Cour Pénale Internationale

International Criminal Court

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Date: **18 October 2013**

TRIAL CHAMBER V(B)

Before: **Judge Kuniko Ozaki, Presiding Judge**
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. UHURU MUIGAI KENYATTA

Public

Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial

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 Benjamin Gumpert

Counsel for the Defence
Mr Steven Kay
Ms Gillian Higgins

Legal Representatives of Victims
Mr Fergal Gaynor

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit
Mr Patrick Craig

Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber V(B) (the 'Chamber') of the International Criminal Court (the 'Court'), in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, having regard to Articles 27, 61, 63, 64 and 67 of the Rome Statute (the 'Statute'), by Majority, issues this Decision on the Defence Request for Conditional Excusal from Continuous Presence at Trial.

I. OVERVIEW

1. Whenever a national trauma is inflicted upon a country, the eyes of the nation invariably turn to one person—the executive head of state or government—with questions and for answers and demands for solutions and hopes of future safety. It is so with natural disasters or massive accidents or intentional acts of terror. But there is much more that the executive head of state or government must do in good faith, often unsung and out of sight, to prevent national traumas. And, beyond the management and prevention of emergencies, he or she does so much more. Indeed, the functions of the executive head of state of the average nation will be too numerous to list here. In the outlines, the picture is usefully framed in the following words of Vattel, writing in his *Law of Nations*: 'a faithful administrator, to watch for the nation, and take care to preserve it, and render it more perfect; to better its state, and to secure it, as far as possible, against everything that threatens its safety or its happiness.'[1] Hence, the sovereign functions of an executive head of state or government are significantly different from those of any other citizen—even of those who run the most important commercial enterprises within the state.

2. In modern international law, however, the conducts of even incumbent heads of state or government must be subjected to judicial inquiry (criminal type), when it has credibly been alleged that serious reasons exist to suspect their complicity in a calculated infliction of a national trauma in the manner of crimes that shock the

[1] Emer de Vattel, *The Law of Nations*, Bk I, ch IV (1758) [Indianapolis: Liberty Funds, 2008, edited by B Kapossy and R Whatmore] §42, p 99.

conscience of humanity. The Rome Statute requires it. And it is wholly right that it is so. In the case at bar, the Prosecutor has alleged that the accused had a directing hand in the death, maiming and displacement of many. The judicial inquiry into that allegation must go on.

3. Yet, it is entirely possible to conduct such an inquiry in this Court, in a manner that permits the concerned head of state or government reasonable leeway to manage the affairs of his or her nation, when compatriots have given him or her that sovereign mandate—through the democratic process—in full knowledge of any criminal charge laid against that individual as an accused person, enjoying the presumption of innocence, before this Court. The Rome Statute, when construed *properly*, implicates no jural dissonance that necessarily precludes such an arrangement.

4. In the circumstances, it is correct to conditionally grant the Defence request of the Chamber to excuse Uhuru Kenyatta from continuous presence at trial, in order to permit him to discharge his functions of state as the executive President of Kenya; while his trial proceeds, as it must do, in this Court.

5. The conditional excusal is in the following terms:

a. Mr Kenyatta must be physically present in the courtroom for the following hearings:

i. the entirety of the opening statements of all parties and participants;
ii. the entirety of the closing statements of all parties and participants;
iii. when victims present their views and concerns in person;
iv. the entirety of the delivery of judgment in the case;
v. the entirety of the sentencing hearings (if applicable);
vi. the entirety of the sentencing (if applicable);
vii. the entirety of the victim impact hearings (if applicable);

viii. the entirety of the reparation hearings (if applicable); and

ix. any other attendance directed by the Chamber.

b. Mr Kenyatta is excused from continuous presence at other times during the trial. This excusal is strictly for purposes of accommodating the discharge of his duties as the President of Kenya. The resulting absence from the trial must therefore always be and seen to be directed towards performance of those duties of state.

c. The majority of the Chamber further requires the Kenyatta Defence to file with the Registry, no later than one day after the time-limit for request for leave to appeal this Decision, a waiver signed by Mr Kenyatta, in the form attached as an annex to this Decision.

6. As was stressed in the *Ruto* decision, it needs also to be stressed here that the conditional excusal granted to Mr Kenyatta in this decision is purely a matter of reasonable accommodation of the demanding functions of his office as the President of Kenya, and not merely the gratification of the dignity of his own occupation of that office.

II. BACKGROUND AND PROCEDURAL HISTORY

7. In the Kenyan election year 2007, Uhuru Kenyatta was understood to be a senior member of a political movement that competed in the elections against the party to which William Ruto belonged—Ruto too was a senior member.[2] It is understood that the two men belong to two of the larger ethnic groups in Kenya, and that they enjoyed prominent social and political status in Kenya.[3] It is also said that

[2] See Annex A to Prosecution submission on agreements as to evidence, ICC-01/09-02/11-704-AnxA; Annex A : First Joint Submission by the Prosecution and the Defence as to Agreed Facts and Certain Materials Contained in the Prosecution's List of Evidence, ICC-01/09-01/11-451-AnxA.

[3] Annex to Prosecution's Updated Document Containing the Charges pursuant to the Trial Chamber's Order (ICC-01/09-01/11-439), ICC-01/09-01/11-448-AnxA, para 10; Annex to Prosecution submission of

Mr Kenyatta is Kikuyu and Mr Ruto is Kalenjin.[4] It is alleged that the manner in which the two men conducted themselves and their political contest during that election resulted in the violence now generally known as the Kenyan Post-Election Violence 2007-2008, which allegedly had a distinct inter-ethnic dimension.[5] It is also alleged that hundreds of persons were killed and many more were maimed or displaced.[6] This resulted in the Prosecutor of this Court laying charges against Mr Kenyatta and Mr Ruto for crimes against humanity.

8. Consequently, on 23 January 2012, Pre-Trial Chamber II, by a Majority, confirmed, separately, certain charges against each of Mr Kenyatta and Mr Ruto in connection with their alleged roles in the Kenyan Post-Election Violence 2007-2008.[7] On 29 March 2012 both cases were transferred to Trial Chamber V (as it then was) for the purpose of trial.

9. At all stages of both the Pre-Trial Chamber and relevant Trial Chambers proceedings, the attendance of both Mr Kenyatta and Mr Ruto has been governed by the summons to appear regime, in addition to their own recognisances and undertakings of continued cooperation with the Court.[8] That is to say, they have at no time in these proceedings been subject to detention.

Second Updated Document Containing the Charges and the Updated pre-trial brief, ICC-01/09-02/11-732-AnxA-Red, paras 3 – 5.

[4] Annex A to Prosecution submission on agreements as to evidence, ICC-01/09-02/11-704-AnxA, para 10 ; Annex A : First Joint Submission by the Prosecution and the Defence as to Agreed Facts and Certain Materials Contained in the Prosecution's List of Evidence, ICC-01/09-01/11-451-AnxA, para 3.

[5] See Updated Document Containing the Charges Pursuant to the Decision on the content of the updated document containing the charges (ICC-01/09-01/11-522), ICC-01/09-01/11-533-AnxA-Corr; Corrigendum of the Second Updated Document Containing the Charges, ICC-01/09-02/11-732-Conf-AnxA-Corr.

[6] *See* Updated Document Containing the Charges Pursuant to the Decision on the content of the updated document containing the charges (ICC-01/09-01/11-522), ICC-01/09-01/11-533-AnxA-Corr; Corrigendum of the Second Updated Document Containing the Charges, ICC-01/09-02/11-732-Conf-AnxA-Corr.

[7] ICC-01/09-02/11-382-Red, paras 428-429; ICC-01/09-01/11-373, para 349.

[8] ICC-01/09-02/11-382-Red, Disposition; ICC-01/09-01/11-373, para 349; ICC-01/09-02/11-T-22-ENG, p.5, lines 6-8.

10. On 28 February 2013, the defence team for Mr Kenyatta ('Kenyatta Defence') filed a motion requesting permission that Mr Kenyatta be permitted to participate in the trial *via* video link ('First Motion').[9] On 8 March 2013, the Victims' Legal Representative ('LRV')[10] and, on 22 March 2013, the Office of the Prosecutor ('Prosecution'),[11] each filed responses opposing the First Motion. Pursuant to an order of the Chamber,[12] on 9 April 2013 the Registry also filed observations on the necessary modalities for implementing video link attendance.[13]

11. While their cases were awaiting trial, Mr Kenyatta and Mr Ruto teamed up to contest in the 2013 Kenyan presidential election on the same ticket on which Mr Ruto was Mr Kenyatta's running mate for the post of President of Kenya.[14]

12. On 4 March 2013, Mr Kenyatta and Mr Ruto were elected as President and Deputy President, respectively, of the Republic of Kenya.

13. On 17 April 2013, the defence team for Mr Ruto made an application for the excusal of Mr Ruto from continuous presence at trial, to enable him to perform his duties as the Deputy President of Kenya.[15]

14. In a decision delivered on 18 June 2013 (the 'Ruto Decision'), Trial Chamber V(A), by a Majority, granted Mr Ruto a conditional excusal from continuous presence at trial (the 'Ruto relief').[16] On 18 July 2013, Trial Chamber V(A), by Majority, granted the Prosecution leave to appeal the Ruto Decision on the following two issues:

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[9]ICC-01/09-02/11-667. A similar request was filed on the same day in respect of Mr Ruto (see (ICC-01/09-01/11-629).
[10]ICC-01/09-02/11-686.
[11]ICC-01/09-02/11-703.
[12]ICC-01/09-02/11-705.
[13]ICC-01/09-02/11-715.
[14] Transcript of Status Conference of 15 May 2013, ICC-01/09-01/11-T-23-Red-ENG, p 27, lines 19 -22
[15]ICC-01/09-01/11-685.
[16]Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, 18 June 2013, ICC-01/09-01/11-777 (the"Ruto Decision").

A. The scope of the requirement under Article 63(1) that the accused be present during the trial and whether, or to what extent, the Trial Chamber has a discretionary power to excuse an accused from attending most of the trial; and

B. Whether the test for an excusal of the accused developed by the Majority is supported by the applicable law (together the 'Ruto Appeal Issues').[17]

15. On 20 August 2013, the Appeals Chamber granted suspensive effect in respect of the Ruto Decision.[18] The Ruto Appeal Issues are currently before the Appeals Chamber. On 17 September 2013, five African states (United Republic of Tanzania, the Republic of Rwanda, the Republic of Burundi, the State of Eritrea and the Republic of Uganda), jointly filed before the Appeals Chamber *amicus curiae* submissions opposing the Prosecution's appeal ('Joint *Amicus* Submissions').[19]

16. On 19 September 2013 two other African States (the Federal Democratic Republic of Ethiopia and the Federal Republic of Nigeria) also sought leave to join in the appeal, with the objective of addressing the importance of giving to Article 63(1) a broad and flexible interpretation, which 'encourages State cooperation in the widest possible set out circumstances and without jeopardising the constitutional responsibilities of leaders', as well as the 'balance to be struck between those subject to the Court's jurisdiction but who also occupy high office'. But the Appeals Chamber denied leave on grounds of the need to proceed with speed in the disposition of the appeal, noting that the two States were of the same position as the earlier five States who had been granted leave to file the Joint *Amicus* Submissions.[20]

17. On 30 August 2013, the Chamber issued a scheduling order and agenda for a status conference to be held on 6 September 2013.[21] The parties and participants were

[17]ICC-01/09-01/11-817.
[18]ICC-01/09-01/11-862.
[19]ICC-01/09-01/11-948.
[20] ICC-01/09-01/11-988.
[21]Scheduling Order and Agenda for Status Conference, ICC-01/09-02/11-799.

