

THE INTERNATIONAL CRIMINAL COURT ON PRESENCE AT TRIAL: THE (IN)VALIDITY OF RULE 134*QUATER*

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ABSTRACT

In November 2013, the ICC's Assembly of States Parties adopted Rule 134*quater* as an amendment to the Rules of Procedure and Evidence of the Court. With the trials of Uhuru Kenyatta and William Ruto in mind, the States Parties agreed that the Trial Chamber should be able to excuse the accused from continuous presence at his or her trial when the accused has to perform "extraordinary public duties at the highest national level". Almost immediately after the eventful meeting of the ASP, Ruto submitted an excusal request under this new Rule in which he argued that the Trial Chamber should relieve him from the obligation to attend all trial hearings for as long as he would be Vice-President of Kenya. The Prosecution strongly objected to this request, but the Trial Chamber unanimously decided to excuse Ruto under the new Rule from all trial hearings, except for the closing statements, the delivery of the judgement, hearings in which victims would present their views in person and the first five trial days after a judicial recess. This Brief for the International Crimes Database gives a critical commentary on the responses of the Prosecution and of the Trial Chamber to Ruto's request for an unconditional excusal. It concludes that the Prosecution and the Trial Chamber have failed to recognize that Rule 134*quater* cannot be reconciled with the relevant provisions of the Statute. Both should have found the new Rule to be invalid under the Statute.

I. INTRODUCTION

The 2013 meeting of the ICC's Assembly of States Parties (ASP) was not "*business as usual*".¹ As a result of the rising tension between African States and the Court over the trials of Uhuru Kenyatta and William Ruto, the ASP was faced with what may have been the most serious political crisis of the ICC since its establishment. A few days before the ASP's annual gathering, which took place in The Hague from 20 to 26 November, the Security Council refused to suspend their trials under Article 16 of the Rome Statute.² This decision raised the stakes for the ASP. Several States Parties warned that there was now "*a very real possibility*" that African States would leave the Court.³ The ASP's "*most critical job*" would therefore be to establish a

¹ ASP, '[Statements in General Debate of the Twelfth Session of the ASP](#)', 20-26 November 2013, closing remarks by the President of the ASP, Tinna Intelmann.

² On this failed deferral request, see A. S. Knottnerus, 'The Growing rift between Africa and the International Criminal Court: The Curious (Im)Possibility of a Security Council Deferral', in: N. Lavranos, R. Kok, *et al.* (eds.), *Hague Yearbook of International Law*, Leiden: Martinus Nijhoff Publishers 2014, vol. 26 (2013), pp. 35-57.

³ ASP, *supra* note 1, statement by New Zealand. See also the statements by Australia, Brazil, Canada, Costa Rica, Czech Republic, Denmark, Finland, France, Germany, Italy, Japan, Jordan (also on behalf of Liechtenstein), Lithuania (on behalf of the EU), Luxembourg, Peru, Philippines, Portugal, Spain, Trinidad & Tobago and the US (as an observer state).

“*constructive dialogue*” with the 34 African States Parties to the Court and to address their concerns about the trials of Kenyatta and Ruto.⁴

For their part, the African Union (AU) and the present African States called upon the ASP to amend the Statute and the Rules of Procedure and Evidence (RPE). They argued that amendments were required to Article 27 (“*irrelevance of official capacity*”) and to Article 63.1 of the Statute (“*the accused shall be present during the trial*”).⁵ The rules on presence at trial would have to become more flexible so that Kenyatta and Ruto would not be distracted by their trials in the exercise of their respective tasks as President and Vice-President of Kenya. The rules on personal immunity would have to be redrafted to ensure that in the future all sitting Heads of State would be immune from prosecution by the Court.⁶

A first step towards a compromise between the African States and the other Parties was taken on the second day of the ASP during a special segment on “*the indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation*”. Disappointing for the African States was that this segment concluded “*that any substantive change to the Rome Statute was unlikely to materialize in the near future*”.⁷ The amendments that they proposed to the Statute, especially on Article 27, were too drastic for the majority of the States Parties. Moreover, these amendments would not offer an immediate solution for the trials of Kenyatta and Ruto, given that they would only enter into force one year after seven-eighths of the States Parties would have ratified them (Article 121.4). What was promising for the African States was that the segment showed “*broad agreement*” that “*practical solutions*” had to be found for their concerns.⁸ In fact, it was agreed that this could be done by amending the RPE on presence at trial. This would be acceptable for most States Parties and, contrary to amendments to the Statute, these changes would enter into force immediately (Article 51.2).

