Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/09-01/11**
Date: **8 January 2014**

TRIAL CHAMBER V(A)

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR V. WILLIAM SAMOEI RUTO
and JOSHUA ARAP SANG

Public

Prosecution response to Defence request pursuant to Article 63(1) and Rule 134*quater* for excusal from attendance at trial for William Samoei Ruto

Source: **The Office of the Prosecutor**

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

The Office of the Prosecutor
Ms. Fatou Bensouda
Mr. James Stewart
Mr. Anton Steynberg

Counsel for William Samoei Ruto
Mr. Karim Khan
Mr. David Hooper
Ms. Shyamala Alagendra

Counsel for Joshua Arap Sang
Mr. Joseph Kipchumba Kigen-Katwa
Ms. Caroline Buisman

Legal Representatives of Victims
Mr. Wilfred Nderitu

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms. Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr. Herman von Hebel

Defence Support Section

Victims and Witnesses Unit
Mr. Patrick Craig

Detention Section

Victims Participation and Reparations Section

Other

Introduction

1. Mr Ruto seeks an unlimited excusal from attendance at trial ("Request").[1] The Request should be denied for three reasons: (i) it is contrary to the plain text of Rule 134*quater*, which does not authorise "blanket excusals";[2] (ii) it advances a reading of Rule 134*quater* that is inconsistent with the Statute; and (iii) it fails to make the necessary factual showing.

2. *First,* the Request is contrary to the plain text of Rule 134*quater*, which establishes a procedure through which certain accused with "extraordinary public duties" may apply for absences only from "specific hearings". Thus, the Request must fail from the outset, since what it seeks is a blanket excusal.

3. *Second*, even if Rule 134*quater* could be read to authorise a blanket excusal, such a construction would be *ultra vires* the Rome Statute and hence unenforceable. The Rules and any amendments thereto, "shall be consistent with th[e] Statute".[3] If they are not, Article 51(5) requires that the Statute shall prevail. The reading of Rule 134*quater* advanced in the Request fails, because it violates at least three provisions of the Statute:

    - **Article 63(1).** The Appeals Chamber has held that Article 63(1) does not permit a "blanket excusal" from trial. Rather, excusal may be permitted only "on a case-by-case basis, at specific instances of the proceedings".[4] Yet the interpretation of Rule 134*quater* advanced in the Request would permit just such a "blanket excusal" and there is no suggestion of the "case-by-case" approach required by the Appeals Chamber. Such an interpretation is unsustainable, as it would create a fatal conflict

[1] ICC-01/09-01/11-1124.
[2] ICC-01/09-01/11-1066 OA 5, para.63 ("the Trial Chamber provided Mr Ruto with what amounts to a *blanket excusal* before the trial had even commenced, effectively making his absence the general rule and his presence an exception" (emphasis added)).
[3] Article 51(4).
[4] ICC-01/09-01/11-1066 OA 5, para.63.

between Rule 134*quater* and Article 63(1). Thus, the request must fail as a matter of law.

- **Article 21(3).** Article 21(3) requires the Statute and Rules to be interpreted and applied "without any adverse distinction" based on, *inter alia*, the "status" of an individual. The reading of Rule 134*quater* advanced in the Request violates this equal treatment principle, because it would treat a certain accused persons differently to others based solely on his or her "status" as a high public official. Again, the Request fails as a matter of law.

- **Article 27(1).** Mirroring the equal treatment principle set down in Article 21(3), the first sentence of Article 27(1) requires the Statute to be applied "equally to all persons without any distinction based on official capacity". Again, the reading of Rule 134*quater* advanced in the Request violates the Statute's equal treatment principle because it 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.

