9 March 2013

available at <http://world.time.com/2013/03/09/kenyas-election-what-uhuru-kenyattas-victory-means-for-africa/> (accessed 14 July 2014).

Russel A '2013: A Decisive Year for Kenya – and the ICC' 3 January 2013 available at

<http://justiceinconflict.org/2013/09/05/icc-and-kenya-parting-ways-what-it-means-and-what-it-doesnt/> (accessed 14 July 2014).

The Christian Science Monitor 'Text of Kenya Power-Sharing Deal' 29 February 2008 available at

<http://www.csmonitor.com/World/Africa/2008/0229/p25s01-woaf.html> (accessed 30 April 2014).

The Sentinel Project 'Equality of Impunity?' 6 December 2013 available at

<https://thesentinelproject.org/2013/12/06/equality-of-impunity/> (accessed 6 October 2014).

Wamai N 'The International Criminal Court and the Kenyan Election' 2 May 2013 available at

<http://qatescambridge.wordpress.com/2013/05/02/unintended-impacts-in-the-kenyan-election/> (accessed 14 July 2014).

Website of the International Criminal Court available at www.icc-cpi.int (accessed 20 October 2014).