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TRIAL CHAMBER V(A)

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR v.
WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG

Public

Defence Application for Leave to Appeal the Trial Chamber's Oral Decision of 28 October 2013 on the Defence request for disclosure of all costs expended by the VWU for relocation, maintenance and support of Witness P-268

Sources: Defence for Mr. William Samoei Ruto

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

The Office of the Prosecutor

Ms. Fatou Bensouda
Mr. James Stewart
Mr. Anton Steynberg

Counsel for William Samoei Ruto

Mr. Karim A. A. Khan QC
Mr. David Hooper QC
Mr. Essa Faal
Ms. Shyamala Alagendra

Counsel for Joshua Arap Sang

Mr. Joseph Kipchumba Kigen-Katwa
Ms. Caroline Buisman

Legal Representatives of the Victims

Mr. Wilfred Nderitu

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(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

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Mr. Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The defence for Mr. William Samoei Ruto ("Defence") respectfully applies to the Trial Chamber ("Chamber") for leave to appeal the Chamber's oral decision of 28 October 2013 ("Impugned Decision")¹ on the Defence's oral request for an order requiring disclosure to the Defence of the funds expended by the Court's Victims and Witnesses Unit ("VWU") on the relocation, maintenance and/or support of Witness P-268 ("Request").²

2. As succinctly summarised by the Chamber:

*The legal bases of the Defence request [were], alternatively, the Chamber's decision of 4 September 2013 entitled, "Decision on disclosure of information related to Prosecution intermediaries" or, alternatively, Article 67(2), which requires the Prosecutor to disclose information which may affect the credibility of Prosecution evidence. The rational basis for the request [...] is that the request may affect the credibility of the witness.*³

3. The Chamber similarly encapsulated the Prosecution and VWU's oral submissions in opposition to the Request as follows:

*The reason for opposing the request is that the VWU is an independent unit tasked with making independent judgements on what is appropriate, in terms of costs to be expended on witnesses' sustenance or maintenance, witnesses that are within their care, and as such, all efforts are made to ensure that those costs are reasonable and not inordinate.*⁴

4. In determining the Request, the Chamber reasoned that:

Witnesses who come to testify, it is presumed, will have to have sustenance in their lives, whether it is afforded to them on their own or through the instrumentality of the Victims and Witnesses Unit. It therefore does not afford a prima facie indicia of credibility that the Victims and Witnesses Unit has

¹ ICC-01/09-01/11-T-60-CONF-ENG ET, p. 44, lines 5 to 19 (open session).

² ICC-01/09-01/11-T-60-CONF-ENG ET, p. 4, line 14 to p. 15, line 3, and p. 38, line 4 to p. 41, line 5.

³ ICC-01/09-01/11-T-60-CONF-ENG ET, p. 43, lines 15 to 19 (open session).

⁴ ICC-01/09-01/11-T-60-CONF-ENG ET, p. 43, line 24 to p. 44, line 4 (open session).

*undertaken those reasonable tasks of providing reasonable support and maintenance to a witness rather than the witness doing it themselves.*⁵

5. The Chamber accordingly rejected the Request, holding that “the probative value of granting the request [...] is outweighed by both the considerations of prejudice and efficiency, not only in relation to the witness but also the operations of the Victims and Witnesses Unit and the administration of justice in general”.⁶
6. The Defence seeks leave to appeal the following issue arising out of the Impugned Decision:

Whether the Trial Chamber erred in applying the balancing test for disclosure of VWU expense information for the relocation, maintenance and/or support of Witness P-268 by assessing the probative value of this information only on the basis of the source providing the assistance – the VWU – and not also considering whether “reasonable support and maintenance to a witness” may prima facie implicate the credibility of a witness in view of the personal circumstances of the witness and his or her family prior to the provision of such assistance (“Issue”).

