**Cour Pénale Internationale**

**International Criminal Court**

Original: **English**

No.: **ICC-01/09-01/11**
Date: **19 February 2014**

**TRIAL CHAMBER V(A)**

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

**SITUATION IN THE REPUBLIC OF KENYA**

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

**Public**

# Separate Further Opinion of Judge Eboe-Osuji to the 'Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*'

**Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:**

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

**Counsel for William Samoei Ruto**
Mr Karim Khan
Mr David Hooper
Mr Essa Faal
Ms Shyamala Alagendra

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

**Legal Representatives of Victims**
Mr Wilfred Nderitu

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for Victims**
Ms Paolina Massidda

**The Office of Public Counsel for the Defence**

**States Representatives**

***Amicus Curiae***

**REGISTRY**

**Registrar**
Mr Herman von Hebel

**Deputy Registrar**

**Victims and Witnesses Unit**
Mr Patrick Craig

**Detention Section**

**Others**

**Victims Participation and Reparations Section**

# SEPARATE FURTHER OPINION OF JUDGE EBOE-OSUJI

1. I fully share the decision of the Chamber and its reasons for granting the Defence request for excusal of Mr Ruto from continuous presence at trial further to r 134*quater*. I merely add these few words separately, in further support of the correctness of the Chamber's decision.

## I

2. In the ICJ case concerning *International Status of South West Africa*, Judge McNair offered a useful caution about how relevant analogies in private law systems may help, and inspire, the development of international law. The point of his caution was this. It is neither ultimately workable nor wholly appropriate to import into international law, analogies, concepts, ideas, principles, and approaches 'lock, stock and barrel' from private law systems.[1] It is the idiom 'lock, stock and barrel' that memorably marks the caution. Lord McNair never discouraged the drawing of inspiration from the domestic legal sphere. In many instances, indeed, lengthier experience and usages of the domestic legal system (that have admirably served their purposes) can usefully guide international legal solutions, practice or precedents. But, caution is required in every case, given material distinctions in the lay of the land in either sphere. The matter now before us brings to mind the general wisdom of that caution.

3. These distinctions notably occur in the following particulars (among others) directly implicated in the context of this litigation. The national criminal justice system is not beholden to the consensus of sovereign equals[2] to bring it into existence and make it work and sustain it. Its existence is peremptory. In particular, judgments and orders of the court are enforced by the police, notwithstanding anyone's contrary views or inclinations. But, in the international legal order, things work differently. The international criminal justice system—as a functional system apart from the normative rules and principles that it should apply—depends on the adoption of a consensual treaty among States. The consenting States not only enjoy the status of sovereign equality *inter se*, but also (as is particularly the case with the Rome Statute) the right to opt out. It is not unknown in history for the life of even a 'permanent' court of international justice to be brought to an end (as to the ultimate experience of the PCIJ teaches), whether or not it is replaced by something else. Another critical distinction evident in the international criminal justice system is the absence of a police force that must enforce the judgments and orders of the court. Enforcement of any court order depends on the goodwill and cooperation of States acting firmly and in unison. In the absence of either, regional blocs of alliance or sympathy may form safe havens for the subject of the court order. The court order is thus rendered effectively *brutum fulmen*, despite repetend appeals of the

[1] *Case concerning International Status of South West Africa (Advisory Opinion)* (1950) Separate Opinion by Sir Arnold McNair, ICJ Reports 128, at p 148.

[2] Any idea of equality of members of a domestic parliament does not compare. For instance, the equality of members of national parliament is not sovereign equality. And, members of national parliament are not entitled, by reason of sovereign equality, to opt out of a piece of legislation that has been passed into law.

international court concerned and its sympathisers (including valiant civil society organisations whose tireless efforts are reduced to a virtual game of cat-and-mouse with the subject of the court order).

4. Some may, of course, be tempted to belittle the judicial circumspection or self-restraint that results from the foregoing considerations: possibly claiming support in Martti Koskenniemi's words to the effect that 'it is not the lawyer's problem' to worry about 'sociological analyses about effectiveness, implementation and compliance ... unless the lawyer has internalized the self-image of the political decision-maker's little helper.'[3] [It should not be necessary, of course, to dwell on the obvious fallacy of the argument as an appeal to the ridicule—a device that affords no help to an argument beyond the initial amusement that is possibly roused. Nor is it necessary to elaborate upon the pragmatic circumspection and self-restraint of even domestic courts that are notably careful to avoid making orders that will likely become *brutum fulmen.*] The evident aim of the intended argument, so colourfully presented, is the bare urge of legal formalism: fidelity to the law without more. It is in the manner of saying: 'valid law' must be applied by courts without further ado.[4] It is an argument that the Prosecution has repeatedly made in the mini-series of litigation in this case, concerning the application of article 63(1) of the Statute.

5. But any appeal to Professor Koskenniemi, as indicated above, may well be out of context. For, it is not comfortably accommodated by the words he wrote in the same place—quite significantly—preceding the teasing words quoted above. That is to say, he had also written this: 'Answers to questions about (valid) law are conditioned *upon the criteria for validity that a legal system uses to define its substance.* These criteria do refer to social facts and moral ideas but cannot be reduced to them—without doing away with the legal question (by interpreting it as "in fact" a question about what works, or what is good) and the profession that was tasked to answer it. *Yet we know, of course, that questions of valid law do not admit of a single right answer. Even if there may be agreement on a form, that often vanishes when we seek to establish its meaning ...*'.[5] He also fully recognises and acknowledges that formalism is an anachronistic orthodoxy that no one remembers when last it held sway as the right guide to legal thought. Quite specifically, he tells us that the formalistic approach to legal reasoning was long ago rejected generally, as 'petrified mysticism, unable to assist in the fulfilment of modernity's great projects.'[6] It is my humble view that it must remain so rejected in this modern Court's project of international justice.

6. But even if Koskenniemi's position is accurately reducible to the view that 'it is not the lawyer's problem' to worry about 'sociological analyses about effectiveness, implementation and compliance,' it is then a view that I am unable to accept. The greater appeal lies, in my view, in the contrasting, realist stance of Justice Oliver Wendell Holmes Jr, who rejected what he famously

---

[3]See Martti Koskenniemi, *The Gentle Civilizer of Nations* [Cambridge: Cambridge University Press, 2004] p 495.
[4]*Ibid.*
[5]*Ibid*, [emphases added, but parentheses received].
[6]*Ibid*, p 496.

described as the 'fallacy of the logical form.'[7] As he put it: 'I think that judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious ...'.[8] And, particularly insisting that it is very much the lawyers' problem to worry about the sociological implications of the rules they urge and make, Holmes continued: 'I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions.'[9] I agree. But, it may be observed that the policy considerations implicated in Holmes' view do not create a one-way street that constrains judges to render *only* decisions that give comfort to political decision-makers, regardless of the beckoning of circumstances in a different direction. Quite the contrary, policy considerations have impelled international courts to render vectorial decisions (that political decision makers may find inconvenient) on matters on which the courts' constitutive instruments were silent; because such decisions emanate from such implied powers as are considered essential for the performance of the proper functions of the institution concerned.[10]

