

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 16 December 2013

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding
Judge Olga Herrera Carbuccion
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

***THE PROSECUTOR v.
WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG***

Public

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

Sources: Defence for Mr. William Samoei Ruto

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. Introduction

1. Mr. William Samoei Ruto is an accused person before the Court who is concurrently mandated to fulfil functions of an “important and extraordinary [...] dimension” as Deputy President of the Republic of Kenya.¹ The defence for Mr. Ruto (“Defence”) hereby requests the Trial Chamber, pursuant to Article 63(1) of the Rome Statute (“Statute”) and Rule 134*quater* of the Rules of Procedure and Evidence (“Rules”), to excuse Mr. Ruto from physical presence at his trial due to his extraordinary obligations at the highest national level.
2. Rule 134*quater* was adopted by consensus by the Assembly of States Parties (“ASP”) at its 12th Session on 27 November 2013.² The ASP adopted two other amendments to the Rules³ that also address the meaning, scope and application of Article 63(1).
3. The ASP’s intervention was necessitated on two bases. First, to provide a clearer understanding of States Parties’ intentions and views regarding the general interpretation and application of Article 63(1) in light of the minimal information and lack of clarity in the Statute’s *travaux préparatoires*. Secondly, to address the particular situation of cooperating accused who are also government officials at the highest level, exemplified by Mr. Ruto in this case and by Mr. Kenyatta in the Kenya II case.
4. In adopting Rule 134*quater*, the ASP, as the Court’s legislature, codified the manner in which a Trial Chamber should exercise its discretion when confronted with this second issue. In particular, the ASP confirmed that Trial Chambers are competent to find “a balanced approach by virtue of which the Court will continue to exercise the jurisdiction to inquire into the criminal responsibility of

¹ ICC-01/09-01/11-777 (“Ruto Excusal Decision”), paras. 50-51.

² Resolution ICC-ASP/12/Res.7 (Advance Version).

³ These are Rule 134*bis* and 134*ter*. See Resolution ICC-ASP/12/Res.7 (Advance Version).

the accused, while still permitting him to continue to perform his [or her] functions of state".⁴

5. The Defence submits, as more fully articulated below, that this excusal request satisfies all the Rule 134*quater* criteria and, therefore, should be granted by the Trial Chamber in order to achieve the above-mentioned principled, pragmatic and necessary balance between two competing and legitimate norms.

II. Applicable Law

A. Relevant Provisions of the Statute and Rules

6. Article 63(1) of the Statute states: "*The accused shall be present during the trial.*"
7. Article 67(1)(d) of the Statute provides that: "*In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: [...] Subject to article 63, paragraph 2, to be present at the trial [...]*".
8. Article 64(2) of the Statute obligates a Trial Chamber to "*ensure that a trial is fair and expeditious and conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses*".
9. New Rule 134*ter* ("Excusal from presence at trial") states:⁵
 1. An accused subject to a summons to appear may submit a written request to the Trial Chamber to be excused and to be represented by counsel only during part or parts of his or her trial.
 2. The Trial Chamber shall only grant the request if it is satisfied that:
 - (a) exceptional circumstances exist to justify such an absence;
 - (b) alternative measures, including changes to the trial schedule or a short adjournment of the trial, would be inadequate;
 - (c) the accused has explicitly waived his or her right to be present at the trial; and
 - (d) the rights of the accused will be fully ensured in his or her absence.

⁴ Ruto Excusal Decision, para. 92.

⁵ See Resolution ICC-ASP/12/Res.7 (Advance Version), p. 4.

3. The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question. Any absence must be limited to what is strictly necessary and must not become the rule.

10. New Rule 134^{quater} (“Excusal from presence at trial due to extraordinary public duties”) provides:⁶

1. An accused subject to a summons to appear who is mandated to fulfill 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.
2. The Trial Chamber shall consider the request expeditiously and, if alternative measures are inadequate, shall grant the request where it determines that it is in the interests of justice and provided that the rights of the accused are fully ensured. The decision shall be taken with due regard to the subject matter of the specific hearings in question and is subject to review at any time.