7. The Issue concerns an accused’s fundamental right to receive information under the rubric of Article 67(2) of the Rome Statute (“Statute”) that “may” impact on the credibility of Prosecution evidence. If the Impugned Decision is materially flawed, the Defence may have been denied access to readily available information in the possession of the Court that “may” impact on the credibility of Prosecution evidence. Accordingly, the Defence submits that the Issue is one that significantly impacts on the fairness and expeditiousness of proceedings as well as the outcome of the trial.

⁵ ICC-01/09-01/11-T-60-CONF-ENG ET, p. 44, lines 13 to 19 (open session).

⁶ ICC-01/09-01/11-T-60-CONF-ENG ET, p. 44, lines 8 to 12 (open session).

8. If the Defence is able to elicit information during the cross-examination of Witness P-268 or otherwise collect evidence through on-going Defence investigations that indicates that the assistance the VWU provided to the witness and his family may have acted as an inducement for his testimony, the Defence may find it necessary to submit a request for reconsideration of the Impugned Decision and recall of the witness for further questioning. Evidence pertaining to the credibility of a witness *ipso facto* impacts the Chamber's evaluation of the value and reliability of the witness's evidence and, therefore, the Issue may also significantly impact the outcome of the trial.
9. Additionally, an "authoritative determination" by the Appeals Chamber of the Issue will materially advance the proceedings by "ensuring that [...] [they] follow the right course"⁷ – namely resolving whether information concerning the funds expended by the VWU on the relocation, maintenance and/or support of a witness and his/her family/dependents is information to which the defence is entitled under Article 67(2) of the Statute.
10. Finally, while the Impugned Decision is limited to a single witness, the Chamber's underlying reasoning, as set out at paragraph 4 above, is not. This is an additional factor that weighs in favour of granting this application as the significance of the impact of a flawed decision on the fairness and expeditiousness of proceedings and the outcome of the trial will only be magnified with each denied request for access to VWU witness expense information, with a concomitant increased risk of the "unravel[ing] [of] the judicial process".⁸

⁷ Situation in the Democratic Republic of Congo, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006 ("Decision on Extraordinary Review Application"), para. 15.

⁸ Decision on Extraordinary Review Application, para. 16.

II. Applicable Law

11. An application for leave to appeal an interlocutory decision must meet the requirements of Article 82(1)(d) of the Statute, which states that a party may appeal

[a] decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

12. A successful application for leave to appeal must therefore satisfy the following criteria:⁹

- a) Whether the matter is an “appealable issue”;
- b) Whether the issue at hand could significantly affect either the:
 - i. Fair and expeditious conduct of the proceedings, or
 - ii. The outcome of the trial; and
- c) Whether, in the opinion of the Chamber, an immediate resolution of the issue by the Appeals Chamber could materially advance the proceedings.

13. The criteria set out in subparagraphs a), b) and c) above are cumulative. Accordingly, failure to fulfil one or more of these requirements is fatal to an application for leave to appeal.¹⁰ Each of the requirements has also been discussed in the Court’s jurisprudence.

⁹ See, e.g., Decision on the Prosecution’s Application for Leave to Appeal the “Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence”, ICC-02/05-03/09-179, 13 July 2011 (“Decision on Leave to Appeal Disqualification of Counsel Decision”), para. 5; Decision on the Prosecution’s Application for Leave to Appeal the “Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation”, ICC-02/05-03/09-243, 1 November 2011 (“Decision on Leave to Appeal Translation of Statements”), para. 5.

¹⁰ Decision on Leave to Appeal Disqualification of Counsel Decision, para. 6; Decision on Leave to Appeal Translation of Statements, para. 6.