7. Ultimately, a fundamental consideration remains this. A judge of an international court may charge aggressively into the porcelain shop of international relations, brandishing every power that recommends itself or serves the purposes or desires of the proponent; he or she may feel propelled by the robust self-image of a judge sitting in a domestic court; and, may be unperturbed by the unique (even idiosyncratic) and delicate circumstances inherent in international relations. But, such a judge should not hope to escape condemnation not more flattering than the jeering tag of a political decision maker's 'little helper'. Credence may, in the circumstances, beckon towards derision of lawyers, such as appears in Douglas Pepler's century-old verse:

> The law the lawyers know about
> Is property and land;
> But why the leaves are on the trees,
> And why the waves disturb the seas,
> Why honey is the food of bees,
> Why horses have such tender knees,
> Why winters come when rivers freeze,
> Why Faith is more than what one sees,
> And Hope survives the worst disease,
> And Charity is more than these,
> They do not understand.[11]

---

[7] Oliver Wendell Holmes Jr, 'The Path of the Law', (1897) 10 *Harvard Law Review* 457, at p 468
[8] *Ibid*, p 467.
[9] *Ibid*, p 468.
[10] See *Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations* (1949) ICJ Reports 174 at p 182. See also *Nuclear Tests Case (New Zealand v. France) (Judgment)* (1974) ICJ Reports 457, para 23.
[11] Douglas Pepler, *The Devil's Devices or Control versus Service* [London: The Hampshire House Workshops, 1915].

8. It will be helpful, indeed, if lawyers and judges working in the courtrooms of the ICC do not leave the members of the ASP similarly thinking:

> The law they know about is only domestic law;
> The province of international relations and
> The peculiarities of its very own law,
> They do not understand.

9. The point of recalling the distinctions between international law and national law and their respective fields of operation is not at all to suggest that international judges must abdicate any expectation—even claim—of resoluteness in their judgments and orders *sans peur et sans reproche*,[12] in deference to the shifting winds of politics and diplomacy or questions of compliance. Indeed, an international court should be ready, willing and able to make any decision that is *essential* to the performance of its functions as a court of law with a particular object and purpose, notwithstanding possible concerns that the resulting order may even become *brutum fulmen*. The point, rather, is that the work of international judges must always be approached with a clear view of—and due sensitivity to—the differences between the domestic and the international justice systems, with particular reference to the limits of the latter. No purpose is served in getting carried away by the apparent power to issue *every* judicial order that it is possible to issue regardless of questions of the necessity, simply because it is an order that a domestic court would be able to issue.

## II

10. The ideal litigation involves cases in which the applicable law in the case had either been set or established well before the facts engaged in the litigation. It will be strange, in the least, to pretend that such is the case in the present litigation.

11. Following litigation on the matter, the Trial Chamber rendered a decision of 18 June 2013—largely unheralded at the time—granting conditional excusal to Mr Ruto from continuous presence at trial.[13] The purpose was to enable him to continue to fulfil his functions as the Deputy President of Kenya, while his trial proceeded unhindered before this Trial Chamber. The Prosecution promptly sought leave to appeal. A majority of the Trial Chamber granted leave.[14] I humbly dissented.[15] In granting the leave, the majority was primarily motivated by the concern expressed by the Prosecution in their leave application that it was necessary to present the matter to the Appeals Chamber, in order to forestall the risk of eventual nullification of any aspect of the trial conducted

---

[12] See Koskenniemi, *The Gentle Civilizer of Nations, supra*, p 495.
[13] *Prosecutor v William Samoei Ruto and Joshua Arap Sang* (*Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial*) 18 June 2013, [Trial Chamber] [the 'Excusal Decision'], Majority Decision of Judge Eboe-Osuji and Judge Fremr.
[14] *Prosecutor v William Samoei Ruto and Joshua Arap Sang* (*Decision on Prosecution's Application for Leave to Appeal the 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial'*) 18 July 2013, [Trial Chamber] [the 'Majority Leave to Appeal Decision'], Majority Decision of Judge Herrera Carbuccia and Judge Fremr.
[15] *Ibid*, Dissenting Opinion of Judge Eboe-Osuji.

in the absence of the accused, were the Appeals Chamber ultimately to come to the view that article 63(1) had left *no room* for the Trial Chamber to excuse the accused from presence at trial.[16]

12. Following the grant of leave to appeal, the Prosecutor sought and received from the Appeals Chamber an interim suspension of the operation of the Trial Chamber's majority decision (that had granted the excusal), pending the outcome of the appeal.[17]

13. What came next as a matter of fact included these. The Government of Kenya extra-judicially protested with vigour, amplifying their complaint that the processes of the Court were being conducted in a manner that was unduly interfering with the sovereignty and independence of Kenya, by unnecessarily impeding the orderly governance of the country.[18] The African Union joined them in that complaint[19] and requested of the UN Security Council that this case (involving an accused that has in the meantime become the serving Deputy President of Kenya), as well as the case against Mr Kenyatta (who has since become the President of Kenya), be deferred, pursuant to article 16 of the Statute, for the duration of the terms of office of the two men.[20] The request at the Security Council fell short of two votes to obtain the nine-vote majority needed for an adopting resolution to pass, in the absence of a veto.[21] It had been understood, at the Security Council, that the ASP of the ICC was the better forum to address the concerns of the Government of Kenya.[22]

14. The Appeals Chamber eventually decided on the merits of the matter of whether or not there was discretion in the Trial Chamber to grant excusal in the light of article 63(1) of the Statute. The majority of the Appeals Chamber dismissed what they very correctly understood to be the purport of the Prosecutor's ultimate submission—i.e. that the language of article 63(1) was simple and straightforward and 'does not leave room for judicial discretion' in the Trial Chamber to conduct trial in the absence of the accused, beyond the removal of disruptive accused (as provided for in article 63(2)).[23] As the majority of the Appeals Chamber held, article 63(1) did indeed leave the

---

[16] *Ibid*, Majority Decision of Judge Eboe-Osuji and Judge Fremr, paras 21—22.

[17] *Prosecutor v William Samoei Ruto and Joshua Arap Sang (Decision on the request for suspensive effect)* 20 August 2013, [Appeals Chamber].

[18] Identical letters dated 21 October 2013 from the Permanent Representative of Kenya to the United Nations addressed to the Secretary-General and the President of the Security Council, Doc S/2013/624, 22 October 2013.

[19] See Extraordinary Summit of Heads of State and Government of the African Union, Decision on Africa's Relationship with the International Criminal Court, Ext/Assembly/AU/Dec.1, 12 October 2013. Available at http://www.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20_E.pdf, pp 1—3.

[20] UN Department of Public Information (News and Media Division, New York), 'Security Council Resolution Seeking Deferral of Kenyan Leaders' Trial Fails to Win Adoption, with 7 Voting in Favour, 8 Abstaining', 15 November 2013. Available at http://www.un.org/News/Press/docs//2013/sc11176.doc.htm.

[21] See Security Council, 7060th Meeting, Doc. S/PV.7060, 15 November 2013 to see the minutes of the meeting where the draft resolution submitted by Azerbaijan, Burundi, Ethiopia, Gabon, Ghana, Kenya, Mauritania, Mauritius, Morocco, Namibia, Rwanda, Senegal, Togo and Uganda (Doc. S/2013/660) was discussed.

[22] See the statement delivered on behalf of the United States of America, by Ambassador-at-Large Stephen J Rapp, at the 12th Session of the ASP, on 21 November 2013, p 4. Available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-USA-ENG.pdf.TO DO citation.

