

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/09-01/11  
Date: 18 February 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**

**Reasons for the Decision on Excusal from Presence at Trial  
under Rule 134<sup>quater</sup>**

Decision 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  
Mr Essa Faal  
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**

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**Registrar**

Mr Herman von Hebel

**Deputy Registrar**

**Victims and Witnesses Unit**

Mr Patrick Craig

**Detention Section**

**Others**

**Victims Participation and Reparations  
Section**

**Trial Chamber V(A)** (the ‘Chamber’) of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, having considered Articles 21(3), 27(1), 51(4), 63(1), 64(2) and 67(1)(d) of the Rome Statute (the ‘Statute’), Rules 134*bis*, 134*ter* and 134*quater* of the Rules of Procedure and Evidence (the ‘Rules’), as well as Regulations 34(b) and 35 of the Regulations of the Court (the ‘Regulations’), renders the following Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*.

## **I. BACKGROUND AND SUBMISSIONS**

1. On 27 November 2013, at its 12<sup>th</sup> plenary meeting, the Assembly of State Parties (‘ASP’) adopted, among other amendments, Rule 134*quater* of the Rules.<sup>1</sup>
2. On 16 December 2013, the defence team for Mr Ruto (‘Ruto Defence’) filed the ‘Defence Request pursuant to Article 63(1) of the Rome Statute and Rule 134*quater* of the Rules of Procedure and Evidence to excuse Mr. William Samoei Ruto from attendance at trial’ (the ‘Request’).<sup>2</sup>
3. On 20 December 2013, the Chamber granted the Office of the Prosecutor (‘Prosecution’) an extension of the time limit for a response to the Request until 9 January 2014.<sup>3</sup>
4. On 8 January 2014, the Prosecution filed the ‘Prosecution response to Defence request pursuant to Article 63(1) and Rule 134*quater* for excusal from attendance at trial for William Samoei Ruto’ (the ‘Response’).<sup>4</sup>

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<sup>1</sup> Resolution ICC-ASP/12/Res.7.

<sup>2</sup> ICC-01/09-01/11-1124.

<sup>3</sup> Order on the Prosecution's request for extension of time limit, ICC-01/09-01/11-1128.

<sup>4</sup> ICC-01/09-01/11-1135.

5. On 9 January 2014, the Common Legal Representative for Victims (the 'Legal Representative') filed the 'Response of the Common Legal Representative for Victims to the Defence Request Pursuant to Article 63(1) of the Rome Statute and Rule 134*quater* of the Rules of Procedure and Evidence to Excuse Mr. William Samoei Ruto from Attendance at Trial' (the 'Legal Representative Response').<sup>5</sup>
6. On 14 January 2014, the Ruto Defence filed an addendum modifying the Request (the 'Addendum').<sup>6</sup>
7. On 15 January 2014, pursuant to the Chamber's order,<sup>7</sup> a status conference was held to discuss the Request and other matters related to trial proceedings (the 'Status Conference').<sup>8</sup>
8. On the same day, during the Status Conference, the Chamber by oral ruling decided to conditionally excuse Mr Ruto from presence at trial (the 'Oral Ruling') and indicated that it would issue reasons in due course.<sup>9</sup>
9. On 20 January 2014, the Ruto Defence filed 'Defence Submission of Copy of Mr. Ruto's Signed Waiver'<sup>10</sup> pursuant to one of the conditions set by the Oral Ruling.

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<sup>5</sup> ICC-01/09-01/11-1139.

<sup>6</sup> Addendum to "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-01/09-01/11-1143.

<sup>7</sup> Order scheduling a status conference, 10 January 2014, ICC-01/09-01/11-1141.

<sup>8</sup> ICC-01/09-01/11-T-72-ENG.

<sup>9</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 67, line 2 - page 68, line 1.

<sup>10</sup> ICC-01/09-01/11-1151.

## ***Oral Ruling***

### **10. The Oral Ruling reads as follows:**

The Chamber has considered the request. This Chamber hereby conditionally excuses Mr Ruto from continuous presence at trial on the following conditions: As indicated in the new Rule 134 including quater, a waiver [...] must be filed.

That's one condition. The further conditions are these: Mr Ruto must be physically present in the courtroom for the following hearings:

- (1) the entirety of the closing statements of all parties and participants in the case;
- (2) when victims present their views and concerns in person;
- (3) the entirety of the delivery of the judgment in the case;
- (4) the entirety of the sentencing hearing, if applicable;
- (5) the entirety of the sentencing, if applicable;
- (6) the entirety of the victim impact hearings, if applicable;
- (7) the entirety of the reparation hearings, if applicable;
- (8) the first five days of hearing starting after a judicial recess as set out in regulation 19bis of the regulations of the Court; and
- (9) any other attendance directed by the Chamber either proprio motu or other request of a party or participant as decided by the Chamber.

The Chamber considers that the attendance of Mr Ruto pursuant to the requirement indicated in condition number (8), being attendance at the first five days of hearing starting after a judicial recess, will require him to be present for today's hearing and [...] starting tomorrow and the next five days. However, in view of the need for Mr Ruto to deputise for the president of the Republic of Kenya during his absence from the country from 16 January 2014, Mr Ruto is excused from [...] presence at trial on 16 and 17 January 2014. Mr Ruto shall, however, be present for the remainder of the period indicated under condition number (8). The fuller reasons for the oral decision will be issued in due course. That is the oral ruling on the requests.<sup>11</sup>

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<sup>11</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 67, line 2 - page 68, line 1.

### ***Ruto Defence Submissions***

11. First, the Ruto Defence submitted that an accused shall be excused from his trial due to his extraordinary public duties, if the applicable test stipulated by Rule 134*quater* of the Rules is satisfied.<sup>12</sup> As regards the duration of excusal, the Ruto Defence argued that Rule 134*quater* of the Rules authorises the 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, because Rule 134*quater* of the Rules, considered alongside Rule 134*ter* of the Rules, meaningfully omits a restriction on the duration of an ordered excusal.<sup>13</sup>
12. Second, the Ruto Defence argued that Rule 134*quater* of the Rules is consistent with the Statute, as required by Article 51(4) of the Statute. Citing the Chamber's 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial' (the 'Excusal Decision'),<sup>14</sup> the Ruto Defence maintained that the amendment does not conflict with Article 27 of the Statute and that 'any excusal granted pursuant to Rule 134*quater* of the Rules 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.'<sup>15</sup>
13. According to the Ruto Defence, Rule 134*ter* of the Rules codifies the general principles enunciated by the Appeals Chamber in the judgment regarding the Excusal Decision (the 'Excusal Judgment')<sup>16</sup> with respect to a particular, but broadly applicable, circumstance.<sup>17</sup>

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<sup>12</sup> Request, ICC-01/09-01/11-1124, para. 27.

<sup>13</sup> Request, ICC-01/09-01/11-1124, para. 29.

<sup>14</sup> 18 June 2013, ICC-01/09-01/11-777.

<sup>15</sup> Request, ICC-01/09-01/11-1124, para. 30. See also, Status Conference, ICC-01/09-01/11-T-72-ENG, page 8, line 20 - page 9, line 4.