14. According to this Court's settled jurisprudence, an appealable issue must emanate from the ruling of the impugned decision,¹¹ must be an "identifiable subject or topic requiring a decision for its resolution" and "not merely a question over which there is disagreement or conflicting opinion",¹² and its resolution must be "essential for the determination of matters arising in the judicial cause under examination".¹³
15. The requirement set out in paragraph 12 b) above consists of two disjunctive elements. In relation to the first, the Appeals Chamber has stated that "[t]he term 'fair' in the context of article 82 (1) (d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute".¹⁴ Included within the attributes of a fair trial are the "expeditious conduct of the proceedings in one form or another [...], as well as the investigation of crime".¹⁵ With respect to the element of "expeditiousness of proceedings", this has been held "to be closely linked to the concept of judicial proceedings 'within a reasonable time'" and to complement "the guarantees afforded to [an accused], such as the right to fair and public proceedings".¹⁶
16. In relation to the second prong of the requirement in paragraph 12 b), the Appeals Chamber has found that a Chamber considering whether a given issue would affect the outcome of the trial requires the Chamber to "ponder the possible implications of a given issue being wrongly decided on the outcome of

¹¹ See, e.g., *Prosecutor v. Lubanga*, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, ICC-01/04-01/06-915, 24 May 2007, paras. 56-59; Decision on Leave to Appeal Translation of Statements, para. 10.

¹² *Situation in the Democratic Republic of Congo*, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006 ("Decision on Extraordinary Review Application"), para. 9.

¹³ Decision on Extraordinary Review Application, para. 9.

¹⁴ Decision on Extraordinary Review Application, para. 11.

¹⁵ Decision on Extraordinary Review Application, para. 11.

¹⁶ *Prosecutor v. Bemba*, Decision on the Prosecutor's Application for Leave to Appeal the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-532, 18 September 2009, para. 20.

the case”, a process which “involves a forecast of the consequences of such an occurrence”.¹⁷

17. In respect of the final requirement, the term “advance” in this prong of the test requires that the immediate and “authoritative determination” by the Appeals Chamber of the issue will “ensur[e] that the proceedings follow the right course” by “[r]emoving doubts about the correctness of a decision or mapping a course of action along the right lines [...]”.¹⁸ The Trial Chamber has stated that “[t]he significance of this third criterion requires underscoring. It makes the ‘opinion of the Chamber’ about the efficiency of the appeal, in the particular circumstances, the ultimate factor in the granting of leave to appeal, regardless of the merits of the two earlier criteria.”¹⁹
18. The Trial Chamber has also highlighted the broad discretion of a Chamber when considering applications for leave to appeal: “In its determination whether leave to appeal should be granted, the Chamber is [] not limited to the arguments put forward by the party seeking leave.”²⁰

III. The Proposed Issue for Appeal

19. The Defence applies to the Trial Chamber for leave to appeal the following issue arising from the Impugned Decision, which the Defence submits satisfies all the requirements of Article 82(1)(d) of the Statute:

Whether the Trial Chamber erred in applying the balancing test for disclosure of VWU expense information for the relocation, maintenance and/or support of Witness P-268 by assessing the probative value of this information only on the basis of the source providing the assistance – the VWU – and not also considering whether “reasonable support and maintenance to a witness” may prima facie

¹⁷ Decision on Extraordinary Review Application, para. 13.

¹⁸ Decision on Extraordinary Review Application, para. 15.

¹⁹ Decision on Ruto Defence's Application for Leave to Appeal the 'Decision on the Prosecution's Request to Add New Witnesses to its List of Witnesses', 24 September 2013, ICC-01/09-01/11-983, para. 19.

²⁰ *Ibid.*, para. 20.

implicate the credibility of a witness in view of the personal circumstances of the witness and his or her family prior to the provision of such assistance.