B. Appeals Chamber Judgment

11. In its recent judgement, the Appeals Chamber made several key findings regarding the general interpretation and application of Article 63.⁷
12. First, the Appeals Chamber found that “article 63 (1) of the Statute does not operate as an absolute bar in all circumstances to the continuation of trial proceedings in the absence of the accused”.⁸ Second, a Trial Chamber does have discretion to excuse an accused from physical presence at trial in limited circumstances.⁹ Third, “the presence of the accused must remain the general rule”.¹⁰ Fourth, and drawing upon Article 63(2) as an interpretive guide:¹¹
 - i. the requirement that an accused be physically present at trial can be superseded by certain rights, duties and/or circumstances, among them the duty of the Court to ensure that proceedings are carried out in an orderly manner in the interests of the fair and proper administration of justice;¹²

⁶ See Resolution ICC-ASP/12/Res.7 (Advance Version), p. 4.

⁷ ICC-01/09-01/11-1066 OA 5 (“Ruto Excusal Judgment”).

⁸ Ruto Excusal Judgment, para. 55.

⁹ Ruto Excusal Judgment, para. 61.

¹⁰ Ruto Excusal Judgment, para. 61.

¹¹ Ruto Excusal Judgment, para. 61.

¹² Ruto Excusal Judgment, para. 51.

- ii. Excusal cannot be granted until “other reasonable alternatives have proved inadequate”;¹³
 - iii. The excusal granted must only be “for such duration as is strictly required”; and¹⁴
 - iv. An absent “accused must still be represented by and in position to instruct counsel”.¹⁵
13. These general principles were derived by the Appeals Chamber in recognition of the reality that the “complex nature of trials of international crimes”, means that “[a] measure of flexibility in the management of proceedings” is required. The Appeals Chamber found that this flexible approach “accords with the duty of the Trial Chamber to ensure that a trial is” conducted in the manner required by Article 64(2) of the Statute.¹⁶
14. The Appeals Chamber’s analysis of Article 63 in its judgment also revealed that, while broad principles could be discerned from the Statute’s *travaux préparatoires*, there was a lack of clarity about the more specific application of the Article. In this regard, the Appeals Chamber noted:
- the travaux préparatoires, as a secondary means of interpretation, show that, although a number of exceptions to the requirement of the accused’s presence at trial other than that set out in article 63 (2) of the Statute were discussed and ultimately deemed unnecessary, the question of whether an accused person could be excused from attending the trial in circumstances where he or she was, in principle, present for the trial, but had waived the right to be present, was not explicitly addressed.*¹⁷

¹³ Ruto Excusal Judgment, para. 61.

¹⁴ Ruto Excusal Judgment, para. 61.

¹⁵ Ruto Excusal Judgment, para. 61.

¹⁶ Ruto Excusal Judgment, para. 50. See text of Article 64(2) at paragraph 8 above.

¹⁷ Ruto Excusal Judgment, para. 52 (internal citations omitted) (emphasis added).

15. In the Ruto Excusal Judgement, the Appeals Chamber addressed one part of this question, namely when a Trial Chamber may grant an accused's request for excusal in a particular, but potentially broadly applicable, circumstance. As discussed more fully below, the test addressing this particular circumstance was codified by the ASP in Rule 134^{ter} of the Rules.
16. Crucially, however, the Appeals Chamber made clear that excusal "premised on Mr. Ruto's important function" would not be addressed.¹⁸ It was, thus, left to the ASP to take the baton from the Appeals Chamber and address this scenario, along with certain others.