[23] *Prosecutor v Ruto and Sang (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial")* 25 October 2013, [Appeals Chamber] [the 'Excusal Judgment'], Majority Opinion of Judge Song, Judge Monageng and Judge Kuenyehia, **para 25. See also paras 26, 27 and 45.**

Trial Chamber discretion to excuse accused (other than disruptive accused) from presence at trial.[24] But, they held, on the other hand, that the Trial Chamber had exercised that discretion improperly by effectively making absence the general rule and presence the exception.[25] According to the Appeals Chamber majority, the discretion should not have been exercised in that way, as they understood article 63(1). As I had pointed out elsewhere, the decision of the Appeals Chamber majority had in many respects raised more questions than it had answered.[26] A particularly notable aspect of the difficulty with the decision was lack of clarity as to the legal source of the limitations that the Appeals Chamber majority came to impose on the Trial Chamber's discretion to grant the excusal—they clearly did not result from any known text of the Rome Statute nor from any jurisprudence known at the time.[27]

15. The 12th session of the ASP came in November 2013, almost on the heels of the UN Security Council vote on the request of the Government of Kenya and the African Union for an article 16 deferral. There is little room for reasonable doubt that the States participants (comprising both the membership of the ASP and the permanent membership of the UN Security Council beyond the ASP) that were convened at the November 2013 session of the ASP appeared determined to accommodate the concerns of the Government of Kenya and of the African Union.[28] It could also not be doubted that r 134*quater* was adopted by the ASP, precisely for that immediate purpose. And that particular development needs not to be seen as legally untoward. It is to be kept in mind, in that regard, that international law recognises the presumption of good faith as one of its principles.[29] And, the ASP is entitled to the presumption. Seen in the light of good faith, the adoption of r 134*quater* implicates a gap with which the State Parties were not specifically confronted when the Rome Statute was initially drafted and adopted.[30] Examples abound in domestic legislative practice where gaps in statute law were subsequently filled by the legislature, following actual events that exposed the gaps.[31] Notably, the filling of those gaps has occasionally

---

[24] *Ibid*, paras 50—56.
[25] *Ibid*, para 61.
[26] *Prosecutor v Uhuru Muigai Kenyatta (Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial)* 27 November 2013, [Trial Chamber] [the 'Kenyatta Excusal Reconsideration Decision'], Dissenting Opinion of Judge Eboe-Osuji.
[27] *Ibid*, para 31; Schabas, 'Appeals Chamber Rules on Presence of Kenyan Leaders During Trial', 26 October 2013. Available at http://humanrightsdoctorate.blogspot.nl/2013/10/appeals-chamber-rules-on-presence-of.html.
[28] See Amendments to the Rules of Procedure and Evidence, Resolution ICC-ASP/12/Res.7 (Advance version) [the 'Resolution'].
[29] See for example, *Norwegian Claims Case* (1922) [Permanent Court of Arbitration], XI RIAA 309 at p 324 ['As the Tribunal is of opinion that the good faith of the United States Emergency Fleet Corporation is to be presumed ...']; *Mavrommatis Jerusalem Concessions Case* (1925) [Permanent Court of International Justice], A5 at p 43 ['it seems hardly permissible to doubt that the British Government... will loyally take steps to ensure that its promise is respected ...']; *Lighthouses Case* (1934) [International Court of Justice], Separate Opinion of Judge Séfériadès A/B 62 at p 47.
[30] Indeed, the official records of the 12th session of the ASP indicate that the purpose of adopting the new rules was 'to ensure the necessary degree of flexibility when dealing with specific circumstances which could not have been foreseen when the Statute was adopted': see 'Special segment as requested by the African Union: "Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation", Informal Summary by the Moderator', Doc No ICC-ASP/12/61 dated 27 November 2013, para 8.
[31] The following examples are found in US federal statute books: the *Federal Kidnapping Act*, 18 USC 1201 of 1948, also known as the 'Lindbergh Law': passed in response to the infamous Lindbergh kidnapping in 1932, making transporting a kidnapping victim across state lines a federal crime that is punishable by life imprisonment; the *Brady*

been known to involve the legislative overruling of judgments of courts that had interpreted a related legislation a certain way.[32] Judges will do their best in good faith to fill gaps through reasonable construction. But it remains the prerogative of the legislature to fill any gaps they see a need to fill, regardless of the interpretations offered by judges. That is precisely what the ASP did by adopting r 134*quater*. We shall come later to the dispute as to the correct *form* that the legislature *must* employ to fill legislative gaps—as has been argued by the Prosecution.

*

16. It may suffice to note that in a joint statement that he delivered at the November 2013 ASP (on behalf of Jordan and Liechtenstein), Prince Zeid Ra'ad Zeid Al-Hussein, PhD, issued the reminder that as long as the ICC involves a human process, mistakes 'will always be made' in its affairs.[33] This needs not be seen as a call for complacency, in toleration of every mistake that could possibly be made in the affairs of the ICC. It is rather a sobering reminder for those who seek perfection in the work of the ICC. That reminder has a notable place in the law. The law does not require perfection and the elimination of doubt in all that is done in its name. It is for that reason that even in the most important decision that a court could make in a criminal case—the finding of guilt—the required standard is not guilt beyond *every* doubt. It is, more realistically, guilt beyond a *reasonable* doubt. Doubt may legally linger if that doubt is not reasonable. Notably, in that regard, drafters of legal texts are not, in their part, required to achieve textual perfection. It had, indeed, been observed in *Pertulosa Claim*, that it is unwise to imagine that any treaty drafting 'is stamped with infallibility'.[34] Similarly, the ASP should not be required to eliminate every doubt and achieve perfection in their own work as it concerns the affairs of the Court. The Rome Statute contains gaps.

---

*Handgun Violence Prevention Act*, 107 Stat 1536 of 1993, also known as the 'Brady Law': gun control legislation, named after former White House Press Secretary James Brady, who was shot and paralyzed by John Hinckley Jr during a 1981 assassination attempt on President Reagan. The law mandates waiting periods for handgun purchases and orders background checks on anyone attempting to buy a gun; *Kristen's Act*, 114 Stat 2027 of 2000: passed in response to the 1997 disappearance of Kristen Modafferi. Since she was an adult, her family could not use any of the nation's kidnapping resources to try to track her down. *Kristen's Act* created a National Center for Missing Adults; the *Hate Crimes Prevention Act*, 18 USC 249 of 2009, also known as the 'Matthew Shepard Hate Crimes Prevention Act': passed in response to the murders of Matthew Shepard and James Byrd Jr. This 2009 act expands the 1969 federal hate-crime law to include crimes motivated by a victim's actual or perceived gender, sexual orientation, gender identity, or disability.

[32]A particular example (apposite in the present case) is the US federal legislation known as the *Lilly Ledbetter Fair Pay Act* of 2009, 123 Stat 5. It was specifically passed by the US Congress, with the specific purpose of overruling a 5:4 majority decision of the US Supreme Court in *Ledbetter v Goodyear Tire & Rubber Co*, 550 US 618 (2007) [US Supreme Court], in which the Court had held that the statute of limitations for pay equity lawsuits begins to run on the date that the employer makes the initial discriminatory wage decision, not at the date of the most recent unequal pay. Specifically reversing that decision, the US Congress passed the *Lilly Ledbetter Fair Pay Act* 'to clarify that a discriminatory compensation decision or other practice that is unlawful under ... occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice, and for other purposes'.