IV. Submissions

(a) *The Issue constitutes an appealable issue pursuant to Article 82(1)(d)*

20. In determining the Request, the Chamber applied a balancing test as follows:

“[T]he probative value of granting the request [...] is outweighed by both the considerations of prejudice and efficiency, not only in relation to the witness but also the operations of the Victims and Witnesses Unit and the administration of justice in general.”²¹ The Chamber then set out its reasoning with respect to its evaluation of the probative value element of the test, holding that:

*Witnesses who come to testify, it is presumed, will have to have sustenance in their lives, whether it is afforded to them on their own or through the instrumentality of the Victims and Witnesses Unit. It therefore does not afford a prima facie indicia of credibility that the Victims and Witnesses Unit has undertaken those reasonable tasks of providing reasonable support and maintenance to a witness rather than the witness doing it themselves.*²²

21. The Defence does not challenge the Chamber’s finding on the presumptive reasonableness of the assistance provided by the VWU to P-268 nor the Chamber’s determination that witnesses who come to testify must have ‘sustenance in their lives’. Rather, the Defence submits that the Chamber erred when considering the impact such sustenance may have on the credibility of a witness’s testimony by focusing solely on the source of the assistance provided – the VWU. The Chamber, in its application of the balancing test, did not consider what such “reasonable support and maintenance” may mean to a witness and his or her family members in view of the particular circumstances of the witness.

²¹ ICC-01/09-01/11-T-60-CONF-ENG ET, p. 44, lines 8 to 12 (open session).

²² ICC-01/09-01/11-T-60-CONF-ENG ET, p. 44, lines 13 to 19 (open session).

Such an analysis is, the Defence submits, essential to a proper evaluation of the “probative value”²³ element of the Chamber’s balancing test.

22. The Defence accepts, for example, that the facilitation by VWU of required medical care to a witness or his or her family members, or the payment by VWU of school fees for a witness’s children in circumstances where the children would not otherwise be able to attend school, may qualify as “reasonable support and maintenance”. However, if such reasonable assistance places a witness or his or her family members in significantly improved material circumstances compared to those in which they existed prior to the VWU’s intervention – for example because the witness had insufficient income to pay for medical care and/or school fees – such reasonable assistance may, the Defence submits, *prima facie* impact on the credibility of the witness’s evidence.
23. The Defence, therefore, submits that the Issue arises out of the Impugned Decision and is “not merely a question over which there is disagreement or conflicting opinion”.²⁴ As indicated above, the Issue was central to the Chamber’s evaluation of the probative value element of the aforementioned balancing test and, accordingly, crucial to the Chamber’s determination on the Request.

(b) The Issue significantly affects the fair and expeditious conduct of the proceedings and the outcome of the trial

24. The criteria to be satisfied under the second prong of the leave to appeal test are disjunctive. As set out more fully below, the Defence submits that the Issue satisfies both criteria. Further, the Defence submits that the holding of Trial Chamber IV, when faced with a similar leave to appeal application from the

²³ ICC-01/09-01/11-T-60-CONF-ENG ET, p. 44, line 8 (open session).

²⁴ Decision on Extraordinary Review Application, para. 9.

defence in the case of the *Prosecutor v. Abdallah Banda*, is instructive for the present application:

*The fairness of the proceedings would be significantly affected if the defence were denied access to relevant material which is in the possession of the prosecution. The resulting need to investigate and gather evidence to replace the material to which the defence would be denied access would cause delays in the proceedings and would thus affect the expeditious conduct of the proceedings. Should the defence fail to collect evidence to replace such missing material, the outcome of the trial could also be affected.*²⁵

The Issue significantly affects the fair and expeditious conduct of the proceedings

25. The Issue significantly affects the “fair and expeditious conduct of proceedings”.

Broadly speaking, issues relating to disclosure significantly affect the fair conduct of proceedings. If the Trial Chamber has erred in determining the Issue, then Mr. Ruto may have been denied information that is relevant to the investigation of and if deemed appropriate cross-examination of the witness on the essential matter of the witness’s motivation for testifying.

26. As noted above, Trial Chamber IV has held that “[t]he fairness of the proceedings would be significantly affected if the defence were denied access to relevant material which is in the possession of the prosecution”.²⁶ The Defence submits that the same logic applies with even greater force to information that may fall under Article 67(2) of the Statute and that the organ of the Court in possession of the information (here the Registry instead of the Prosecution) does not change this calculation.