<sup>16</sup> 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', 25 October 2013, ICC-01/09-01/11-1066.

<sup>17</sup> Request, ICC-01/09-01/11-1124, paras 13-15.

14. At the Status Conference, the Ruto Defence clarified how, Rule 134<sup>quater</sup> of the Rules, as opposed to Rule 134<sup>ter</sup> of the Rules, was envisaged by the ASP to advance the stance properly set out in the Excusal Decision, namely, that attendance need not be the norm.<sup>18</sup> The Ruto Defence argued that to the extent the construction of Article 63 of the Statute is unclear in the Excusal Judgment, no inconsistency can be said to exist between this provision of the Statute and Rule 134<sup>quater</sup> of the Rules.<sup>19</sup> Therefore, it was submitted that no amendment to the Statute is required to support a continuous absence from trial. The Ruto Defence maintained that the Excusal Judgment clarifies the meaning of 'presence' at trial but not the definite contours of Article 63 of the Statute.<sup>20</sup> The Ruto Defence noted that the Appeals Chamber conceded the *travaux préparatoires* were of limited assistance.<sup>21</sup>
15. Further, the Ruto Defence added that according to the principles of treaty interpretation, '[j]ust as States are presumed to intend agreements consistent with their other obligations at international law, so must the State parties be assumed to intend that the rules they adopt be consistent with the Statute'.<sup>22</sup>
16. Third, the Ruto Defence argued that the circumstances of Mr Ruto satisfy the six elements of the applicable test under Rule 134<sup>quater</sup> of the Rules as follows:

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<sup>18</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 7, lines 6-11.

<sup>19</sup> Request, ICC-01/09-01/11-1124, paras 14-16; Status Conference, ICC-01/09-01/11-T-72-ENG, page 6, line 21 - page 7, line 1.

<sup>20</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 6, lines 9 - 20 and page 54, lines 6 - 24.

<sup>21</sup> Request, ICC-01/09-01/11-1124, para. 14; ICC-01/09-01/11-T-72-ENG, page 6, line 21 - page 7, line 1.

<sup>22</sup> Request, ICC-01/09-01/11-1124, para. 26 (emphasis omitted), citing 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* (2008), page 1044.

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

17. The Ruto Defence submitted that Mr Ruto appears before the Court upon summons issued on 8 March 2011. The Ruto Defence maintained that the Excusal Decision explicitly holds by reference to the 2010 Constitution of Kenya, that as Deputy President of Kenya, Mr Ruto is 'an individual mandated [by the Constitution of Kenya] to fulfill extraordinary public duties at the highest national level'.<sup>23</sup>

*(ii) Mr Ruto's Explicit Waiver*

18. The Ruto Defence maintained that Mr Ruto explicitly waives his right to be present at trial and will submit, should he be required, a signed waiver to the Chamber.<sup>24</sup> It includes a waiver of the right to complain later about a specific witness who did not identify Mr Ruto in the courtroom during testimony.<sup>25</sup>

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

19. The Ruto Defence submitted elements (iii) and (iv) share 'interrelated' underlying principles and considerations warranting their joint legal discussion.<sup>26</sup>

20. When addressing the adequacy of alternative measures, the Ruto Defence referred to the examples listed in Rule 134<sup>ter</sup> of the Rules, but maintained that the merits of alternative measures must be considered vis-à-vis the 'underlying purpose' of the new rule, which the Ruto Defence argued is 'to allow a State to have the benefit of the services and dedicated attention of an

<sup>23</sup> Request, ICC-01/09-01/11-1124, para. 38; Status Conference, ICC-01/09-01/11-T-72-ENG, page 8, lines 16 - 19.

<sup>24</sup> Request, ICC-01/09-01/11-1124, para. 40.

<sup>25</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 16, lines 12 - 18.

<sup>26</sup> Request, ICC-01/09-01/11-1124, para. 41.



accused individual mandated to fulfill extraordinary public duties at the highest national level, while at the same time ensuring that the accused's criminal case before the Court proceeds in an efficient, expeditious and fair manner'.<sup>27</sup> Accordingly, given the scope and nature of Mr Ruto's constitutional duties, alternative measures would not further the purpose of Rule 134*quater* of the Rules;<sup>28</sup> Mr Ruto's 'extraordinary public duties' will necessitate regular, repeated adjournments and changes to the trial schedule, which will prevent the Court from proceeding in 'an efficient, expeditious and fair manner' and prevent the Republic of Kenya from having 'the benefit of the services and dedicated attention' of Mr Ruto in the exercise of his functions as Deputy President of Kenya.<sup>29</sup>

21. Given that the efficient and expeditious conduct of proceedings is central to the interests of victims in this case, the Ruto Defence submitted that these regular, repeated adjournments and changes to the trial schedule, which may result from denying the Request, are not in the interests of justice.<sup>30</sup> The Ruto Defence argued that there was no empirical evidence put forward by the Prosecution or the victims that the absence of an accused would reduce the effect or the standing of the Court.<sup>31</sup> The Ruto Defence also argued that 'nothing in Rule 134*quater* of the Rules mandates that the granting of an excusal pursuant to the rule will *ipso facto* result in Mr Ruto's "continuous" absence from trial'.<sup>32</sup> According to the Ruto Defence, 'Mr Ruto has already been present for very significant portions of the trial and may attend other hearings in pursuit of his' right under Article 67 of the Statute.<sup>33</sup> The Ruto

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<sup>27</sup> Request, ICC-01/09-01/11-1124, para. 32.

<sup>28</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 18, line 21 - page 19, line 6; Request, ICC-01/09-01/11-1124, para. 42.

<sup>29</sup> Request, ICC-01/09-01/11-1124, paras 32 and 42; Status Conference, ICC-01/09-01/11-T-72-ENG, page 18, line 7 - page 19, line 6.

<sup>30</sup> Request, ICC-01/09-01/11-1124, para. 45.

<sup>31</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 17, lines 5 - 21.

<sup>32</sup> Request, ICC-01/09-01/11-1124, para. 47.

<sup>33</sup> Request, ICC-01/09-01/11-1124, para. 47. See also Request, ICC-01/09-01/11-1124, para. 39.

Defence also contended that there will be no 'detrimental impact on the morale and participation of victims and witnesses' and that Mr Ruto's 'unwavering' cooperation with the Court promotes 'public confidence in the administration of justice' and 'the principle that no one is above the law within the Rome Statute'.<sup>34</sup>

22. The Ruto Defence submitted that the concept of the 'interests of justice' should be interpreted broadly, and 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 State [...]'.<sup>35</sup> Therefore, the Ruto Defence argued that the 'interests of justice' must also be understood in terms of the 'State-oriented' purpose of Rule 134<sup>quater</sup> of the Rules, whereby an excusal would be in the interest of justice of the citizens of the Republic of Kenya for they then 'can benefit from the regular services and dedicated attention of Mr Ruto [...]'.<sup>36</sup>

*(v) Rights of the accused must be fully ensured*

23. The Ruto Defence insisted that the rights of Mr Ruto will be ensured by counsel acting on his behalf during trial proceedings, and the Court's E-court access system and other telecommunications will allow Mr Ruto to be fully informed of the proceedings on an on-going basis.<sup>37</sup>

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<sup>34</sup> Request, ICC-01/09-01/11-1124, paras 47-48; Status Conference, ICC-01/09-01/11-T-72-ENG, page 17, line 22 - page 18, line 4.