instructed to notify the Chamber, by 3 September 2013, of any other issues they may wish to raise at the status conference.[22]

18. On 3 September 2013, the Kenyatta Defence sent an email[23] listing, among other things, a request for dispensation from attendance at trial on the part of Mr Kenyatta as an issue the Kenyatta Defence 'wishe[d] to raise' at the status conference under agenda item D (Other matters).[24]

19. At the status conference on 6 September 2013, the Kenyatta Defence made, as described in further detail in the submissions section below, an oral application for what they described as a 'Ruto Relief', or words to that effect, excusing Mr Kenyatta from continuous presence at trial ('Kenyatta Defence Oral Submissions').[25] The Prosecution and LRV opposed the application.[26]

20. Pursuant to an order of the Chamber,[27] on 23 September 2013 the Kenyatta Defence filed the 'Defence Request for Conditional Excusal from Continuous Presence at Trial' (together with the Kenyatta Defence Oral Submissions, the 'Excusal Request').[28]

21. Also on 23 September 2013, Trial Chamber V(A) adjourned the proceedings in the *Ruto and Sang* trial and permitted Mr Ruto to return to Kenya to attend to his functions as Deputy Head of State in the resolution of the terrorist attack then occurring at the Westgate Mall, in Nairobi.[29]

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[22]ICC-01/09-02/11-799, para 3.
[23]E-mail sent by the Defence to the Chamber on 3 September 2013 at 16:26.
[24]E-mail sent by the Defence to the Chamber, Prosecution and Legal Representative on 3 September 2013 at 20:20. The Defence's email was initially sent to the Chamber only on 3 September 2013 at 16:26. It was re-sent to the Prosecution and Legal Representative upon the direction of the Chamber, issued by e mail on 3 September 2013 at 18:11.
[25]ICC-01/09-02/11-T-26-ENG.
[26] *Ibid.*
[27]Email from the Chamber to the parties on 12 September 2013 at 15.40.
[28]ICC-0109-02/11-809.
[29] ICC-01/09-01/11-T-35-ENG and ICC-01/09-01/11-T-37-Red-ENG.

22. On 1 October 2013, the Prosecution[30] and the LRV[31] each filed submissions opposing the Excusal Request.

III. SUBMISSIONS

A. The Defence Submissions

23. In the Excusal Request, the Kenyatta Defence seeks that Mr Kenyatta be granted a conditional excusal from continuous presence at trial on such terms that his physical presence in the courtroom be only required at the opening, closing and delivery of the judgment. It is submitted that, at any other time his presence is required, or he wishes to participate, this should be satisfied by way of video link.[32] In the alternative, it is requested that Mr Kenyatta's continuous presence be satisfied by means of video link ('Alternative Request').[33] It was submitted that these arrangements would be with 'full responsibility for [the accused's] own actions and conduct in relation to developments in the trial'.[34]

24. The Kenyatta Defence specifies that the Excusal Request supersedes the First Motion.[35] Consequently, save where specifically incorporated by reference in the submissions of the parties and participants, the Chamber has not considered prior submissions made in relation to the First Motion.

25. The Kenyatta Defence submits that the election of Mr Kenyatta as President of Kenya constitutes 'significantly changed' circumstances since the time the First Motion was filed, as the accused now has 'extraordinary and exceptional roles and

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[30]ICC-01/09-02/11-818.
[31]ICC-01/09-02/11-819.
[32] ICC-01/09-02/11-809, paras 1, 28, 38; ICC-01/09-02/11-T-26-ENG, page 18, lines 14-22.
[33] ICC-01/09-02/11-809, paras 4 and 39.
[34] ICC-01/09-02/11-T-26-ENG, page 18, lines 14-22.
[35] ICC-01/09-02/11-809, para 2. However, see also ICC-01/09-02/11-T-26-ENG, page 25, lines 11-20, where the Kenyatta Defence stated that the video link request is not an alternative request but rather should be an option for when the accused, having been granted an excusal, wished to participate but was unable to come to The Hague. Based on the written submission the Majority of the Chamber assumes that the Kenyatta Defence has now changed their submission on this matter.

responsibilities as an incumbent Head of State'.[36] The 'extensive duties' of Mr Kenyatta, as President, are elaborated upon in the submissions of the Kenyatta Defence by reference to relevant provisions of the Kenyan Constitution.[37] The Kenyatta Defence further refers to the Joint *Amicus* Submissions in support of the 'exceptional nature of the duties' faced by a Head or Deputy Head of State or Government.[38] These duties are submitted as additional to the role of the President as a 'figurehead and symbol of authority for the nation'.[39]

26. The Kenyatta Defence submitted that, as Head of State, the need for such an order is even greater in the case of Mr Kenyatta than was the case for Mr Ruto, as the office 'inherently carries greater responsibility'.[40]

27. The Kenyatta Defence submits that resolving the question of attendance at trial in a manner that 'permits the Head of State to fully to discharge his constitutional duties' is a 'matter of fundamental importance of Kenya'.[41] It is further argued that as the people of Kenya were 'fully informed' about the ICC proceedings against Mr Kenyatta at the time of the election, they have a 'legitimate expectation' that 'their country's democracy' be 'respected' and the outcome of the election be 'accorded recognition and given effect'.[42] In support of this view, the Kenyatta Defence quotes the Joint *Amicus* Submissions to the effect that mechanistically requiring continuous presence would 'deprive the electorate of the best government they are entitled to'.[43]

28. Regarding the interpretation of Article 63(1) of the Statute, the Kenyatta Defence submits that the intention of the provision was to protect the rights of

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[36] ICC-01/09-02/11-809, paras 3 and 29; ICC-01/09-02/11-T-26-ENG, page 18, lines 1-22. See also ICC-01/09-02/11-T-26-ENG, page 24, lines 18-21.
[37] ICC-01/09-02/11-809, para 30.
[38] *Ibid*, para 30.
[39] *Ibid*, para 29.
[40] *Ibid*, para 30; ICC-01/09-02/11-T-26-ENG, page 18, line 23.
[41] ICC-01/09-02/11-809, para 30.
[42] *Ibid*, para 32.
[43] *Ibid*, para 31.

accused to be present and to prevent trials *in absentia*.[44] The Kenyatta Defence supports the majority opinion in the *Ruto* Decision that 'it is neither reasonable nor necessary to interpret the provision in a manner that eliminates the discretion of the Trial Chamber reasonably to permit the accused to carry out his duties'.[45] The Kenyatta Defence argues that a 'balanced approach' between the Court continuing to exercise its jurisdiction and enabling the accused to 'perform his functions of state' should be adopted.[46] Additionally, quoting the *Ruto* Decision, the Kenyatta Defence argues that Article 64(6)(f) of the Statute provides a 'residual power and discretion' to do what is 'fair, reasonable and just' in the circumstances.[47]

29. Moreover, it is argued that no definition of 'presence' for the purposes of Article 63(1) of the Statute is set out in either the Statute of the Rules.[48] In response to questions from the bench, the Kenyatta Defence confirmed that they consider presence by video link to constitute 'presence' within the meaning of the Statute and drew a parallel to a witness providing evidence by way of video link.[49]

30. The Kenyatta Defence additionally submits that in light of the 'quality of the prosecution' and the 'evidence that is to be challenged', Mr Kenyatta should be entitled to exercise his judgment as to his need to be present.[50] The Kenyatta Defence argues that the purpose of these proceedings is 'not to punish an innocent man' and that, given that the Kenyatta Defence act with the full instructions of their client, the accused's continuous presence is not required.[51] It argued that the 'spectacle' of having an accused person present in court throughout is not a necessary function of the court and that if an acquittal should result, there would have been a 'totally

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[44] *Ibid*, para 24.
[45] *Ibid*, para 31 (quoting the *Ruto* Decision, *supra*, para 53).
[46] ICC-01/09-02/11-809, para 31 (quoting the *Ruto* Decision, *supra*, para 92).
[47] ICC-01/09-02/11-809, para 26 (quoting the *Ruto* Decision, *supra*, para 33).
[48] ICC-01/09-02/11-809, para 24.
[49] ICC-01/09-02/11-T-26-ENG, page 24, line 22- page 25, lines 4, 21-23.
[50] ICC-01/09-02/11-T-26-ENG, page 19, lines 16-21. See also ICC-01/09-02/11-809, para 34 where it is submitted that Mr Kenyatta has 'every reason to be fully confident as to the merits of his defence being accepted by the Chamber'.
[51] ICC-01/09-02/11-809, paras 33 and 37.

unnecessary spectacle in relation to a Head of State'.[52] It is further submitted, relying, *inter alia*, on the Joint *Amicus* Submission, that, in the event of an eventual dismissal, it will have been 'in the best interests of Kenya' to enable the accused to 'continue uninterrupted' his constitutional responsibilities.[53]

31. In response to the Prosecution submissions regarding Article 27 of the Statute, the Kenyatta Defence submits that the 'clear intention' of the provision is to prevent the official position of an accused being used as a shield against individual criminal responsibility, but that such an intention does not impact the discretion of a Trial Chamber regarding the issue of continuous presence.[54]

32. The Kenyatta Defence confirms that the reasoning underlying the Excusal Request—based on the accused's position as Head of State and the quality of the evidence in this case—would be slightly different from that adopted in the *Ruto and Sang* case.[55]

33. Finally, the Kenyatta Defence submits that Trial Chamber V(A), in permitting Mr Ruto to return to Kenya on 23 September 2013, has 'recognised the need to accommodate important political duties'.[56]

B. Prosecution Submissions

34. The Prosecution opposes the Excusal Request on three principal grounds, namely that: it lacks a legal basis; the granting the Excusal Request would be contrary to the interests of justice; and considerations of judicial economy favour awaiting the Appeals Chamber to determine the merits of the appeal of the *Ruto* Decision.[57]

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[52] ICC-01/09-02/11-T-26-ENG, page 19, line 22 – page 20, line 7.
[53] ICC-01/09-02/11-809, para 34.
[54] ICC-01/09-02/11-809, para 35.
[55] ICC-01/09-02/11-T-26-ENG, page 20, line 12 – page 21, line 1.
[56] ICC-01/09-02/11-809, para 36.
[57] ICC-01/09-02/11-818.

35. The Prosecution submits that, pursuant to Article 63(1) of the Statute, presence at trial is a requirement, and not just a right.[58] It is submitted that this is supported by both a plain text and contextual reading, and that there is 'no uncertainty as to the meaning of [Article 63(1) of the Statute]'.[59] The Prosecution cites, in particular, Articles 63(2), 61(2)(a), 58 and 67(1)(d) as supporting the position that, when Article 63(1) is considered within the statutory framework, the 'legislative intent' to require the accused's presence at trial 'is clear'.[60] Additionally, the Prosecution submits that this interpretation is further clarified and confirmed by the drafting history of the Statute.[61]

36. Moreover, relying upon statements of Trial Chamber IV and the ICTR Appeals Chamber, the Prosecution submits that presence, within the meaning of Article 61(3) of the Statute, means physical presence in the courtroom.[62]

37. The Prosecution argues that Article 64(6)(f) is a 'catch-all' provision rather than a 'trump-all' one, and does not permit a Trial Chamber to exercise a discretion to disregard 'controlling' or 'unambiguous statutory requirements'.[63] The Prosecution submits that international and domestic precedents are inapplicable as, while many have an equivalent provision to Article 67(1)(d) of the Statute, none of the jurisdictions appear to have the equivalent of Article 63(1) of the Statute.[64]

38. The Prosecution contend that the 'limited relief' afforded in the *Bemba* case, where the accused was permitted to be absent for four court sessions, does not support granting of the broad relief requested in the Excusal Request whereby Mr

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[58] *Ibid*, paras 4-5.
[59] *Ibid*, paras 6 and 10.
[60] *Ibid*, paras 11-14.
[61] *Ibid*, paras 7-9.
[62] *Ibid*, paras 15-17.
[63] *Ibid*, paras 18-20.
[64] *Ibid*, para 22.

