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TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding
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 redacted version of

Decision on the "Request for Leave to Appeal the 'Decision on Appointment of Duty Counsel for a Witness' (ICC-01/09-01/11-1775-Conf)"

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
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Mr Joseph Kipchumba Kigen-Katwa
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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

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Defence**

States Representatives

Amicus Curiae

REGISTRY

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Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Mr Göran Sluiter

Trial Chamber V(A) (the ‘Chamber’) of the International Criminal Court (the ‘Court’ or ‘ICC’), in the case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* (the ‘case’), pursuant to Article 82(1)(d) of the Rome Statute (the ‘Statute’) and Rule 155 of the Rules of Procedure and Evidence (the ‘Rules’), renders this ‘Decision on the “Request for Leave to Appeal the ‘Decision on Appointment of Duty Counsel for a Witness’ (ICC-01/09-01/11-1775-Conf)”’.¹

I. BACKGROUND

1. On 14 October 2014, the Chamber set out the court schedule for the period from 17 November 2014 to 12 December 2014.² Witness 658 (the ‘First Witness’) was scheduled to testify during that period³ and Witness 727 (the ‘Second Witness’) was scheduled to testify thereafter.⁴
2. On 20 November 2014, the Registry filed a Power of Attorney dated 6 November 2014, in which the First Witness appointed Mr Göran Sluiter (‘Counsel’), who acts as his legal representative at the national level, as his counsel ‘in respect of all ICC-matters, including [his] appearance as [a] witness’.⁵ The Registry consequently retained Counsel as duty counsel for the First Witness for the purpose of Rule 74.⁶
3. Later, on 20 November 2014, Counsel requested disclosure of [REDACTED] between the First Witness and the Second Witness, in respect of whom Counsel

¹ Hereinafter, all references to “Articles” are to those of the Statute and all references to “Rules” are to those of the Rules.

² Decision on the Prosecution’s Second Submission of Schedule of Evidence of Summoned Witnesses, ICC-01/09-01/11-1605-Conf.

³ ICC-01/09-01/11-1605-Conf, para. 2.

⁴ [REDACTED]

⁵ Annex to Corrected version of Registration in the case-file communications concerning the legal representation of Witness P-0658, 20 November 2014, ICC-01/09-01/11-1677-Conf-Anx.

⁶ Email from the Registry to a Legal Officer of Trial Chamber V(a), 20 November 2014 at 14:03.

was also the legal representative at the nation level.⁷ Counsel advised that he was legally obliged to advise his other client, the Second Witness, of [REDACTED].

4. On 21 November 2014, after having heard submissions from the parties and Counsel,⁸ the Chamber ruled that Counsel was relieved from representing the First Witness before the Court for the purpose of Rule 74, and that the Registry was to appoint a replacement immediately.⁹ The reasons for that decision were rendered on 10 December 2014;¹⁰ and were based on two issues of concern: (i) the avoidance of the possibility of a conflict of interest; and (ii) the preservation of the confidentiality of the trial proceedings.¹¹
5. On 9 December 2014, the Second Witness requested, *inter alia*, to be represented by Counsel before the Court in accordance with Rule 74.¹²
6. On 12 January 2015, the Chamber found that for the same reasons that Counsel had been relieved from representing the First Witness, it was inappropriate to appoint him as duty counsel for the Second Witness in respect of Rule 74. The Registry was directed to appoint duty counsel other than Counsel to represent the Second Witness for the purpose of Rule 74 (the 'Impugned Decision').¹³
7. On 19 January 2015, the Registry transmitted to the Chamber a submission from Counsel dated 18 January 2015,¹⁴ entitled 'Request for Leave to Appeal the

⁷ Email from the Prosecution to Trial Chamber V-A Communications, 20 November 2014, at 18:42. For further information regarding the nature and disclosure of [REDACTED], see ICC-01/09-01/11-T-153-CONF-ENG ET; Decision on the Defence Application for Certain Measures Concerning Prosecution Witness 658, ICC-01/09-01/11-1672-Conf.

⁸ Transcript of hearing of 21 November 2014, ICC-01/09-01/11-T-158-CONF-ENG ET, p. 2, lines 14 to 23.

⁹ Decision on the Representation by Mr Sluiter as Duty Counsel for Witness 658, communicated to the parties and participants via email (see Email from Trial Chamber V-A Communications, 21 November 2014 at 17:54).

¹⁰ Reasons for the Decision on the Replacement of Duty Counsel for a Witness, ICC-01/09-01/11-1749-Conf ('Reasons Decision').

¹¹ Reasons Decision, paras 44 and 57.

¹² Prosecution's Communication of Information from [REDACTED] and Request for a Status Conference, 9 December 2014, ICC-01/09-01/11-1745-Conf.

¹³ ICC-01/09-01/11-1775-Conf.

¹⁴ ICC-01/09-01/11-1784-Conf.