4. The Prosecution acknowledges that the Chamber should seek to give effect to the legislative intent of Rule 134*quater* to the extent that the provision can be reconciled with the Statute. However, the adoption of Rule 134*quater* does not permit conflicting statutory provisions to be cast aside, which is what the Request requires the Chamber to do. The Chamber should reject that approach and instead seek a reading of Rule 134*quater* that is consistent with the Statute. The Prosecution submits such a reading is possible – one that enables Rule 134*quater* to be reconciled with the interpretation of Article 63(1) adopted by the Appeals Chamber and the equal treatment principle articulated in Articles 21(3) and 27(1). Under this interpretation:

- A summonsed accused who is "mandated to fulfil *extraordinary* public duties at the highest national level"[5] satisfies the "exceptional circumstances" component of the six-part test for excusal laid down by the Appeals Chamber under Article 63(1), provided that the specific duties relied upon are in fact shown to be "extraordinary".[6]
- The other five parts of the Appeals Chamber's test – alternative measures, limited absences, explicit waiver, assurance of rights, and case-by-case grants with due regard to hearings – apply to *all* accused, irrespective of their duties outside the courtroom.
- Finally, in exercising its discretion, as circumscribed by the Appeals Chamber, Rule 134*quater*(2) explicitly enjoins the Chamber to consider whether the excusal would be "in the interests of justice". In the context of this Rule, the "interests of justice" component recognises that there are interests at stake beyond those of the parties to the case, such as the interests of the citizens of the country concerned to enjoy effective leadership, the interests of victims and witnesses and the interests of the public in the proper administration of justice.[7]

5. The above interpretation gives effect to the legislative intent of Rule 134*quater*, which singles out requests for excusal due to extraordinary public duties for particular attention, as a specific sub-category of exceptional circumstances that may justify excusal, while respecting the plain language of the Rule and ensuring consistency with the Statute.

6. *Third*, even if the interpretation of Rule 134*quater* advanced in the Request could somehow be reconciled with Articles 63(1), 21(3) and 27(1) – and it cannot – the Request must still fail, for want of the necessary factual showing required to grant an accused's excusal from "specific hearings". In particular,

[5] Rule 134*quater*(1), emphasis added.
[6] ICC-01/09-01/11-1066 OA 5, para.62.
[7] See ICC-01/09-01/11-1066 OA 5, para.49. See further para.35 below.

the Request fails to demonstrate: (i) that there are particular "*extraordinary* public duties at the highest national level" that Mr Ruto is mandated to fulfil; (ii) that "alternative measures are inadequate"; (iii) that a blanket excusal "is in the interests of justice"; or (iv) that "due regard to the subject matter of the specific hearings in question" has been given.[8]

7. In sum, the Request fails on the law and on the facts. It should be denied.

Submissions

I. Rule 134*quater* does not permit a blanket excusal

8. The Request fails because Rule 134*quater*'s plain wording does not allow for the blanket excusal sought. The wording in the last sentence of Rule 134*quater*(2) states that any decision by the Chamber must be "taken with due regard to the subject matter of the specific hearings in question". These words demonstrate that the rule does not allow blanket absences. Rather, any request must be confined to "specific hearings", the nature of which is a determinative factor in the Chamber's decision on whether to grant it. To interpret this rule otherwise would be to violate the basic principles of statutory interpretation that statutes shall be read in accordance with their plain language[9] and so as to give effect to all terms.[10]

[8] Rule 134*quater*(2).
[9] Like the Statute, the RPE must be interpreted "in good faith" and in accordance with their "ordinary meaning"; see ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, para.55.
[10] As one leading commentator on interpretation of legal texts has stated, "[t]he presumption exists that a statute does not contain redundancies, and an apparent coincidence of two norms therefore is an inducement to interpret one of them in such a way that the apparent redundancy disappears" (A. Ross, *On Law and Justice* (2004), p.132). See also, *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) ("It is the duty of the Court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."); cited in, *inter alia*, *United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *Moskal v. United States*, 498 U.S. 103 (1990); *Warner-Lambert Co. v. Apotex Corp.*, 316 F.3d 1348, 1355 (Fed. Cir. 2003); On the application of the principles of interpretation to criminal procedure (in particular, the presumptions of coherence and lack of contradiction in the law), see J. Maier, *Derecho Procesal Penal*, Vol. I, 1 (1996), pp.209 et seq.