C. Assembly of States Parties and the Adoption of New Rules

17. The ASP is not only the legislature of the ICC,¹⁹ it is also responsible for the overall management and oversight of the Court, setting the ICC's long-term vision and seeking to ensure the Court's viability and continued growth through the addition of States Parties.²⁰ Given this reality, and in view of the critical and pressing nature of the issue, the ASP exercised its legislative function by amending the Rules to provide greater clarity and instruction to the Court on the meaning, scope and application of Article 63.
18. Amending the Rules was the appropriate course to take because, as recognised by the scholar and commentator, William Schabas:²¹

[t]he Rules [...] are not exhaustive, [...] despite the aspirations of their drafters. [...] [M]any issues and circumstances were not foreseen, and in the silence of the Rules and the Regulations [of the Court] the judges have had to innovate. [...] Of course,

¹⁸ Ruto Excusal Judgment, para. 58.

¹⁹ See ICC - Assembly of States Parties, http://www.icc-cpi.int/en_menus/asp/assembly/Pages/assembly.aspx ("The Assembly of States Parties is the management oversight and legislative body of the International Criminal Court."). See also Statute, Article 51.

²⁰ See, e.g., Statute, Article 112 and Resolution ICC-ASP/12/Res.8 (Advance Version), Strengthening the International Criminal Court and the Assembly of States Parties.

²¹ W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford, 2010), p. 645 (internal citations omitted).

the [ASP] may always intervene by means of an amendment to the Rules in order to adjust or even overrule decisions taken by the chambers in this area.”.

19. The non-exhaustive nature of the Rules is recognised in the amendment process.

In this regard, the following explanation is instructive.

*The relative ease with which [the Rules] can be adopted...will allow [them] to safeguard the relevance and adaptability of the ICC in changing historical circumstances. Although the...Rules are first and foremost a reflection of the will of the [ASP], it can be assumed that they will evolve organically over time to meet the needs of the Court, of the participants involved in its processes, and of States Parties [...].*²²

20. In this context, the ASP at the recent session adopted three rules that provide a more detailed framework for the Court’s approach to the scope and application of Article 63(1) and give expression to the limited circumstances in which a Trial Chamber has discretion to excuse an accused from physical presence at trial.

21. First, through Rule 134*bis*, the ASP clarified that Article 63(1) of the Statute permits an accused to fulfil the presence requirement through video technology upon application to and at the discretion of the Trial Chamber.²³

22. Second, through Rule 134*ter*, the ASP set out the principles and procedures governing a Trial Chamber’s exercise of discretion in circumstances where an accused requests excusal on the basis of “exceptional circumstances”. In adopting Rule 134*ter*, the ASP codified the test “derived” by the Appeals

²² B. Broomhall, “Article 51 Rules of Procedure and Evidence”, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Hart 2008), p. 1037.

²³ The text of Rule 134*bis* is as follows (ICC-ASP/12/Res.7 (Advance Version), p. 3):

Presence through the use of video technology

1. An accused subject to a summons to appear may submit a written request to the Trial Chamber to be allowed to be present through the use of video technology during part or parts of his or her trial.
2. The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question.

Chamber as appropriate for requests falling under this category and incorporated the test in full in Rule 134*ter*.²⁴

23. Through Rule 134*quater* the ASP addressed the issues presently facing Mr. Ruto in this case. In so doing, the ASP expressed its consensus view that the situation of cooperating accused persons who are “mandated to fulfill extraordinary public duties at the highest national level” do not fall into the category of circumstances covered by Rule 134*ter*, and therefore provided a separate rule to address such situations.
24. As expanded upon below, the overlap in certain elements of Rules 134*ter* and 134*quater* is logical and necessary in view of the generally applicable principles outlined in the Ruto Excusal Judgment, as identified at paragraph 12 above. Bearing in mind these general principles, it is clear from the amendments to Rule 134 and the limited and exceptional situations they address that the presence of the accused at trial still remains the general rule.²⁵
25. The adoption of the amendments to Rule 134 exemplify the underlying purpose of the Rules amendment process – namely, as stated above, to permit the Court’s legislature to ensure that the ICC “evolve[s] organically”, and “to safeguard the relevance and adaptability of the ICC in changing historical circumstances”. In respect of the rule at issue in this request - Rule 134*quater* - the ASP, cognisant of the jurisprudence and practices of the Court, has addressed the practical and real world consequences of the unforeseen, but welcome development of accused individuals who are mandated to fulfill extraordinary public duties at the highest national level, *voluntarily* submitting themselves to the jurisdiction of the Court. Specifically, the ASP has recognized that the requirement that an accused

²⁴ Compare the text of Rule 134*ter* (Advance Version) set out at paragraph 9 above with that of paragraph 62 of the Ruto Excusal Judgment.