[33]See the statement delivered by H.R.H Prince Zeid Raad Zeid Al Hussein of the Hashemite Kingdom of Jordan, speaking also on behalf of HE Ambassador Christian Wenaweser of the Principality of Liechtenstein, at the 12th Session of the ASP, on 20 November 2013. Available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-JordanLiechtenstein-ENG.pdf.

[34]*Pertulosa Claim* (1951) ILR 18, p 148. See also Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law (Peace)*, 9th edn, [London & New York: Longman, 1997], vol I, p 1273, footnote 12.

But when gaps are discovered in the current text of a treaty, necessary accommodation must be made to fill those gaps. And notable methods of achieving that end include 'subsequent agreements', 'subsequent practices' or indeed 'special meanings' relative to the interpretation of treaty provisions. International law requires that these must be taken into account in the interpretation of the concerned treaty—as revealed in the international legal norms codified in article 31(3) and article 31(4) of the Vienna Convention on the Law of Treaties.

17. In the same vein, there is no legal requirement that judicial reasoning must also achieve a standard of perfection that satisfies everyone with a direct or a surrogated interest in the matter at hand.

18. The common denominators thus become reasonableness and the elimination of whims and caprices in decision-making at every level. In that connection, it is to be expected that reasonable people will disagree on what is a reasonable decision to be made on this matter. That is as it should be. But justice marches on.

*

19. The question then is whether r 134*quater* is reasonable in both its purpose and context. My answer to that question is unequivocally in the affirmative. The reasons for the Chamber's decision amply demonstrate what makes r 134*quater* reasonable. To those I add the further considerations discussed in this separate further opinion.

20. It is always important to keep in mind that the task at hand is about divination of legislative intent of the ASP in their adoption of article 63(1) of the Statute.

21. In that regard, the Prosecution had appealed the Trial Chamber's initial decision of 18 June 2013 in which Mr Ruto was granted excusal from presence at trial.[35] As part of their appeal, the Prosecution had complained that in assuming the discretion to grant the excusal, the majority of the Trial Chamber had interpreted article 63(1) in a manner that fostered a choice of policy that the ASP had considered and rejected.[36] In their decision of the appeal, the Appeal Chamber majority rejected the suggestion that the ASP had considered and rejected the idea of discretion in the circumstances presented to the Trial Chamber.[37] But, as noted earlier, notwithstanding their finding that there was discretion in the Trial Chamber, the Appeals Chamber majority imposed conditions constraining the circumstances in which the Trial Chamber could exercise the discretion that they found to exist in the Trial Chamber. It is undoubted that the sources of those conditions was the Appeals Chamber majority's intrinsic sense, in good faith, of what is fair and just in the case; though external to both the actual text of article 63(1) or from existing jurisprudence.

---

[35]Prosecution appeal against the "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial", ICC-01/09-01/11-831.
[36]*Ibid*, para 19.
[37]Excusal Judgment, *supra*, para 52.

22. In the resulting development, the ASP accepted and codified in r 134*ter* the conditions that the Appeals Chamber had laid down to constrain the Trial Chamber's exercise of discretion. But, the ASP went further and adopted r 134*quater* in language that is strikingly similar to the essential terms of the decision of the majority of the Trial Chamber that had initially granted the excusal.[38] The conclusion thus becomes inescapable that what the ASP did in adopting r 134*quater* amounted to ratification and adoption of the choice of policy indicated in the majority decision of the Trial Chamber.

23. In the appreciation of the events, the statement (earlier noted) from Prince Zeid, the first President of the ASP, also delivered on behalf of two other past Presidents of the ASP [Ambassador Christian Wenaweser and Mr Bruno Stagno Ugarte] must be kept fully in mind.[39] As noted earlier, he accepted that mistakes might have been made by the ASP in the manner of their work in the past.[40] That point is consistent with the proposition that efforts must be made to correct identified mistakes as speedily as possible. In that regard, it is clear that the speediest way that the ASP could have corrected any judicial misapprehension of legislative intent underlying article 63(1) was by adopting the new r 134*ter* and r 134*quater*. Some may find it understandably hard to see good faith in any argument that knowingly insists that the ASP may not make that clarification—and it should not be respected, if they make it—except through the technically more involved and temporally longer process of statutory amendment. It would seem worse than high-handed, the criticism may continue, to insist upon such more complicated process, knowing full well that it bears the high possibility that a particular accused will not benefit from the purpose of the more complex process, notwithstanding both the intention of the ASP that he does, and considering that the clarified dispensation will indeed come into place in the future. It is an approach that has been rightly criticised as 'austerity of tabulated legalism.'[41] In the common law world, it was the rejection of the urged approach that led to the development of the law of equity—the aim of which was to ameliorate the unthinking harshness that was being perpetrated by judges on the urging of lawyers in the name of formal adherence to valid law.

24. And, in appraising the reasonableness of ASP's adoption of r 134*quater* in both its purpose and context, it may help to note that the adoption of r 134*quater* is, in effect, consistent with international legal norms concerning sovereignty and independence of States, which Bin Cheng observed as constituting 'the cardinal rule of international law'.[42] Notably, as regards sovereignty and independence of States, the Permanent Court of International Justice had held that '[r]estrictions upon the independence of States cannot [...] be presumed'[43] and that 'in case of

---

[38]See Resolution, *supra*.
[39]Statement by Prince Zeid Raad Zeid Al Hussein, *supra*.
[40]*Ibid*.
[41]See *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 [Privy Council], p 328, *per* Lord Wilberforce.
[42]Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* [Cambridge: Cambridge University Press, 1994] p 306.
[43]*Case of the SS 'Lotus' (France v Turkey)*, 1928, Judgment No 9, PCIJ, Series A, No 17, p 18.

doubt, a limitation of sovereignty must be construed restrictively.'[44] Similarly, the International Court of Justice has held: 'When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.'[45]

25. As there is no evidence on record that is capable of sustaining in a persuasive way any insistence that the ICC States Parties had *clearly* in mind the limitation of sovereignty and independence of States in their initial adoption of article 63(1), their subsequent adoption of r 134*quater*—particularly in the international diplomatic circumstances in which they adopted the rule—is entirely consistent with an understanding of article 63(1) as prescribing a new international *procedural* norm that should accommodate the pre-existing *cardinal substantive* international legal norms described above by Professor Cheng, the PCIJ and the ICJ,[46] long before the creation of the ICC.

*

26. The point here, however, is not at all to deny every value to the Prosecution's argument that the objectives of the ASP in adopting r 134*quater* would have been better served had its text been introduced into the law of the ICC through an amendment of the Rome Statute. But the value of that argument is disproportionately overstated by the insistence that the failure of the ASP to proceed by way of amendment of the Rome Statute is fatal to r 134*quater*. The limits of the proper value to the Prosecution argument is, in my view, only that the adoption of the text of r 134*quater* in the manner of statutory amendment will do much to reduce litigation—such as we have seen in the present instance—as regards the relationship between article 63(1) and r 134*quater*. It is for that reason and nothing more that the ASP should be encouraged to consider amending the Rome Statute to codify in it the provisions of the new r 134*bis* to r 134*quater*.