Kenyatta would be absent for all but the opening, closing and delivery of judgment.[65]

39. The Prosecution submits that the 'policy arguments' made by the Kenyatta Defence in the context of the Excusal Request should 'have no bearing on the Chamber's assessment and can be summarily discarded'.[66]

40. The Prosecution submits that all persons should be equal before the Court—citing for additional support, Articles 27(1) and 21(3) of the Statute—and that this request should therefore not be granted on the basis that the accused is the President of Kenya. It is submitted that to do so would violate the 'bedrock legal principle that all persons are to be treated equally under the law'.[67]

41. Moreover, it was argued that the granting of an order in the form sought would be contrary to the interests of justice because it could 'invite a flood of excusal requests' as many of the accused likely to appear before this Court could present a reason why they have functions that would justify non-participation.[68] It was submitted that it would also compromise the 'seriousness and integrity' of the proceedings which the accused's presence serves to demonstrate.[69] The Prosecution argued that the presence of the accused also assists the Chamber in determining the veracity of the evidence by providing an opportunity for the Chamber to observe the 'demeanour and conduct' of the accused during its presentation.[70]

42. The Prosecution rejects the Kenyatta Defence contention that the presence of the accused would amount to a 'spectacle' or an 'attempt to punish an innocent man', noting that following a full confirmation hearing a Pre-Trial Chamber has

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[65] *Ibid*, para 21.
[66] *Ibid*, para 23.
[67] ICC-01/09-02/11-T-26-ENG, page 22, line 19 – page 23, line 6; ICC-01/09-02/11-818, paras 24-26.
[68] ICC-01/09-02/11-T-26-ENG page 23, lines 7-11; ICC-01/09-02/11-818, paras 27-29.
[69] ICC-01/09-02/11-818, para 30.
[70] *Ibid*, para 31.

committed Mr Kenyatta to trial and that requiring his attendance at that subsequent trial is the 'faithful application of the law agreed to by the States Parties'.[71]

43. With respect to the video link component of the request and the Alternative Request, the Prosecution refers to its response to the First Motion.[72]

44. Finally, the Prosecution submits that while the matter is before the Appeals Chamber and the law is 'in such a state of flux' the debate is academic and that it would be more timely to make concrete submissions once the Appeals Chamber has rendered its decision on the Ruto Appeal Issues.[73]

C. Submissions of the Victims' Counsel

45. With respect to the video link component of the request and the Alternative Request, the Victims' Counsel (the 'LRV') refers to his response to the First Motion.[74]

46. The LRV submits that both the plain language of Article 63(1) of the Statute itself, and reading the provision in the context of the Statute as a whole, 'unambiguously reflects an obligation' on the accused to be physically present in the courtroom for the entire trial.[75] It is argued that the Statute does not envisage that a person who is accused of crimes against humanity would be 'at liberty' in the country in which the crimes were committed, in proximity to the surviving victims and far from the courtroom for 'almost all of the trial'.[76]

47. The LRV argues that Article 27(1) reflects the 'fundamental human right' of equality before the law and that no accused may be treated preferentially on account of their 'official capacity'.[77] It is submitted that the language in Article 27 of the

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[71] *Ibid*, para 32.
[72] *Ibid*, para 3.
[73] ICC-01/09-02/11-T-26-ENG, page 22, lines 13-18; ICC-01/09-02/11-818, para 33.
[74] ICC-01/09-02/11-819, para 2.
[75] *Ibid*, paras 11-16.
[76] *Ibid*, para 14.
[77] *Ibid*, paras 17-27.

Statute reinforces this guarantee of equality in even stronger terms than the statutes of the hybrid and *ad hoc* tribunals.[78]

48. The LRV submits that the Chamber's discretion pursuant to Article 64(6)(f) of the Statute is a 'residual power' which cannot be applied to areas 'unambiguously covered' by other provisions of the Statute.[79] The LRV further submits that to the extent that a residual power to permit excusal exists in international criminal law, it appears to have only been recognised in relation to accused persons who are in custody and either require short-term medical treatment or refuse to attend the courtroom. In particular, the LRV emphasizes that in all cases where an accused's ability to waive the right to attend has been upheld the accused person was in custody. It is submitted that there is no precedent for an international tribunal allowing an accused to be at liberty in the country in which the alleged crimes were committed.[80]

49. The LRV submits that to set aside the requirement of presence at trial on the basis that the accused is a serving Head of State creates a 'dangerous precedent' with an alarming 'potential domino effect'.[81]

50. In relation to the arguments presented by the Kenyatta Defence regarding the necessity of Mr Kenyatta fulfilling his 'constitutional duties', the LRV submits that it is for the Republic of Kenya to present these arguments, by way of an *amicus* submission, rather than for the accused, who is on trial in his personal capacity, to do so.[82] Moreover, the LRV notes that within Article 64(2) of the Statute, the obligations of the Chamber in ensuring the fair and expeditious conduct of

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[78] *Ibid*, paras 24-26.
[79] *Ibid*, paras 28-30.
[80] *Ibid*, paras 31-34.
[81] *Ibid*, paras 36-39.
[82] *Ibid*, paras 40-42.

proceedings are to the accused as well as the victims and witnesses, but not the interests of a state.[83]

51. The LRV argues that the accused, having been fully aware of the impending trial, and having been in fact committed for trial at the time of deciding to run for election, should not be permitted to rely on circumstances which he has knowingly, voluntarily and deliberately brought into being. It is submitted that the accused made no attempt to 'arrange his affairs in a manner best suited to ensure his full cooperation with the Court' and, through his selection of Mr Ruto as his Deputy, exacerbated rather than attempted to reduce the impact of the trials on state affairs.[84]

52. The LRV submits that all accused benefit from the presumption of innocence and all accused have an obligation to attend trial; the presumption does not displace the obligation. Moreover, it is noted that 'jurisdictions across the world', including the U.S., require the presence of an accused when charged with 'serious' crimes.[85]

53. The LRV additionally submits, quoting Justice Kennedy of the U.S. Supreme Court and the Crown Court of England and Wales in support, that the physical presence of an accused at trial is a 'vital element' as it enables the trier of fact to observe the 'demeanour and expressions' of the accused throughout.[86]

54. The LRV notes that the question of the attendance of Mr Kenyatta at trial has been frequently raised at meetings he has held with victims over recent months. He states that there is 'trenchant opposition from the vast majority' of victims to the accused being permitted to be absent from the courtroom. He advises that '[t]he victims appear to consider the presence of the Accused in the courtroom to be a vital element of a fair trial'. The LRV additionally submits that many of the victims express a 'fervent and sincere faith' in the Court, in contrast with their view of the

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[83] *Ibid*, para 43.
[84] *Ibid*, paras 44-49.
[85] *Ibid*, paras 50-53 and 57.
[86] *Ibid*, paras 54-56.

domestic court system, and that being seen to grant 'preferential treatment' to 'powerful accused' would send an 'unfortunate message to the victims'.[87]

55. Finally, the LRV also endorsed the Prosecution's arguments that it is not timely to consider the matter while the *Ruto* Decision is still pending before the Appeals Chamber.[88]

IV. DISCUSSION

Preliminary matter

56. As a preliminary matter, the Chamber notes that in recent filings,[89] including the one currently under consideration, the Kenyatta Defence refers to Mr Kenyatta and their team repeatedly by using his title as President.[90] In the *Ruto* Decision, the Trial Chamber had occasion to issue the following caveat:

> It must be clearly stressed from the outset that the Deputy President of Kenya as such is not on trial before this Chamber. The accused person over whom the Chamber is exercising jurisdiction is William Samoei Ruto. He is being tried in his *individual* capacity for allegations of crimes made against him *personally*. It may also be noted that the charges against him were laid and confirmed and the case transferred to the Trial Chamber for his trial—and indeed an initial date for the trial was once set—before he was elected into office as Deputy President of Kenya. Although Mr Ruto has come into that office in the meantime, while his trial remained pending, let it not be understood that the Deputy President of Kenya is on trial in that capacity. There is a material difference in the law in this regard.[91]

57. Precisely the same consideration applies here. These proceedings are against Mr Kenyatta in his personal capacity and not in his capacity as President. In the circumstances, the Chamber does not consider the use of this title appropriate in

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[87] *Ibid*, paras 58-61.
[88] ICC-01/09-02/11-T-26-ENG, page 24, lines 6-10.
[89] See, e.g., ICC-01/09-02/11-816-Conf.
[90] See, e.g., ICC-01/09-02/11-809, paras 1, 5, 29, 34, 37-39.
[91] *Ruto* Decision, *supra*, para 28.

filings in this case. The Chamber therefore directs the Kenyatta Defence to refrain from including Mr Kenyatta's official title in its filings.

Judicial Economy

58. The Majority of the Chamber will now consider the urge of both the Prosecution and LRV for a deferral of this decision pending the Appeals Chamber's determination of the Prosecution appeal against the *Ruto* Decision, considering that the decision of the Appeals Chamber may be dispositive of the Kenyatta request. This urge for deferral is supposedly motivated by concerns of judicial economy.[92]

59. The Majority of the Chamber does not consider that the argument on this point has been adequately made out in a manner that would facilitate consideration. While the Chamber will always welcome amply considered and researched submissions aimed at assisting the Chamber in the determination of issues before it, it remains the prerogative of the Chamber to worry about judicial economy. The concern is neither made out in this case, nor does the Majority of the Chamber consider the rendering of this decision in its own time as inconvenient to judicial economy. In the peculiar circumstances of this case, the contrary may well be the case. In the result, the submission is rejected.

A Lesson worth Keeping in Mind at All Times

60. In the litigation now before this Chamber, the Prosecution maintains the position that it should not be possible to proceed with a trial if the accused is not present at trial. For that reason, they oppose the Excusal Request.

61. In their written submissions, Defence Counsel noted that the trial in the case of *Ruto and Sang* had to adjourn in order to permit Mr Ruto to return to Nairobi to attend to his duties as regards the terrorist incident at the Westgate Mall.

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[92] ICC-01/09-02/11-818, para 33; ICC-01/09-02/11-T-26-ENG, page 22, lines 13-18.

62. Indeed, the Westgate Mall incident portends a very important object lesson in the circumstances of the litigation under consideration. It exposes, in a very obvious way, not only the dilatory potentials of the resistance to the Ruto relief now sought by Mr Kenyatta; it also exposes the damaging possibilities of the refusal to grant the relief. It is a veritable 'early warning sign' as to what is reasonable in the interpretation of Article 63(1) of the Rome Statute. It is not a sign to be ignored.

63. Right in the middle of the examination-in-chief of the first prosecution witness in the *Ruto and Sang* case, the siege at Westgate Mall occurred. The very next day, the Defence for Mr Ruto applied for an adjournment of the case, in order to enable Mr Ruto to return to Nairobi and play his part in managing the incident, in his capacity as the Deputy President of Kenya. It was telling, of course, that the Prosecutor did not oppose the Defence motion for Mr Ruto to return home. Indeed, the good sense of the request was doubly underscored by the fact that the Prosecution had insisted that the examination-in-chief of a prosecution witness must be suspended for one week or possibly more while Mr Ruto was away.[93] This was notwithstanding the clear and unequivocal recommendation of the VWU that the testimony of the witness be not interrupted at all, in view of the peculiar vulnerabilities regarding her security and psychological well-being. In the result, the trial in the *Ruto and Sang* case was delayed for seven court days.