9. Indeed, the Request acknowledges that the "specific hearing" requirement is "the final limb of the Rule 134*quater* test",[11] but misconceives the nature and application of this test:

10. *First*, it is incorrect to suggest that Rule 134*quater*(2)'s "specific hearings" provision comes into play only if the Chamber decides to "review" an excusal decision.[12] On the contrary, Rule 134*quater*(2) states that "*[t]he decision* shall be taken with due regard to the subject matter of the specific hearings in question" (emphasis added). Thus, under the plain language of the rule, the "specific hearings" requirement applies to the decision itself, not only its review.

11. *Second*, it is incorrect to infer authorisation for blanket excusals from Rule 134*quater*(2)'s final clause, under which an excusal decision is "subject to review at any time".[13] The Chamber's authority to review its own decisions applies irrespective of the duration of the excusal authorised. A Chamber can review a decision to authorise a one-week excusal in the same way as it could review a decision to grant a blanket excusal. Rule 134*quater*(2)'s "review" clause therefore does not support the Defence argument that the provision authorises blanket excusals.

12. *Third*, there is no merit to the argument that Rule 134*quater* authorises blanket excusals because it "omits the restriction [present in Rule 134*ter*] that the excusal ordered be for such duration as is strictly required".[14] The requirement that absences "must be limited to that which is strictly required" arises from Article 63(1), as interpreted by the Appeals Chamber.[15] As explained further below, to ensure compliance with the Statute, the "strictly required" element of the Appeals Chamber's six-part test must be applied

[11] ICC-01/09-01/11-1124, para.36.
[12] *Ibid*.
[13] *Ibid*.
[14] *Ibid*., para.29.
[15] ICC-01/09-01/11-1066 OA 5, para.62.

also to applications under Rule 134*quater*. If not, Rule 134*quater* would be void due to inconsistency with the Statute. Therefore, the differences between Rule 134*ter* and Rule 134*quater* do not demonstrate that Rule 134*quater* permits blanket excusals, as the Request suggests.

II. The interpretation of Rule 134*quater* advanced in the Request is inconsistent with the Statute

13. Even if Rule 134*quater* could plausibly be interpreted to authorise a blanket excusal – and it cannot – such a construction could not be given effect because it would be inconsistent with the Statute.

a. The Statute prevails over the Rules in case of inconsistency

14. In cases of inconsistency between the Statute and the Rules, the Chamber must defer to the provisions of the Statute. Article 51(4) states that "[t]he Rules . . . [and any amendments thereto] . . . shall be consistent with this Statute". Article 51(5) is even clearer: "[i]n the event of conflict between the Statute and the Rules . . . the Statute shall prevail". The Explanatory note to the Rules also confirms that the Rules (including any amendments thereto under Rule 3) are "an instrument for the application of the Rome Statute . . . to which they are subordinate in all cases".[16]

15. Judge Pikis reaffirmed this principle in a separate concurring opinion in the *Lubanga* case: "in the event of conflict with the Statute the latter shall prevail (see article 51 (5) of the Statute)".[17] Trial Chamber V followed Judge Pikis'

[16] Explanatory note to the Rules of Procedure and Evidence, p.1.
[17] ICC-01/04-01/06-424 OA 3, Separate opinion of Judge Georghios M. Pikis, para.4; *see also* ICC-01/04-01/06-2953 A2 A3 OA 21, para.52 and fn.163 ("The Appeals Chamber recalls that the explanatory note to the Rules of Procedure and Evidence states that they are 'an instrument for the application of the Rome Statute'"); ICC-01/09-01/11-62, para.14 ("under article 51(5) of the Statute, the provision of rule 121(3) of the Rules is to be read against the backdrop of, and subject to statutory provisions that guarantee the rights of the Defence and, in particular, the right of the suspects to have adequate time for a meaningful preparation of their defence pursuant to article 67(l)(b)"); ICC-01/04-101-tEN-Corr, para.47 ("the Chamber must point out that, pursuant to article 51 (5) of the Statute, the Rules of Procedure and Evidence is an instrument that is subordinate to the Statute. It follows that a provision of the Rules cannot be interpreted in such a way as to narrow the scope of an article of the Statute."); ICC-02/05-01/09-3, para.128 ("the Majority considers that the Elements of Crimes and the Rules must be applied unless the competent

reasoning in its October 2012 decision on victims' participation when, "mindful of Articles 51(4) and (5)", the Chamber undertook to "apply Rule 89(1) of the Rules in the manner that it considers to be most consistent with the norms indicated in Article 68(3)".[18]

b. The blanket excusal sought in the Request is inconsistent with Article 63(1)

