



Open Letter to the President of the International Criminal Court (ICC) on the Decision on William Ruto's Excusal from Continuous Presence at his Trial and the forthcoming Decision on *In Situ* Hearings

Your Excellency,

Judge Sang-Hyun SONG

President of the International Criminal Court (ICC)

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The Netherlands

We, Kenyans for Peace with Truth and Justice (KPTJ) wish to express our concerns about recent and potentially forthcoming decisions by the trial chamber which appear to contradict the spirit of the Rome Statute and disregard the expectations that victims have for impartial and transparent justice

1. Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial

The first of these is the decision of the Trial Chamber in the *Prosecutor vs. William Samoei Ruto* to Grant the accused excusal from being present at all stages of the hearing in his case. KPTJ considers this decision to be ill informed and in contravention of the principle of Irrelevance of Official Capacity.

Mr. Ruto's request for excusal was based on the fact that he has since the beginning of the process ascended to the Deputy Presidency of the Republic of Kenya and as such requires leeway from being present at the court in order to attend to official duties. Mr. Ruto's argument is based purely on his position in government and attendant responsibilities. The Court's acquiescence to his request, in our opinion, amounts to preferential treatment, contravenes the very essence of the Rome Statute's assertion on official capacity and misinterprets the convention of presence during trial:

Article 27 of the Rome Statute States the following:

- 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.*
- 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.*

It is our opinion that allowing Mr. Ruto to miss sections of his trial owing to his ascendancy to the Deputy Presidency panders to the whims of the accused and accords him preferential treatment purely on the basis of his position as a state officer. This creates a distinction in treatment of state and non- state officers by the Court. The decision contradicts the essence of Article 27 on equal application of the statute without distinction based on official capacity.

Politically, the excusal sends out the wrong signal to victims and affected communities who have placed their faith in the ICC to render justice impartially. Given the history of preferential treatment of political elites by the Kenyan legal system, victims and affected communities will view this decision as the beginning of a deliberate effort to absolve the accused persons in the Kenyan cases from criminal responsibility due to their ascendancy to high political offices following the recent general elections.

Further, the excusal sends the wrong signal to African leaders who have benefitted from impunity. It indicates that even when a process is initiated to hold them accountable, they will benefit from their political status and receive preferential treatment from international tribunals. Public perception views the court's decision as pandering to the whims of the African Union (AU) which has been critical of the ICC in defence of the suspects in the Kenyan cases.

2. Application for conducting in situ hearings, either in Kenya or Tanzania

On 9 April 2013, as requested by the Trial Chamber, the Registry transmitted its observations to the Trial Chamber concerning possible modalities for video links to be used in the trial hearings in the two Kenya cases. In addition to requesting to conduct the trial via video link, the Defense for Ruto and Sang filed applications for conducting *in situ* hearings, either in Kenya or Tanzania.

Victims and witnesses remain concerned about the forthcoming decision on partial *In Situ* Hearings. The feasibility study carried out by the registry focuses more on the logistical aspects of local hearings as opposed to the more important aspects of victims concerns, particularly the safety of victims, witnesses and affected communities.

Constituent members of KPTJ have interacted with victims, their families and affected communities who have displayed trepidation towards the possibility of all or parts of the hearings being conducted either in Arusha, Tanzania or Kenya. The proximity of these potential

trial locations poses a great danger to victims, witnesses, affected communities and their families who risk being identified and re-victimized by associates and supporters of the accused persons.

The political risks attendant to *in Situ* hearings are also evident. The accused persons are likely to indirectly mobilize their supporters to the location of the hearings and create a political spectacle which will detract from the essence of the trials and generate political tensions which will in turn derail the proceedings. This is a precedent that has taken place in local judicial mechanisms whenever political elites in Kenya face legal scrutiny by the Courts.

The effect of *in Situ* hearings in this political context will serve to politicize the proceedings and diminish the principle of such hearings which are designed to bring the justice process closer to the affected communities so that they can be part and parcel of the process of delivering justice. Instead, the political manipulation of the hearings in Kenya will serve to disaffect victims and affected communities who will be intimidated and harassed. Further, witnesses will face unprecedented safety concerns and may be exposed to coercion.

We urge the Court to consider these sensitive issues which will have an effect on the integrity and legitimacy of proceedings and act in good faith to safeguard the rights of victims and affected communities.

Kindly receive the assurance of our most distinguished sentiments.

Gladwell Otieno

(For Kenyans for Peace with Truth and Justice)

CC: Mr. Herman von Hebel

The Registrar

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