<sup>35</sup> Request, ICC-01/09-01/11-1124, para. 34.

<sup>36</sup> Request, ICC-01/09-01/11-1124, para. 46.

<sup>37</sup> Request, ICC-01/09-01/11-1124, paras 35 and 49.

*(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*

24. The Ruto Defence submitted that the vast majority of remaining hearings in this case entail the oral testimony of witnesses and given the ‘balancing of interests’ underscored by the purpose of Rule 134<sup>quater</sup> of the Rules ‘in principle, it is legitimate and proper for Mr Ruto to be excused from trial hearings moving forward.’<sup>38</sup> The burden should not be on the Defence to show which trial sessions Mr Ruto’s must be in attendance for.<sup>39</sup> The Ruto Defence submitted element (vi) of the test emphasises the nature of the Chamber’s continuous power of review as to which sections of the trial Mr Ruto will attend.<sup>40</sup> Further, the Ruto Defence submitted that if the Request is granted, on any occasion where the Chamber considers a review of the excusal, the parties should first be permitted to make submissions.<sup>41</sup>

#### ***Addendum and responses to it***

25. The Ruto Defence submitted that in view of the 5<sup>th</sup> Ordinary Summit of the International Conference on the Great Lakes Region which the President of Kenya must attend, Mr Ruto seeks to be excused on 16 and 17 January. The relief sought was as follows: (1) that the Chamber issue an oral decision on the Request for excusal at the Status Conference with reasons to follow; (2) if the Chamber (a) did not issue a decision at the Status Conference or (b) issued a decision rejecting the Request, Mr Ruto sought excusal from attending the

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<sup>38</sup> Request, ICC-01/09-01/11-1124, para. 50.

<sup>39</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 15, lines 6 - 14.

<sup>40</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 14, line 23 - page 15, line 5.

<sup>41</sup> Request, ICC-01/09-01/11-1124, para. 50.

trial on 16 and 17 January by virtue of a separate request also pursuant to Article 63(1) of the Statute and Rule 134<sup>quater</sup> of the Rules.<sup>42</sup>

26. The Ruto Defence stated that the President and Deputy President are 'the only two individuals in Kenya who have a democratic mandate by the people of Kenya [...]',<sup>43</sup> and that the President and Deputy President are not permitted to be absent from Kenya simultaneously.<sup>44</sup>
27. As regards part (b) of the request contained in the Addendum, at the Status Conference the Prosecution appeared to take no position on the matter and the defence team for Mr Sang ('Sang Defence') submitted they did not oppose it.<sup>45</sup>

### *Sang Defence Submissions*

28. Referring to Article 147(2) of the Constitution of Kenya, the Sang Defence pointed out during the Status Conference that the Deputy President is conferred functions in addition to 'any other functions of the president as the president may assign' which are constitutional functions.<sup>46</sup> The Sang Defence pointed out that no protocol exists to define and guide the delegation of functions to the Deputy President by the President.<sup>47</sup> Further, the instance of delegation may be unknown to third parties or the Court for purposes of security.<sup>48</sup> Therefore, the Sang Defence concluded that to satisfy Rule 134<sup>quater</sup> of the Rules, the mere fact that there is a constitutional option to delegate presidential functions on the Deputy President – and that he has a

<sup>42</sup> Addendum, ICC-01/09-01/11-1143, paras 2, 8 - 9.

<sup>43</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 56, lines 23 – 24.

<sup>44</sup> Addendum, ICC-01/09-01/11-1143, footnote no. 3. See also Status Conference, ICC-01/09-01/11-T-72-ENG, page 56, line 17 - page 57, line 3.

<sup>45</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 59, lines 13 - 16 and page 60, lines 18 - 20.

<sup>46</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 62, line 19 - page 64, line 2.

<sup>47</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 64, lines 8 - 12.

<sup>48</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 64, lines 13 - 19.

constitutional obligation to reciprocally perform those functions - is sufficient for meeting the requirements of the rule.<sup>49</sup>

### ***Prosecution Submissions***

29. The Prosecution submitted that the plain reading of Rule 134*quater* of the Rules does not allow for a blanket excusal, as it states that the Chamber's decision on a request for excusal must be 'taken with due regard to the subject matters of the specific hearings in question'.<sup>50</sup> The Prosecution contended that the requirement of 'specific hearings' applies to the Chamber's decision on excusal, rather than coming into play only if the Chamber decides to 'review' such decision.<sup>51</sup> The Prosecution submitted that the final clause of Rule 134*quater*(2) of the Rules, under which an excusal decision is subject to review at any time, does not support the Ruto Defence's argument that Rule 134*quater* of the Rules authorises blanket excusals,<sup>52</sup> because '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'.<sup>53</sup> The Prosecution argued that the differences between Rule 134*ter* and Rule 134*quater* of the Rules do not demonstrate that Rule 134*quater* of the Rules permits blanket excusals and observed that if the Ruto Defence's argument is accepted, Rule 134*quater* of the Rules would be void due to inconsistency with the Statute, which requires that absences 'must be limited to what is strictly required'.<sup>54</sup>

<sup>49</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 64, lines 16 - 19 and page 65, lines 18 - 23.

<sup>50</sup> Response, ICC-01/09-01/11-1135, para. 8.

<sup>51</sup> Response, ICC-01/09-01/11-1135, para. 10.

<sup>52</sup> The Prosecution defined the term 'blanket excusal' as 'any excusal which effectively makes the absence of the accused the general rule and his presence the exception', Status Conference, ICC-01/09-01/11-T-72-ENG, page 20, lines 14 - 16.

<sup>53</sup> Response, ICC-01/09-01/11-1135, para. 11.

<sup>54</sup> Response, ICC-01/09-01/11-1135, para. 12.

30. The Prosecution submitted that by asking the Chamber to excuse Mr Ruto from trial hearings moving forward the Ruto 'Defence requests the Chamber to apply an interpretation of Rule 134*quater* of the Rules which is inconsistent with the law as it stands'.<sup>55</sup> In particular, the Prosecution contended that if Mr Ruto is allowed to be absent for the remainder of his trial, his absence would become the rule and would not be limited at all.<sup>56</sup> The Prosecution submitted that if blanket excusals were possible, the requirement in Rule 134*quater* of the Rules that the Chamber take into account the subject matter of the specific hearings during the period for which excusal has been requested would be redundant.<sup>57</sup> The Prosecution disagreed with the Ruto Defence's argument that the requirement that the presence of the accused remain the rule *at this Court* and contended that the presence of each accused during each trial must be the general rule.<sup>58</sup>
31. The Prosecution submitted that the Request for excusal is contradicted by the provisions of the Statute guaranteeing equal treatment: Article 21(3) and Article 27(1) of the Statute, as well as by one of the founding principles of the Statute, namely to end impunity to those responsible for the most serious crimes regardless of who they are.<sup>59</sup> As regards the language of the provisions, the Prosecution specified that 'official capacity' in Article 27(1) of the Statute is synonymous to 'official status' and that in Article 21(3) of the Statute 'other status' is a 'catch-all term'.<sup>60</sup> It was submitted that in order not to violate these provisions, Rule 134*quater* of the Rules must be read to emphasise the duties of the individual, not the office.<sup>61</sup>

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<sup>55</sup> Response, ICC-01/09-01/11-1135, para. 16.