27. In particular, beyond that limited value, the insistence upon judicial rejection of r 134*quater* simply because its text was not adopted by way of amendment of the Rome Statute is particularly out of place in the specific context of the Rome Statute, relative to the Rules of Procedure and Evidence—both of which are treaties[47] in their own remits (albeit ranked differently in the system) and both of which are negotiated and adopted by precisely the same body (unlike systems such as the ICTR, ICTY, SCSL and the average common law jurisdictions where statutes are passed by the legislature while Rules of Court are adopted by judges). To deny the ASP the facility of using the Rules to indicate legislative intent underlying given provisions of the Statute, such as in the present case, is to deny them flexibility to resolve with relative speed impasses in the application of the

[44] *Case of the Free Zones of Upper Savoy and the District of Gex (Second Phase) (France v Switzerland)*, 1930, Order, PCIJ, Series A, No 24, p 12. See also *Case relating to the Territorial Jurisdiction of the International Commission of the River Oder (United Kingdom of Great Britain and Northern Ireland, Denmark, France, Germany, Sweden v Poland)* 1929, Judgment No 16, PCIJ, Series A, No 23, p 26.
[45] *Nuclear Tests Case (New Zealand v. France) (Judgment)*, *supra*, para 47.
[46] See Excusal Decision, *supra*, Majority Decision of Judge Eboe-Osuji and Judge Fremr, para 52.
[47] According to article 2(1)(a) of the Vienna Convention on the Law of Treaties, a 'treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and *whatever its particular designation* ...' [emphasis added].

Statute. The attitude does not stand on any judicial precedent in international law. It should not become one through a decision of this Chamber.

III

28. As part of the Prosecution's attack against the new amendment as 'an impermissible' revision of article 63(1), they had argued as follows, among other things:

> Nor can the amended Rule be said to "provide greater clarity and instruction to the Court on the meaning scope and application of Article 63", since any such alteration to *the meaning of the Article*, however subtle, amounts to nothing less than an impermissible amendment of the Statute.[48]

29. The argument assumes objective certainty as to 'the meaning' of article 63(1). But any such assumption is necessarily undone by the criss-crossing disagreements that were all too evident in the original *Ruto* excusal litigation, as to 'the meaning of the Article'. It should be recalled that there was a 3:2 split in the Appeals Chamber: the minority disagreed with the majority as to the reasoning of the decision but agreed with the majority in the eventual outcome; the majority disagreed with the Prosecution's argument that there was no discretion to grant excusal from presence at trial, while in the same vein disagreeing with the majority of the Trial Chamber as regards the exercise of the discretion. At the Trial Chamber, there had also been a split: a minority disagreed with the majority. It is not necessary also to recall that the Prosecution and the Defence did not agree as to 'the meaning of the Article'.

30. The din of disagreements as to 'the meaning of the Article' recalls, yet again, the quixotic insistence that article 63(1) had, somehow, managed to achieve the feat of the perfect legal text, that was all too plain to permit judicial interpretation. But, in an effort to keep expectations more realistic, the European Court of Human Rights has repeatedly indicated that '*however clearly drafted* a provision of criminal law may be, *in any legal system*, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances.'[49] Similar observations have indeed been made in Trial Chamber V(B).[50] Koskenniemi would agree. In his book aptly titled *From Apology to Utopia: The Structure of International Legal Argument*, he observes as follows: 'The idea that law can provide objective resolutions to actual disputes is premised on the assumption that legal concepts have a meaning which is present in them in some intrinsic way, that at least their core meanings can be verified in an objective fashion. *But modern linguistics has taught us that concepts do not have such*

---

[48]Prosecution response to Defence request pursuant to Article 63(1) and Rule 134*quater* for excusal from attendance at trial for William Samoei Ruto, ICC-01/09-01/11-1135, para 31[emphasis added].

[49]*K-HW v Germany*, Application No 37201/97, Judgment of 22 March 2001, paras 45 and 85 [emphasis added] [ECtHR, Grand Chamber]. See also *S W v United Kingdom*, Application No 20166/92, Judgment of 22 November 1995, para 36 [ECtHR], and *C R v United Kingdom*, Application No 20190/92, Judgment of 22 November 1995 [ECtHR] , para 34.

[50]*Prosecutor v Uhuru Mugai Kenyatta (Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial)* 18 October 2013, [Trial Chamber], Majority Decision of Judge Fremr and Judge Eboe-Osuji, paras 68—75, 103.

*natural meanings. In one way or other, meanings are determined by the conceptual scheme in which the concept appears. ... [T]here is no one conceptual scheme in the way we use our legal language.*'[51] He is right.

31. In the circumstances, it becomes difficult to see how one could speak in terms of 'the meaning of the Article', such as makes 'impermissible' the intervention of the ASP for purposes of clarifying or elucidating the meaning of the provision.

32. It may, perhaps, be noted here that the siren call of clarity as to the meaning of article 63(1) comes chiefly from the incidence of the word 'shall'; which, it is argued, indicates mandatory presence at trials without exceptions beyond the removal of disruptive accused pursuant to article 63(2).[52] It is hoped that a discussion conducted elsewhere[53] reveals the weaknesses of the view based on 'shall'. That is to say, there is ample judicial and scholarly authority to the effect that the word 'shall' is not a word that mandatorily shackles a provision to one particular post of outcomes and none other, regardless of any other consideration, context and purpose implicated in the legal instrument in question or in the wider world of the law that includes that legal instrument. 'Shall' can, in certain circumstances, have a directory effect. In other words, 'shall' may mean *may*.[54]

33. The adoption of both r 134*ter* and r 134*quater*, though not expressed as such, is wholly consistent with the idea that 'shall' does not always, inevitably dictate a mandatory outcome. It may be noted that, in codifying in r 134*ter* (what was a distillation of the Appeals Chamber majority decision in the *Ruto* excusal appeal), the ASP was ordaining the decision of the Appeals Chamber majority. It is also notable that even the decision of the Appeals Chamber majority did not permit the appearance of the word 'shall' in article 63(1) to impose a reading that excluded any discretion in the Trial Chamber to excuse an accused from continuous presence at trial beyond the removal of a disruptive accused pursuant to article 63(2). And, there is no persuasive reason, in my view, to suppose that the Appeals Chamber majority had exhausted the reasonable limits of possible abatement from *shall*'s absolute imperium, such that makes the ASP's adoption of r 134*quater* 'nothing less than an impermissible amendment of the Statute.'

*

34. It is also to be considered that the effect of insisting that r 134*quater*—unanimously adopted by *the States Parties*—must be disregarded in the interpretation of article 63(1) is, indeed, far worse than disregarding a specific statement uniformly and clearly adopted by *a drafting committee*, as part of *travaux préparatoires*, unequivocally indicating what is not the intendment of a relevant statutory provision. It must be said that the task of treaty interpretation will no longer be an exercise

[51] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* [Cambridge: Cambridge University Press, 2005] p 503 [emphasis added].
[52] See Excusal Judgment, Joint Separate Opinion of Judge Anita Ušacka and Judge Erkki Kourula, *supra*.
[53] See Kenyatta Excusal Reconsideration Decision, Dissenting Opinion of Judge Eboe-Osuji, *supra*, paras 17—27.
[54] See, *ibid*, for a review of authorities in that regard.

in the divination of the intent of the *States Parties to the treaty*, in any circumstance in which lawyers and judges assume freedom to disregard the States Parties' clear, direct and unanimous communication of that intent, whatever be the method and manner and timing employed by the States Parties in registering that communication. And what the exercise thus becomes is hard to tell.