64. The worry persists as to the very real potential that the resistance to the idea of discretion of the Trial Chamber to proceed with a trial when the accused is not present, if judicially sustained, will one day mean that a case will be aborted, because an accused person has absconded following an earlier promise to appear. Such an abortion may result in the frustration of the victims' yearning for justice. On no view could it be reasonably supposed that these outcomes are what the drafters of the Statute wanted for the Court. Yet, that is precisely what the Prosecutor's

[93]This was on account of an order for suspensive effect that the Appeals Chamber had made at the instance of the Prosecution that prevented the Chamber from proceeding with a trial in the absence of Mr Ruto.

position stands for. To the contrary, these are outcomes that the Ruto relief precisely sought to avoid. As Trial Chamber V(A) observed in that decision:

> [A]n interpretation [of Article 63(1)] that imposes the duty on the Chamber [to not proceed with a trial in the absence of the accused] will not only foster judicial inefficiency by constraining the Chamber to stop the trial on every occasion that the accused is unable with good reasons to be present during the trial although he consents that the trial may proceed in his absence …; but it will also hold the Court hostage to impunity by negating the power of the Chamber to proceed with the trial of an accused who deliberately absconded from his own trial in circumstances that are precisely calculated to frustrate the trial and the course of justice. The outcome indicated in the latter scenario and the view that supports it are wholly detrimental to the overall purpose of the establishment of the Court. It plays into the hands of the very impunity that the Statute eschews so fundamentally.[94]

65. Given the lessons learnt so early in the *Ruto and Sang* trial when the trial had to be adjourned for Mr Ruto to return home and attend to his duties in connection to the Westgate terror attack, we find highly unsafe the Prosecutor's persistence in the philosophical rectitude of her opposition to the Ruto relief being granted in this case.

Application of the Ruto *Decision*

66. In its decision of 18 June 2013, the majority of Trial Chamber V(A) granted Mr Ruto a conditional excusal from continuous presence at trial, in order to enable him to perform his functions as the Deputy President of Kenya. It should be said from the outset that the entirety of the material reasoning employed in that decision is fully applicable to the current request of Mr Kenyatta, with necessary variations. An important point of variation, however, is that Mr Kenyatta is the President. That is all the more reason that the Ruto relief should apply to Mr Kenyatta in a stronger way. In this connection, it is noted that the Majority of Trial Chamber V(A) considered that Mr Ruto had qualified for the conditional excusal granted him, because his position as Deputy President of Kenya involved 'important functions of

[94]Ruto Decision, *supra*, para 44.

an extraordinary dimension'.[95] Mr Kenyatta as the President deserves that consideration even more.

67. The reasoning of the majority in the *Ruto* Decision is therefore fully adopted for purposes of the present decision. Strictly speaking, no more needs be said than has already been said in the decision of the majority of the Trial Chamber V(A). Nevertheless, the following further thoughts may be expressed, in fuller amplification of the reasoning already indicated, and to recognise evident developments that have since occurred.

Is Article 63(1) of the Statute so plain as to require no construction?

68. The Prosecution's position proceeds from the proposition that the wording of Article 63(1) of the Statute is so plain and straightforward that it requires no construction at all.[96] That understanding of how the law works has long and repeatedly been rejected by eminent publicists. To begin with, Francis Bennion's caution that '[a]n enactment is not to be construed as if it were a piece of ordinary prose'.[97] But perhaps more directly to the point, Lord McNair, notably, observed as follows:

> *Plain terms.* Many references are to be found in judgments, opinions, and other documentary sources (British and others) to the primary necessity of giving effect to the 'plain terms' of a treaty, or construing words according to their 'general and ordinary meaning' or their 'natural signification' and so forth, and of not seeking *aliunde* for a meaning 'when the terms are clear'. But this so-called rule of interpretation like others is merely a starting-point, a prima facie guide, and cannot be allowed to obstruct the essential quest in the application of treaties, namely to search for the real intention of the contracting parties in using the language employed by them.[98]

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[95] Ruto Decision, *supra*, para 49.
[96] ICC-01/09-02/11-818, paras 1, 6 and 22-23.
[97] Francis Bennion, *Statutory Interpretation*, 5th edn [London: LexisNexis, 2008] p 474.
[98] Lord McNair, *The Law of Treaties* [Oxford: Clarendon Press, 1961 (reprinted 2003)] p 366.

69. In rejecting the obvious point of such propositions, Lord McNair concluded as follows:

> In short, it is submitted that while a term may be 'plain' *absolutely*, what a tribunal adjudicating upon the meaning of a treaty wants to ascertain is the meaning of the term *relatively*, that is, in relation to the circumstances in which the treaty was made, and in which the language was used. If that is what is meant by the doctrine of 'plain terms', no objection is raised to it. But if it means that tribunals must stop short at applying the term in its primary and literal sense and permit no inquiry as to anything further, it is submitted that the doctrine is wrong.[99]

70. Given the view of Article 63(1) as a provision of notable conciseness, Lord McNair's choice of an example to illustrate the conclusion quoted above is perhaps worth repeating here:

> An instance may be taken from another sphere of legal interpretation. A man, having a wife and children, made a will of *conspicuous brevity* consisting merely of the words 'All for mother'. No term could be 'plainer' than 'mother', for a man can only have one mother. His widow claimed the estate. The court, having admitted oral evidence which proved that in the family circle the deceased's wife was always referred to as 'mother', as is common in England, held that she was entitled to apply for administration with the will annexed, which in effect meant that she took the whole estate. 'Mother' is, speaking abstractly, a 'plain term', but, taken in relation to the circumstances surrounding the testator at the time when the will was made, it was anything but a 'plain term'.[100]

71. In his own book on statutory interpretation, Justice G P Singh has similarly observed as follows: 'The rule, that plain words require no construction, starts with the premise that the words are plain, which is itself a conclusion reached after construing the words. It is not possible to decide whether certain words are plain or ambiguous unless they are studied in their context and construed.'[101] In their recent book, Justice Scalia and Bryan Garner similarly observed as follows: 'It is sometimes said that a plain text with a plain meaning is simply applied and not "interpreted" or

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[99] *Ibid*, p 367.

[100] *Ibid.*

[101] G P Singh, *Principles of Statutory Interpretation*, 8th edn [Nagpur, India: Wadhwa & Co, 2001] p 45.

"construed." Whether that is true is perhaps a matter of definition. As we see things, "if you seem to meet an utterance which doesn't have to be interpreted, that is because you have interpreted it already."'[102]

72. In the very correct observations of Scalia and Garner: 'Any meaning derived from signs involves interpretation, even if the interpreter finds the task straightforward.'[103] That, too, is consistent with an earlier observation of Singh underscoring the difficult task of statutory interpretation:

> The task is often not an easy one and the difficulties arise because of various reasons. To mention a few: Words in any language are not scientific symbols having any precise or definite meaning, and language is but an imperfect medium to convey one's thought, much less of a large assembly consisting of persons of various shades of opinion.[104]

73. Matters are even more complicated when a court of law is confronted with a situation that the legislator had evidently not anticipated in the full clarity of the particular situation presented after the enactment. Singh recognised that complexity in the following words: 'It is impossible even for the most imaginative Legislature to forestall exhaustively situations and circumstances that may emerge after enacting a statute where its application may be called for.'[105] [As will be seen below in the context of a related discussion, Sir Hersch Lauterpacht had made a similar observation in the sphere of international law.] The practical solution appears in Singh's observation as follows: 'In all real controversies of construction, if it were open to consult the Legislature as to its intention, the answer of most of the legislators in all probability will be: "such a problem never occurred to us, solve it as best as you can, consistent with the words used, and the purpose indicated by us in the statute".'[106] Therein lies what Bennion described as the 'dynamic processing' of

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[102] Antonin Scalia and Bryan Garner, *Reading Law: The Interpretation of Legal Texts* [St Paul, MN: Thomson/West, 2012] p 53.
[103] *Ibid.*
[104] Singh, *supra*, p 3.
[105] *Ibid.*
[106] *Ibid*, p 7.

statutory language that is 'carried out from time to time by the courts.'[107] And, according to him, the court in that regard 'has a certain degree of delegated legislative power'[108]; provided 'that the judge must bear always in mind *whose words he or she is expounding*.'[109] This underscores the role of policy considerations and the choices that judges must make in that regard, is discussed in a related context below.

74. In a nutshell, what is entailed in the task of statutory construction—which concerns identification of the meaning of words in context—is possibly captured in the following words of Lord Nicholls of Birkenhead:

> Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful so long as it is remembered that the "intention of Parliament" is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even a majority of individual members of either House. These individuals will often have widely varying intentions. Their understanding of the legislation and of the words used may be impressively complete or woefully inadequate. Thus, when the courts say that such-and-such a meaning "cannot be what Parliament intended", they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.[110]

75. The reasoning of the majority of Trial Chamber V(A) in the *Ruto* Decision is consistent with the foregoing.

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[107] Bennion, *supra*, p 470.
[108] *Ibid*, p 471.
[109] *Ibid*, p 475.
[110] *R v Secretary of State for the Environment, Transport and the Regions* ex parte *Spath Holme* [2001] 2 AC 349 at 396 [House of Lords].

The Limited Value of Travaux Préparatoires

76. It is not necessary to refer to the *travaux préparatoires* in the settlement of the issues in this litigation. In this regard, it is noted that international law neither requires nor recommends consultation of *travaux préparatoires* in treaty interpretation. It merely permits it in limited circumstances, as indicated in Article 32 of the Vienna Convention on the Law of Treaties.[111] As the Appeals Chamber has held, the *travaux préparatoires* of the Statute *may*, in accordance with Article 32 of the VCLT, be resorted to as a '*supplementary* means of interpretation designed to provide (a) confirmation of the meaning of a statutory provision resulting from the application of Article 31 of the Vienna Convention of the Law of Treaties and (b) the clarification of ambiguous or obscure provisions and (c) the avoidance of manifestly absurd or unreasonable results'.[112]

77. The constant tendency (clearly evident in the Prosecution's submissions in this litigation) to refer to *travaux préparatoires* has a correlative tendency towards an expectation that consultation of *travaux préparatoires* is something that should be done as a matter of best practices in treaty interpretation, whenever there is a disagreement as to the correct interpretation. There is a certain fallacy in that suggestion in light of its implications. International law has not seen fit to *require* consultation of *travaux préparatoires* for any reason in the task of treaty interpretation. What was done in Article 32 of the VCLT was to *permit* resort to *travaux préparatoires*—as a supplementary aid—for the limited purposes therein indicated. It is obvious that such a permissive rule was a compromise achieved between the opposing stances of the system of law (the common law) that traditionally forbade consultation to preparatory material and the systems that did not similarly forbid it.

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[111]Article 32 of the Vienna Convention on the Law of Treaties reads, in relevant part, 'Recourse *may* be had to *supplementary* means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion,' (emphasis added).
[112]ICC-01/04-168, para 40 (emphasis added).

Had the international community (speaking through the instrumentality of the VCLT) found a policy need to prefer resorts to *travaux préparatoires*, a corresponding policy statement would have been clearly communicated in Article 32 of the VCLT in terms stronger than the mere grant of permission to do so. In the absence of such a clear policy statement, caution is called for against a practice that results by accretion to an ever-present expectation that consultation *should* be had to *travaux préparatoires* as a matter of anyone's conception of 'best practices' in treaty interpretation. Thus, in the circumstances such as the present, it is the Chamber's responsibility to construe the text of a particular provision in the Rome Statute which is a living legal document. The Chamber must be free to construe the existing text in the best way it sees that achieves the ends of fairness, reasonableness, good faith and justice in the case; having *particular* regard to the text of the provision in context and bearing in mind the overall object and purpose of the Statute. The Chamber must be free to undertake that responsibility, unshackled from the need to make composite sense of the inchoate unused materials and other shavings (in the manner of possibly unresolved disputes, partial texts, competing texts, revised texts, disparate views, and so on, in the drafting committee) collected from the work floor of those who had done their own job of drafting the text as best they could in their own time and had since left the scene. Indeed, international law, in any of its aspects, will be much the poorer in its purpose of service to the living world, if important treaties are fossilised in the remains of *travaux* that may not embody improved content or understanding of other necessary tributaries of the law than at the time the treaty was drafted. Happily, the drafters of the VCLT appear to have understood the concern. That is why they did not require consultation of the *travaux* for any reason.