<sup>56</sup> Response, ICC-01/09-01/11-1135, paras 17 and 19; Status Conference, ICC-01/09-01/11-T-72-ENG, page 19, lines 18-23.

<sup>57</sup> Response, ICC-01/09-01/11-1135, para. 17(d).

<sup>58</sup> Response, ICC-01/09-01/11-1135, para. 19.

<sup>59</sup> Response, ICC-01/09-01/11-1135, paras 20-29.

<sup>60</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 31, lines 8 - 16 and page 32, lines 9 - 18.

<sup>61</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 33, line 20 - page 34, line 2.

32. The Prosecution contended that the recent amendments to the Rules cannot 'override' the Appeals Chamber's interpretation of Article 63(1) of the Statute and the 'States Parties must be assumed to intend that the Rules they adopt be consistent with the Statute'.<sup>62</sup> The Prosecution submitted that 'the task of the Chamber is to seek an interpretation of Rule 134<sup>quater</sup> that is consistent with the Statute, while at the same time giving effect to the legislative intent to the greatest extent possible'.<sup>63</sup> The Prosecution argued that 'Rule 134<sup>quater</sup> can be reconciled with the Statute if the requirement that the individual be "mandated to fulfil extraordinary public duties at the highest national level" becomes an explicitly enunciated sub-category of the "exceptional circumstances" limb of the Appeals Chamber's test'.<sup>64</sup> The Prosecution submitted that if the individual is able to demonstrate extraordinary public duties at the highest national level, this would always satisfy the exceptional circumstances limb.<sup>65</sup>
33. The Prosecution submitted that the requirement that the excusal be in the interests of justice recognises that there are interests at stake beyond those of the parties to the case, '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" and on "the morale and participation of victims and witnesses" if the accused is continuously absent from his or her trial'.<sup>66</sup>

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<sup>62</sup> Response, ICC-01/09-01/11-1135, para. 30, citing 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* (2008), page 1044, margin no. 31.

<sup>63</sup> Response, ICC-01/09-01/11-1135, para. 32.

<sup>64</sup> Response, ICC-01/09-01/11-1135, para. 34.

<sup>65</sup> Response, ICC-01/09-01/11-1135, para. 34.

<sup>66</sup> Response, ICC-01/09-01/11-1135, para. 35.

34. The Prosecution submitted that ‘the Appeals Chamber’s reading of Article 63(1) of the Statute must be regarded as authoritative’ and that if the States Parties wished to change its effect, they could have amended the Statute.<sup>67</sup>
35. The Prosecution submitted that the Request fails to demonstrate on a factual basis how Mr Ruto meets several requirements of Rule 134*quater* of the Rules.<sup>68</sup> First, the Request did not establish how Mr Ruto is ‘mandated to fulfill extraordinary public duties at the highest national level’ because the Ruto Defence assumed ‘that the prerequisite condition for the application of Rule 134*quater* is his status, without more’.<sup>69</sup> The Prosecution submitted that absence cannot be ‘granted as a corollary of an accused’s high office’ because such a rule would substantively be incompatible with Articles 21(3) and 27(1) of the Statute.<sup>70</sup> The Prosecution added that the State Parties did not intend for the accused’s rank or position to be determinative because the rule emphasised the importance of the duties themselves – that these duties must be jointly exceptional in nature and of a kind that occupies ‘the highest national level’.<sup>71</sup>
36. The Prosecution argued that the ‘extraordinary’ criterion refers to ‘over and above the normal, day-to-day duties of a deputy head of state’.<sup>72</sup> It was submitted that not every activity undertaken by the Deputy President of Kenya will qualify. The Prosecution added that the Ruto Defence failed to stipulate the duties Mr Ruto will need to perform, how they qualify as ‘extraordinary’ and why no other person than Mr Ruto can carry them out.<sup>73</sup> The Prosecution argued that ‘the Defence may reasonably be expected to

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<sup>67</sup> Response, ICC-01/09-01/11-1135, para. 37.

<sup>68</sup> Response, ICC-01/09-01/11-1135, paras 39-43; Status Conference, ICC-01/09-01/11-T-72-ENG, page 42, line 18 - page 45, line 19.

<sup>69</sup> Response, ICC-01/09-01/11-1135, para. 40.

<sup>70</sup> Response, ICC-01/09-01/11-1135, para. 40.

<sup>71</sup> Response, ICC-01/09-01/11-1135, para. 40.

<sup>72</sup> Response, ICC-01/09-01/11-1135, para. 41.

<sup>73</sup> Response, ICC-01/09-01/11-1135, paras 41 – 43.



provide such details in respect of the next three week court session – i.e. for a “specific hearing” ‘.<sup>74</sup> The Prosecution also pointed out that the Constitution of Kenya does not clearly define the duties of the Deputy President and they may therefore include ‘anything from the extremely important to the extremely mundane’. The Prosecution also submitted that Rule 134*quater* of the Rules will only apply when the Deputy President is deputising for the President in his absence.<sup>75</sup>

37. The Prosecution argued that the Request implicitly suggests that there could ‘never be adequate alternative measures for accused in the highest positions of government’ which renders the alternative measures criterion meaningless, even though purposefully inserted by the States Parties.<sup>76</sup>
38. According to the Prosecution, the Ruto Defence failed to meet its burden for satisfying the ‘alternative measures’ criterion under Rule 134*quater* of the Rules, because it failed to raise obvious alternatives such as delegating Mr Ruto’s routine duties, his presence by video-link and a changed court schedule.<sup>77</sup>
39. The Prosecution submitted that there is no factual showing of how an excusal is in the interests of justice because the Request does not address the other concerns outlined by the Appeals Chamber – those which define the interests of justice implicated by an accused’s presence or absence.<sup>78</sup>
40. The Prosecution argued that there is no discussion by the Request of the subject matter of the specific hearings implicated by virtue of Mr Ruto’s absence. The Prosecution contended that there is ‘no attempt to assess the

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<sup>74</sup> Response, ICC-01/09-01/11-1135, para. 43.

<sup>75</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 43, line 17 - page 44, line 13 and page 45, lines 6-19.

<sup>76</sup> Response, ICC-01/09-01/11-1135, para. 44.

<sup>77</sup> Response, ICC-01/09-01/11-1135, para. 45.

<sup>78</sup> Response, ICC-01/09-01/11-1135, paras 46 – 47.