35. That is to say, it is one thing, of course, for lawyers and judges to engage in presumptively intelligent speculation as to the intent of States Parties to a particular treaty in making a specific provision in that treaty, when such speculation was not guided by specific information from the parties as to what they meant by the provision under construction. But it is quite extraordinary to insist that such specific indication of intent, when subsequently given by the States Parties, must be ignored for reasons of certain technicality—such as seems to be the argument of the Prosecutor. In the context of this case, such a position is extraordinary, not only because it was not supported by any authority (of any strength at all, let alone of extraordinary strength) in the nature of precedent; but, perhaps, more tellingly, it is contradicted by principles of international law codified in article 31(3) and (4) of the Vienna Convention on the Law of Treaties. Moreover, the position is not sufficiently borne out, as will be seen presently, by the Prosecutor's argument of inconsistency between article 21(3) and article 27(1).

## IV

36. I fully share the reasoning of the Chamber that the argument of inconsistency between r 134*quater* and article 21(3) is not made out in the particulars of that very issue. And that is a difficulty that is compounded by the principle that texts and legal instruments are to be presumed to comply with international law and not to be in violation of it.[55] The equivalent principle in leading constitutional democracies is the presumption of constitutionality. The US Supreme Court's statement of that presumption in *Fletcher v Peck* is worth reiterating:

> The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.[56]

37. It must be noted that the Prosecution's argument of equality before the law is based on article 21(3) of the Statute. A key element of the norm articulated in that provision is consistency with 'internationally recognised human rights' standards that prohibit 'adverse distinctions' based on the usual forbidden grounds. But the Prosecution's arguments in this connection largely ignore

[55] *Case concerning Right of Passage over Indian Territory (Portugal v. India) (Preliminary Objections)* (1957) ICJ Reports 125, p 142: 'It is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it'.
[56] *Fletcher v Peck*, 10 US 87 (1810) [US Supreme Court], p 128.

the fact that 'internationally recognised human rights' standards do not forbid all distinctions in the nature of *bona fide* occupational requirements that are rationally connected to the performance of functions. I note in this connection, the following observations of the New Zealand Law Commission:

> To give fuller effect to the principle that the State is under the law and to ensure that as far as practicable legal procedures relating to and remedies against the Crown (as representing the State) are the same as those which apply to ordinary persons.
>
> ...
> In the case of the Crown, however, there are certain public functions that must be performed. The Crown must therefore have or acquire, by way of exception to the general principle, certain additional powers not enjoyed by citizens. These must also be performed according to law.[57]

38. Similarly to be noted is the judgment of the Supreme Court of Canada in *Meiorin's case*, which broadly stands for the proposition that equality before the law is not a legal principle without exceptions relating to performance of functions. There, the Court held that where discrimination is made out on a *prima facie* assessment, the measure in question may be saved if the following is shown: (i) the measure in question is a bona fide occupational requirement, in the sense that the purpose of the measure is rationally connected to the performance of contemplated function; (ii) the measure was adopted in an honest belief that it was necessary to fulfil a legitimate purpose related to the function, and (iii) the measure is reasonably necessary to the accomplishment of that purpose.[58]

39. Also to be noted in this regard are the following observations of Professor Manfred Nowak, in his commentary on article 14 of the International Covenant on Civil and Political Rights[59]: '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"; similarly, diplomatic privilege or parliamentary immunity is not affected'.[60]

40. All this is to say that the law permits some reasonable exceptions to the general principle of equality before the law; when such exceptions are reasonably based on the performance of *functions* rather than status or dignity, as appropriate means to enable a proper performance of those functions. Such is precisely the purpose of r 134*quater* in distinguishing those accused who are 'mandated to fulfil extraordinary public duties at the highest national level' from other accused persons before the Court.

---

[57]New Zealand Law Commission, Report 37, *Crown Liability and Judicial Immunity, A response to* Baigent's case *and* Harvey v Derrick, May 1997, paras 16 and 20 [emphasis omitted].
[58]*British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU)*[1999] 3 SCR 3 [Supreme Court of Canada]. To the same effect, see also *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* [1999] 3 SCR 868 [Supreme Court of Canada], popularly known as *Grismer's case*.
[59]'All persons shall be equal before the courts and tribunals.'
[60]Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd edn, [Kehl am Rhein: Engel, 2005] p 309 [internal footnotes omitted].

V

41. I also agree with the Chamber's finding that there is no inconsistency between r 134*quater* and article 27(1). I fully concur with the Chamber's reasoning in rejecting that argument. The central purpose of the Chamber's reasoning is that what lies at the heart of article 27(1) is the proscription of immunity from the jurisdiction of the Court, on the basis of official capacity. Its aim is not the peremptory abolishment of any differentiated treatment of accused persons, even on the basis of functions that attend persons who enjoy the presumption of innocence while standing trial.

42. But, there is room for a closer look at the complaint of inconsistency between r 134*quater* and article 27(1). As the Prosecution put the complaint:

> Article 27(1) provides that "[t]his Statute shall apply equally to all persons without any distinction based on official capacity". Again, the interpretation of Rule 134*quater* advanced in the Request violates the principle of equal treatment under the law, creating different outcomes for accused persons seeking to be excused from attendance at their trial.[61]

43. I am not at all impressed by the attempt to frame the argument—facially—as if the quarrel was with 'the interpretation of Rule 134*quater* advanced in the Request', and not with the rule itself. It takes very little to see that the Prosecution's quarrel was directly with r 134*quater* as adopted by the ASP. It is to be noted that their ultimate quarrel, even immediately revealed in the same sentence, is with '[violation of] the principle of equal treatment under the law, creating different outcomes for accused persons.' It was not the interpretation advanced in the request that presented that disparate treatment. It is the very words and purpose of r 134*quater*. Indeed, the overall thrust of the Prosecution submission is to urge the Court to strip r 134*quater* of the unique features that make it different from r 134*ter*—and to apply *only* r 134*ter*. The Prosecution's quarrel, therefore, is really with r 134*quater*, not with its interpretation as advanced in the Ruto Defence application.

44. I am not persuaded by that ultimate attack against r 134*quater*. It is to be kept in mind that the argument that a conflict exists is given an air of reality only when the first sentence of article 27(1) is considered in isolation. But, the flaw in the argument is, first, that article 27(1) must be construed, according to the usual interpretative norms, in its context. Contexts often clarify meanings of specific provisions. They help in identifying what is known in some jurisdictions as 'the law's matter', 'the leading feature' of the law, 'the pith and substance' of the law, or 'the true nature and character' of the law expressed in the given provision in contrast to another law or provision held out as standing in competition.

45. In *R v Morgentaler*, for instance, the Supreme Court of Canada was seised of the question whether a piece of provincial legislation was *ultra vires*, for encroaching upon the legislative

[61]Prosecution response to Defence request pursuant to Article 63(1) and Rule 134*quater* for excusal from attendance at trial for William Samoei Ruto, *supra*, para 24.

powers of the federal parliament to legislate on criminal law; in which event the provincial legislation in question would be unconstitutional and void. As part of its analysis in answering that question, the Supreme Court said as follows:

> Classification of a law for purposes of federalism involves first identifying the "matter" of the law and then assigning it to one of the "classes of subjects" in respect to which the federal and provincial governments have legislative authority under ss 91 and 92 of the *Constitution Act, 1867*. This process of classification is "an interlocking one, in which the British North America Act [62] and the challenged legislation react on one another and fix each other's meaning"... Courts apply considerations of policy along with legal principle; the task requires "a nice balance of legal skill, respect for established rules, and plain common sense. It is not and never can be an exact science"....
>
> A *law's "matter"* is *its leading feature* or *true character*, often described as *its pith and substance*: *Union Colliery Co of British Columbia v Bryden*, [1899] AC 580 (PC), at p 587; see also *Whitbread v Walley*, [1990] 3 SCR 1273, at p 1286. There is no single test for a law's pith and substance. The approach must be flexible and a technical, formalistic approach is to be avoided.[63]

46. The doctrine of 'pith and substance', as the foregoing quote might reveal, was originally introduced into the legal language of Commonwealth jurisdictions by the Privy Council in deciding cases related to the constitutional law of Canada, when the Privy Council was the final court of appeal for Canada and the rest of the Commonwealth apart from England and Wales.