²⁵ *Supra*, para. 12.

be physically present at trial should be superseded by the interests of the State in this limited instance.²⁶

26. Notwithstanding the foregoing, it is recognised that the Rules are “an instrument for the application of the Rome Statute...to which they are subordinate in all cases.”²⁷ However,

*[n]ormal rules of treaty interpretation will lead the Court to seek readings of the Rules which are consistent with the Statute. Just as States are presumed to intend agreements consistent with their other obligations at international law, so must the States Parties be assumed to intend that the Rules they adopt be consistent with the Statute.*²⁸

III. Submissions on content of Rule 134^{quater} and its application to Mr. Ruto

A. The applicable test under Rule 134^{quater} for excusal of an accused person

27. If the following six elements are satisfied, a Trial Chamber “shall” grant a request for excusal pursuant to Rule 134^{quater}.

(i) Individual subject to a summons and mandated to fulfil extraordinary public duties at the highest national level

28. The core of Rule 134^{quater} is addressed in this first element – namely, that the person requesting excusal must be “subject to a summons to appear [and] is mandated to fulfill extraordinary public duties at the highest national level”. The summons sub-element needs no explanation. With respect to the next sub-element, the accused person must be one who occupies an office “at the highest national level”, which clearly includes individuals at the apex of the governance structure of a State. Further, the individual must be “mandated” – that is authorised, if not compelled, by law – to undertake “extraordinary public

²⁶ *Supra*, para. 12i.

²⁷ Rules, Explanatory Note, p. 1. See also Article 51(5).

²⁸ B. Broomhall, “Article 51 Rules of Procedure and Evidence”, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Hart 2008), p. 1044 (internal citations omitted).

duties". The exact contours of the term "extraordinary" need not be examined at length here, "[b]ut it suffices [...] to venture the view that the functions that meet the test are not ones that many people are in a position to perform at the same time and in the same sphere of operation."²⁹

29. Unlike Rule 134*ter*, which replicates the considerations detailed in the Ruto Excusal Judgment, Rule 134*quater* clearly omits the restriction that the excusal ordered be for such duration as is strictly required. Such a limitation is unnecessary as Rule 134*quater* authorises a Trial Chamber to grant an excusal for as long as the accused person is mandated to fulfil extraordinary public duties at the highest national level.
30. Rule 134*quater*'s recognition of an individual's "extraordinary public duties" does not conflict with Article 27 ("Irrelevance of official capacity"). The Trial Chamber's previous findings in this regard fully address and dismiss this matter. In particular, the Chamber set out that "[t]he central principle captured in Article 27 [] is that the official position of the accused does not shield him against the jurisdiction of the Court".³⁰ Accordingly, the Chamber held that "[t]he object of Article 27 is not to remove from the Trial Chamber all discretion to excuse an accused from continuous presence in an ongoing trial, when the excusal is recommended by the functions implicit in the office that he or she occupies".³¹ In short, and as required by Article 27, any excusal granted pursuant to Rule 134*quater* will have no effect on the fact that Mr. Ruto remains before this Trial Chamber in order for it to determine his criminal responsibility for the charges laid against him. To suggest otherwise is without legal merit.

²⁹ Ruto Excusal Decision, para. 49.

³⁰ Ruto Excusal Decision, para. 69.

³¹ Ruto Excusal Decision, para. 71.

