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TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding Judge
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

**Prosecution's application for leave to appeal the decision on excusal from
presence at trial under Rule 134^{quater}**

Source: Office of the Prosecutor

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Introduction

1. The Prosecution requests leave under Article 82(1)(d) to appeal the Chamber's 15 January 2014 oral decision to conditionally excuse Mr Ruto from presence at trial,¹ the reasons for which were issued on 18 February 2014 (together, the "Decision").² The Prosecution seeks leave to appeal on the following issues:

- i. Is Rule 134*quater*, 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*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 (together, the "Issues").

2. The Issues need to be resolved by way of interlocutory appeal because: (i) they arise from the Decision; (ii) they would significantly affect the fair and expeditious conduct of the proceedings; (iii) they would significantly affect the outcome of the trial; and (iv) immediate resolution by the Appeals Chamber may materially advance the proceedings.³

3. As it did with respect to the Chamber's June 2013 excusal decision ("2013 Decision"),⁴ the Chamber should grant leave to the Prosecution to appeal the Decision. By majority, the Chamber granted the Prosecution leave to appeal the 2013

¹ ICC-01/09-01/11-T-72-ENG, pp. 67-68.

² ICC-01/09-01/11-1186.

³ ICC-01/04-168 OA 3, paras. 9-19; see also ICC-01/09-01/11-1154.

⁴ ICC-01/09-01/11-777. The additional attendance condition – "the first five days of hearing starting after a judicial recess as set out in regulation 19bis of the regulations of the Court" – does not distinguish the relief granted from that of the 2013 Decision in practical terms. Unless the Chamber orders otherwise (see, *e.g.*, ICC-01/09-01/11-T-72-ENG, p. 67, lines 16-24), Mr Ruto will attend at most 15 days per year more than required in the 2013 Decision.

Decision (“Leave to Appeal Decision”),⁵ noting that the issues raised by the Prosecution “may indeed significantly affect the outcome of the trial”,⁶ would have “a significant impact on the duration of the trial proceedings and therefore on its expeditiousness”,⁷ and would affect “the fairness of the proceedings in its own merits”.⁸ It found that “the scope of the requirement of presence and the Chamber’s discretionary power to excuse an accused from attending most of the trial” was an appealable issue that arose from the 2013 Decision.⁹

4. The same conclusion is warranted here. The Decision raises the same key issue as the 2013 Decision – excusal from presence at trial – and grants substantially the same relief as the 2013 Decision. The difference between the two is that the Decision raises a novel legal question additional to those in the 2013 Decision, namely whether Rule 134*quater* is consistent with the operative provisions of the Statute, and in particular Article 63(1). This constitutional question can only be resolved by the Appeals Chamber. Accordingly it is necessary and prudent for the Appeals Chamber to review the Decision on an interlocutory basis. The standard to assess whether the Issues meet the criteria for leave to appeal should be applied consistently in the two situations and, as a necessary consequence, leave to appeal the Decision should be granted.

Submissions

I. The Issues arise from the Decision.

5. The core question under the first issue is whether the Chamber’s interpretation of Rule 134*quater* in the Decision is consistent with the operative

⁵ ICC-01/09-01/11-817.

⁶ ICC-01/09-01/11-817, para. 22.

⁷ ICC-01/09-01/11-817, para. 23.

⁸ ICC-01/09-01/11-817, para. 24.

⁹ ICC-01/09-01/11-817, para. 17; see also paras. 18-19.

statutory provisions, and in particular Article 63(1), as interpreted by the Appeals Chamber. That this issue arises from the Decision is demonstrated by the 11 paragraphs the Chamber devoted to it in the section entitled “[c]onsistency of Rule 134*quater* of the Rules with Article 63(1) of the Statute”.¹⁰ For example, the Chamber concluded that “the intention of the States Parties [in adopting Rule 134*quater*] was to include in the Trial Chamber’s discretion to conditionally excuse from presence a specific category of accused persons”.¹¹ Reasoning that “[t]he adoption of the new rules thus clarifies certain aspects of Article 63(1)”,¹² the Chamber “decided to conditionally excuse Mr Ruto from presence at trial pursuant to Rule 134*quater*”.¹³ The Chamber’s explicit treatment of this legal question demonstrates that the first issue “arises” from the Decision for the purpose of Article 82(1)(d).