47. The doctrine of 'pith and substance' is also an analytical formula that the Supreme Court of India has adopted for purposes of settling constitutional litigation concerning right of way between federal and state legislation. In a recent case, for instance, the Supreme Court explained its application in India in the following way:

> One of the proven methods of examining the legislative competence of a legislature with regard to an enactment is by the application of the doctrine of pith and substance. This doctrine is applied when the legislative competence of the legislature with regard to a particular enactment is challenged with reference to the entries in various lists. If there is a challenge to the legislative competence, the courts will try to ascertain the pith and substance of such enactment on a scrutiny of the Act in question. In this process, it is necessary for the courts to go into and examine the true character of the enactment, its object, its scope and effect to find out whether the enactment in question is genuinely referable to a field of the legislation allotted to the respective legislature under the constitutional scheme. This doctrine is an established principle of law in India recognized not only by this Court, but also by various High Courts. Where a challenge is made to the constitutional validity of a particular State Act with reference to a subject mentioned in any entry in List I, the Court has to look to the substance of the State Act and on such analysis and examination, if it is found that in the pith and substance, it falls under an entry in the State List but there is only an incidental encroachment on any of the matters enumerated in the Union List, the State Act would not become invalid merely because there is incidental encroachment on any of the matters in the Union List.[64]

---

[62] The *British North America Act, 1867* (UK) later renamed the *Constitution Act, 1867* [(UK), 30 & 31 Vict, c 3 reprinted in RSC 1985, App II No 5] is the initial component and a major part of the Constitution of Canada.
[63] *R v Morgentaler* [1993] 3 SCR 463 [Supreme Court of Canada], at para 481 [emphases added].
[64] *Ahmed Latifur Rehman Sheikh v State of Maharashtra and Ors* (2010), Civil Appeal No 1975 (together with Civil Appeal Nos 1976 and 1977) of 2008, judgment of 23 April 2010, at para 35 [Supreme Court of India].

48. Thus explained, the doctrine operates to invalidate the provision under attack only when a 'pith and substance' analysis reveals that the repugnance complained of was something that troubled the core of the dominant legislation. The provision under attack will not be invalidated in the absence of any incompatibility at all or at the core.

49. The High Court of Australia replaced the doctrine of 'pith and substance' in 1965 with the equivalent notion of 'the true nature and character' of the provision under consideration. In *Fairfax v Federal Commissioner of Taxation*, Chief Justice Barwick explained the notion as follows:

> The argument for invalidity not unnaturally began with the proposition that the question to be decided is a question of substance and not of mere form; but the danger quickly became evident that the proposition may be misunderstood as inviting a speculative inquiry as to which of the topics touched by the legislation seems most likely to have been the main preoccupation of those who enacted it. Such an inquiry has nothing to do with the question of constitutional validity under s 51 of the Constitution. Under that section the question is always one of subject matter, to be determined by reference solely to the operation which the enactment has if it be valid, that is to say by *reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes; it is a question as to the true nature and character of the legislation*: is it in *its real substance* a law upon, "with respect to", one or more of the enumerated subjects, or *is there no more in it in relation to any of those subjects than an interference so incidental as not in truth to affect its character*? [...][65]

50. Barwick CJ made sure to clarify that the purpose of 'the true nature and character' inquiry remains to discern real substance from mere form, and avoid the possibility of mere words misleading the analysis. As he put it: 'The need to distinguish between form and substance appears from what has just been said. ... Accordingly the task of characterizing laws according to subject matter must be performed with care lest mere words mislead. The Court... "is not to be bound by the name which Parliament has chosen to give the Act"—one may add, or has chosen to give anything else—"but is to consider what the Act is in substance—what it does, what it commands or prescribes" ...'[66].

51. It has been correctly observed (in both the High Court of Australia and the House of Lords) that there is no real difference between 'pith and substance' and 'true nature and character'.[67] Both formulas were devised to aid the 'classification of a law for purposes of federalism', when the validity of the law in question is under attack. For precisely the same reasons, in my own view, the doctrines are equally capable of adaptation to aid the classification of a dominant legal text relative to a servient legal text and *vice versa*, when the validity of the servient legal text is under attack on grounds of incompatibility with the dominant legal text. In other words, a proper appreciation of the 'pith and substance' or the 'true nature and character' of either text will indicate whether there is indeed real incompatibility between them, such as to result in the invalidity of the servient text. This

---

[65] *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1[High Court of Australia], at para 6 [emphases added].
[66] *Ibid*, para 7.
[67] See *Bank of NSW* v *The Commonwealth* (1948) 76 CLR 1 [High Court of Australia], at p 185, *per* Latham CJ. To a similar effect, in *Gallagher v Lynn* [1937] AC 863 at 869—70, a House of Lords case arising out of Northern Ireland, Lord Atkin also employed 'pith and substance' and 'true nature and character' as alternative expressions.

process of classification, in this context, should also be 'an interlocking one' in which the dominant legal text and the challenged servient text 'react on one another and fix each other's meaning'. For that purpose, the Chamber should also 'apply considerations of policy along with legal principle' in a task that 'requires a nice balance of legal skill, respect for established rules, and plain common sense.' And, of course, '[i]t is not and never can be an exact science.'

52. At any rate, the context of either provision must still be considered for the determination of invalidity of a servient legal text (held out as incompatible with a dominant text), whether or not the 'pith and substance' or the 'true nature and character' doctrine is adapted into the analysis. It may, of course, be noted that just as the discernment of context of legislative words and phrases is a cardinal feature of the doctrine of 'pith and substance' (or of 'true nature and character'); the discernment of context of words and phrases is, similarly, a cardinal feature of interpretation of treaties in international law, as the principle codified in article 31(1) of the Vienna Convention on the Law of Treaties instructs. In practical terms, discernment of context means that the word or phrase in question 'is not to be seen as it were in outer darkness, but in the light that is shed upon it by the scheme into which it comes.'[68]

53. A particularly useful illustration of judicial exercise in the ascertainment of context is afforded by the Privy Council in the classic Canadian constitutional case of *The Citizens Insurance Company of Canada and The Queen Insurance Company v Parsons*.[69] The appellant insurance companies had insured against fire the premises of the respondent located in the province of Ontario. But they had failed to comply with certain requirements of a piece of Ontario legislation that prescribed uniform conditions for fire insurance policies. In a bid to avoid the effects of the non-compliance, the appellants argued that the Ontario legislation (prescribing the conditions that the appellants had failed to observe) was *ultra vires* the provincial legislature. The argument was based on the view that the Ontario legislation under consideration was an encroachment upon the powers exclusively reserved for the federal Parliament of Canada for, among other things, the 'regulation of trade and commerce'. Thus arose the question, among others, whether the business of insuring buildings against fire was a 'trade'. In answering the question, the Privy Council considered that the 'sense' in which the word must be understood is controlled or limited by its context. As the Privy Council put it:

> Whether the business of fire insurance properly falls within the description of "a trade" must, in their Lordships' view, depend upon *the sense in which that word is used in the particular Statute to be construed*; ... The words "regulation of trade and commerce," *in their unlimited sense, are sufficiently wide, if uncontrolled by the context and other parts of the Act*, to include every regulation of trade ranging from political arrangements in regard to trade with foreign Governments, requiring the sanction of Parliament, down to minute rules for regulating particular trades. *But a consideration of the Act shows that the words were not used in this unlimited sense.*[70]

---

[68] *Fairfax v Federal Commissioner of Taxation*, *supra*, at para 1, *per* Windeyer J.
[69] *The Citizens Insurance Company of Canada and The Queen Insurance Company v Parsons* [1881] 7 AC 96 [Privy Council].
[70] *Ibid*, para 23[emphases added].

54. Continuing with the exercise in contextualising the use of the legislative word, the Privy Council immediately observed as follows:

> In the first place, *the collocation* of [the subject of 'regulation of trade and commerce'] with classes of subjects of *national and general* concern affords an indication that regulations relating to general trade and commerce were in the mind of the Legislature, when conferring this power on the [Canadian federal] Parliament. If the words had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in [the section in which 'regulation of trade and commerce' also appears] would have been unnecessary; ...[71].

55. In light of the adaptability indicated in paragraph 51, the approach in judicial reasoning which the Privy Council has mapped out above should afford a useful template of legal reasoning in the determination of the question whether article 27(1) of the Statute truly clashes with r 134*quater*, such as would result in the invalidation of the latter.

*

56. What then is the context of the sentence that anchors the Prosecution's argument that r 134*quater* is invalid by reason of inconsistency with article 27(1) of the Statute? What is 'the scheme into which it comes' that 'shed[s] light ... upon it'? It takes, indeed, the most minimal examination to see that the textual neighbourhood of that very same sentence directly supplies the clarifying context or 'the scheme into which it falls' that sheds light upon it. Specifically, that particular context or scheme is evident in the collocation of the sentence with both the remainder of article 27(1) (where the sentence is found) and article 27(2). It might help now to look carefully at article 27 in its entirety as comprising that context or scheme. It says this:

> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

57. One sees, therefore, that the second sentence of article 27(1) indicates *exemption* of a person from *criminal responsibility* as the mischief that the provision targets for exclusion from the Rome Statute. And, in further clarification, article 27(2), again, says that the mischief aimed at is that no one is beyond the jurisdiction of the Court, even if national law or international law (and r 134*quater* is certainly part of international law) grants an accused 'immunities' or 'special procedural rules'. The intendment of article 27(1) is not to eliminate all manner of differentiated

[71] *Ibid*, para 24 [emphases added].

treatment among accused persons. Were that the intendment, it would have been a simple matter for the drafter of article 27(2) to have employed words to the following effect: 'In the exercise of its jurisdiction over any person, the Court may not recognise any immunity or special procedural rule which may attach to the official capacity of that person for any reason whatsoever, whether under national or international law.' But that is not what article 27(2) says.

58. And, quite significantly, the value of article 27(2), in its own particular terms, is not to be ignored. That provision does not preclude 'special procedural rules' that confer privileges to any particular accused. What it does, rather, is forbid such 'special procedural rules' from conferring—or resulting in—immunity from the jurisdiction of the Court. Rule 134*quater* is a 'special procedural rule' designed for the benefit of persons mandated to fulfil extraordinary duties at the highest national level. But it does not confer immunity from the jurisdiction of the Court. To the contrary, its aim is to ensure that accused persons mandated to fulfill extraordinary duties at the highest national level will remain within the jurisdiction of the Court, with their trials conducted with minimum interruption as a result of the legitimate demands of their public office.

59. The implication of article 27(2) is inescapable, indeed, in its accommodation of r 134*quater* within the overall scheme of article 27, of which article 27(1) is a part. It, thus, makes it difficult to insist that there is inconsistency between r 134*quater* and article 27(1). That is to say, it is hard to persist convincingly with the argument of inconsistency between article 27(1) and r 134*quater* without also contending that there is inconsistency between article 27(1) (which is held out as forbidding the special procedural rules) and article 27(2) (which does not prohibit special procedural rules that do not result in immunity from jurisdiction). Article 27(2) thus becomes the veritable door that allows the sort of special procedural rule, that r 134*quater* prescribes, into the overall scheme of article 27.

60. In the final analysis, to focus only on the strip of text that appears as the first sentence of article 27(1) and hold it out as in conflict with r 134*quater* amounts to a classic illustration of the fallacy of quoting a text out of context.

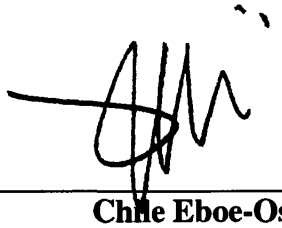
* * *

61. In conclusion, all the various channels of the issues raised in this litigation may be commonly guided in their resolution by the following words that US Supreme Court Justice Benjamin Cardozo wrote in his book *The Nature of the Judicial Process*: 'Our survey of judicial methods teaches us, I think, the lesson that the whole subject matter of jurisprudence is more plastic, more malleable, the moulds less definitively cast, the bounds of right and wrong less preordained and constant, than most of us, without the aid of some such analysis, have been accustomed to believe. We like to picture to ourselves the field of the law as accurately mapped and plotted.'[72] Whatever we make of it, the point is that administration of justice has always been a human process that is necessarily conditioned by the non-algorithmic realism of the human life.

[72]Benjamin N Cardozo, *The Nature of the Judicial Process* [New Haven: Yale University Press, 1921] p 161.

Justice Oliver Wendell Holmes Jr had similarly rejected the supposition that applied law 'can be worked out like mathematics from some general axioms of conduct. This is the natural error of the schools, but it is not confined to them. I once heard a very eminent judge say that he never let a decision go until he was absolutely sure that it was right. So judicial dissent often is blamed, as if it meant simply that one side or the other were not doing their sums right, and, if they would take more trouble, agreement inevitably would come.'[73] In those words, Justice Holmes and Justice Cardozo—two of the most eminent jurists of all time—clearly described a central paradigm of the judicial process, as applied in real life, in the courtroom. It is a paradigm that the ICC and its advent in the age of the computer do not successfully redefine. And that is what Prince Zeid was saying, in effect.

62. To put the point differently, as with any other criminal justice system (national or international) conceived, designed and operated by human beings, the Rome Statute and its system were not intended to operate in nirvana. Reasonableness—not perfection—should be the objective mark of its utility and value. That mark of reasonableness was achieved by the ASP in their adoption of r 134*quater* for its intended purpose, without prejudice to the usefulness of statutory codification of the intendment of the new rule. And just as reasonable is the Chamber's decision granting the application of the Defence, founded on r 134*quater*, and the concomitant rejection of the Prosecution arguments opposing the application.



**Chile Eboe-Osuji**
(Presiding Judge)

Dated 19 February 2014
At The Hague, The Netherlands

[73]Holmes, *supra*, p 465.