27. With respect to Witness P-268 as well as all future Prosecution witnesses to whom similar VWU assistance has been provided, the denial of access to the

²⁵ Decision on the Defence Application for Leave to Appeal the “Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”, 21 March 2013, ICC-02/05-03/09-457, para. 19.

²⁶ *Ibid.*

information requested on the legal basis set out in the Impugned Decision necessitates the Defence expending limited resources on attempting to investigate the material living circumstances of a witness and his or her family pre and post-VWU assistance, and/or utilizing limited and valuable cross-examination time seeking to ascertain in a general manner the witness's subjective personal value of the reasonable VWU assistance provided the witness and whether such reasonable assistance may have influenced the witness's testimony and indeed decision to be a witness.

28. In the event the Defence has been improperly denied access to the information in question due to the Impugned Decision, the Defence will be significantly prejudiced both by not having had in hand the information necessary to fully and most efficiently undertake the investigation and, if appropriate, cross-examination outlined above, and by the unnecessary expenditure of time and resources in seeking to at least partially mitigate the impact of this denial of access. The Issue, therefore, significantly affects the fairness of proceedings.
29. The expeditiousness of proceedings may also be significantly impacted. As held by Trial Chamber IV, "[t]he resulting need to investigate and gather evidence to replace the material to which the defence would be denied access would cause delays in the proceedings and would thus affect the expeditious conduct of the proceedings".²⁷ As the Trial Chamber is aware from recent Defence submissions, defence investigations, including into each of the Prosecution's witnesses, continue in earnest and the extent of the investigations which still require to be undertaken were a factor in the defence's request that trial proceedings not restart until the new year.²⁸

²⁷ *Ibid.*

²⁸ ICC-01/09-01/11-T-64-CONF-ENG ET, p. 69, lines 14-22 (open session).

30. Furthermore, in the event the Defence is able to elicit information during the cross-examination of Witness P-268 or otherwise collect evidence through ongoing Defence investigations that tends to show that the assistance the VWU provided to Witness P-268 and his family may have acted as inducement for his testimony, the Defence may deem it necessary to submit a request for reconsideration of the Impugned Decision and recall of the witness for further questioning. The litigation of this issue and the actual process of recalling the witness would therefore significantly impact on the expeditiousness of proceedings.
31. As with the fairness element, the impact on the expeditiousness of proceedings will only be magnified in the event the general principle set out by the Chamber at paragraph 4 above is applied to future Defence requests for disclosure of VWU witness expenditures. As the Majority of this Trial Chamber recently held, “the need to recall [] witnesses [...] would [] have a significant impact on the duration of the trial proceedings and therefore on its expeditiousness”.²⁹
32. The Defence emphasises that its above submissions are not “contingent and speculative”.³⁰ It may well be the case that a review of VWU expenditures with respect to Witness P-268, and, indeed, future witnesses for whom similar expenditures have been made, reveals no significant material difference in the living circumstances of the witness pre and post-VWU provision of assistance. But, without access to the requested VWU information, the Defence is denied the opportunity to fully, properly and efficiently undertake the analysis and investigation necessary to reach a definitive conclusion on the matter.

²⁹ Decision on Prosecution's Application for Leave to Appeal the 'Decision on Mr Ruto's Request for Excusai from Continuous Presence at Trial', 18 July 2013, ICC-01/09-01/11-817, para. 23.

³⁰ Decision on Prosecution's Application for Leave to Appeal the 'Decision on Disclosure of Information related to Prosecution Intermediaries', 8 October 2013, ICC-01/09-01/11-1018-Red, para. 36 (“Moreover, regardless of whether or not the Issues constitute appealable issues, the Chamber considers the Prosecution's submissions regarding the potential impact of the Issues on the fairness and expeditiousness of the proceedings to be contingent and speculative.”).

