

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/09-01/11

Date: 2 April 2014

**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**

**Decision on 'Prosecution's application for leave to appeal the decision on excusal  
from presence at trial under Rule 134<sup>quater</sup>'**

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

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Mr James Stewart  
Mr Anton Steynberg

**Counsel for William Samoei Ruto**

Mr Karim Khan  
Mr David Hooper  
Mr Essa Faal  
Ms Shyamala Alagendra

**Counsel for Joshua Arap Sang**

Mr Joseph Kipchumba Kigen-Katwa  
Ms Caroline Buisman

**Legal Representatives of Victims**

Mr Wilfred Nderitu

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for Victims**

Ms Paolina Massidda

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

**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Deputy Registrar**

**Victims and Witnesses Unit**

Mr Patrick Craig

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**Trial Chamber V(A)** (the ‘Chamber’) of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, pursuant to Article 82(1)(d) of the Rome Statute (the ‘Statute’), renders, by majority, Judge Herrera Carbuccion dissenting, this Decision on ‘Prosecution’s application for leave to appeal the decision on excusal from presence at trial under Rule 134*quater*’.

## **I. BACKGROUND AND SUBMISSIONS**

1. On 15 January 2014, the Chamber gave an oral decision to conditionally excuse Mr Ruto from presence at trial.<sup>1</sup> On 18 February 2014, the Chamber issued the ‘Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*’<sup>2</sup> (together, the ‘Impugned Decision’).
2. On 24 February 2014, the Office of the Prosecutor (‘Prosecution’) filed the ‘Prosecution’s application for leave to appeal the decision on excusal from presence at trial under Rule 134*quater*’ (the ‘Application’) requesting leave under Article 82(1)(d) of the Statute to appeal the Impugned Decision.<sup>3</sup>
3. On 27 February 2014, the Legal Representative of Victims (the ‘Legal Representative’) filed the ‘Common Legal Representative for Victims’ Response to the Prosecution’s Application for Leave to Appeal the Decision on Excusal from Presence at Trial under Rule 134*quater*’ (the ‘Legal Representative Response’).<sup>4</sup>
4. On 28 February 2014, the defence for Mr Ruto (the ‘Ruto Defence’) filed the ‘Defence response to the “Prosecution’s application for leave to appeal the decision

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<sup>1</sup> Transcript, ICC-01/09-01/11-T-72-ENG, p. 66, line 15 – p. 68, line 1.

<sup>2</sup> ICC-01/09-01/11-1186.

<sup>3</sup> ICC-01/09-01/11-1189.

<sup>4</sup> ICC-01/09-01/11-1193.

on excusal from presence at trial under Rule 134<sup>quater</sup>''' (the 'Ruto Defence Response').<sup>5</sup>

5. The defence for Mr Sang did not file a response.

*a. Prosecution Application*

6. The Prosecution seeks leave to appeal the Impugned Decision on the following issues:

- i. Is Rule 134<sup>quater</sup> of the Rules of Procedure and Evidence (the 'Rules'), as interpreted by the Chamber when granting conditional excusal to Mr Ruto, consistent with Articles 63(1), 21(3) and 27(1) of the Statute;
- ii. If Rule 134<sup>quater</sup> of the Rules is consistent with Articles 63(1), 21(3) and 27(1) of the Statute, does it on its own terms permit the Chamber to conditionally excuse Mr Ruto from presence at trial subject to the conditions in paragraph 79 of the Chamber's written reasons (together, the 'Issues').<sup>6</sup>

7. The Prosecution submits that the Issues directly arise from the Chamber's reasoning in the Impugned Decision and formed the basis for its conclusion that Mr Ruto could be conditionally excused from presence at trial.<sup>7</sup>

8. The Prosecution submits that the determination of the Issues will significantly affect the fair and expeditious conduct of the proceedings. In relation to expeditiousness, the Prosecution argues that if the Impugned Decision is found to be incorrect and the Appeals Chamber orders that the sessions that Mr Ruto did not attend must be nullified and re-heard, the expeditiousness of the trial will be reduced.<sup>8</sup> Similarly, considering the possibility of an eventual appeal against the judgment of the Chamber, the Prosecution submits that there is uncertainty as to

<sup>5</sup> Ruto Defence Response, ICC-01/09-01/11-1196.

<sup>6</sup> Application, ICC-01/09-01/11-1189, para. 1.

<sup>7</sup> Application, ICC-01/09-01/11-1189, paras 5-7.