6. A subsidiary question under the first issue is whether the Chamber’s interpretation of Rule 134*quater* in the Decision is consistent with other provisions of the Statute, including articles 21(3) and 27(1). The Chamber devoted three paragraphs to its assessment of this question under the heading “[c]onsistency of Rule 134*quater* of the Rules with other provisions of the Statute”,¹⁴ demonstrating that it too arises from the Decision.

7. The second issue also arises from the Decision. The Chamber interpreted Rule 134*quater* to permit excusal from presence at trial, subject to nine hearings requiring Mr Ruto’s presence.¹⁵ The Chamber found that Rule 134*quater*’s wording (i.e.: “shall be taken with due regard to the subject matter of the specific hearings in question”) “should be viewed in the light of the express omission from Rule 134*quater* of the

¹⁰ ICC-01/09-01/11-1186, paras. 48-58.

¹¹ ICC-01/09-01/11-1186, para. 58.

¹² ICC-01/09-01/11-1186, para. 58.

¹³ ICC-01/09-01/11-1186, para. 79.

¹⁴ ICC-01/09-01/11-1186, paras. 59-61.

¹⁵ ICC-01/09-01/11-1186, para. 79. *See also* para. 74.

Rules of the requirement of ruling on excusal on a case-by-case basis".¹⁶ And, "[g]iven the lack of the latter requirement, the rule must allow for the possibility of the decision being taken without the Chamber's specific knowledge of the subject matter of each hearing from which the accused seeks to be absent".¹⁷ The Chamber's interpretation of this component of Rule 134*quater* formed the basis for its conclusion that Mr Ruto could be conditionally excused from presence at trial subject to the hearings listed in paragraph 79 of the written reasons, and therefore it too arises from the Decision.

II. The Issues would significantly affect the fair and expeditious conduct of the proceedings.

8. *First*, the Issues would significantly affect the expeditiousness of the trial. It is foreseeable that the Appeals Chamber will be called upon to review the Decision in any eventual Article 81 appeal against conviction, acquittal or sentence. If the Appeals Chamber finds the Chamber erred in the Decision, it may require parts of the trial not attended by Mr Ruto to be re-heard to ensure consistency with the restrictions set down in its 25 October 2013 judgment.¹⁸ As the Chamber noted in the Leave to Appeal Decision, any repetition of hearings for which Mr Ruto is absent, or the need to recall all witnesses heard therein, would have a "significant impact on the duration of the trial proceedings and therefore on its expeditiousness".¹⁹ The Appeals Chamber confirmed this reasoning when it granted suspensive effect for the 2013 Decision on the basis that it "would be difficult to correct and may be irreversible" if it were found to be incorrect,²⁰ which it ultimately was.

¹⁶ ICC-01/09-01/11-1186, para. 76.

¹⁷ ICC-01/09-01/11-1186, para. 76.

¹⁸ ICC-01/09-01/11-1066 OA5.

¹⁹ ICC-01/09-01/11-817, para. 23.

²⁰ ICC-01/09-01/11-862 OA5, para. 10.

9. The same logic applies here. If the Decision is found to be incorrect and sessions that Mr Ruto did not attend must be re-heard, the expeditiousness of the trial would be reduced. Accordingly, it is appropriate and prudent to resolve this issue now by way of interlocutory appeal, to avoid consequences that “would be difficult to correct and may be irreversible” if the Decision is held to be wrong in any post-verdict appeal.

10. These concerns are not “negated”²¹ by the Appeals Chamber’s ruling that Trial Chambers enjoy a measure of discretion to grant excusal under Article 63(1). Any exercise of this discretion is subject to the Appeals Chamber’s caution that absence must “not become the rule”.²² If it is later determined that the Decision runs afoul of this principle, re-hearing parts of the trial may still be necessary.

11. *Second*, the fairness of the proceedings would be significantly affected by the uncertainty occasioned by the Decision: not knowing if the evidence adduced in the absence of the Accused can be relied upon.²³ This risk is a real and concrete one. As canvassed in prior submissions, Article 51(4) requires Rule 134*quater* to be consistent with the operative provisions of the Statute, and in particular Article 63(1), no matter the “intention of the States Parties”.²⁴ The Appeals Chamber has ruled on the parameters of a Chamber’s discretion to excuse an accused from presence at trial under Article 63(1). The open question now is whether the Chamber’s reading of Rule 134*quater* in the Decision is consistent with Article 63(1). If it is not, and the Decision is incorrect, the hearings that Mr Ruto does not attend risk being invalidated after the fact.