After a week of negotiations on the details of these amendments, the ASP adopted three new Rules on presence at trial: Rules 134*bis*, 134*ter* and 134*quater*. This Brief is mainly concerned with the last and most controversial of the three amendments, which created a ‘special’ excusal regime in case the accused fulfils “*extraordinary public duties at the highest*

⁴ *Id.*, statements by Australia and Brazil.

⁵ Note that a leaked document of the Kenyan delegation to the ASP lists a number of other amendments as well, including to the Preamble of the Statute (adding a clause on the complementarity of the ICC to regional criminal jurisdictions). See Journalists for Justice, [‘Kenya’s proposed agenda items for the 12th Session of the Assembly of State Parties’](#), 11 November 2013.

⁶ ASP, *supra* note 1, statements by Botswana, Congo, DRC, Gambia, Ghana, Kenya, Ivory Coast, Namibia, Nigeria, Seychelles, South Africa, Tanzania, Tunisia and Uganda (on behalf of the AU).

⁷ ASP, ‘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” - [Informal summary by the Moderator](#)’, 21 November 2013.

⁸ *Id.*

national level'. African States, as well as the US and the UK have welcomed this amendment, but several commentators have questioned its validity under the Statute.⁹

Section II sketches the background of the discussion during and after the ASP on this new Rule. Why did African States desired a special excusal regime and why have commentators questioned the validity of Rule 134*quater*? Sections III and IV address the responses of the Prosecution and the Trial Chamber to the excusal request that was submitted by Ruto under this new Rule only three weeks after the ASP. On what basis did they assess the validity of Rule 134*quater* and how convincing is their reasoning? Section V explains why the Appeals Chamber will, at least for now, not be able to rule on this question because of a recent ruling from the Trial Chamber refusing leave to appeal its decision on Ruto's excusal request. Finally, section VI concludes this Brief by reflecting on the political success and the (potential) backlash of Rule 134*quater*.

II. BACKGROUND

In the months preceding the ASP, presence at trial became a contentious issue in the trials of Kenyatta and Ruto. Following their election in March 2013, the two accused requested to be excused from having to attend all trial hearings. In first instance, the Trial Chambers granted the two accused far-reaching excusals (with dissenting opinions from Judges Carbuccion and Ozaki), which allowed them to skip most trial hearings.¹⁰ However, on 25 October 2013, after an appeal of the Prosecution, the Appeals Chamber reversed the Trial Chamber's decision on Ruto's presence (with a joint separate opinion from Judges Kourula and Usacka), because it would amount "*to a blanket excusal before the trial had even commenced, effectively making his absence the rule and his presence an exception*".¹¹ The Appeals Chamber recognized that the Trial Chamber has some discretion under Article 63.1 to excuse the accused, but reasoned that

⁹ AU Assembly, 'Decision on the Progress Report of the Commission on the Implementation of the Decisions on the ICC', [Doc. Assembly/AU/13\(XXII\)](#), 30-31 January 2014; Mark Simmonds, '[Press Release - FCO Minister welcomes new ICC rules on attendance in person](#)', 28 November 2013; Samantha Power, '[Statement on the ICC Assembly of States Parties' Decision on Kenya](#)', 27 November 2013.

¹⁰ ICC, *Prosecutor v Ruto and Sang*, Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, Trial Chamber V.A, [ICC-01/09-01/11](#), 18 June 2013; ICC, *Prosecutor v Ruto and Sang*, Initial decision Trial Chamber V.A. on Ruto's excusal request - Dissenting Opinion of Judge Herrera Carbuccion, [ICC-01/09-01/11-777-Anx2](#), 18 June 2013; ICC, *Prosecutor v Kenyatta*, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, Trial Chamber V.B., [ICC-01/09-02/11](#), 18 October 2013; ICC, *Prosecutor v Kenyatta*, Decision Trial Chamber V.B. on Kenyatta's excusal request – Partially Dissenting Opinion of Judge Ozaki, [ICC-01/09-02/11-830-Anx2](#), 18 October 2013.