78. Moreover, resort to *travaux préparatoires* may be inappropriate in the interpretation of treaties, like the Rome Statute, which sets up an international organisation. As *Akehurst's* teaches: '*[T]ravaux préparatoires* are used less for interpreting treaties setting up international organisations than for interpreting other

kinds of treaty. Treaties setting up international organisations are intended to last longer than most other types of treaty, and recourse to *travaux préparatoires* would not always be appropriate in such circumstances, because it would mean looking at the (possibly distant) past, instead of looking at the present and the future ...'[113]. Accordingly, the intentions of the States Parties at the time of conclusion of a treaty may have evolved overtime. Moreover, the fact that a large number of States Parties who joined the international organisation may not have been represented at the negotiation and conclusion of the treaty will make it 'politically awkward to rely on the *travaux préparatoires*' of the treaty.[114]

79. Other commentators have similarly diminished the value of *travaux préparatoires*. As Aust explained: '*[T]ravaux* are by their nature less authentic than the other elements, being often incomplete and misleading'.[115] For his part, Lord McNair observed: 'The Permanent Court and the International Court of Justice have exercised great caution in [the matter of referring to preparatory work] and it is not easy to extract from their references to it any clear principle [footnote omitted]. They have shown a reluctance to exclude resort to preparatory work *e limine* and at the same time an unwillingness to accord to the practice anything like a decisive role.'[116] And according to *Oppenheim's*: 'It would be possible to argue that since it is the intention of the parties which is being sought, an examination *ab initio* into their intentions is admissible, thus justifying a liberal use of *travaux préparatoires*, or even of evidence wholly extrinsic to the treaty and the negotiations leading to it. However, the text of the treaty is normally the only authentic and the most recent expression of what the parties intended, and consequently interpretation may be

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[113] *Akehurst's Modern Introduction to International Law*, 7th revised edn (Peter Malanczuk) [London: Routledge, 1997] p 366.
[114] *Ibid.*
[115] Anthony Aust, *Modern Treaty Law and Practice*, [Cambridge: Cambridge University Press, 2007] at p244.
[116] McNair, *supra*, at p 413.

thought of as essentially a textual matter. Or again, there is the view that the parties' intentions are to be discerned from the object and purpose of the treaty.'[117]

80. As an optional and often unreliable aid, it is preferable to avoid, where possible, resorting to *travaux préparatoires*. In the present instance, they offer no assistance and, as discussed below, do not confirm the interpretation urged by the Prosecution.

81. The Prosecution submits, both in these proceedings and in the complaint against the *Ruto* Decision, that to interpret Article 63(1) in any way other than requiring continuous presence would be merely an exercise in a judicial choice of policy amounting to re-writing the Statute. The Prosecutor registered that complaint in another forum, in the following way:

> Whatever "discretion" a Trial Chamber may have, *it does not permit it to discard controlling statutory requirements, or to substitute its own policy preferences for those of the States Parties. The Majority it is bound to apply the law as it stands.* The Decision fails to do this, and is incorrect as a result.[118]

82. It needs to be said from the outset, that *there is no reliable evidence* that the States Parties to the Statute had clearly indicated their own 'policy preferences' in any manner that should reasonably lead to the factual conclusion *that they clearly foresaw and carefully considered the negative results indicated earlier and accepted them* as part of the incidence of Article 63(1) as it should be applied. Evidence as to such a serious proposition is not achieved by the reconstruction of statutory history, merely by piecing together disparate bits and pieces of not only inconclusive information in the Statute's *travaux préparatoires* but also analytical inferences and conclusions drawn by researchers.[119]

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[117] *Oppenheim's International Law*, Volume 1 (Peace), 9th edn (Sir Robert Jennings and Sir Arthur Watts) [London: Longman, 1996], p 1271.
[118] See 'Prosecution appeal against the "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial"' 29 July 2013, ICC-01/09-01/11-831, para 4 (emphasis added).
[119] *Ibid*, paras 18–22 and related footnotes.

83. Nor is there any reliable evidence from the preparatory material tending to show that States Parties had settled any policy preference that precluded the discretion that enabled Trial Chamber V(A) to grant Mr Ruto the excusal, as such, from continuous presence at trial. Available commentary appears to show the following: First, the plenary session of the Rome Diplomatic Conference did not consider any proposal that precluded from the Trial Chamber the discretion to grant a Ruto relief. Second, delegates in the drafting committee did not consider that Article 63(1) precluded the discretion to conduct a trial in the absence of the accused. The extent of the agreement in the Drafting Committee is reported to have been only to the following effect: 'The general rule, i.e. the presence of the accused at trial, was not controversial. There was also agreement that measures to prevent the accused from disrupting the trial and procedures for preservation of evidence had little to do with the issue of trials *in absentia*.'[120] The observation that measures to prevent disruption of trials—eventually reflected in article 63(2)—were viewed as having little to do with trials *in absentia* is fully consistent with the following observations of Trial Chamber V(A): 'Article 63(2) is unique and particular in its context; and that it has a purpose that is not inevitably explained by a legislative intention to exclude a Trial Chamber's power to grant permission to an accused to be absent from his own trial. The primary purpose of Article 63(2) is to grant to the Trial Chamber the power to (positively) prevent the accused from exercising what is also a right (the right to presence), when the accused insists on exercising that right in a disruptive way. That unique context of a positive power to effect lawful deprivation of the right of the accused to presence at trial, by way of enforced absence against his will, does not, as such, implicate any intention on the part of the drafter to exhaust the circumstances in which a Trial Chamber may permit an accused at his own prayer to be absent

[120] Håkan Friman, 'Rights of Persons Suspected or Accused of a Crime' in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute* [The Hague: Kluwer Law International, 1999] 247 at p 259.

during his trial.'[121] These are not a safe basis to conclude that the discretion to grant a Ruto relief had been considered and rejected by the States Parties. Third, while there had been a failure to agree to permit trial *in absentia* in express terms, there are two reasons, among others, to reject the proposition that this had resulted from a deliberate policy preference of the States Parties. They are: (i) failing to agree upon a course of action does not readily translate into an agreement against that course of action, such as might implicate a policy preference against that course of action; and (ii) there are serious reasons to consider that the failure to reach an agreement on trials *in absentia* had resulted from a misapprehension of the law in significant respects on the part of the common law delegates who had been generally credited with opposition to the idea. They appear to have been under the erroneous impression that such trials were not permissible in common law jurisdictions or in international law, when in fact the opposite is true as to the correct position in common law jurisdictions[122] and international law.[123] There also appears to have been a misapprehension that there was a requirement to conduct trial *de novo* whenever an absconding accused turned up after a trial *in absentia*.[124] But, this is not always the case. As the *Demebukov* case clearly shows, there is no obligation to conduce a trial *de novo* if it is shown that the accused had been reliably informed of the date of the trial, but he chose not to attend.[125] Fourth, time had run out on the negotiation to reach an agreement on trial *in absentia*. It could not, of course, be supposed that more time would have produced a clear agreement. Still, the running out of time to conduct further negotiation, better research and consultation with

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[121] Ruto Decision, *supra*, para 59.

[122] Ruto Decision, *supra*, para 75, and footnotes cited therein.

[123] *Ibid*, paras 46 and 76.

[124] United Nations, *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June - 17 July 1998, Official Records, Volume III, Reports and other documents*, Doc No A/CONF.183/13 (Vol III) [New York: United Nations, 2002], Working paper on article 63, Document A/CONF.183/C.1/WGPM/L.67, p 299, footnote 179; Also *see* Willam A. Schabas, *The International Criminal Court: Commentary on the Rome Statute* [Oxford: Oxford University Press, 2010] p 754

[125] *Demebukov v Bulgaria*, Application No 68020/01, Judgment of 28 February 2008 [ECtHR].

experts, with a view to achieving a clear agreement in either direction is not a safe basis to conclude that the States Parties had arrived at a clear policy preference that excluded the discretion that Trial Chamber V(A) found to enable it grant the Ruto relief. It may be helpful here to remain mindful of Aust's caution that 'today even the records of a conference served by an independent and expert secretariat will generally not tell the whole story. The most important parts of a negotiation, and of drafting, often take place informally with no *agreed* record being kept. ... The reason why a particular compromise formula was adopted, and what it was intended to mean, may be difficult to establish. This will be especially so if the form of words was deliberately chosen to overcome a near irreconcilable difference of substance.'[126] This is especially the case where the conclusion of the treaty 'shows all the signs of the last-minute compromises which are needed to reach consensus.'[127]

84. Perhaps, more importantly, there are four significant bits of information in the Official Records that make it unsafe to accept the suggestion that the reasoning of Trial Chamber V(A) in granting the Ruto relief was inconsistent with the policy preferences of the States Parties. The first is that the text of Option 1 was considered and rejected. Option 1 said as follows: 'The trial shall not be held if the accused is not present'.[128] The second is that it was recognised that Option 1 would have had the effect of leaving no discretion in a Trial Chamber to conduct a trial in the absence of the accused. This recognition appears in footnote 179 at page 53 of the Official Record: 'Option 1 prohibits trial *in absentia* without any exception; like option 2, it would deal with procedures needed to preserve evidence for trial as a matter separate from trial *in absentia*.' The third is that Article 63(1) was ultimately adopted in a text that is different from the text of Option 1. The adopted text is this: 'The accused shall be present during the trial'. This was the precise text that the Working Group had submitted to the Committee of the Whole in conference document

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[126] Aust, *supra*, p 246 (emphasis added).

[127] *Ibid.*

[128] *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, supra*, p 53.

A/CONF.183/C.1/WGPM/L.51. And, finally, the fourth bit of information available from the Official Records is that after careful consideration of the provisions of Articles 64 and 67, the adopted text of Article 63(1) was found to best serve the purposes of the Statute. The necessary information in that regard appears in footnote 178 at page 298 of the Official Record that says as follows: '*After having further reflected* upon the provisions in Articles 64 and 67, it has been concluded that the text of paragraph 1 in document A/CONF.183/C.1/WGPM/L.51 should be retained.' [Emphasis added.] It is unhelpful, of course, to speculate as to the content of the further reflection alluded to in the footnote. But it is sufficient to note that the interplay between Articles 63(1), 64 and 67 was ultimately considered by the Working Group in definitively settling upon a text of Article 63(1) that is different from the text of Option 1. It is significant then that the reasoning of Trial Chamber V(A) had similarly involved a careful analysis of the interplay among Articles 63(1), 64 and 67 in arriving at a decision that, like the Working Group, similarly rejected an outcome that would have been dictated by the text of Option 1 in its effect as explained in footnote 179 at page 53 of the Official Record.