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'.<sup>79</sup> The Prosecution maintained that to give this criterion effect, a balancing exercise must exist such as to concede the possibility that the interests of parties and participants may outweigh those of the accused on some occasions of potential absence.<sup>80</sup>

### ***Ruto Defence Reply to the Prosecution's Response***

41. The Ruto Defence submitted the Prosecution's Response frustrates the whole purpose of Rule 134*quater* of the Rules and the intention of the ASP, thereby denuding the rule of any real effect at all; the very purpose of Rule 134*quater* of the Rules is to lend clarity to Article 63 of the Statute and the issues emerging from the Excusal Decision and the Excusal Judgment.<sup>81</sup>
42. In its reply to the Response, the Ruto Defence argued that, contrary to the Prosecution's assertion, Article 21(3) of the Statute is of no relevance to the Request, as it deals with immutable characteristics and affects the rights of the defence. It is thus not an argument to be evoked by the Prosecution. The ASP did not subvert internationally recognised human rights by enacting Rule 134*quater* of the Rules because procedural indulgences, in addition to

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<sup>79</sup> Response, ICC-01/09-01/11-1135, para. 49.

<sup>80</sup> Response, ICC-01/09-01/11-1135, paras 49 – 50. See also Status Conference, ICC-01/09-01/11-T-72-ENG, page 29, line 5 - page 30, line 11.

<sup>81</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 5, line 12 - page 7, line 25.

agreements on privileges and immunities are part of public international law.<sup>82</sup>

43. With respect to the Prosecution's argument that a showing of specific duties must be required, the Ruto Defence maintained that the plain meaning of Rule 134*quater* of the Rules does not require a case-by-case showing of specific extraordinary duties. The Ruto Defence referred to Article 72 of the Statute, which in its view illustrates the large deference which the Statute gives to issues of national security, and argues that 'it couldn't be expected that individuals operating or holding the most senior positions would be required to reveal state secrets to an extent to justify excusal'.<sup>83</sup>

#### ***Legal Representative Submissions***

44. At the Status Conference, the Legal Representative submitted that the principle that the accused shall be present at trial is a principle of international criminal law which was not changed by the ASP through Rule 134*quater* of the Rules.<sup>84</sup> The Legal Representative also asserted that the victims wish to see Mr Ruto in the courtroom, particularly where dual status witnesses testify.<sup>85</sup> Further, the Legal Representative argued that the word 'assistant' in Article 147 of the Constitution of Kenya should be given plain and ordinary meaning whereby the Deputy President is only assistant to the President and he does not ordinarily replace the President.<sup>86</sup> Finally, the Legal Representative argued that the purpose of Rule 134*quater* of the Rules is 'to counter the practical issues that this and other trials might face such as the

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<sup>82</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 9, line 14 - page 12, line 25.

<sup>83</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 8, lines 1 – 12.

<sup>84</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 48, lines 11 - 25.

<sup>85</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 52, line 4 - page 53, line 4.

<sup>86</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 49, line 24 - page 52, line 3.

Westgate Mall attack [...]’ and that a delicate balance must be reached in determining the competing interests at stake in assessing the practical issues – which includes the interests of victims.<sup>87</sup>

## II. APPLICABLE NEW RULES

### 45. Rules 134*bis*, 134*ter* and 134*quater* of the Rules read:

#### Rule 134*bis*

##### **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 Chambers shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearing in question.

#### Rule 134*ter*

##### **Excusal from presence at trial**

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 Chambers 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.

#### Rule 134*quater*

##### **Excusal from presence at trial due to extraordinary public duties**

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 Chambers 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

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<sup>87</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 53, lines 14 - 24.

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.

### III. ANALYSIS

#### *Preliminary matter*

46. The Chamber notes that: (i) the Legal Representative Response was filed after the expiry of the time limit set in Regulation 34(b) of the Regulations and (ii) no written request for an extension of the time limit was made under Regulation 35(1) of the Regulations. It further notes that the extension granted to the Prosecution on 20 December 2013 does not imply a consequent extension of time for the Legal Representative. At the Status Conference, the Chamber already decided it would not consider the Legal Representative Response in the process of rendering a decision on the Request.<sup>88</sup> Subsequently, the Legal Representative made a request for reconsideration, to 'extend the time frame retrospectively' under Regulation 35(2) for good cause due to exceptional circumstances.<sup>89</sup>
47. The Chamber notes that the request for extension is in fact a request for reconsideration. The Chamber does not find it necessary to reconsider its decision to disregard the response since the Legal Representative was given the opportunity to address the main points raised in the Legal Representative Response in his oral submissions at the Status Conference.<sup>90</sup>

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<sup>88</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 3, lines 15 - 25.

<sup>89</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 46, lines 5-10.

<sup>90</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 48, line 14 - page 53, line 24.

***Consistency of Rule 134quater of the Rules with Article 63(1) of the Statute***

48. The Chamber notes at the outset that the Prosecution requests the Chamber to adopt an interpretation of Rule 134quater of the Rules which, in the Prosecution's view, accords with the language of the Statute.<sup>91</sup> This request is based on Article 51(4) of the Statute, which provides that '[t]he Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with [the] Statute'. It must be noted, however, that the Prosecution's argument is that the Defence's interpretation of Rule 134quater of the Rules, rather than Rule 134quater of the Rules itself, is inconsistent with the Statute.<sup>92</sup> This is a significant distinction, because the Statute requires that '[i]n the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail'.<sup>93</sup> The Prosecution's position is that such a conflict will arise if Rule 134quater of the Rules is interpreted in the way the Defence suggests and that a reading of the rule that is consistent with the Statute is possible.<sup>94</sup>
49. There is another important consideration on which the Prosecution's argument is based. The Prosecution proceeds on the understanding that the Excusal Judgment provides an authoritative reading of Article 63(1) of the Statute.<sup>95</sup> The Appeals Chamber's reading of Article 63(1) of the Statute is as follows:

The discretion that the Trial Chamber enjoys under article 63 (1) of the Statute is limited and must be exercised with caution. The following limitations exist: (i) the absence of the accused can only take place in exceptional circumstances and must not become the rule; (ii) the possibility of alternative measures must have been considered, including, but not limited to, changes to the trial schedule or a short adjournment of the trial; (iii) any absence must be limited to that which is strictly necessary; (iv) the accused must have explicitly waived his or her right to be present at trial; (v) the rights

<sup>91</sup> Response, ICC-01/09-01/11-1135, para. 32.

<sup>92</sup> Response, ICC-01/09-01/11-1135, para. 16.

<sup>93</sup> Article 51(5) of the Statute.

<sup>94</sup> Response, ICC-01/09-01/11-1135, para. 4.