¹¹ ICC, *Prosecutor v Ruto and Sang*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial", [ICC-01/09-01/11 OA 5](#), 25 October 2013, para. 63; ICC, *Prosecutor v Ruto and Sang*, Judgment Appeals Chamber on Presence at Trial - Joint Separate Opinion of Judge Erkki Kourula and Judge Anita Usacka, [ICC-01/09-01/11-1066-Anx](#), 25 October 2013.

this discretion is subject to a number of conditions, including that an excusal should only be granted “*in exceptional circumstances*”, on a case-by-case basis and should be “*limited to what is strictly necessary*”.¹²

It was in response to this judgement of the Appeals Chamber that the African States called for amendments to the Statute and RPE on presence at trial during the ASP. They wanted a more flexible excusal regime with less strict conditions for high-level accused who, like Kenyatta and Ruto, have public duties to attend to. After a week of negotiations, the ASP agreed that there should be a follow-up to the Appeals Chambers ruling and approved three amendments to the RPE on presence at trial. With these amendments, which were received as a “*big win*” by Kenya and the AU, the ASP attempted to keep the African States on board, while keeping the principles of the Statute intact.¹³

The first amendment, Rule 134*bis*, allows defendants to be virtually present through video technology (so-called ‘trials by Skype’). The second amendment, Rule 134*ter*, copies the Appeals Chamber’s judgement. It stipulates that the accused who is subjected to a summons to appear before the Court may submit a written request “*to be excused and to be represented by council only during part or parts of his trial*”, which will be granted by the Trial Chamber under the exact same conditions that the Appeals Chamber mentioned. The most far-reaching and the most controversial change was saved for the third amendment, Rule 134*quater*. This amendment creates a ‘special’ excusal regime that African States desired for those accused who are “*mandated to fulfil extraordinary public duties at the highest national level*”. It provides that the Trial Chamber will “*expeditiously*” consider a request of the accused who fulfils extraordinary public duties and that this request “*shall*” be granted (1) “*if alternative measures are inadequate*”, (2) if the Chamber determines that an excusal is “*in the interests of justice*” and (3) if “*the rights of the accused are fully ensured*”. The second paragraph of Rule 134*quater* adds that a decision on a 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*”.

What makes this last amendment the most controversial is that it clearly deviates from the conditions that the Appeals Chamber set (and which were recalled in Rule 134*ter*). Rule 134*quater* does not provide that excusals should be limited to what is strictly necessary or that decisions should be taken on a case-by-case basis. Contrary to the Appeals Chamber’s interpretation of Article 63.1, it appears that Rule 134*quater* permits the Trial Chamber to excuse the accused in an almost unlimited fashion. Among commentators, such as Kevin John Heller,

¹² ICC, *Prosecutor v Ruto and Sang*, Judgment Appeals Chamber, *supra* note 11, para. 62.

¹³ Amina Mohamed, the Kenyan foreign minister, as quoted in: Robert Nyasato, ‘[Kenya lauds AU Support in reviewing ICC rules](#)’, *Standard Digital*, 29 November 2013.

this raised the question whether Rule 134*quater* is consistent with the Statute, as is required under Article 51.4.¹⁴

III. RUTO'S EXCUSAL REQUEST

Only three weeks after the ASP, Ruto submitted an excusal request which put Rule 134*quater* to judicial review. In its submission, the Defence argued that the Trial Chamber should excuse Ruto from all trial hearings for as long as he would be Vice-President of Kenya.¹⁵ Rule 134*quater* would allow for such a long-term excusal, because the Rule omits a restriction on the duration of an excusal.