16. The governing texts and jurisprudence of this Court require that Rule 134*quater* be applied consistently with Article 63(1), as interpreted by the Appeals Chamber. By asking for Mr Ruto to "be excused from trial hearings moving forward"[19] – a blanket excusal – the Defence requests the Chamber to apply an interpretation of Rule 134*quater* that is inconsistent with the law as it stands.

17. The Appeals Chamber, cognisant of the accused's position and duties as the Deputy President of Kenya, rejected the possibility of a "blanket excusal", both explicitly in its analysis[20] and implicitly in the six-limb test it devised to regulate an accused's excusal from attendance at trial.[21] In particular:

a. The first limb demands that the absence of the accused "must not become the rule". By allowing Mr Ruto to be absent for the remainder of his trial, his absence would - inescapably - become the rule.

b. The third limb requires that an accused's absence "be limited to that which is strictly necessary". By allowing Mr Ruto to be absent for the remainder of his trial, his absence would not be "limited" at all.

c. The sixth limb requires any decision on excusal to be taken "on a case-by-case basis". By granting one excusal request for the rest of the trial, further

---

Chamber finds an irreconcilable contradiction between these documents on the one hand, and the Statute on the other hand. If such irreconcilable contradiction is found, the provisions contained in the Statute must prevail").

[18] ICC-01/09-01/11-460, para.22; see also paras.23-30.

[19] Request, para.50; see also para.47 ("in addition [Mr Ruto] may attend other hearings in pursuit of his Article 67 right."); 51 ("the Defence … requests that the Trial Chamber excuse Mr Ruto from attending his trial").

[20] ICC-01/09-01/11-1066 OA 5, paras.61, 63.

[21] *Ibid*.

decisions would no longer be necessary, rendering this requirement redundant.

d. The sixth limb also demands that the Chamber takes into account "the subject matter of the specific hearings . . . during the period for which excusal has been requested". If blanket excusals were possible, this entire phrase would be redundant.

18. The Request[22] recognises that one of the "key findings of the Appeals Chamber regarding the general interpretation of Article 63" is that "the presence of the Accused must remain the general rule".[23] However, the Request fails to squarely address the burning issue of how the blanket excusal sought can be reconciled with this principle.

19. To the extent that the Request attempts to reconcile the amendment with the Appeals Chamber's judgment by suggesting that the exceptional situation envisioned in Rule 134*quater* means that presence at trial will remain the rule *at this Court*,[24] this must be rejected. Article 63(1) requires that the presence of *each* accused during *each* trial be the general rule. The Appeals Chamber demonstrated this by focusing its judgment on whether *Mr Ruto's* presence at trial – nobody else's – would be the "exception" or "the rule". Neither do the arguments that Mr Ruto may voluntarily attend despite being excused, or that the Chamber may subsequently review the excusal decision, alter the fact that the *decision* to excuse him from this point onward would make his absence, not his presence, the general rule.

[22] At paras.11 – 12.
[23] ICC-01/09-01/11-1066 OA 5, para.61.
[24] Request, para.24.

c. The blanket excusal sought in the Request is inconsistent with the equal treatment provisions enshrined in Articles 21(3) and 27(1)

20. The Request's blanket excusal is also contradicted by the equal treatment provisions enshrined in the Statute.

21. *First,* Article 21(3) provides that "the application and interpretation of law" must "be without adverse distinction" based on any "other status". Under this article, the Chamber has the duty to "ensure that all accused are treated fairly and impartially",[25] which is a fundamental human right,[26] a *jus cogens* norm of international law,[27] and is reflected in the statutes of the *ad hoc* tribunals.[28]