<sup>95</sup> Response, ICC-01/09-01/11-1135, para. 37.

of the accused must be fully ensured in his or her absence, in particular through representation by counsel; and (vi) the decision as to whether the accused may be excused from attending part of his or her trial must be taken on a case-by-case basis, with due regard to the subject matter of the specific hearings that the accused would not attend during the period for which excusal has been requested.<sup>96</sup>

50. It is clear that some of the limitations to the discretion of the Trial Chamber under Article 63(1) of the Statute, set out in the Excusal Judgment, are reflected in the new rules. Notably, Rule 134~~ter~~ of the Rules faithfully reflects the ruling of the Appeals Chamber. By contrast, Rule 134~~quater~~ of the Rules does not include all of the limitations listed by the Appeals Chamber. In particular, the rule omits to include the following requirements: i) that the absence must not become the rule; ii) that the absence must be limited to that which is strictly necessary; and iii) that the decision as to whether the accused may be excused from attending part of his or her trial must be taken on a case-by-case basis.
51. The Prosecution's proposed interpretation of Rule 134~~quater~~ of the Rules, which, in the view of the Prosecution, ensures that the rule 'can be reconciled with the Statute',<sup>97</sup> seeks to impose these three requirements.<sup>98</sup> The Prosecution's position appears to be that even though the ASP did not include these requirements in Rule 134~~quater~~ of the Rules, they should be considered to be implicit in that rule in order for it to be consistent with the Statute, as interpreted by the Excusal Judgment. The Chamber, however, notes that, such an interpretation would raise questions as to the relation between Rule 134~~quater~~ and Rule 134~~ter~~ of the Rules, which does contain these three requirements.

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<sup>96</sup> Excusal Judgment, ICC-01/09-01/11-1066, para. 2.

<sup>97</sup> Response, ICC-01/09-01/11-1135, para. 4.

<sup>98</sup> That the absence must not become the rule, Response, ICC-01/09-01/11-1135, paras 17(a) and 19; that the absence must be limited to that which is strictly necessary, Response, ICC-01/09-01/11-1135, para. 17(b); and that the decision as to whether the accused may be excused from attending part of his or her trial must be taken on a case-by-case basis, Response, ICC-01/09-01/11-1135, paras 3 and 23.

52. Viewed in the light of Rule 134~~ter~~ of the Rules and its faithful reflection of the ruling of the Appeals Chamber, Rule 134~~quater~~ of the Rules deliberately omits these three elements of the ruling. The Prosecution's interpretation seeks to impose the three requirements, which runs counter to the apparent intention of the drafters of the new rules.<sup>99</sup>
53. The Chamber notes the Prosecution's proposition that the Chamber should seek a reading of Rule 134~~quater~~ of the Rules that is consistent with the Statute.<sup>100</sup> It must seek such a reading in order to give effect to Article 51(4) of the Statute, which requires consistency of the Rules with the Statute. It must also bear in mind that it is the States Parties who adopt amendments to the Rules.
54. The Chamber will now turn to the question whether Rule 134~~quater~~ of the Rules can be applied in accordance with the Rome Statute.
55. The Chamber is of the view that the adoption of Rule 134~~quater~~ of the Rules, without all requirements listed in Rule 134~~ter~~ of the Rules, was intended to be consistent with Article 63(1) of the Statute and to provide further clarity to that provision. Indeed, the Appeals Chamber acknowledged that in the Statute's *travaux préparatoires* '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'.<sup>101</sup> In the Excusal Judgment, the Appeals Chamber provided an interpretation of Article 63(1) of the Statute aimed to cover some of the situations that were not explicitly addressed when the

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<sup>99</sup> The purpose of amending the Rules was 'to ensure the necessary degree of flexibility when dealing with specific circumstances which could not have been foreseen when the Statute was adopted'. See: Special segment as requested by the African Union: "Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation", 27 November 2013, ICC-ASP/12/61.

<sup>100</sup> Response, ICC-01/09-01/11-1135, para. 4.

<sup>101</sup> Excusal Judgment, ICC-01/09-01/11-1066, para. 52.



Statute was being drafted. The States Parties codified that interpretation in Rule 134<sup>ter</sup> of the Rules. In addition, they adopted Rule 134<sup>quater</sup> of the Rules, applicable to a specific type of situations, also not explicitly addressed in the *travaux préparatoires*. By the incorporation of these rules, the ASP clarified the position of State Parties in relation to the scope and application of Article 63(1) of the Statute.

56. The Chamber notes Article 31(3)(a) of the Vienna Convention on the Law of Treaties ('Vienna Convention'),<sup>102</sup> which lays down that together with the context, an exercise of treaty interpretation must take into account 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions'. Rules 134<sup>ter</sup> and 134<sup>quater</sup> of the Rules are part of the Resolution adopted by the ASP,<sup>103</sup> and as such can be regarded as a 'subsequent agreement' about the scope and application of Article 63(1) of the Statute under Article 31(3)(a) of Vienna Convention. In addition, the Chamber recalls that the Rules are meant to be 'an instrument for the application of the Statute'.<sup>104</sup> The specific rules were adopted to provide greater clarity to the Court on the scope and application of Article 63(1) of the Statute. This is especially true in relation to Rule 134<sup>quater</sup> of the Rules which was adopted specifically to cover persons who are 'mandated to fulfil extraordinary public duties at the highest national level', identifying the need to modify the general rule under Rule 134<sup>ter</sup> of the Rules (which was also laid down by the Appeals Chamber)<sup>105</sup> for cases such as the present case.
57. The Chamber notes that in order to give effect to the rules of interpretation set out in Vienna Convention, the Chamber cannot apply Rule 134<sup>quater</sup> of

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<sup>102</sup> Vienna Convention on the Law of Treaties, adopted on 23 May 1969 and entered into force on 27 January 1980, United Nations, Treaty Series, vol. 1155.

<sup>103</sup> Resolution ICC-ASP/12/Res.7.

<sup>104</sup> See 'Explanatory note' to the Rules.

<sup>105</sup> Excusal Judgment, ICC-01/09-01/11-1066, para. 62.

the Rules in the interpretation suggested by the Prosecution. Moreover, the Chamber notes that an unconditional excusal of Mr Ruto from the entirety of the trial proceedings would also be contrary to Article 63(1) of the Statute in the light of Rule 134<sup>quater</sup> of the Rules, paragraph 2, which provides that the accused may be required to attend specific hearings throughout the trial and that an excusal decision is subject to review at any time.

58. As indicated earlier, by repeating the limitations, as set out by the Appeals Chamber, in one rule (Rule 134<sup>ter</sup> of the Rules), but at the same time consciously omitting three of these limitations in another rule (Rule 134<sup>quater</sup> of the Rules), the ASP indicated that the intention of the States Parties was to include in the Trial Chamber's discretion to conditionally excuse from presence a specific category of accused persons. The adoption of the new rules thus clarifies certain aspects of Article 63(1) of the Statute and, if applied taking into consideration the conditions set down below, is not contrary to any other statutory provision.

***Consistency of Rule 134<sup>quater</sup> of the Rules with other provisions of the Statute***

59. As indicated earlier, the Prosecution alleges the inconsistency of Rule 134<sup>quater</sup> of the Rules, as interpreted by the Request, with the principle of non-discrimination set out in Article 21(3) of the Statute,<sup>106</sup> which protects against 'adverse distinction founded on grounds such as gender [...], age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status'.<sup>107</sup> The listed grounds concern the person's characteristics or status. By contrast, the focus of Rule

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<sup>106</sup> Response, ICC-01/09-01/11-1135, para. 23.

<sup>107</sup> Article 21(3) of the Statute.

134<sup>quater</sup> of the Rules is rather on the functions which the person is mandated to perform.