How did the Prosecution and the Trial Chamber respond to this request? For its part, the Prosecution opposed the request by questioning the consistency of Ruto's interpretation of Rule 134*quater* with the Statute. To be clear, the Prosecution did not challenge the validity of the amendment under the Statute, but only Ruto's interpretation of Rule 134*quater*. The Prosecution argued that the new Rule and any interpretation thereof could not "*overrule the Appeals Chamber's interpretation*" of the Statute.¹⁶ In applying Rule 134*quater*, the Trial Chamber would have to respect all the conditions that the Appeals Chamber had set for its discretion under Article 63.1 to excuse an accused, including that an excusal must be limited to what is strictly necessary. Because Ruto's request would come down to a "*blanket excusal*", the Trial Chamber would have no other choice than decline it.¹⁷

A second reason to reject the request would be its inconsistency with the equal treatment principle, which is laid down in Article 27.1 ("*this Statute shall apply equally to all persons without any distinction based on official capacity*") and in Article 21.3 (the Statute shall be interpreted and applied "*without any adverse distinction*"). If Rule 134*quater* would allow the accused to miss all trial hearings for as long as the accused is Vice-President, it would "*create a regime under which two accused seeking the same relief ... would be treated differently, based only on official capacity*".¹⁸ According to the Prosecution, Rule 134*quater* would only be in line with the equal

¹⁴ Kevin John Heller, ['Will the New RPE 134 Provisions Survive Judicial Review? \(Probably Not.\)'](#), *Opinio Juris*, 28 November 2013. See also Abel S. Knottnerus, ['Extraordinary Exceptions at the ICC: What happened with Rule 134quater?'](#), *Opinio Juris*, 18 July 2014.

¹⁵ ICC, *Prosecutor v Ruto and Sang*, 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](#), 16 December 2013, para. 29.

¹⁶ ICC, *Prosecutor v Ruto and Sang*, Prosecution response to Defence request pursuant to Article 63(1) and Rule 134*quater* for excusal from attendance at trial for William Samoei Ruto, [ICC-01/09-01/11](#), 8 January 2014, para. 30.

¹⁷ *Id.*, para. 38.

¹⁸ *Id.*, para. 3.

treatment principle, if it would be interpreted as emphasizing the duties that the accused bears as an individual instead of the obligations of the office that the accused fulfils.

A third and final reason that the Prosecution mentioned for opposing the request was that it failed to specify Ruto's extraordinary public duties, as would be required under Rule 134*quater*. The Defence only listed "*the normal, day-to-day duties*" of the Kenyan Vice-President under the Kenyan Constitution. The Prosecution claimed that this was insufficient, because dealing with the aftermath of a terrorist attack like at the Westgate Mall in Nairobi would be an extraordinary public duty, but "*opening new roads or welcoming a foreign dignitary would not be*".¹⁹

Yet, despite these strong objections from the Prosecution, the Trial Chamber permitted Ruto in its decision of 18 February to skip almost all trials hearings. Ruto would only have to attend the closing statements, the delivery of the judgement and the first five trial days after a judicial recess (regulation 19*bis*).

How did the Trial Chamber come to this (unanimous) decision? First, it was argued that the conditions of the Appeals Chamber could not be read into Article 63.1, because such an interpretation of Rule 134*quater* would "*run counter to the apparent intention*" of the States Parties who clearly distinguished Rule 134*quater* from Rule 134*ter* which does list these conditions.²⁰ The Chamber reasoned that Rule 134*quater* should be understood as a subsequent agreement in the sense of Article 31.3.a of the Vienna Convention on the Law of Treaties. The new Rule would be consistent with the Statute without the conditions of the Appeals Chamber, because as a subsequent agreement it would provide "*greater clarity*" on the scope and application of Article 63.1 to "*a specific type of situations*" which were not "*explicitly addressed when the Statute was being drafted*".²¹

Second, the Trial Chamber found that Rule 134*quater*, as interpreted by the Defence, does not raise any problems under Article 27.1. The three Judges argued that the new Rule could not "*be read as limiting the criminal responsibility of those performing 'extraordinary public duties at the highest national level', nor as limiting the Court's jurisdiction over such persons*" and would therefore not defeat or obstruct the object of Article 27.1, which would apparently be to remove immunity from jurisdiction on the basis of official capacity.²² Furthermore, the interpretation of the Defence would also not be incompatible with Article 21.3. According to the Chamber, the object of this provision is to prohibit adverse distinction on the basis of a person's characteristics or status,

¹⁹ *Id.*, para. 41.