22. Article 21 is "analogous to constitutional provisions in national law"[29] in that it permits the Chamber to "refuse to apply . . . a Rule of Procedure and Evidence if it [finds] the provision to be inconsistent with the standard in paragraph 3".[30] Because Rule 134*quater* forms part of the applicable law under the Statute,[31] it "must be construed in accordance with the provisions of article 21 (3)".[32]

23. Rule 134*quater* as proposed by the Defence would allow two accused differentiated only by their job description to achieve two entirely different outcomes. While the first would have to make case-by-case requests for

[25] ICC-01/09-01/11-777-Anx2, Dissenting opinion of Judge Herrera Carbuccia, para.7.
[26] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III), Article 7; International Covenant on Civil and Political Rights (16 December 1966) United Nations, Treaty Series, vol. 999, p.171, Article 14(1).
[27] Inter-American Court of Human Rights Advisory Opinion No.OC-18/03 "Legal Status and Rights of Undocumented Migrants," para.101 ("Accordingly, this Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws.").
[28] ICTY Statute Article 21(1); ICTR Statute Article 20(1); STL Statute Article 16(1).
[29] William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP, 2010), p.398.
[30] Margaret McAuliffe deGuzman, "Applicable law", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, Article by Article (Hart, 2008), p.712, margin no. 24.
[31] Article 21(1).
[32] ICC-01/04-01/06-424 OA 3, Separate opinion of Judge Pikis, para.4.

excusal, the other would be allowed to make one request for the whole of trial. This is directly in conflict with Article 21(3)'s principle of non-discrimination. Indeed, on the Defence's interpretation, while all Accused are equal, some – those who hold high public office – are more equal than others.

24. *Second*, Article 27(1) provides that "[t]his Statute shall apply equally to all persons without any distinction based on official capacity". Again, the interpretation of Rule 134*quater* advanced in the Request violates the principle of equal treatment under the law, creating different outcomes for accused persons seeking to be excused from attendance at their trial.

25. The Prosecution notes the Chamber's ruling, in its decision on Mr Ruto's request from excusal from continuous presence at trial, that the "main[] inten[tion]"[33] and "chief object"[34] of Article 27 is to remove immunity from jurisdiction on grounds of official position. But it is not the *only* object or intention of Article 27(1).

26. Split into two sentences, the scope of Article 27(1) is broader than its direct context suggests. Indeed, introductory words of the second sentence - "[i]n particular" - signal that the removal of jurisdictional immunity based on official capacity is *but one* important example of a wider principle of equal application of the Statute. While the purpose of the second sentence of Article 27(1) is undoubtedly to foreclose head of state immunity, the first sentence aims to ensure that *all* persons receive equal treatment under the law of this Court, both on substantive and procedural matters.

27. Further, the first sentence of Article 27(1) does not speak only in terms of immunity from prosecution, but instead requires that "***this Statute*** shall apply to all persons without any distinction" (emphasis added). This reference to the "Statute" as a whole, rather than solely to those provisions

[33] ICC-01/09-01/11-777, para.70.
[34] *Ibid.*, para.69.

relating to criminal responsibility, makes it clear that Article 27(1) was intended to ensure that the Court's legal framework is applied equally to all persons – be they great or small, powerful or weak, famous or obscure.[35]

28. A blanket excusal is in direct contrast to Article 27(1)'s principle of equal treatment because the Chamber would be able to grant different relief for accused in identical procedural postures solely on the basis of their official status.

29. *Third,* granting a particular Accused preferential treatment based only on his or her high official position would violate one of the founding principles of the Rome Statute, namely to end impunity of those responsible for the most serious crimes, regardless of who they are.

*d. The correct interpretation of Rule 134*quater *reconciles the ASP's legislative intent with the Statute*

30. The Prosecution recognises that the Assembly of States Parties is the Court's legislature, and that one of its intentions at this year's Assembly was to advance the state of the law with respect to the absence of an accused in high public office.[36] But the States Parties chose to amend the Rules, not the Statute, and Article 51(4) requires amendments to the Rules to be "consistent with th[e] Statute". Contrary to the Request's suggestion,[37] the recent amendments cannot "overrule" the Appeals Chamber's interpretation of Article 63(1).