(ii) Explicit waiver

31. “[T]he request must specify that the accused explicitly waives the right to be present at the trial.” This element is likewise straightforward.

(iii) Alternative measures are inadequate

32. As set out in Rule 134*ter*, alternative measures may include changes to the trial schedule or a short adjournment of the trial. In determining whether alternative measures are inadequate it is necessary to consider the underlying purpose of this new rule – namely, to allow a State to have the benefit of the services and dedicated attention of an accused individual mandated to fulfil extraordinary public duties at the highest national level, while at the same time ensuring that the accused’s criminal case before this Court proceeds in an efficient, expeditious and fair manner.

33. The importance placed by the ASP on these two goals is emphasised by the requirement that a request submitted pursuant to Rule 134*quater* “shall” be considered expeditiously – a qualification not included by the ASP in Rule 134*ter*.

(iv) Request is in the interests of justice

34. This fourth element is also unique to Rule 134*quater*. The Defence submits that, in the context of this Rule, the concept of the “interests of justice” should be interpreted broadly. Bearing in mind the overarching and fundamental issues that the rule seeks to address, it is submitted that the principle entails balancing the interests of all parties and participants (including victims), as well as witnesses, to efficient, expeditious and fair proceedings, as well as the interests of a concerned State³² to the benefit of the services and dedicated attention of an accused individual especially one in receipt of a democratic mandate to perform extraordinary public duties at the highest national level.

³² In regard to this ‘democratic’ interest, see the Ruto Excusal Decision at paragraphs 80 to 90.

(v) Rights of the accused must be fully ensured

35. The rights of an accused excused pursuant to the rule will primarily be ensured by the accused's counsel acting on his or her behalf during trial proceedings.

(vi) Decision on the request shall be taken with due regard to the subject matter of the specific hearings in question and is subject to review at any time

36. This final limb of the Rule 134*quater* test recognizes that the Trial Chamber remains the ultimate guarantor of the fairness, efficiency and expeditiousness of the proceedings. The indicated review might be justified, as suggested by the wording of the rule, with respect to the specific circumstances of particular hearings.

B. Mr. Ruto's request for excusal pursuant to Article 63(1) and Rule 134*quater*

37. The Defence respectfully submits that Mr. Ruto satisfies all the elements set out under Rule 134*quater* and, as prescribed by the Rule, the Trial Chamber "shall" excuse him from attendance at trial.

(i) Mr. Ruto is subject to a summons and is an individual mandated to fulfil extraordinary public duties at the highest national level

38. As the Trial Chamber is aware, Mr. Ruto appears before the Court upon summons.³³ Further, Mr. Ruto, as the Deputy President of Kenya, is "an individual mandated [by the Constitution of Kenya] to fulfil extraordinary public duties at the highest national level". This is a finding that the Trial Chamber has, of course, already reached in the Ruto Excusal Decision, which remains equally valid today.³⁴

³³ ICC-01/09-01/11-1, issued on 8 March 2011.

³⁴ Ruto Excusal Decision, paras. 50-51. In particular, the Trial Chamber noted that: "Only one person at a time is constitutionally authorised to perform the functions of the Deputy President of Kenya during any presidential term of five years, and those functions include the following: the Deputy President of Kenya is the principal assistant of the President and deputises for the President in the execution of the President's functions; when the President is absent or is temporarily incapacitated, and during any other period that the President decides, the Deputy President shall, within certain limits, act as the President; in the event of vacancy in the office of the President, the Deputy President shall assume office as President for the remainder of the term of the President; and, the President and the Deputy President are the principal members of the National Executive of the

39. The Defence emphasises that Mr. Ruto is not seeking an excusal for his own personal convenience or because he is in any way a recalcitrant accused. The contrary is true. Mr. Ruto has attended sessions which he was not required to attend (such as various status conferences) and, since trial began on 10 September 2013, has attended all save 9 trial days.³⁵ However, the reality is that Mr. Ruto finds himself subject to two extremely onerous duties. The first is to the Court which includes Mr. Ruto's pursuit for justice and to clear his name. The second is to the Republic of Kenya and Mr. Ruto's obligation to faithfully discharge his constitutional duties and to fulfil his electoral pledges which include working tirelessly to promote national security, foster economic development and bring social justice to the country. Accordingly, Mr. Ruto wishes to avail himself of the workable solution which the ASP provided for this specific situation in the form of Rule 134*quater* relief.