60. In the view of the Chamber, Rule 134<sup>quater</sup> of the Rules does not refer to said characteristics or status, but focuses on the functions which the person is mandated to perform. Rule 134<sup>quater</sup> of the Rules distinguishes between those accused who are ‘mandated to fulfil extraordinary public duties at the highest national level’ and other accused persons. Furthermore, the Chamber notes that the purpose of the principle enunciated in Article 21(3) of the Statute is to prevent ‘adverse distinction’ on prohibited grounds. The list of grounds on which such adverse distinction shall not be founded is similar to those included in the major international human rights treaties.<sup>108</sup> The purpose of such clauses in those treaties is to prevent discrimination, which the European Court of Human Rights has defined as ‘treating differently, without an objective and reasonable justification, persons in relevantly similar situations’.<sup>109</sup> The Chamber considers that Rule 134<sup>quater</sup> of the Rules provides an objective and reasonable justification. For these reasons, the Chamber is not persuaded that there is any conflict between Rule 134<sup>quater</sup> of the Rules and Article 21(3) of the Statute.
61. As regards the Prosecution’s argument that Rule 134<sup>quater</sup> of the Rules, as interpreted by the Request, is incompatible with Article 27(1) of the Statute,<sup>110</sup> the Chamber considers that Rule 134<sup>quater</sup> of the Rules cannot be read as limiting the criminal responsibility of those performing ‘extraordinary public

<sup>108</sup> See, for instance, Universal Declaration of Human Rights, adopted on 10 December 1948 by United Nations General Assembly Res. 217A (III), U.N. Doc A/810 at 71, Article 2; African Charter on Human and Peoples’ Rights, adopted on 27 June 1981 and entered into force on 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 2; American Convention on Human Rights, adopted on 22 November 1969 and entered into force on 18 July 1978, United Nations, Treaties Series, vol. 1144, Article 1.1; European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950, entered into force on 3 September 1953, United Nations, Treaty Series, vol. 213, Article 14.

<sup>109</sup> European Court of Human Rights, *Nachova v. Bulgaria*, Judgment, Nos 43577/98 and 43579/98, 6 July 2005, para. 145; European Court of Human Rights, *Willis v. the United Kingdom*, Judgment, No. 36042/97, 11 June 2002, para. 48.

<sup>110</sup> Response, ICC-01/09-01/11-1135, para. 24.

duties at the highest national level', nor as limiting the Court's jurisdiction over such persons. Hence, the Chamber does not consider that the object of Article 27 of the Statute is offended or defeated by Rule 134*quater* of the Rules, or by the Chamber's decision to allow Mr Ruto, pursuant to the said rule, to be excused from continuous presence at his trial in order to permit him to carry out the functions as contemplated in Rule 134*quater* of the Rules.

### ***Application of Rule 134*quater* of the Rules to the present case***

#### ***Summons to appear***

62. Mr Ruto certainly meets the requirement of Rule 134*quater* of the Rules, whereby the person must be subject to a summons to appear.<sup>111</sup>

#### ***Extraordinary public duties at the highest national level***

63. Rule 134*quater* of the Rules applies to any person 'mandated to fulfil extraordinary public duties at the highest national level'. The Chamber notes 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,<sup>112</sup> 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;<sup>113</sup> 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;<sup>114</sup> in the event of vacancy in the office of the President, the Deputy

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<sup>111</sup> Pre-Trial Chamber II, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, ICC-01/09-01/11-1.

<sup>112</sup> See the Constitution of Kenya (2010), s 148 generally, together with a 136(2)(a).

<sup>113</sup> Constitution of Kenya (2010), s 147(1).

<sup>114</sup> Constitution of Kenya (2010), s 147(3).

President shall assume office as President for the remainder of the term of the President;<sup>115</sup> and the President and the Deputy President are the principal members of the National Executive of the Republic.<sup>116</sup> The duties of the Deputy President are certainly ‘extraordinary public duties’ and, given the structure of the Kenyan government, they are at ‘the highest national level’.

64. As regards the Prosecution’s argument that not every activity undertaken by the Deputy President of Kenya meets the requirements Rule 134*quater* of the Rules,<sup>117</sup> the Chamber notes that the rule sets out two requirements for the public duties of the accused seeking excusal: they must be extraordinary and at the highest national level. The Chamber agrees that not every duty at the highest national level is an extraordinary one. However, having regard to the above-listed functions of the Deputy President of Kenya, the Chamber is of the view that the number of extraordinary duties among all duties attached to that position is such as to render a case-by-case analysis impractical. The Prosecution acknowledges this in its Response.<sup>118</sup> The Prosecution, however, asserts on this basis that Rule 134*quater* of the Rules does not contemplate ‘blanket excusals’.

65. The Chamber sees no need to discuss the meaning of the notion of ‘blanket excusal’. It suffices to note that the result of what the Prosecution asserts in this connection<sup>119</sup> would be to remove a significant feature distinguishing Rule 134*quater* of the Rules from Rule 134*ter* of the Rules, which, for reasons discussed earlier, was not the intention of the ASP. The Chamber is of the view that when it is reasonably expected, based on the Constitution of Kenya, that the accused is highly likely to be frequently required to fulfil

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<sup>115</sup> Constitution of Kenya (2010), s 146(2)(a).

<sup>116</sup> Constitution of Kenya (2010), s 130(1).

<sup>117</sup> Response, ICC-01/09-01/11-1135, para. 41.

<sup>118</sup> Response, ICC-01/09-01/11-1135, para. 43.

<sup>119</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 20, lines 14 - 16.

extraordinary duties at the highest national level, the proper accommodation of these duties is to excuse him from presence at trial, with limitations. Indeed, such was the intention of the ASP, which consciously omitted from Rule 134*quater* of the Rules the requirement of a case-by-case ruling.

66. In view of the foregoing considerations, the Chamber is satisfied that Mr Ruto is 'mandated to fulfil extraordinary public duties at the highest national level', within the meaning of Rule 134*quater* of the Rules.

#### *Waiver*

67. As indicated earlier, Mr Ruto filed a signed waiver,<sup>120</sup> as required by the Oral Ruling.<sup>121</sup>

#### *Alternative measures*

68. With respect to the requirement of Rule 134*quater* of the Rules, that alternative measures are inadequate, the Chamber notes that, given the above-mentioned anticipated frequency of the need for Mr Ruto to perform extraordinary duties at the highest national level, it would not be desirable to adjourn the hearing each time such a need arises. With such frequent adjournments the Chamber would be unable to ensure that each witness could give evidence without interruption. Such interruption often affects the quality of the evidence and the well-being of witnesses, who usually come to the Court from distant places and would need to stay away from their homes for prolonged periods of time. Adjournments would also prevent the Chamber from proceeding in an efficient and expeditious manner. Additionally, such adjournments would adversely affect the interests of the victims and the co-accused Mr Sang.

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<sup>120</sup> ICC-01/09-01/11-1151.

<sup>121</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 67, line 4.