85. While it is unhelpful to speculate as to the content of the reflection in which the Working Group had engaged in ultimately settling upon the eventual text of Article 63(1), it must be accepted as a practical matter that, in its outward effect, such reflection—done in relation to the adopted text in its interplay with Articles 64 and 67—may reasonably be considered (as the Majority of the Chamber does indeed consider it) to have overtaken any prior disagreements that might have been seen in the negotiation of the text of Article 63(1). As seen earlier, *Oppenheim's* supports this approach: '[T]he text of the treaty is normally the only authentic and the most recent expression of what the parties intended, and consequently interpretation may be thought of as essentially a textual matter.'[129] And, as Aust concludes: '*Travaux* must

[129] *Oppenheim's, supra*, p 1271.

therefore always be approached with care. Their investigation is time-consuming, their usefulness often being marginal and very seldom decisive.'[130]

86. In the light of the foregoing, the effects of Articles 64 and 67, particularly as Trial Chamber V(A) has explained, cannot be ignored for purposes of a proper understanding of Article 63(1). Among those effects is the effect of Article 64(6)(f) that reserves for the Trial Chamber a general, residual power to rule as it sees fair, reasonable and just in the particular circumstances confronting the Chamber.[131] It is through such *ex aequo et bono* power, as it were, that the Trial Chamber is able to prevent the generally accepted rule of presence of accused at trial from being something that unwittingly produces injustice, unfairness or inefficiencies in the administration of justice.

87. In the circumstances, then, it is clear that the *travaux préparatoires* cannot safely be relied upon to 'confirm' the interpretation of Article 63(1), as advocated for by the Prosecution in their argument that there is no discretion in the Trial Chamber to proceed with the trial when the accused is not present. The suggestion thus becomes entirely unsustainable to the effect that in granting a Ruto relief, a Trial Chamber would have been acting against the clear 'policy preference' of the States Parties to the Statute. Indeed, it is not unreasonable to suppose that had the States Parties clearly foreseen the situation in the present case, they would more likely than not, have expressly granted a Trial Chamber the discretion to grant a Ruto relief.

The Superior or More Reliable Aids in Treaty Interpretation

88. Recalling the commentary in *Akehurst's* quoted above, it is appropriate instead to focus our attention, for interpretative purposes, on the present and the future operation of the Rome Statute.

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[130] Aust, *supra*, p 247.

[131] See Ruto Decision, *supra*, para 33.

89. In any event, the question at hand is more confidently resolved by resorting to the 'other elements' than on *travaux préparatoires*, as recommended by Aust (noted earlier). Some of the superior interpretative aids to which *travaux préparatoires* must yield the right of way, pursuant to the hierarchy of aids established in Article 31 (relative to Article 32) of the VCLT, are described in the paragraphs immediately following below. In particular, it is not necessary to resort to the *travaux préparatoires* to 'determine' the meaning of Article 63(1), because the employment of the other superior aids indicated in Article 31 of the VCLT (as discussed below) do not leave the meaning of Article 63(1) of the Rome Statute 'ambiguous or obscure'; or lead to a result which is 'manifestly absurd or unreasonable', such as would recommend resort to the *travaux préparatoires* in the optional way that Article 32 of the VCLT permits. We will now review those superior aids.

90. *The object and purpose of the treaty* [Article 31(1) of VCLT]. Here, it must be accepted that any interpretation of the treaty that could defeat its object and purpose must be rejected as a correct interpretation of the treaty. This is particularly the case when such an interpretation aims only to achieve a collateral, discrete objective that is not necessary for the achievement of the more over-arching object or purpose of the treaty. It is for that reason that the Majority of the Chamber rejects an interpretation the objective of which is only to secure the continuous presence of the accused: when the interpretative formula employed to achieve that limited objective will (a) foreseeably result in the denial of justice to victims, and foster continuing impunity, when an accused person absconds after an initial appearance or presence at trial, and the trial is required to be stopped indefinitely; or (b) delay the administration of justice if undesirable adjournments were to be granted in a case, such as happened when Trial Chamber V(A) adjourned hearing for over one week in order that Mr Ruto may return to Nairobi and attend to his duties when the Westgate Mall was attacked by armed assailants.

91. *The context of the treaty* [Article 31(2) of VCLT]. This includes: the text of the treaty, the preamble of the treaty, any annexes to the treaty, any related agreement by all the parties in connection with the conclusion of the treaty, and any other document of one or more parties made in connection with the conclusion of the treaty and accepted by the other parties as a related document. It is important to consider that the enumeration of the context (in Article 31 of the VCLT) as including the text, the preamble, the annexes, any cognate agreement or even instrument developed by one party and accepted by others, lends further support to the generally accepted idea that a treaty must be read as a whole and not in its isolated words and parts, according to the principle of integration explained by Sir Gerald Fitzmaurice as follows: 'Treaties are to be interpreted as a whole, and particular parts, chapters or sections also as a whole.'[132] In this connection, it is noted that Trial Chamber V(A) had adopted an integrated construction of the Rome Statute that resulted in the grant of the Ruto relief. That approach in its entirety is adopted in the disposition of the present case.

92. *Relevant rules of international law in relations between the parties* [Article 31(3)(c) of VCLT]. This must comprise both pre-existing and emergent rules of international law implicated by the circumstances. Pre-existing rules will, of course, comprise those rules that have not been clearly displaced by the treaty applied in good faith, keeping in mind that included in the very first directive of Article 31 of the VCLT is the principle that a treaty 'shall be interpreted in good faith'. Good faith must mean not only that parties must give the treaty a necessary effect, but that they must refrain from giving it unnecessary effect, especially when to do so will likely infringe upon important interests of other states. In circumstances such as the present case, a cardinal consideration must be given to the need to avoid unnecessary infringement of the sovereignty of states, if sovereignty is not legitimately supplanted to that extent by a necessary application of the treaty.

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[132] See Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points', (1957) 33 *British Yrbk Int'l L* 203, at 211.

Judicial Choice of Public Policy in Statutory or Treaty Interpretation

93. What is ultimately implicated in the circumstances of the litigation now presented to the Trial Chamber—and particularly in the light of the stark lessons learnt from the need to adjourn the *Ruto and Sang* trial to enable Mr Ruto attend to his duties related to the Westgate attack—is better appreciated and resolved in the light of Singh's earlier noted observation as follows: 'In all real controversies of construction, if it were open to consult the Legislature as to its intention, the answer of most of the legislators in all probability will be: "such a problem never occurred to us, solve it as best as you can, consistent with the words used, and the purpose indicated by us in the statute".'[133] This is precisely the prescient value of Article 64(6)(f) that reserves for the Trial Chamber a general, residual power to rule as it sees fair, reasonable and just in the particular circumstances confronting the Chamber.

94. Against the foregoing, it is next to be considered whether in the task of statutory or treaty interpretation, especially when unforeseen situations have been encountered, it is legally correct for a Trial Chamber to make a public policy choice in finding workable legal solutions. The correctness of such an exercise in judicial choices is to be evaluated against the validity of the Prosecutor's *dura lex, sed lex* argument, to the effect that the law must be applied as it stands regardless of the consequences. In that regard, any complaint against the making of a judicial choice of policy must labour under a serious misconception of the law. In the particular circumstances of the present matter, such a complaint does more to validate the Dickensian negative description of the law in colourful terms of asininity.[134] The

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[133] Singh, *supra*, p 7.

[134] "That is no excuse," replied Mr Brownlow. "You were present on the occasion of the destruction of these trinkets, and indeed are the more guilty of the two, in the eye of the law; for the law supposes that your wife acts under your direction."

"If the law supposes that," said Mr Bumble, squeezing his hat emphatically in both hands, "the law is a ass—a idiot. If that's the eye of the law, the law is a bachelor; and the worst I wish the

purchase of the complaint is quite paltry, particularly because jurists of great eminence accept that statutory interpretation should comport to public policy when the legislator has not clearly indicated an overriding intention. They also accept that it is within the province of the court to identify the applicable public policy and comport the statutory language to it.

95. Francis Bennion, for instance, helpfully explains the role of public policy in the following way: 'No [statute] can convey expressly the fullness of its legal effect. Indeed only a small proportion of this intended effect can be conveyed by the words of the [statute]. For the rest, Parliament assumes that interpreters will draw necessary inferences. One inference is that, unless the contrary intention appears, Parliament expects relevant aspects of legal policy (which is based on public policy) to be applied.'[135] And, commenting further on the point, Bennion observed: 'Whichever way legal policy falls to be applied in the construction of legislation it bears the same essential character, being the peculiarly legal aspect of the general area that judges call public policy. So we may find them referring to it either as legal policy or public policy.'[136]

96. Oliver Wendell Holmes Jr also wrote in support of the view that public policy is a legitimate consideration in the administration of justice. According to him: 'The life of the law has not been logic: it has been experience.' More than mere 'syllogism' to be automatically followed without regard to consequences, the development of the law has had more to do with human-intelligence factors, such as 'felt necessities of the time', 'prevalent moral and political theories', and 'intuitions of public policy, avowed or unconscious', etc. He rejected the idea that the law is properly to be understood 'as if it contained only the axioms and corollaries of a book of

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law is, that his eye may be opened by experience—by experience": Charles Dicken, *Oliver Twist* available at http://www.online-literature.com/dickens/olivertwist/52/.

[135] Bennion, *supra*, p 769.

[136] *Ibid*, p 770.

mathematics.'[137] The role of public policy is particularly never to be underestimated: 'Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy ...'.[138]

97. In the sphere of international law in particular, reference may be had to the scholarship of Professor Rosalyn Higgins (as she then was)—eminent scholar who eventually served as a judge of the International Court of Justice. According to her, 'there is no avoiding the essential relationship between law and policy'.[139] Dismissing an assumption that a court can arrive at 'the correct legal view' sanitised of 'considerations of non-judicial character' more appropriate 'for the political rather than the legal arena', she wrote as follows:

> Reference to 'the correct legal view' or 'rules' *can never avoid the element of choice* (though it can seek to disguise it), nor can it provide guidance to the preferable decision. In making this choice one must inevitably have consideration for the humanitarian, moral, and social purposes of the law.[140]

98. As she had also observed more fully:

> Policy considerations, although they differ from 'rules', are an integral part of that decision making process which we call international law; the assessment of so-called extralegal considerations is *part of the legal process,* just as is reference to the accumulation of past decisions and current norms. A refusal to acknowledge political and social factors cannot keep law 'neutral', for even such a refusal is not without political and social consequence. There is no avoiding the essential relationship between law and politics.[141]

99. Higgins's views in that regard were endorsed by Judge McDonald and Judge Vohrah in the Appeals Chamber of the ICTY in the *Erdemovic* case. According to

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[137] Oliver Wendell Holmes Jr, *The Common Law* [Boston: Little, Brown and Company, 1881] p 1.
[138] *Ibid*, p 35.
[139] Rosalyn Higgins, *Problems & Process—International Law and How We Use It* [Oxford: Clarendon Press, 1994] p 5.
[140] *Ibid*, emphasis added.
[141] *Ibid*, emphasis received.

them, the point 'is not that policy concerns dominate the law but rather, where appropriate, are given due consideration in the determination of a case.'[142]

100. It need not be gainsaid that the view which insists that international law is capable of operating in a politically sterile environment implicates amazing naïveté as to how life really works. As Lauterpacht observed: '[I]n interpreting and applying concrete legal rules the Court does not act as an automatic slot-machine, totally divorced from social and political realities of the international community.'[143]

101. It is also never in doubt that it is the proper province of the court to make the choice as to the applicable public policy—even taking into account sources not directly applicable in the particular case before the court. Evidently, Bennion saw no need to mince his words in that regard: 'So far as concerns statutory interpretation by the courts, the content of public policy (and therefore legal policy) is what the court thinks and says it is. However, in this the court may be guided by Acts of Parliament (even though not directly applicable in the instant case) as indicating Parliament's view of the content of the relevant public policy.'[144]