(ii) Mr. Ruto's Explicit waiver

40. Through his counsel, Mr. Ruto hereby respectfully informs the Chamber that he waives his right to be physically present at his trial and is content to and fully confident in being represented by counsel only. Mr. Ruto has been informed of the implications of his request and his waiver is freely and unequivocally given. Should the Trial Chamber so direct, Mr. Ruto stands ready to submit an appropriate signed waiver to the Chamber to this effect as he has done on previous occasions pursuant to the Chamber's orders.³⁶

Republic." Ruto Excusal Decision, para. 51, citing to Articles 130(1), 136(2)(a), 146(2)(a), 147(1), 147(3) and 148 of the 2010 Constitution of Kenya (a copy of the Constitution is available at: <http://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf>).

³⁵ The Defence has not included the one week adjournment which was granted after the Westgate attack.

³⁶ See ICC-01/09-01/11-782-Anx; ICC-01/09-01/11-1068-Anx; ICC-01/09-01/11-1079-Anx; ICC-01/09-01/11-1096-Anx.

(iii) *Alternative measures are inadequate* & (iv) *Request is in the interests of justice*

41. The interrelated nature of the principles and considerations underlying elements three and four of the Rule 134*quater* test mean that these elements can be addressed together.
42. As submitted above, the ASP's purpose in adopting Rule 134*quater* is to permit a State to have the benefit of the services and dedicated attention of an accused individual mandated to fulfil extraordinary public duties at the highest national level, while at the same time ensuring that the accused's criminal case before this Court proceeds in an efficient, expeditious and fair manner.
43. In view of the scope and nature of Mr. Ruto's constitutional duties, alternative measures are inadequate to concurrently satisfy the two above-identified interests. The daily duties of the Deputy President of Kenya are, by virtue of the singular and high-level status of that office, evidently "extraordinary public duties". Further, the reality is that, absent a grant of excusal pursuant to Rule 134*quater*, the nature of these duties means that regular and repeated adjournments and changes to the trial schedule will likely be necessary. Per the maxim *ut res magis valeat quam pereat*,³⁷ it is only pursuant to Rule 134*quater* (and not Rule 134*ter*) that Mr. Ruto may request excusal on the basis of his extraordinary public duties as Deputy President of Kenya.
44. As the Majority of Trial Chamber V(B) commented in the Kenya II case:

Given the lessons learnt so early in the Ruto and Sang trial when the trial had to be adjourned for Mr Ruto to return home and attend to his duties in connection to the

³⁷ See further the Ruto Excusal Decision at paragraph 39 (citing to Corfu Channel case, (Judgment of 9 April 1949) (1949) ICJ Reports 4 at p. 24; Interpretation of Peace Treaties (Second Phase) Advisory Opinion (1950) ICJ Reports 221 at p. 229, and the dissenting opinion of Judge Read at p. 231 [International Court of Justice]; and The 'Kronprins Gustaf Adolf (Sweden v USA) (1932) Reports of International Arbitral Awards, vol II 1239 at p. 1256).