'Decision on Appointment of Duty Counsel for a Witness' (ICC-01/09-01/11-1775-Conf)' (the 'Request').¹⁵

8. On 23 January 2015 the Prosecution filed the 'Prosecution response to [REDACTED] 'Request for Leave to Appeal the 'Decision on Appointment of Duty Counsel for a Witness'' (the 'Response').¹⁶

II. SUBMISSIONS

A. *The Request*

9. Counsel recognises that "the text of Article 82 refers to a 'party' rather than the more expansive 'participant'",¹⁷ and submits that the Second Witness nevertheless has standing to request leave to appeal under Article 82(1)(d) to protect his right to a fair hearing given the human rights concerns at stake.¹⁸ Specifically, that the Second Witness is brought within the scope of the right to a fair hearing because his legal position in the proceedings has been substantially affected [REDACTED], and his status as an individual whom 'the Defence believes should be the object of a subpoena or summons'.¹⁹ Counsel argues that were this not to be the case, the Second Witness would have no procedural remedy against the Impugned Decision.²⁰ The impact on the Second Witness's right to a fair trial suffices, it is argued, to bring him within the scope of Article 82(1)(d) in light of: (i) the requirements of Article 21(3); (ii) Pre-Trial Chamber II's acknowledgment that human rights concerns may modify the explicit and exceptional conditions for

¹⁵ ICC-01/09-01/11-1784-Conf-Anx.

¹⁶ ICC-01/09-01/11-1790-Conf.

¹⁷ Request, ICC-01/09-01/11-1784-Conf-Anx, paras 26.

¹⁸ Request, ICC-01/09-01/11-1784-Conf-Anx, paras 26, 28 and 29.

¹⁹ Request, ICC-01/09-01/11-1784-Conf-Anx, paras 30 to 32.

²⁰ Request, ICC-01/09-01/11-1784-Conf-Anx, para. 33.

appeal;²¹ and (iii) the obligation of the Chamber to protect witnesses pursuant to Article 68(1).

10. On the grounds for appeal, it is contended that there are three issues that should be considered by the Appeal's Chamber. First, 'whether the Trial Chamber is under an obligation under Article 64(2) to conduct a balancing of interests when ruling on a witness[']s choice of counsel, and whether the Chamber has erred in exercising its discretion when denying the witness assistance by counsel of choice'.²² Second whether the Chamber correctly interpreted and applied the law related to conflicts of interests, specifically Article 16 of the Code of Professional Conduct for Counsel, which it is argued only requires counsel to take action where an actual conflict of interest arises as opposed to a potential conflict of interest.²³ Finally, whether the Chamber erred in failing to hear the Second Witness (who refuses to testify unless represented by Counsel) prior to taking measures that substantially prejudiced him, contrary to principles of natural justice and procedural fairness.²⁴

B. The Response

11. The Prosecution submits that the Request should be rejected *in limine*.²⁵ First, it is argued that the Request is not properly before the Chamber as Counsel does not represent the Second Witness in proceedings before the Court and thus has no standing to bring the present Request.²⁶ The Prosecution notes that Counsel was never appointed to represent the Second Witness, in accordance with Regulation 123 of the Regulations of the Registry.²⁷ Second, the Prosecution argues that even if

²¹Request, ICC-01/09-01/11-1784-Conf-Anx, paras 26 to 28 and 32 to 33; citing *Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jaques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Pre-Trial Chamber II, Decision of Mr Kikolo's "Notice of appeal against the decision of the Single Judge ICC-01/05-01/13-743-Conf-Exp" dated 10 November 2014 and on the urgent request for the partial lifting of the seizure on Mr Kikolo's assets dated 24 November 2014, ICC-01/05-01/13-773, pages 5 and 6.

²²Request, ICC-01/09-01/11-1784-Conf-Anx, B.

²³Request, ICC-01/09-01/11-1784-Conf-Anx, para. 46-52.

²⁴Request, ICC-01/09-01/11-1784-Conf-Anx, D and paras 42 and 55 to 56.

²⁵Response, ICC-01/09-01/11-1790-Conf, para. 1.

²⁶Response, ICC-01/09-01/11-1790-Conf, para. 3.