[35] This reading of Article 27(1) is in turn reinforced by the requirement of Article 21(3), requiring an interpretation which eschews any distinction founded on, *inter alia*, status.
[36] See, *e.g.*, ICC-01/09-02/11-863-Anx-Corr, Dissenting opinion of Judge Eboe-Osuji, para.13 and footnotes cited therein.
[37] Request, para.18, citing to William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP, 2010), p.645. Properly read, Schabas' comments are limited to overruling innovations by the judges that arise from lacunae in the Rules or Regulations and not to judicial interpretations of provisions of the Statute.

Instead, "States Parties [must] be assumed to intend that the Rules they adopt be consistent with the Statute".[38]

31. Nor can the amended Rule be said to "provide greater clarity and instruction to the Court on the meaning scope and application of Article 63",[39] since any such alteration to the meaning of the Article, however subtle, amounts to nothing less than an impermissible amendment of the Statute.

32. The task for the Chamber, therefore, is to seek an interpretation of Rule 134*quater* that is consistent with the Statute, while at the same time giving effect to the legislative intent to the greatest extent possible. To best give effect to the States Parties' legislative intent, legitimate "public policy" interests[40] and avoid conflict with the Statute, the Chamber should follow "[n]ormal rules of treaty interpretation . . . [and] seek readings of the Rules which are consistent with the Statute".[41] It would only be in the absence of a "plausible consistent reading . . . [that] inconsistency will be found".[42]

33. Similarly, if language is capable of more than one interpretation, the Chamber should apply a construction that "will not produce unreasonable results".[43]

34. The Prosecution submits that Rule 134*quater* can be reconciled with the Statute. Under this reading, individuals "mandated to fulfil extraordinary public duties at the highest national level" and subject to a summons become an explicitly enunciated sub-category of the "exceptional circumstances" limb of the Appeals Chamber's six-part test. In other words, where an accused on a

---

[38] Bruce Broomhall, "Article 51 Rules of Procedure and Evidence", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, Article by Article (Hart, 2008), p.1044, margin no.31.
[39] Request, para.17.
[40] ICC-01/09-02/11-830, paras.93-101.
[41] Bruce Broomhall, "Article 51 Rules of Procedure and Evidence", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, Article by Article (Hart, 2008), p.1044, margin no.31.
[42] Bruce Broomhall, "Article 51 Rules of Procedure and Evidence", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, Article by Article (Hart, 2008), p.1044, margin no.31.
[43] ICC-01/09-02/11-830, para.111, partly citing to *Gill v. Donald Humberstone & Co Ltd* [1963] 1 WLR 929, at p.934 [House of Lords].

summons to appear is able to demonstrate extraordinary[44] public duties at the highest national level, this would *always* satisfy the "exceptional circumstances" limb. The other five parts of the Appeals Chamber's test – alternative measures, limited absences, explicit waiver, assurance of rights, and case-by-case grants with due regard to specific hearings – continue to apply.

35. Finally, in exercising its discretion, as circumscribed by the Appeals Chamber, Rule 134*quater*(2) explicitly enjoins the Chamber to consider whether the excusal would be "in the interests of justice". Since the interests of justice[45] are frequently engaged in decisions of the Trial Chamber, this phrase must refer to something more if it is not to be superfluous. However, as outlined above, the phrase cannot be interpreted as expanding the ambit for excusal beyond what is permitted by Article 63(1), as interpreted by the Appeals Chamber, as this would create a conflict between the Rule and the Statute. The Prosecution submits, therefore, that in the context of this Rule, the "interests of justice" component simply recognises that, in dealing with requests for excusal by an accused who is mandated to fulfil extraordinary public duties at the highest national level, there are interests at stake beyond those of the parties to the case. Thus, in considering what is in the interests of justice, the Chamber is also required to bring into the balance both interests in favour of excusal, such as the interest of the citizens of the relevant country in effective governance, and factors militating against excusal, such as the detrimental impact on "public confidence in the administration of justice"

[44] As discussed further below, the duties relied upon must be "extraordinary" in nature. Thus, duties which might be described as "ordinary", e.g. attending routine cabinet meetings, dealing with administrative requirements of the position, advising the President on day-to-day matters etc., would not meet the required threshold.