*Westgate terror attack, we find highly unsafe the Prosecutor's persistence in the philosophical rectitude of her opposition to the Ruto relief being granted in this case.*³⁸

45. Accordingly, granting this request is in the interests of justice because it will ensure the efficient and expeditious conduct of proceedings, an objective central to the interests of the victims in this case. Similarly, in the event this request is denied, the significant difficulties existent in the scheduling of witnesses in this case will be exacerbated, thereby resulting in avoidable travel difficulties and stress for the witnesses.³⁹
46. It is similarly in the interests of justice in a wider sense, and in view of the above-stated second 'State-oriented' purpose of this rule, to grant Mr. Ruto's excusal request so that the Republic of Kenya, and therefore the more than forty million citizens of the Republic, can benefit from the regular services and dedicated attention of Mr. Ruto, who the Kenyan citizenry have elected to fulfill the mandate of the high office of Deputy President.
47. The Defence recognizes the comment of the Appeals Chamber that "the continuous absence of an accused from his or her own trial would have a detrimental impact on the morale and participation of victims and witnesses", and that "[m]ore broadly, the presence of the accused during the trial plays an important role in promoting public confidence in the administration of justice". However, nothing in Rule 134*quater* mandates that the granting of an excusal pursuant to the rule will *ipso facto* result in Mr. Ruto's "continuous" absence from trial. As detailed in paragraph 39 above, Mr. Ruto has already been present for very significant portions of the trial and in addition may attend other hearings in pursuit of his Article 67 right. Indeed, the Defence certainly does not

³⁸ ICC-01/09-02/11-830 ("Kenyatta Excusal Decision"), para. 65.

³⁹ As noted by the Appeals Chamber, "the psychological well-being of witnesses would not be best served if the trial had to be automatically adjourned in each such instance" of an accused's justified absence from trial (Ruto Excusal Judgment, para. 50).

preclude the possibility of Mr. Ruto exercising this right in the event excusal is granted. More importantly, as addressed below, the excusal decision is subject to review at any time by the Trial Chamber.

48. With respect to the promotion of public confidence in the administration of justice, Mr. Ruto's unwavering cooperation with and respect for the Court, both prior to and after his election as Deputy President, is, arguably, the strongest public indication of his respect for this Court as an institution of justice. The Defence notes in this respect ASP President Intelmann's statement that, *inter alia*, Rule 134*quater* reaffirms "the principle that no one is above the law within the Rome Statute".⁴⁰

(v) Rights of the accused must be fully ensured

49. The rights of Mr. Ruto will be fully ensured in any absences from the courtroom, as they have been thus far, by his counsel. Further, and given the importance of an accused person being an active participant in the proceedings,⁴¹ the Defence submits that the Court's remote E-court access system, daily produced verbatim records of trial proceedings, and, of course, telecommunications, are more than adequate to allow Mr. Ruto to be fully informed of the proceedings in his case and, thus, to be properly equipped to provide detailed and relevant instructions to counsel on an on-going basis.

(vi) Decision on the request shall be taken with due regard to the subject matter of the specific hearings in question and is subject to review at any time

50. As trial proceedings have now commenced, the vast majority of remaining hearings in this case will entail the oral testimony of witnesses. Given, as is discussed above, the balancing of interests that is at the heart of Rule 134*quater*, the Defence submits that, in principle, it is legitimate and proper for Mr. Ruto to

⁴⁰ Closing remarks of the President of the Assembly of States Parties, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/PR967.aspx.

⁴¹ Ruto Excusal Judgment, para. 49.

be excused from trial hearings moving forward. Nonetheless, and as this final broad element of the Rule 134*quater* test provides, a granted excusal is subject to the Chamber's review at any time, with the Trial Chamber mandated to take into consideration the nature of the hearings upcoming before the Chamber. In this respect, if the request is granted, the Defence submits that, on any occasion where the Chamber is considering reviewing the grant of excusal, the parties be first permitted to make submissions in order to inform the Chamber's review.

V. Relief requested

51. Based on the above submissions, the Defence of Mr. William Samoei Ruto respectfully requests that the Trial Chamber excuse Mr. Ruto from attending his trial pursuant to Article 63(1) of the Statute and Rule 134*quater* of the Rules.

Respectfully submitted,



Karim A.A. Khan QC
Lead Counsel for Mr. William Samoei Ruto

Dated this 16th Day of December 2013
At The Hague, Netherlands