<sup>8</sup> Application, ICC-01/09-01/11-1189, paras 8-10.

the reliability of evidence adduced in the absence of the accused. This uncertainty, in the submission of the Prosecution, significantly affects the fairness of the proceedings.<sup>9</sup>

9. The Prosecution submits that the risk of nullification by the Appeals Chamber of the proceedings from which Mr Ruto is absent can significantly impact the outcome of the trial as well. The Prosecution contends that if the nullified parts of the evidentiary phase of the trial need to be repeated, witnesses may need to be recalled to give evidence and some witnesses i) may no longer be available; and/or ii) the passage of time may impact their memory and ability to give evidence.<sup>10</sup> Considering this risk of nullification, the Prosecution adds that it is prudent that the Appeals Chamber resolves the Issues through an authoritative decision at this early stage and that such a decision may significantly advance the proceedings.<sup>11</sup>
10. The Prosecution further submits that the Impugned Decision raises the same key issues as the Chamber's decision of June 2013 on excusal.<sup>12</sup> The Prosecution adds that since the Chamber, by majority, granted the Prosecution's leave to appeal that decision,<sup>13</sup> the same conclusion is warranted here.<sup>14</sup>

*b. Legal Representative Response*

11. The Legal Representative submits that he associates himself with the observations of the Prosecution.<sup>15</sup> In particular, the Legal Representative argues that there is a need for finality on the law as regards the consistency of Rule 134*quater* of the Rules with the Statute because the parties and participants need to be assured of the

<sup>9</sup> Application, ICC-01/09-01/11-1189, paras 11-12.

<sup>10</sup> Application, ICC-01/09-01/11-1189, paras 13-14.

<sup>11</sup> Application, ICC-01/09-01/11-1189, paras 15-17.

<sup>12</sup> See Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, 18 June 103, ICC-01/09-01/11-777 ('June 2013 Excusal Decision').

<sup>13</sup> See 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, ICC-01/09-01/11-817.

<sup>14</sup> Application, ICC-01/09-01/11-1189, paras 3-4.

<sup>15</sup> Legal Representative Response, ICC-01/09-01/11-1193, para. 2.

consistent application of the Statute throughout the proceedings.<sup>16</sup> The Legal Representative further submits that failure to resolve the Issues by way of an interlocutory appeal would negatively impact victims' continued participation in the case and, by extension, significantly affect the outcome of the trial.<sup>17</sup>

*c. Ruto Defence Response*

12. The Ruto Defence submits that the Issues constitute mere divergences of opinion regarding the determination made by the Chamber in the Impugned Decision and the positions the Prosecution wishes to advance were duly considered and dismissed. The Ruto Defence contends that the Issues are thus not appealable issues.<sup>18</sup>
13. In the alternative, the Ruto Defence submits that the Issues do not affect the fair and expeditious conduct of proceedings or the outcome of the trial; nor may an immediate resolution by the Appeals Chamber materially advance the proceedings. The Ruto Defence argues that the Prosecution's arguments are predicated on highly speculative fears and that the Prosecution does not compellingly establish that there is a real rather than theoretical risk of nullification of the trial by the Appeals Chamber.<sup>19</sup>
14. The Ruto Defence further argues that leave should not be granted merely because leave to appeal the June 2013 Excusal Decision was granted. The Ruto Defence contends that the legal landscape is different from what it was in 2013 with the recent amendment to the Rules by the Assembly of State Parties.<sup>20</sup>

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<sup>16</sup> Legal Representative Response, ICC-01/09-01/11-1193, paras 2-5.

<sup>17</sup> Legal Representative Response, ICC-01/09-01/11-1193, para. 5.

<sup>18</sup> Ruto Defence Response, ICC-01/09-01/11-1196, paras 6-9.

<sup>19</sup> Ruto Defence Response, ICC-01/09-01/11-1196, paras 2, 10-15.

<sup>20</sup> Ruto Defence Response, ICC-01/09-01/11-1196, paras 4-5.

## II. APPLICABLE LAW

15. Article 82(1)(d) of the Statute sets out the following requirements for the granting of a request for leave to appeal:

- i. whether the decision involves an issue that would significantly affect:
  - a. the fair and expeditious conduct of proceedings; or
  - b. the outcome of the trial; and
- ii. in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

16. The Chamber recalls that, for the purposes of the first prong of this test, the Appeals Chamber has defined an 'issue' as 'an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion'.<sup>21</sup>

## III. ANALYSIS AND CONCLUSIONS

17. The Issues challenge the consistency of Rule 134<sup>quater</sup> of the Rules, 'as interpreted by the Chamber', with Articles 63(1), 21(3) and 27(1) of the Statute. The Prosecution focuses on the Chamber's interpretation of the Rule, rather than on the Rule itself. However, the formulation of the Issues uses the language of Article 51(4) of the Statute, requiring consistency of the Rules, rather than an interpretation of the Rules, with the Statute. The formulation of the Issues is thus misleading and does not clearly identify the object of the challenge. Furthermore, relying on its purported challenge to consistency with the Statute, the Prosecution seeks to challenge the Chamber's conditional excusal from presence. However, this excusal constitutes in fact the entire disposition of the Impugned Decision. The Majority of

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<sup>21</sup> *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9.