The Issue significantly affects the outcome of trial

33. The Issue may significantly affect the outcome of trial because, if the Impugned Decision was wrongly decided, the Trial Chamber may not have before it important evidence that is relevant to the Chamber's evaluation of the credibility of Witness P-268's testimony. Accordingly, in the words of Trial Chamber IV, "[s]hould the defence fail to collect evidence to replace such missing material, the outcome of the trial could also be affected".³¹

(c) The immediate resolution of the Issue will materially advance the proceedings

34. It is, of course, for the Chamber to decide if, in the Chamber's view, the mandatory final criterion of the leave to appeal test is satisfied – namely, whether an immediate resolution of an issue, in the particular circumstances, will materially advance the proceedings.³² The Defence respectfully submits that an expeditious determination by the Appeals Chamber of the Issue will materially advance the proceedings not only with regard to the evidence of Witness P-268, but additionally for all future witnesses with respect to whom the Defence may request disclosure of VWU witness expenditures.
35. In the event the Appeals Chamber were to determine that the Trial Chamber erred on the issue identified for appeal and this reversal of the Impugned Decision resulted in disclosure of the requested VWU witness expenditure, the Defence would be in a position to expeditiously determine whether, based on this information, it is necessary to request the recall of the witness for further questioning. This would, the Defence submits, "ensur[e] that the proceedings

³¹ Decision on the Defence Application for Leave to Appeal the "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor", 21 March 2013, ICC-02/05-03/09-457, para. 19.

³² See Decision on Ruto Defence's Application for Leave to Appeal the 'Decision on the Prosecution's Request to Add New Witnesses to its List of Witnesses', 24 September 2013, ICC-01/09-01/11-983, para. 19.

follow the right course” by “[r]emoving doubts about the correctness of [the] decision or mapping a course of action along the right lines”.³³

36. This trial is in its early stages, with only six of potentially more than forty Prosecution witnesses having been called. As Trial Chamber IV has observed in the above-cited decision concerning the scope of Rule 77 of the Rule of Procedure and Evidence, “it is of crucial importance to resolve the question of the scope of the defence's right to inspection of relevant material before the trial starts. The Chamber therefore considers that an immediate resolution by the Appeals Chamber may materially advance the proceedings”.³⁴ Again, as submitted at paragraph 26 above, this logic applies with even great vigor to information that may fall within the rubric of Article 67(2) of the Statute at this relatively early stage in trial proceedings.
37. Further, the Defence submits that ensuring that the proper ‘course of action’ is followed is of particular importance here, as it is the neutral organ of the Court – the Registry – that opposes providing the Defence relevant and potentially exonerating information emanating from and within the control of the Registry. In the Defence’s respectful submission, it is critical that the Appeals Chamber authoritatively weigh-in on the appropriate approach a Chamber should take when balancing the organisational interests of the independent Registry vis-à-vis the interests of accused persons to investigate and if necessary cross-examine a Prosecution witness on matters concerning that witness’s credibility. Accordingly, should the Impugned Decision result in the Registry being permitted to improperly withhold relevant and potentially exonerating

³³ Decision on Extraordinary Review Application, para. 15.

³⁴ Decision on the Defence Application for Leave to Appeal the “Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”, 21 March 2013, ICC-02/05-03/09-457, para. 20.

information from the Defence, the decision is certainly one, the Defence submits, that may “cloud or unravel the judicial process”.³⁵

V. Relief Requested

38. For the reasons set out above, the Defence respectfully requests that the Trial Chamber grant leave to appeal the Issue discussed above pursuant to Article 82(1)(d) of the Rome Statute.

Respectfully submitted,



Karim A.A. Khan QC
Lead Counsel for Mr. William Samoei Ruto

Dated this 4th Day of November 2013
At The Hague, the Netherlands

³⁵ Decision on Extraordinary Review Application, para. 16.