[45] At least in the sense of ensuring a fair and expeditious trial with respect for the rights of the accused and regard to the protection of witnesses as per Article 64(2).

and on "the morale and participation of victims and witnesses"[46] if an accused is continuously absent from his or her trial.

36. The above interpretation gives effect to the legislative intent of Rule 134*quater*, which singles out requests for excusal due to extraordinary public duties for particular attention, while respecting the plain language of the Rule and ensuring consistency with the Statute.

37. In sum, the law requires that Rule 134*quater* be read to be consistent with the Statute, which is the governing law. The Appeals Chamber's reading of Article 63(1) must be regarded as authoritative. If the States Parties wished to change its effect, or weaken the prohibition on preferential treatment of accused who hold high public office, they could have amended the Statute. They did not do so. Contrary to the position advanced in the Request, the same cannot be achieved by the back door, by amending the Rules.[47]

38. As explained above, Article 63(1) of the Statute does not permit blanket excusals and Articles 21(3) and 27(1) prohibit unequal treatment. Yet a blanket excusal is what the Request demands, and unequal treatment is how it proposes to get there. That approach is impermissible as a matter of law.

III. The Request fails to make the necessary factual showing

39. Even if Rule 134*quater* could be read to permit blanket excusals – which it cannot – the Request fails to justify the relief sought.

a. The Request fails to establish that Mr Ruto is "mandated to fulfil extraordinary public duties at the highest national level"

[46] ICC-01/09-01/11-1066 OA 5, para.49.
[47] The drafters of the Statute ensured that Article 51(4)'s consistency requirements would serve to reassure potentially dissenting States that provisions to which they are likely to have agreed in the Statute would predominate over provisions in the Rules with which they may disagree. See Bruce Broomhall, "Article 51 Rules of Procedure and Evidence", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, Article by Article (Hart, 2008), p.1044, margin No. 30.

40. The Request's argument that Mr Ruto is Deputy President and therefore *ipso facto* mandated to fulfil extraordinary public duties at the highest national level[48] is based on a faulty premise. It assumes that the prerequisite condition for the application of Rule 134*quater* is his status, without more. This cannot be. If "extraordinary public duties at the highest national level" referred to mere status, absence would be inevitably granted as a corollary of an accused's high office. As explained above, this is incompatible with Articles 21(3) and 27(1). If States Parties had wanted the accused's rank or position to be determinative, they would not have emphasised the importance of the duties themselves, which have to be ***both*** "extraordinary" **and** "at the highest national level".

41. Further, by suggesting that a deputy head of state's functions *always* satisfy this criterion,[49] the Request ignores the word "extraordinary" in the rule. A proper interpretation is that an accused must not only be required to perform "public duties at the highest national level", but also that those duties must be "extraordinary", *i.e.* over and above the normal, day-to-day duties of a deputy head of state. Not every activity undertaken by the Deputy President of Kenya will be of such a nature; dealing with the aftermath of the Westgate terrorist attack in Nairobi *is* one such example.[50] Opening new roads or welcoming a foreign dignitary would not be.

42. The Chamber's original finding – that Mr Ruto qualified for excusal because he was "the principal assistant of the President",[51] *i.e.*, because of his "ordinary" functions as Deputy President of Kenya – has now been displaced, both by the requirements for excusal as formulated by the Appeals Chamber and by the higher threshold implicit in Rule 134*quater*'s new "extraordinary"

[48] Request, paras 28, 38.
[49] Request, paras 28, 38, fn.34.
[50] See ICC-01/09-01/11-974, para.9 ("This serious and abhorrent attack on the civilian population of Kenya … can hardly be characterised as part of 'normal state affairs'.").
[51] See ICC-01/09-01/11-777, para.51.

wording. The Defence arguments, premised upon the Chamber's earlier interpretation,[52] are similarly invalid.