69. The Chamber is also not satisfied that the use of video-link would be an adequate alternative measure. The duties of Mr Ruto, discussed above, are such that it would be difficult for him to present himself at all times of the day through a video-link. Having regard to the nature of these duties and their importance to the Republic of Kenya, presence through a video-link in the hours when the court operates would unduly burden the accused in discharging his services to his country.
70. The Chamber takes note of the Prosecution's proposal of delegating routine duties to other competent officials.<sup>122</sup> However, no legal basis for such a proposition has been presented. Furthermore, the proposal is inconsistent with the Prosecution's contention that only extraordinary duties may warrant an excusal. The delegation of routine duties does not dispose of the need for Mr Ruto to fulfil the extraordinary ones. The Chamber is thus not satisfied that this proposal is an adequate alternative measure.
71. In view of the foregoing considerations, the Chamber considers that alternative measures, with respect to the present conditional grant of excusal, are inadequate.

#### *Interests of justice*

72. The parties identified a number of interests that in their view must be considered when assessing an application under Rule 134<sup>quater</sup> of the Rules: efficient, expeditious and fair proceedings, interests of victims, the interests of a concerned State to the benefit of the services and the dedicated attention of an accused mandated to perform extraordinary duties at the highest national level. Reference was also made to the Excusal Judgment, where the accused's ability 'to react to any contradictions between his or her recollection of events

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<sup>122</sup> Response, ICC-01/09-01/11-1135, para. 45.

and the account of the witness' and 'a detrimental impact [of the continuous absence of an accused] on the morale and participation of victims and witnesses' were also mentioned in this context.<sup>123</sup> The Chamber notes that the impact of the accused's continuous absence on the Court's ability to observe the accused reacting to contradictions in the evidence or on the morale of victims and witnesses, albeit of relevance to the interest of justice, is not the only component of the Chamber's assessment under Rule 134*quater* of the Rules.

73. As discussed earlier, the Chamber's assessment under Rule 134*quater* of the Rules involves the balancing of competing interests: (i) the interest of the Court to conduct fair, effective and expeditious proceedings, (ii) the interest of victims in the proceedings conducted in the presence of the accused, (iii) the interest of the Prosecutor, (iv) the evidentiary value of the presence of the accused during the testimony of witnesses, on the one hand; and the interest of the State mandating the accused to fulfil extraordinary duties at the highest national level, on the other hand. The requirement that the grant of the request for excusal must be in the interests of justice cannot amount to an expectation that the absence of the accused should be exclusively beneficial to the conduct of the proceedings or to the interests of victims. Rather, the Chamber must be satisfied that, having balanced the conflicting interests of the Court and the said State, the adverse effects on the interests of justice are not excessive; certainly not such as to negate those interests altogether or to unduly compromise the integrity of the proceedings. There may be cases in which the absence of the accused has such a detrimental effect on, for instance, the interest of victims or one of the other above-mentioned interests identified by the Appeals Chamber, that the Chamber will not be able to be satisfied that the excusal is in the interests of justice. In such a situation, the

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<sup>123</sup> Excusal Judgment, ICC-01/09-01/11-1066, para. 47.



Chamber can decide that the presence of the accused is required for certain hearings. The Chamber may review its decision on the excusal at any time during the trial.

74. In the case at hand, the Chamber is of the view that the continuous absence of Mr Ruto throughout the entire remainder of the trial may indeed be incompatible with the interests of justice, given the active participation of victims in the proceedings. The Chamber is thus persuaded that limitations, listed in the Oral Ruling, should attach to the excusal in order to minimise the adverse effects which the absence of the accused may produce.

*The rights of the accused*

75. In view of the Ruto Defence's assurances,<sup>124</sup> the Chamber is satisfied that the rights of Mr Ruto will be fully ensured during his absence.

*Due regard to the subject matter of the specific hearings in question*

76. The Chamber is of the view that the requirement under Rule 134<sup>quater</sup> of the Rules that the decision on excusal shall be taken with due regard to the subject matter of the specific hearings in question, should be viewed in the light of the express omission from Rule 134<sup>quater</sup> of the Rules of the requirement of ruling on excusal on a case-by-case basis. Given the lack of the latter requirement, the rule must allow for the possibility of the decision being taken without the Chamber's specific knowledge of the subject matter of each hearing from which the accused seeks to be absent. In the present case, the Chamber has preliminarily decided on which hearings the accused person shall be present.

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<sup>124</sup> Request, ICC-01/09-01/11-1124, para. 49.

77. The Chamber further notes that despite the excusal, it may become necessary to require the accused's attendance at specific hearings because of their subject matter. This is so, because the nature of the evidence which is expected to be given during those hearings may be such that the absence of the accused could have impact on the evidence. It is for this reason, among others, that the Chamber decided to require 'any other attendance directed by the Chamber either *proprio motu* or [at a] request of a party or participant as decided by the Chamber'.<sup>125</sup> The Chamber is of the view that excluding specific types of hearings from the excusal and allowing for the possibility of requiring presence at other hearings, as in the Oral Ruling, satisfies the requirement that the decision on excusal shall be taken with due regard to the subject matter of the specific hearings in question.<sup>126</sup>

#### *Review*

78. As required by Rule 134*quater* of the Rules, the Oral Ruling will be subject to review at any time.

#### **IV. CONCLUSION**

79. For the foregoing reasons, the Chamber decided to conditionally excuse Mr Ruto from presence at trial pursuant to Rule 134*quater* of the Rules. Among the conditions of excusal, the Chamber requires Mr Ruto's presence in the courtroom for the following hearings:

(1) the entirety of the closing statements of all parties and participants in the case;

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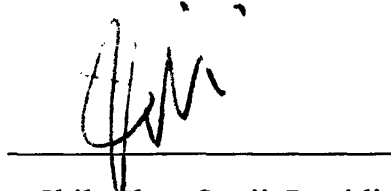
<sup>125</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 67, lines 13 - 15.

<sup>126</sup> In fact, the Prosecution submitted that factors to be taken into account are: the interests of the victims (dual status individuals), witnesses who directly implicate the accused person in criminal activity, and major events such as opening and closing statements. See: Status Conference, ICC-01/09-01/11-T-72-ENG, page 29, lines 8-15. See also Status Conference, ICC-01/09-01/11-T-72-ENG, page 67, lines 6 - 15.

- (2) when victims present their views and concerns in person;
- (3) the entirety of the delivery of the judgment in the case;
- (4) the entirety of the sentencing hearing, if applicable;
- (5) the entirety of the sentencing, if applicable;
- (6) the entirety of the victim impact hearings, if applicable;
- (7) the entirety of the reparation hearings, if applicable;
- (8) the first five days of hearing starting after a judicial recess as set out in regulation 19*bis* of the Regulations of the Court; and
- (9) any other attendance directed by the Chamber either *proprio motu* or other request of a party or participant as decided by the Chamber.<sup>127</sup>

Judge Eboe-Osuji will append a separate further opinion in due course.

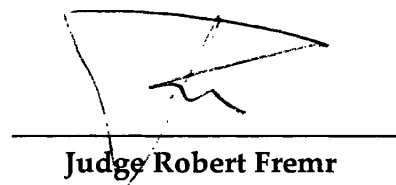
Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji, Presiding



Judge Olga Herrera Carbuccia



Judge Robert Fremr

Dated 18 February 2014

At The Hague, The Netherlands

<sup>127</sup> Status Conference, ICC-01/09-01/11-T-72-ENG, page 67, line 2 - page 68, line 1.