²⁷Response, ICC-01/09-01/11-1790-Conf, para. 4.

the Second Witness were properly represented in Court proceedings by Counsel, he has no standing to file a request for leave to appeal under Article 82(1)(d) as this right is reserved for a *party* to the proceedings as opposed to the more expansive *participant*.²⁸ The Prosecution submits that Article 82(1)(d), by referring to '[e]ither party' suggests a dualist approach, which would be consistent with the finding of the Appeals Chamber that the 'parties' referred to in Article 69(3) are the Prosecution and the Defence.²⁹ The Prosecution further contests Counsel's submission that the human rights of the Second Witness, that are allegedly affected by the Impugned Decision, justify a deviation from the plain terms of Article 82(1)(d), noting that the Appeals Chamber has affirmed that 'the Statute defines exhaustively the right to appeal against decisions.'³⁰ Further it is argued that the jurisprudence of Pre-Trial Chamber II relied upon by Counsel is, *inter alia*, inconsistent with that finding of the Appeals Chamber.³¹

III. APPLICABLE LAW

12. Pursuant to Article 82(1)(d), either party may appeal a decision which involves an issue that would significantly affect: (a) the fair and expeditious conduct of proceedings; or (b) the outcome of the trial; and for which, in the opinion of the Chamber, immediate resolution by the Appeals Chamber may materially advance the proceedings. Pursuant to Rule 155, a party wishing to appeal a decision under Article 82(1)(d) shall make an application to the chamber that rendered the decision, setting out the reasons for the request for leave to appeal.

²⁸ Response, ICC-01/09-01/11-1790-Conf, para. 6.

²⁹ Response, ICC-01/09-01/11-1790-Conf, para. 7, citing Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06-1432, paras 3 and 93.

³⁰ Response, ICC-01/09-01/11-1790-Conf, para. 8, citing, 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, para. 39.

³¹ Response, ICC-01/09-01/11-1790-Conf, para. 9.

IV. ANALYSIS

13. Whereas the Statute does not expressly define the parties who have standing to bring an appeal pursuant to Article 82(1)(d), a party to the proceedings is understood as one by or against whom a suit is brought, whether composed of one or more individuals. The parties named in the present proceedings are the Prosecution and the Defence for Mr Ruto and Mr Sang.³² The use of the word ‘either’ in Article 82(1)(d), signifying one or other of two, further serves to indicate that the right of appeal thereunder is reserved to the two opposing parties to the proceedings.³³ The Appeals Chamber has previously indicated that, in respect of Article 69(3), the term ‘party’ refers in its ordinary sense to the Prosecution and the Defence³⁴ and, in the instant case, there does not appear to be any valid reason to depart from that interpretation in the context of Article 82(1). Indeed Counsel appears to concede that the Second Witness is not a party to the proceedings, within the meaning of Article 82(1)(d), and does not argue that the Second Witness has a right of appeal on the basis of that article solely. It is instead submitted that leave to appeal should be granted in light of the human rights concerns at stake for the Second Witness, notwithstanding the terms of Article 82(1)(d).
14. In accordance with Article 21(3), Article 82 must be interpreted and applied in accordance with internationally recognised human rights. However, Article 21(3) does not justify an expansion of Article 82(1)(d) which conclusively enumerates the pre-requisites for seeking leave to appeal. The Appeals Chamber has held that ‘decisions that are subject to appeal are enumerated in [A]rticles 81 and 82 of the Statute. There is nothing in Part 8 [of the Statute] to suggest that a right to appeal

³² See also Decision on two requests for leave to appeal the “Decision on the request by DRC-DO1-WWWW-0019 for special protective measures relating to his asylum application”, ICC-01/04-01/06-2779, paras 11 and 12 and Decision on the ‘Application of Mishana Hosseinioun for Leave to Appeal Against Decision on Application under Rule 103’, ICC-01/11-01/11-60, pages 4-5.

³³ Decision on the admissibility of the Appeal Against Decision on Application Under Rule 103" of Ms Mishana Hosseinioun of 7 February 2012, Separate Opinion of Judge Daniel David Ntanda Nsereko, ICC-01/11-01/11-74, para. 2.

³⁴ Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06-1432, paras. 3 and 93.

arises except as provided thereunder.³⁵ The Appeals Chamber further held that the limitation of the right to bring interlocutory appeals to those subjects specifically listed in Article 82 of the Statute was fully consistent with internationally recognised human rights, which require that only the convicted person has a right to appeal final decisions on conviction or sentence.³⁶ It concluded that ‘the Statute defines exhaustively the right to appeal’.³⁷ Returning to the present case, the right of a witness to appeal the appointment of counsel is not a right acknowledged by universally recognised human rights norms and as such does not, as claimed by Counsel, “modify the explicit language and exceptional conditions for appeal”.³⁸

15. For the aforementioned reasons, the Second Witness does not have standing to bring the Request pursuant to Article 82(1)(d).

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DISMISSES the Request.

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

Judge Chile Eboe-Osuji
(Presiding)

Judge Olga Herrera Carbuccia

Judge Robert Fremr

Dated 12 February 2015
At The Hague, The Netherlands

³⁵ 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, para. 35

³⁶ ICC-01/04-168, para. 38. Confirmed in; ICC-01/04-01/06-2799, para. 7 and ICC-01/04-01/07-3424 paras 27 to 31.

³⁷ ICC-01/04-168, para. 39.

³⁸ Request, ICC-01/09-01/11-1784-Conf-Anx, para.28.