43. The Request also fails to detail the types of duties Mr Ruto will need to perform that would qualify as "extraordinary", or to justify why Mr Ruto, and no other person, is required to carry them out. That it may be unrealistic for the Defence to stipulate each "extraordinary" event that may arise during the rest of trial demonstrates exactly why Rule 134*quater* does not contemplate blanket refusals. However, the Defence may reasonably be expected to provide such details in respect of the next three week court session – i.e. for a "specific hearing".

b. The Request fails to explore any alternative measures

44. Although acknowledging their existence,[53] the Request does not explore – or even contemplate – that alternative measures could apply in practice for persons mandated to fulfil extraordinary public duties at the highest national level. Rather, by stating in perfunctory fashion that "[i]n view of the scope and nature of Mr Ruto's constitutional duties, alternative measures are inadequate",[54] the Request implies that there could *never* be adequate alternative measures for accused in the highest positions of government. The position advanced in the Request effectively renders this criterion – purposefully inserted by the States Parties – meaningless.

45. In this case, obvious alternative measures that do exist, include the delegation of routine duties to other competent officials, the Accused's presence *via* video link,[55] or a court schedule which allows periodic time off[56] to attend to extraordinary public duties. By failing to raise such alternatives – much less explain why they are inadequate – the Defence has failed to meet its burden.

[52] Request, paras.28, 38, fn.34.
[53] *Ibid.*, para.32.
[54] *Ibid.*, para.43.
[55] As per Rule 134*bis*.
[56] E.g. sitting only four days per week, or three weeks on/three weeks off.

c. The Request fails to consider properly the interests of justice

46. The Request's cursory treatment of the "interests of justice" criterion is unpersuasive. It outlines a test,[57] but then fails to meet it, concluding without demonstrating that Mr Ruto's situation meets the proposed threshold. The two "interests" it refers to in support – to ensure the "efficient and expeditious conduct of proceedings", with concomitant benefits to witnesses and victims, [58] and so the citizens of Kenya "can benefit from the regular services and dedicated attention of Mr Ruto"[59] – do not address the other concerns of the Appeals Chamber, which has outlined definitively what it considered to be the interests of justice implicated by an accused's presence (or lack thereof).

47. The Appeals Chamber stated that an accused plays a "central role . . . in proceedings" whose presence has a "wider significance . . . for the administration of justice".[60] Further, that the accused is "an active participant" in the proceedings who plays an essential role in forming the "fullest and most comprehensive record of the relevant events".[61] Finally, 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 undermine "public confidence in the administration of justice".[62]

48. The Request fails to address *any* of these issues and the Defence fails to satisfy the requirements of the Rule as a result.

d. The Request fails to address the subject matter of the specific hearings

49. The Request largely avoids this criterion. Although the Defence asserts that "the vast majority of remaining hearings in this case will entail the oral

[57] Request, para.34.
[58] *Ibid.*, para.45.
[59] *Ibid.*, para.46.
[60] ICC-01/09-01/11-1066 OA 5, para.49.
[61] *Ibid.*
[62] *Ibid.*

testimony of witnesses",[63] there is: no attempt to analyse the "subject matter" of these hearings, as required by the Appeals Chamber;[64] no attempt to assess the significance to Mr Ruto of each witness's testimony, nor the significance to each witness of Mr Ruto's presence; no suggestion that the Request is limited to hearings involving testimony of lesser significance to the Accused; no consideration of the victim status of certain witnesses; and no assistance offered to the Court as to how the subject matter of the remaining hearings should be balanced against the tasks Mr Ruto would perform instead of attending his trial.

50. The only justification advanced is that Mr Ruto's blanket excusal would be "legitimate and proper".[65] Such conclusory treatment fails to satisfy the requirements of the Rule. If this criterion is to be given effect, it must be possible for the interests of other parties during specific hearings to outweigh an accused's interest in being absent on some occasions. The Chamber acknowledged this balance in its original excusal decision;[66] the Request ignores it.

Conclusion

51. For the foregoing reasons, the Prosecution respectfully requests the Chamber to reject the Request.

Fatou Bensouda,
Prosecutor

Dated this 8th day of January, 2014
At The Hague, The Netherlands

[63] Request, para.50.
[64] ICC-01/09-01/11-1066 OA 5, para.62.
[65] Request, para.50.
[66] ICC-01/09-01/11-777, para.104.