102. Here again, the views of another eminent jurist who served on the bench of the ICJ may be of some help. It is from the perspective of the constant presence of judicial discretion in matters of customary international law that Lauterpacht began his proposition as to the 'constant necessity of making a choice'.[145] According to him, when the law is clear and non-controversial, the discretion may be 'correspondingly circumscribed within narrow limits'. But even then judicial discretion 'is far from

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[142] *Prosecutor v Erdemović,* decision dated 7 October 1997 [ICTY Appeals Chamber], Joint Separate Opinion of Judge McDonald and Judge Vohrah, para 78.
[143] Hersch Lauterpacht, *The Function of Law in the International Community* [Oxford: Oxford University Press, 1933 (first publication) and 2011 (reissued)] p 327.
[144] Bennion, *supra,* p 769.
[145] Hersch Lauterpacht, *The Development of International Law by the International Court* [London: Stevens and Sons, 1958, reprinted Cambridge: CUP 1996] p 396.

being wholly eliminated.'[146] As regards judicial discretion in the manner of 'constant necessity of making a choice', Lauterpacht wrote as follows:

> The position thus viewed with regard to customary international law affects also the measure of judicial discretion in the matter of interpretation of treaties. For although the primary object of the judicial function in this sphere is to ascertain the intention of the parties, that intention can often be ascertained only against the background of customary international law. Moreover, even when a treaty can be interpreted without reference to customary international law, and even when the latter is clear and undisputed, the international judicial function does not on that account become purely automatic. For the ascertainment of the intention of the parties is by no means a mechanical operation. Often, particularly in relation to multilateral treaties, to discover the intention of the parties is no easier than to ascertain the intention of the legislature.[147]

103. Lauterpacht had rejected, in particular, the claim (notably also present in the Prosecutor's submission in this litigation) that is often encountered in legal disputes (and already addressed above) that the text of a treaty can be so plain as to eliminate the judicial discretion in every related case. The reasons militating against such tyranny of the 'plain' text or 'ordinary meaning' include the emergence of facts not contemplated by parties to the treaty in question (a phenomenon addressed by Singh in the domestic sphere) or cases where the plain text may produce absurd or unreasonable results. According to Lauterpacht: 'The "plain" or "ordinary" or "natural" meaning of terms may provide no help; to assume it may amount to avoiding rather than to accomplish the true object of interpretation.'[148] Elaborating on some of the difficulties that may compel a need to look beyond the 'plain' or 'ordinary' meaning of words, Lauterpacht continued as follows: 'There are, in the first instance, occasions in which the parties did not at all contemplate the cases or types of cases which present themselves to the Court. There are instances in which, largely for that very reason, although the language which the parties have used is

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[146] *Ibid*, p 394.
[147] *Ibid*, p 395.
[148] *Ibid*.

clear, its automatic and literal application may lead to an absurdity or a travesty of what must reasonably be assumed to have been the intention of the parties.'[149] But, he continued, the absence of such difficulties does not remove from the judge the task of making choices. For, even then, 'the Judge is often confronted with a choice between conflicting and equally legitimate principles of interpretation.'[150] These are considerations that guide the exercise of the judge's duty to give effect to the intention of the parties:

> It is his duty to give effect to the intention of the parties. But he is bound to interpret that intention in accordance with the paramount principle of good faith which demands that, again within the limits determined by circumstances, the maximum of effect must be given to the instrument in which the parties have purported to create legal obligations. At the same time he must take into account the fact that, especially in the international sphere, their intention may have been to create only a limited or even a nominal obligation. To what extent is that intention decisive? To what extent is it subject to the apparently overriding principle that the object of treaties is to create legal obligations?[151]

104. As identified by Lauterpacht in the foregoing quote, one of the considerations of policy that animate the judicial task of making choices is the 'paramount principle of good faith' in international law. In the view of this Chamber, the principle of good faith should accommodate the spirit of give-and-take in an international legal order that is necessarily based on reasonable adjustment of competing interests, jurisdictions, competencies, or sovereignties. As the principle requires parties to a treaty to do what is necessary to give full effect to the treaty:[152] it should, as indicated earlier, also discourage unnecessary effect being given to a treaty beyond its essential purposes; particularly when such unnecessary effect entails palpable adversity to important aspects of the legitimate interests or sovereignty of a particular state that is affected by such excessive effect being given to the treaty. The Majority of the

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[149] *Ibid.*
[150] *Ibid.*
[151] *Ibid*, pp 395—396.
[152] VCLT, *supra*, Article 26.

Chamber recalls in this connection the 'wisdom of restraint' that was invoked in the *Ruto* Decision:

> In arriving at the correct outcome that depends on the interpretation of certain provisions of the Statute, it is particularly important to heed the wisdom of restraint when giving effect to the scope of a statutory provision, especially in view of existing law and competing considerations. Such a restrained view of interpretation was expressed as follows in a classic work on statutory interpretation: 'Sometimes, to keep the Act within the limits of its scope, and not to disturb the existing law beyond what the object requires, it is construed as operative between certain persons, or in certain circumstances, or for certain purposes only, even though the language expresses no such circumscription of the field of operation.'[153]

105. The circumstances of the present case recommend adherence to the policy of good faith described above. Full effect would have been given to the Statute for its essential purposes if the trial of Mr Kenyatta proceeds uninterrupted. It is unnecessary then to require him to sit in court every single day of the trial, when to do so will necessarily impede his ability to run the country that he had been elected to run.

106. Other policy considerations that may also be brought to bear in the task of treaty interpretation also include those of reasonableness and fairness.[154] The choice of policy that recommends them in the present case includes the unreasonableness that was occasioned when the *Ruto and Sang* trial had to be adjourned for seven days in the middle of the testimony of a vulnerable witness, in order to enable Mr Ruto to fly back to Nairobi and attend to his duties as Deputy President of Kenya when the Westgate Mall was attacked. It was neither reasonable that the trial could not continue for the duration of his absence nor fair to the vulnerable witness.

107. And, without question, the most paramount public policy consideration is the overriding idea of justice itself. Lauterpacht described it as the 'quest for justice'.[155]

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[153] Ruto Decision, *supra*, para 52.
[154] Bennion, *supra*, p 770.
[155] Lauterpacht, *The Development of International Law by the International Court*, *supra*, p 397.

He elaborated upon that quest in treaty interpretation, by aptly dismissing the sort of argument heard in the present litigation: that judges are no more than 'automatic slot-machines'[156] who must abandon any thinking in the application of a statutory text as it might first appear on paper. In his words:

> That quest can derive no decisive assistance from exclusive reliance upon one single doctrine, or tendency, or formula. Unavoidably, in the zeal of forensic effort which it is their business to display, parties will rely upon some exclusive consideration—just as they will often appeal to what may be no more than an argumentative stratagem. Thus they will assert that it is the business of the Court to interpret treaties and not to rewrite them, or that its task is to apply the law and not to change it. That brand of argument, which depicts the judicial function as obvious and automatic, may be no more than a piece of dialectics which begs the question. For the point is what the treaty, properly interpreted, means; the question is what the law is. That question is not answered by the assertion that the interpretation contended for by the other party would amount to rewriting the treaty or changing the law.[157]

108. For his part, Judge Mohamed Shahabudeen wrote about the overriding idea of justice in terms of 'the superior demands of justice.'[158] Such demands will often temper the words of a provision, for the 'overriding purpose of [achieving] justice.' As Judge Shahabudeen put it: 'In this respect, it is said that *the "language or a statute, however mandatory in form, may be deemed directory whenever legislative purpose can best be carried out by [adopting a directory] construction.* Here, the overriding purpose of the provision is to achieve justice."'[159] The 'quest for justice' or the 'superior demands of justice' for victims of atrocities would be defeated by an interpretation of Article 63(1) in the manner urged by the Prosecutor, which would leave a Trial Chamber no discretion to proceed with the trial of an accused person who absconds after having initially made appearances before the Court and accepted its jurisdiction.

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[156] Lauterpacht, *The Function of Law in the International Community, supra* p 396.
[157] *Ibid.*
[158] *Prosecutor v Barayagwiza (Decision [on] Prosecutor's Request for Review of Reconsideration)* dated 31 March 2000 [ICTR Appeals Chamber] Separate Opinion of Judge Shahabudeen, para 53.
[159] *Ibid* (emphasis added).

109. It is undoubtedly for the foregoing reasons, among others, that Judge Shahabuddeen had cautioned against 'any tendency to rely too confidently, or too simplistically, on the maxim *dura lex, sed lex*.'[160]

110. Indeed, the *dura lex, sed lex* stance of the Prosecution—according to which the consequences of a certain construction of words must remain immaterial in the task of statutory construction—has been unequivocally rejected by other important authorities. In the legal classic *Maxwell on Interpretation of Statutes*, it is clearly written that 'consequences [are] to be considered'. And the proposition is more fully elaborated as follows:

> BEFORE adopting any proposed construction of a passage susceptible of more than one meaning, *it is important to consider the effects or consequences which would result from it*, for they often point out the real meaning of the words. There are certain objects which the legislature is presumed not to intend, and a construction which would lead to any of them is therefore to be avoided. It is not infrequently necessary, therefore, to limit the effect of the words contained in an enactment (especially general words), and sometimes to depart, not only from their primary and literal meaning, but also from the rules of grammatical construction in cases where it seems highly improbable that the words in their primary or grammatical meaning actually express the real intention of the legislature. It is regarded as more reasonable to hold that the legislature expressed its intention in a slovenly manner, than that a meaning should be given to them which could not have been intended.[161]

111. In a similar vein, Lord Reid observed as follows: 'If the language is capable of more than one interpretation, we ought to discard the more natural meaning if it leads to an unreasonable result, and adopt that interpretation which leads to a reasonable practicable result.'[162] Surely, the construction of Article 63(1) that would produce the unreasonable results mentioned earlier could not have been what the drafters of the Statute had intended. Such an interpretation should then not be followed merely because the 'plain' text or the 'ordinary meaning' of the words, in

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[160] *Ibid.*

[161] *Maxwell on Interpretation of Statutes*, 12th edn by P St J Langan [London: Sweet & Maxwell, 1969] p 105 (emphasis added).

[162] *Gill v Donald Humberstone & Co Ltd* [1963] 1 WLR 929, at p 934 [House of Lords].

the eyes of some readers, 'says what it says'. That should not be the case, the majority of Trial Chamber V(A) in the *Ruto* Decision has identified a different purpose that is valuable in the provision, which purpose will not produce unreasonable results.

Does Article 27 forbid all distinctions in treatment between accused persons?

112. Besides Article 63(1), another provision of importance in this decision is Article 27 of the Statute, invoked by the Prosecution.[163] It provides indeed that the Statute 'shall apply equally to all persons without any distinction based on official capacity'. However, the Prosecution's submission is that this requirement of equality before the law precludes taking into consideration the particular circumstances and responsibilities of an accused.

113. The submission is misconceived. For one thing, such an interpretation of Article 27 will provide a basis for an accused to insist upon identical treatment between him and the Prosecutor herself. But more importantly, the *ad hoc* tribunals have repeatedly rejected the view that equality demands identical treatment of parties in all circumstances. Rather, the concept of equality, as explained by the Appeals Chamber of the ICTY, is to ensure that each party has 'equal access to the processes of the Tribunal, or equal opportunity to seek procedural relief where relief is needed.'[164] This does not equate to a right to equal relief 'when the circumstances are quite different in each case', unless of course some basis for granting equal relief has been shown.[165] The equivalent provision requiring equality before courts and tribunals in Article 14 of the International Covenant on Civil and Political Rights has similarly been interpreted in a manner which acknowledges the accommodation of reasonable difference. In his commentary on the covenant, renowned human rights

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[163] ICC-01/09-02/11-T-26-ENG, page 22, line 19 – page 23, line 6 ; ICC-01/09-02/11-818, paras 25-26.
[164] *Prosecutor v Kordić & Cerkez (Decision on Application by Mario Cerkez for Extension of Time to File His Respondent's Brief)* 11 September 2001 [ICTY Appeals Chamber] para 7.
[165] *Ibid*, para 9.

expert Professor Manfred Nowak noted that: 'the fact that the plaintiff and the respondent in civil matters or the prosecutor and the accused in criminal cases have different rights does not violate this provision, so long as this does not contravene the principle of "equality of arms"; [footnote omitted] similarly, diplomatic privilege or parliamentary immunity is not affected' [internal footnote omitted].[166]

114. Such reasoning cannot be applied just to 'equality of arms' as between the prosecution and defence but also to the accommodation of reasonable differences between or among accused persons. The particular circumstances of each accused person are in fact commonly considered in ways which result in significantly different reliefs, including in the determination of fitness to stand trial and on matters related to pre-trial detention or provisional release.