²⁰ ICC, *Prosecutor v Ruto and Sang*, Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*, Trial Chamber V.A., [ICC-01/09-01/11](#), 18 February 2014, para. 52.

²¹ *Id.*, paras. 55-56.

²² *Id.*, para. 61.

whereas Rule 134*quater* only focusses on the “*functions which the person is mandated to perform*”.²³

Third, the Trial Chamber agreed with the Prosecution that “*not every duty at the highest national level is an extraordinary one*”.²⁴ However, in its view, the high number of extraordinary public duties that the Kenyan Vice-President has to perform under the Kenyan Constitution would make a “*case-by-case analysis impractical*”.²⁵ Therefore, Ruto would not have to prove when and why he would not be able to attend his trial due to his extraordinary public duties.

IV. THE (IN)VALIDITY OF RULE 134QUATER

How convincing are the arguments from the Prosecution and from the Trial Chamber on the excusal request and especially on the (in)validity of Rule 134*quater*? First of all, in my opinion, the Prosecution’s submission that Rule 134*quater* cannot go beyond the conditions that the Appeals Chamber identified was partly correct. Indeed, in the case at hand, the Appeals Chamber’s judgement may be considered as “*authoritative*” in the sense that an amendment to the Rules cannot “*overrule*” Article 63.1 as interpreted by the Appeals Chamber.²⁶ The presumption must be that the ASP intended the new Rule to be consistent with the Statute, but if the amendment goes beyond the scope of Article 63.1 than this presumption is rebutted and the new Rule is invalid under the Statute. Although judgements of the Appeals Chamber are not binding and offer only *an* interpretation of the Statute, the Prosecution’s implicit assumption is probably correct, namely that proving the inconsistency between the ASP’s amendment to the RPE and the Appeals Chamber’s interpretation of Article 63.1 is sufficient to overturn this *intra vires* presumption.²⁷

What is unconvincing about the Prosecution’s submission, however, is its contention that Rule 134*quater* can be reconciled with the Appeals Chamber’s judgement. Despite best intentions, one cannot turn an apple into a pear. As the Trial Chamber pointed out as well, Rule 134*quater* clearly ignores some of the Appeals Chamber’s conditions, which were almost literally

²³ *Id.*, para. 59.

²⁴ *Id.*, para. 64.

²⁵ *Id.*

²⁶ ICC, *Prosecutor v Ruto and Sang*, *supra* note 16, para. 30.

²⁷ This is irrespective of the fact that I disagree with the Appeals Chamber’s interpretation of Article 63.1. In my view, the ordinary meaning of Article 63.1, looked at on its own terms is clear. The word “shall” establishes that the presence requirement cannot be waived by the accused or by the Chamber. This is confirmed by reading the provision in the context of Article 63.2 which mentions the only exception to continuous presence in the Statute (excusing a disruptive accused). For an extensive discussion of the Appeals Chamber’s judgment and all related questions on presence at trial, only some of which could be discussed in this Brief, see Abel S. Knottnerus, ‘Extraordinary Exceptions at the International Criminal Court: The (New) Rules and Jurisprudence on Presence at Trial’ (*unpublished manuscript*).

repeated in Rule 134^{ter}. Based on the benchmark that the Prosecution set, it should thus have concluded that Rule 134^{quater} is invalid under the Statute.

The Trial Chamber's counterargument that Rule 134^{quater} is a subsequent agreement is unconvincing. A subsequent agreement is an agreement of all States Parties to a treaty, *outside* the legal framework of that treaty. Article 51.4, on the other hand, encapsulates amendments to the RPE by the ASP *within* the scope of the Statute. Additionally, Rule 134^{quater} cannot be a subsequent agreement, because otherwise amendments to the Rules would turn into the amendments of the Statute, for which drafters envisioned a more difficult procedure in Articles 121 and 122.

