

Dissenting Opinion of Judge Olga Herrera Carbuccia

1. I respectfully disagree with the decision of my colleagues to reject the Prosecution's application for leave to appeal the decision on excusal from presence at trial under Rule 134*quater*'.
2. I hereby give the succinct reasons for my dissent.

I. INTRODUCTION

3. On 15 January 2014, the Chamber gave an oral decision to conditionally excuse Mr. Ruto from presence at trial,¹ having considered the 'Defence Request pursuant to Article 63(1) of the Rome Statute and Rule 134*quater* of the Rules of Procedure and Evidence to excuse Mr. William Samoei Ruto from attendance at trial'.² On 18 February 2014, the Chamber issued the 'Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*'³ ('Impugned Decision').
4. 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*', requesting leave under Article 82(1)(d) of the Rome Statute ('Statute') to appeal the Impugned Decision.⁴
5. The Prosecution seeks leave to appeal on the following issues:
 - i. Is Rule 134*quater* of the Rules of Procedure and Evidence ('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;

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

² Defence request pursuant to Article 63(1) of the Rome Statute and Rule 134*quater* of the Rules of Procedure and Evidence to excuse Mr. William Samoei Ruto from attendance at trial, 16 December 2013, ICC-01/09-01/11-1124.

³ Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*, ICC-01/09-01/11-1186.

⁴ Prosecution's application for leave to appeal the decision on excusal from presence at trial under Rule 134*quater*, ICC-01/09-01/11-1189.

- ii. If Rule 134*quater* 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.⁵

II. REASONS

6. The first issue for which leave to appeal is sought by the applicant is whether Rule 134*quater*, as interpreted by the Chamber when granting conditional excusal to Mr Ruto, is consistent with Articles 63(1), 21(3) and 27(1) of the Statute.
7. This issue arises from the Chamber's decision and, as noted by the Prosecution, the Chamber unequivocally treats this issue in the Impugned Decision.⁶
8. The first criterion according to Article 82(1)(d) of the Statute is that the issue should significantly affect the fair and expeditious conduct of the proceedings and impact on the outcome of the trial. If the parties (and particularly the Prosecution) pursue this issue in a final appeal against a conviction, acquittal or sentence, the entire or a significant part of the trial proceedings in which Mr Ruto is not present could be nullified, thus impacting on the fairness and expeditious conduct of proceedings and ultimately the outcome of the trial. In a previous decision this Chamber concluded that if the Appeals Chamber 'were to find the Majority's decision to be in error, the risk of partial or total nullification of the those parts of the hearings conducted in the accused's absence is such that the outcome of the trial is significantly affected by the issues raised by the Prosecution'.⁷ The Chamber also found on that occasion that 'any repetition of sessions of the proceedings in which Mr Ruto is absent, or the need to recall all witnesses heard therein, would also have a significant impact on the duration of

⁵ ICC-01/09-01/11-1189, para. 1.

⁶ ICC-01/09-01/11-1189, para. 5; ICC-01/09-01/11-1186, paras 48-61.

⁷ 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, para. 22.

the trial proceedings and therefore on its expeditiousness', and that the delay contemplated 'is so extensive that this would ultimately also affect the fairness of proceedings'.⁸ Moreover, as noted by the Appeals Chamber in relation to the issue of excusal, 'the consequences of implementing the Impugned Decision [...] would be difficult to correct and may be irreversible'. The Appeals Chamber thus judged that the suspension of the impugned decision at the time was warranted.⁹ The aforesaid reasoning applies *mutatis mutandis* to the present case, and therefore, the issue identified above has the potential to significantly affect the fair and expeditious conduct of proceedings and the outcome of the trial.

9. On the other hand, the second criterion, an immediate resolution by the Appeals Chamber may materially advance the proceedings, is met. In light of the impact on the expeditiousness of the trial proceedings that the impugned decision could ultimately have if found incompatible with the Statute by the Appeals Chamber at the end of the trial proceedings, an immediate resolution by the Appeals Chamber at the interlocutory stage would materially advance the proceedings, thus preventing potential recall of witnesses or the nullification of significant parts of the trial proceedings.
10. The second issue is whether if Rule 134*quater* 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.
11. The second issue is already subsumed in issue 1 above. The issue of whether the Chamber may excuse Mr Ruto from presence at trial subject to the conditions set in the Impugned Decision is the result of its interpretation of Rule 134*quater*, identified above. Thus, this is not a new issue arising from the Impugned Decision.

⁸ ICC-01/09-01/11-817, para. 23.

⁹ Decision on the request for suspensive effect, 20 August 2013, ICC-01/09-01/11-862, para. 10.

III. CONCLUSION

12. For the foregoing reasons I consider that the criteria under Article 82(1)(d) of the Statute are met and the Prosecution's application for leave to appeal should be granted as regards the following issue: whether Rule 134^{quater} of the Rules, as interpreted by the Chamber when granting conditional excusal to Mr Ruto, is consistent with Articles 63(1), 21(3) and 27(1) of the Statute.

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

A handwritten signature in black ink, appearing to read 'O. C.', is positioned above a horizontal line.

Judge Olga Herrera Carbuccion

Dated 2 April 2014

At The Hague, The Netherlands