²¹ See ICC-01/09-02/11-863-Anx-Corr, para. 14.

²² ICC-01/09-01/11-1066 OA5, para. 62.

²³ ICC-01/09-01/11-817, para. 24.

²⁴ ICC-01/09-01/11-1186, para. 58; see also ICC-01/09-01/11-1186-Anx, para. 15.

12. The Prosecution's concerns over Mr Ruto's absence are not "speculative"²⁵ or "mere disagreement"²⁶ with the Chamber's conclusions. Until the Issues are conclusively resolved by the Appeals Chamber, there is legal uncertainty as to the validity of the proceedings for which Mr Ruto is absent. It is this uncertainty that significantly affects the fairness of the proceedings, irrespective of whether the Appeals Chamber ultimately finds the Decision to be correct or incorrect.

III. The Issues would significantly affect the outcome of the trial.

13. The Chamber has previously held that "the risk of partial or total nullification of 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".²⁷ The Appeals Chamber, in granting suspensive effect for the 2013 Decision, confirmed that "the consequences of implementing the Impugned Decision prior to the issuance of the judgment on the Prosecutor's Appeal, would be difficult to correct and may be irreversible".²⁸ The same conclusion is warranted here since the Decision grants substantially the same relief as the 2013 Decision.

14. If parts of the evidentiary phase of the trial need to be repeated, witnesses may need to be recalled to give evidence. Some witnesses may no longer be available, and the passage of time impact their memory and ability to give evidence. This Chamber,²⁹ Trial Chamber V(B),³⁰ and the Appeals Chamber³¹ have noted the potential detrimental impact of trial interruptions on witnesses. Such concerns are best alleviated by taking steps now to resolve issues that may at a later date interrupt or abort this trial.

²⁵ ICC-01/09-01/11-817-Anx, para. 13.

²⁶ ICC-01/09-01/11-817-Anx, para. 2.

²⁷ ICC-01/09-01/11-817, para. 22.

²⁸ ICC-01/09-01/11-862 OA5, para. 10.

²⁹ ICC-01/09-01/11-1186, para. 68.

³⁰ ICC-01/09-02/11-830, para. 63.

³¹ ICC-01/09-01/11-1066 OA5, para. 50.

IV. Immediate resolution by the Appeals Chamber may materially advance the proceedings.

15. The Chamber in its Leave to Appeal Decision found that immediate resolution by the Appeals Chamber may materially advance the proceedings.³² The same reasoning applies here. There is a concrete risk that a trial from which the Accused has been granted excusal (with limitations) may later be nullified by the Appeals Chamber. For that reason, immediate resolution by the Appeals Chamber of the Issues may significantly advance the proceedings through an authoritative decision at this early stage.

16. In addition, the Appeals Chamber has confirmed that the notion of proceedings under Article 82(1)(d) is “not confined to the proceedings in hand but extends to the proceedings prior and subsequent thereto”.³³ Rule 134*quater* is new law at this Court and it may, depending on its interpretation, conflict with the Statute’s operative provisions, in particular Article 63(1). Any ambiguity about its meaning should be resolved as early as possible to improve certainty for future cases. An authoritative ruling from the Appeals Chamber on the interplay between Rule 134*quater* and the operative statutory provisions is the only way to resolve this constitutional question and to provide legal certainty for the parties and the Court as a whole. The importance of receiving clarity from the Appeals Chamber on the law governing excusal from trial has been expressed by Judge Eboe-Osuji.³⁴

17. Granting leave to appeal will also give the Appeals Chamber the opportunity to address the reasoning implicit in the Decision³⁵ – and further explained in Judge

³² ICC-01/09-01/11-817, para. 25.

³³ ICC-01/04-168, para. 12; see also para. 17.

³⁴ ICC-01/09-02/11-863-Anx-Corr, paras. 2, 14-15.

³⁵ ICC-01/09-01/11-1186-Anx, paras. 55, 57-58.

Eboe Osuji's separate further opinion³⁶ – that the Assembly of States Parties can alter the terms of a statutory provision by way of an amendment to the Rules.

Conclusion

18. For the foregoing reasons, the Prosecution respectfully requests the Chamber to grant leave under Article 82(1)(d) to appeal the Decision on the Issues described in paragraph 1.



Fatou Bensouda, Prosecutor

Dated this 24th day of February, 2014
At The Hague, The Netherlands

³⁶ ICC-01/09-01/11-1186-Anx, paras. 26-27.