Second of all, I agree with the Prosecution that Ruto's interpretation of Rule 134^{quater} violates Article 27.1. The Trial Chamber wrongly limited the scope of this provision to a removal from immunity on the basis of official capacity. The first sentence of Article 27.1 stipulates that "this Statute", which must mean the whole Statute, "*shall apply equally without any distinction based on official capacity*". Its second sentence starts off with "*in particular, official capacity as Head of State ... shall in no case exempt a person from criminal responsibility under this Statute*". In my view, the underlined formulation signals that the removal of immunity from prosecution is an important but not the only manner in which the Statute should be applied without any distinction on the basis of official capacity.

Perhaps, as submitted by the Prosecution, Rule 134^{quater} would not make such a distinction if the Trial Chamber were to focus on the extraordinary public duties or functions which the accused is mandated to perform instead of looking at the functions of the office. In this way, the Chamber would, arguably, also live up to its obligation under Article 21.3 to apply and interpret the law without any adverse distinction. Yet, in applying Rule 134^{quater}, the Chamber did not focus on Ruto's extraordinary public duties, but listed the functions that the Kenyan Vice-President is mandated to fulfil under the Kenyan Constitution and concluded solely on this basis that Ruto has to perform extraordinary public duties. By setting this standard of proof for Rule 134^{quater}, the Chamber overstretched what can reasonably be understood as extraordinary. But to be clear, even if the Judges would have followed the Prosecution on this point, they would still have missed the most fundamental problem of Rule 134^{quater}, namely its invalidity under the Statute.

V. NO LEAVE TO APPEAL

Many may have thought that the Trial Chamber's weak ruling would only be a prelude to the Appeals Chamber final decision on the (in)validity of Rule 134^{quater}. However, the Trial Chamber

rejected the Prosecution's application for leave to appeal its ruling. In the opinion of the Majority (Judge Carbuccia dissenting), this request would not fulfil the requirements of Article 82.1.d of the Statute.²⁸ Under this provision a decision may only be appealed when it *"involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings"*.

According to the Prosecution, the Chamber's decision on Ruto's excusal request raised the *"novel legal question"* whether Rule 134quater, as interpreted by the Trial Chamber, is consistent with the Statute (*i.e.* with Articles 63.1, 21.3 and 27.1).²⁹ This question would have to be answered in an interlocutory appeal, because if the Appeals Chamber would find that the Trial Chamber erred in law by granting a far-reaching excusal under Rule 134quater, *"it may require parts of the trial not attended by Mr Ruto to be re-heard to ensure consistency with the restrictions set down [by the Appeals Chamber in its previous judgement]"*.³⁰

This line of reasoning seems persuasive. Indeed, it is not unlikely that if the Prosecution would pursue this issue in an appeal against Ruto's eventual conviction, acquittal or sentence, which does not require leave to appeal from the Trial Chamber (Rule 154 RPE), that the Appeals Chamber would nullify a significant part of the trial proceedings in which Ruto was absent.³¹ Clearly, if the Appeals Chamber would demand repeating hearings and thus rehearing witnesses this would be a significant effect on the fairness and expeditious conduct of the proceedings and ultimately on the outcome of the trial in the sense of Article 82.1.d.

In the opinion of the Trial Chamber, however, these arguments are *"highly speculative"*.³² According to the Majority, the risk of having to repeat the hearings that Ruto did not attend *"significantly decreased"* due to the Appeals Chamber's *"clear recognition of the Chamber's discretion to excuse [the accused] from certain hearings"*.³³ This risk would become *"even more theoretical, if one [considers] the Appeals Chamber's standard of review, whereby the Appeals Chamber 'will not interfere with [another] Chamber's exercise of discretion [...] merely because the Appeals Chamber, if it had the power, might have made a different ruling'"*.³⁴ Yet, while this is

²⁸ ICC, *Prosecutor v Ruto and Sang*, Decision on Prosecution's application for leave to appeal the decision on excusal from presence at trial under Rule 134quater, [ICC-01/09-01/11](#), 2 April 2014; ICC, *Prosecutor v Ruto and Sang*, Decision on Prosecution's application for leave to appeal the decision on excusal from presence at trial under Rule 134quater - Dissenting Opinion of Judge Olga Herrera Carbuccia, [ICC-01/09-01/11-1246-Anx](#), 2 April 2014.