115. Fundamental to the finding in this case is the understanding that the dignity or status of Mr Kenyatta as President of Kenya is not what is at issue in holding that there are exceptional circumstances that justify his conditional excusal from continuous presence at trial. Rather, the finding is based on the attendant obligations and responsibilities of such an office. In certain limited circumstances, other accused may also satisfy this narrow test, were they to demonstrate, for example, skills of exceptional rarity or significant public service responsibilities the immediate application of which may compete with the requirements of the general rule of presence at trial.

A Caveat

116. It is possible that so much of the view of certain public offices, such as that of head of state, is of the dignity of the office. But such a phenomenon need not obscure the law's own view of the functions of the office. Nor should the incidence of dignity override the need to accord due recognition and effect to the incidence of function. It

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[166] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd revised edition (2005). p 309.

is for that reason that Trial Chamber V(A) made sure to stress in *Ruto* that the excusal allowed Mr Ruto was 'purely a matter of accommodation of the demanding functions of his office as Deputy Head of State of Kenya, and not merely the gratification of the dignity of his own occupation of that office.'[167] The same caveat also fully applies here to the excusal granted Mr Kenyatta.

The Uniqueness of the ICC

117. The Statute represents a universal legal framework that seeks to synthesise and harness the best legal norms of international law and municipal law with the aim of fighting impunity. Its essence is disserved by insular or trenchant approaches that should be reproved in their own right, let alone when they will foreseeably foster the very impunity that the Statute was designed to confront.

118. In that connection, it is often said that the ICC is 'a unique' judicial institution. Indeed, the circumstances of these cases put that idea to the test. Uniqueness cannot possibly mean a requirement or expectation to follow blindly the practices ordinarily seen in domestic criminal trials, without regard to the provenance and reasons for such practices and without evaluating their suitability for the wholly different circumstances in which this Court may be called upon to exercise mandate. Here, we have on trial a serving executive President of a country. In the construction of Article 63(1) that speaks to his presence at trial, it should be inadequate to consider that it is always traditional to see accused persons present at their trials. The fallacy of that argument is underscored by the absence of precedents in which serving executive heads of States or government had been required to sit in the courtrooms through criminal trials taking place in their own countries, let alone thousands of miles away abroad.

119. The Majority of the Chamber is conscious of the Prosecutor's argument that the absence of the accused would significantly harm the integrity of the case. The same

[167] Ruto Decision, *supra*, para 71.

argument was summarily dismissed in the *Ruto* decision as lacking support in empirical data. For similar reasons, the Majority finds the argument unpersuasive in the context of the present litigation. Notably, the Majority decision requires the presence of the accused during all crucial parts of the proceedings that serve both the integrity of the Court and its overarching purpose of justice. The proper course in the circumstances is to strike a balance that serves both the right of the victims to the truth and the right of the accused. In circumstances in which the accused (who enjoys the presumption of innocence) has made out a case to the effect that, as the President of Kenya, he has important functions of an extraordinary dimension to perform elsewhere, while the trial proceeds unimpeded, to then require his continuous presence at trial, may well appear as a form of punishment before the verdict.

120. To be clear, the point of the foregoing reasoning is not to the effect that Mr Kenyatta should not at all be subjected to criminal trial at the ICC and its courtrooms at The Hague, simply because he is a serving executive President. It is rather an argument that he may be excused from continuous presence during that trial which must, under the terms of Article 27 of the Statute, proceed notwithstanding that he is the executive President of Kenya. Available precedent, in the manner of the criminal trials of Prime Minister Berlusconi of Italy, while he was in office, indicates that proceedings continued in his absence, when Milan Courts rejected Mr Berlusconi's claims that there was a 'legitimate impediment' (by reason of his official duties) that should have prevented the trial from proceeding.[168] The example is less a legal precedent that a practical one, as Italian law permits trials to proceed in the absence of accused persons, by virtue of the doctrine of *semel praesens semper praesens*.[169] The practical point rather is that a criminal trial could proceed against a serving head of government in his absence.

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[168] See Constitutional Court Throws Out Berlusconi's Legitimate Impediment Appeal, 20 June 2013, available at http://www.corriere.it/International/english/articoli/2013/06/20/legitimate-impediment.shtmland Roundup: Italy's highest court rejects Berlusconi's "legitimate impediment" in fraud trial, 20 June 2013, available at http://www.chinadaily.com.cn/xinhua/2013-06-20/content_9360608.html.

[169] See Ruto Decision, *supra*, para 74.

Witness Intimidation or Interference

121. As a final and equally important matter, the Chamber notes that this Decision has been motivated in part by Article 64(2) of the ICC Statute, which requires the Trial Chamber to ensure that the 'trial is fair and expeditious and is conducted with full respect to the rights of the accused and due regard for the protection of victims and witnesses.' It is obvious that the decision has thus far concentrated on that part that concerns 'full respect to the rights of the accused.' But due regard for the protection of victims and witnesses also warrants serious consideration.

122. In this regard it is important that Mr Kenyatta should make every effort to ensure that victims and witnesses are not intimidated or interfered with. Desirable actions in that connection should include impressing upon his supporters—regardless of his own awareness of their actual links to him—the need to refrain from any conduct or utterance that may reasonably create intimidating or harassing atmosphere for victims and witnesses. Salutary actions in that regard may have obvious benefits in mitigation of sentence, were the Prosecution to succeed in establishing guilt in the end at the requisite standard of proof. But the hope of mitigation of sentence need not be the only motivation for taking effective measures in good faith to ensure that witnesses and victims are not intimidated, harassed or interfered with. It is also the right thing to do in the name of the rule of law and the modem democracy that Kenya is and which Mr Kenyatta is obligated to play a principal part in guiding as the President.

Conditions of the Excusal

123. In light of the analysis provided above, the Majority of the Chamber is persuaded that it is reasonable to grant the Excusal Request, subject to the conditions indicated below. The Majority of the Chamber considers that the conditional grant of

the Excusal Request strikes an appropriate balance with respect to the competing interests at stake.

124. It is recognised that the presence of the accused during the trial is not only a right (by virtue of Article 67(1)(d)), but also a duty on the accused (by virtue of Article 63(1)). Presence of the accused is the default position, necessitated by the imperatives of judicial control. However, as discussed in the foregoing analysis, when the Statute is read as a whole, and taking into account the general body of international law, of which the Statute forms a part, there remains a residue of discretion which permits a Trial Chamber to make reasonable exceptions to the default duty of presence of an accused. Application of this exception is to be done on a case-by-case basis and requires the careful balancing of all the interests concerned. Hence, the grant of the Excusal Request, in part, is an exception to the general rule. The general rule remains that Mr Kenyatta must be present in the courtroom during the trial. In the unique and particular circumstances of this case, the aim of that general rule is sufficiently met by the regime of presence that the Majority of the Chamber now directs:

a. Mr Kenyatta must be physically present in the courtroom for the following hearings:

   i. the entirety of the opening statements of all parties and participants;
   ii. the entirety of the closing statements of all parties and participants;
   iii. when victims present their views and concerns in person;
   iv. the entirety of the delivery of judgment in the case;
   v. the entirety of the sentencing hearings (if applicable);
   vi. the entirety of the sentencing (if applicable);
   vii. the entirety of the victim impact hearings (if applicable);
   viii. the entirety of the reparation hearings (if applicable); and
   ix. any other attendance directed by the Chamber.

b. Mr Kenyatta is excused from continuous presence at other times during the trial. This excusal is strictly for purposes of accommodating his discharge of duties as the President of Kenya. The resulting absence from the trial must therefore always be and be seen to be directed towards performance of those duties of state.

c. The Chamber further requires the Kenyatta Defence to file with the Registry, no later than one day after the time-limit for request for leave to appeal this Decision, a waiver signed by Mr Kenyatta, in the form attached as an annex to this Decision.

125. Violation of any of these conditions of excusal may result in the revocation of the excusal and/or the issuance of an arrest warrant, as appropriate.

126. This decision and its conditions may, from time to time, be reviewed by the Chamber, of its own motion or at the request of any party or participant.

Use of Video Link

127. As part of the relief sought in the Excusal Request, the Kenyatta Defence requests that for all occasions (other than the opening and closing of trial, as well as the delivery of judgment) for which the attendance of Mr Kenyatta is required by the Chamber, or for which he wishes to be present, he is permitted to do so by way of video link. The Kenyatta Defence submits that the relief is requested "[f]or reasons set out" in the Excusal Request. However, the Excusal Request contains barely more than the mere request for this facility and is inadequate to enable any proper consideration of the question by the Chamber.[170] In that regard, the Chamber notes that providing video link facilities would require a considerable outlay in terms of resources, including financial, technological and human resources on the part of the

[170] It is noted that the First Motion is expressly stated to have been superseded and therefore any submissions made by the Kenyatta Defence in that context, having not been incorporated in their current submissions, do not fall for consideration.

Court and is not something that should be ordered without careful consideration and substantial justification. Moreover, the provision of such facilities would be a privilege granted by the Chamber because it was deemed necessary in the circumstances: it is not a privilege that a simple request can secure for any accused. Consequently, to the extent that the Kenyatta Defence request for video link is incorporated in the primary relief requested in the Excusal Request, it is rejected. Separately, having determined to grant, in part, the Excusal Request, the Chamber does not consider it necessary to proceed to an analysis of the Alternative Request.

FOR THE FOREGOING REASONS, THE CHAMBER, BY MAJORITY, HEREBY

GRANTS, in part, the Excusal Request, as follows:

1) Mr Kenyatta must be physically present in the courtroom for the following hearings:

   i. the entirety of the opening statements of all parties and participants;
   ii. the entirety of the closing statements of all parties and participants;
   iii. when victims present their views and concerns in person;
   iv. the entirety of the delivery of judgment in the case;
   v. the entirety of the sentencing hearings (if applicable);
   vi. the entirety of the sentencing (if applicable);
   vii. the entirety of the victim impact hearings (if applicable);
   viii. the entirety of the reparation hearings (if applicable); and
   ix. any other attendance directed by the Chamber.

2) The absence of Mr Kenyatta from the trial resulting from this conditional excusal must always be and be seen to be directed towards performance of Mr Kenyatta's duties of state.

3) The Kenyatta Defence to file with the Registry, no later than one day after the time-limit for request for leave to appeal this Decision, a waiver signed by Mr Kenyatta, in the form attached as annex to this Decision.

REJECTS all other requests.

DIRECTS the Kenyatta Defence to refrain from using Mr Kenyatta's official title in its filings in this case.

Judge Ozaki appends a dissenting opinion, and Judge Eboe-Osuji appends a separate concurring opinion.

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

Judge Kuniko Ozaki, Presiding

Judge Robert Fremr **Judge Chile Eboe-Osuji**

Dated 18 October 2013

At The Hague, The Netherlands