the Chamber therefore finds the Issues to be no more than an attempt to challenge the overall disposition of the Impugned Decision and considers them to be formulated too generally to constitute discrete issues which could be the subject of an appeal to the Appeals Chamber.<sup>22</sup>

18. Even if it were to be accepted that the Issues can be regarded as appealable issues, the Chamber at any rate would note that the Prosecution's arguments that the Issues would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial are based on the contention that should the Appeals Chamber invalidate the hearings from which Mr Ruto was excused on the basis of the Impugned Decision, it would be necessary to hold those hearings anew and recall witnesses. The Prosecution essentially makes the same argument as it did when seeking leave to appeal the Chamber's June 2013 Excusal Decision.<sup>23</sup> However, the present circumstances are markedly different. In its 18 July 2013 decision, the majority of the Chamber granted leave to appeal on the basis of, *inter alia*, a 'risk of partial or total nullification of those parts of the hearings conducted in the accused's absence' and the 'significant impact' which repetition of such hearings would have on the duration and expeditiousness of the trial proceedings. Since then the Appeals Chamber held that a Trial Chamber 'enjoys a measure of discretion' to excuse an accused from presence, subject to conditions.<sup>24</sup> Consistent with the Appeals Chamber's ruling, the Chamber was thus able to excuse the accused from a number of hearings. Meanwhile, the Assembly of States Parties adopted Rule 134*ter*, codifying the Appeals Chamber's ruling, as well as Rule 134*quater* of the Rules, intended to clarify the interpretation of Article 63(1) of the Statute in cases where the accused are mandated to fulfill extraordinary public

<sup>22</sup> See Decision on the joint defence request for leave to appeal the decision on witness preparation, 11 February 2013, ICC-01/09-01/11-596, para. 12.

<sup>23</sup> See Prosecution's Application for Leave to Appeal the "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial", 24 June 2013, ICC-01/09-01/11-783, paras 14-16.

<sup>24</sup> Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', 25 October 2013, ICC-01/09-01/11-1066 (the 'Excusal Judgment'), para. 56.



duties at the highest national level.<sup>25</sup> The discretion to excuse from presence pursuant to new Rule 134*quater* of the Rules, as interpreted by the Chamber in the Impugned Decision, is arguably broader than under the Excusal Judgment. However, as a result of the clear recognition of the Chamber's discretion to excuse Mr Ruto from certain hearings, the Majority of the Chamber considers that the risk of any hearings which Mr Ruto did not attend needing to be repeated has significantly decreased. This risk becomes even more theoretical if one is to consider the Appeals Chamber's standard of review, whereby the Appeals Chamber 'will not interfere with [another] Chamber's exercise of discretion [...] merely because the Appeals Chamber, if it had the power, might have made a different ruling.'<sup>26</sup> Consistent with this standard and in view of the Appeals Chamber's recognition of the Trial Chamber's discretion in matters of excusal from presence, the Appeals Chamber would be unlikely to interfere with the Chamber's discretion and require a re-hearing of witnesses. The Majority of the Chamber therefore considers the Prosecution's arguments to be highly speculative and is not satisfied that the Issues meet requirement (i) mentioned above.

19. As regards the last requirement of Article 82(1)(d) of the Statute, the Chamber recalls that in order for this requirement to be met, the Chamber 'needs to be persuaded, *inter alia*, that there is advantage in resolving the Issues at this stage, bearing in mind that issues of this kind may also be raised in an appeal against the final decision under Article 74 of the Statute.'<sup>27</sup> In view of the limited likelihood that the Appeals Chamber would require the Chamber to hold hearings anew or recall witnesses, or, if so, that the number of such hearings would be significant, the Majority of the Chamber sees no reason why the Issues should be resolved at this

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<sup>25</sup> Resolution ICC-ASP/12/Res.7.

<sup>26</sup> Excusal Judgment, ICC-01/09-01/11-1066, para. 60, citing to *Prosecutor v. Joseph Kony et al*, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, 16 September 2009, ICC-02/04-01/05-408, paras 79-80.

<sup>27</sup> Decision on Defence Applications for Leave to Appeal the Decision on Disclosure of Information on VWU Assistance, 21 January 2014, ICC-01/09-01/11-1154, para. 28.

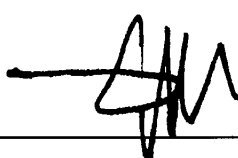
stage. It is not persuaded that an immediate resolution of the Issues would materially advance the proceedings.

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

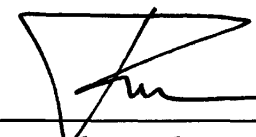
**REJECTS** the Application.

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

Judge Herrera Carbuccion appends a dissenting opinion

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

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**Judge Olga Herrera Carbuccion**

  
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**Judge Robert Fremr**

Dated 2 April 2014

At The Hague, The Netherlands