²⁹ ICC, *Prosecutor v Ruto and Sang*, Prosecution's application for leave to appeal the decision on excusal from presence at trial under Rule 134quater, [ICC-01/09-01/11](#), 24 February 2014, para. 4.

³⁰ *Id.*, para. 8.

³¹ Dissenting Opinion of Judge Carbuccia, *supra* note 28, para. 8.

³² ICC, *Prosecutor v Ruto and Sang*, Trial Chamber Decision, *supra* note 28, para. 18.

³³ *Id.*

³⁴ *Id.* The Trial Chamber quoted ICC, *Prosecutor v Kony et al*, Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009, [ICC-02/04-01/05-408 \(OA 3\)](#), 16 September 2009, para. 79.

indeed the Appeals Chamber's standard of review, the Majority overlooked that the Prosecution's request for leave to appeal did not (only) concern the manner in which the Chamber exercised its discretion, but (also) the more fundamental question of the (in)validity of Rule 134*quater*, as interpreted by the Chamber, with the relevant provisions of the Statute.

In any case, by rejecting the Prosecution's application for leave to appeal, the Trial Chamber closed the litigation on presence at trial in the Ruto case. Perhaps if Kenyatta's trial restarts in October 2014, a new excusal request from Kenyatta will bring the question of the (in)validity of Rule 134*quater* up again. However, we should probably not expect much of it, because the same two Judges who rejected the Prosecution's application for leave to appeal would also decide on Kenyatta's excusal request. So, we may have to wait if the Prosecution will appeal Ruto's future conviction, acquittal or sentence, to know what the Appeals Chamber has to say about the ASP's unprecedented amendment.

VI. CONCLUDING REMARKS

The 2013 meeting of the ASP was devoted to easing the tension between African States and the Court over the trials of Kenyatta and Ruto. With the adoption of Rule 134*quater*, the ASP succeeded in this objective to the extent that it prevented further escalation for the time being, including a potential withdrawal of African States from the Court. However, the amendment did not solve the long-standing conflict between African States and the Court over the arrest warrants for President of Al-Bashir, the (im)possibility of a Security Council deferral and various other issues. In any case, since the ASP, the AU and individual African States have not stopped criticizing the Court.³⁵

In light of the limited political credit that Rule 134*quater* appears to have brought to the Court, one may wonder whether its price was not too high. This Rule and the related decision of the Trial Chamber have established a precedent for circumventing the Statute through amending the RPE and for treating (Deputy-) Heads of State just a little bit less equal than other accused. Some will praise the ASP decisiveness in adopting Rule 134*quater* and will welcome the judicial creativity that the Trial Chamber demonstrated in applying this new Rule, but there is a (potential) backlash for the administration of justice. The active participation of the accused is not just important to protect the rights of the accused, but also because it is through confronting the accused with testimonies and other evidence that Judges are able to form the most comprehensive record of the acts and omissions of the accused. Moreover, the presence and statements of the accused during the course of the trial are crucial for how the general public and especially victims and witnesses perceive and experience the trial.

³⁵ See AU Assembly, *supra* note 9.

Legally speaking, it should be concluded that the Prosecution and the Trial Chamber have failed to recognize that Rule 134*quater* cannot be reconciled with the relevant provisions of the Statute. Both should have found the new Rule to be invalid under the Statute. This is not to say that there should be no flexibility at all when the accused has to perform extraordinary public duties in concrete and unforeseen circumstances such as terrorist attack or a natural disaster, but only that the new excusal regime goes far beyond the standards of the Statute. Short term absences may perhaps be allowed in such circumstances, but they should always remain *de minimis* in the context of the overall trial. By allowing Ruto, and possibly Kenyatta, to skip practically their whole trials, the Trial Chamber has granted an extraordinary exception which may haunt the Court for many years to come.