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**International
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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 response to the “Prosecution’s application for leave to appeal the decision
on excusal from presence at trial under Rule 134^{quater}”**

Source: Defence for Mr. William Samoei Ruto

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

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I. Introduction

1. The defence for Mr. William Samoei Ruto (“Defence”) respectfully submits that the *Prosecution’s application for leave to appeal the decision on excusal from presence at trial under Rule 134quater* (“Application”)¹ should be dismissed. Neither of the Issues² are appealable issues within the terms of Article 82(1)(d) of the Rome Statute (“Statute”) and, in any event, neither satisfies the additional mandatory criteria for the grant of leave to appeal.

2. Simply put, all the arguments advanced in the Application collapse into the single concern that a trial from which an accused has been granted excusal under Rule 134quater of the Rules of Procedure and Evidence (“Rules”) may later be nullified by the Appeals Chamber.³ This concern is unfounded and highly speculative.⁴ First, the Appeals Chamber has ruled that Article 63(1) of the Statute does not operate as an absolute bar to the continuation of trial proceedings in the absence of an accused⁵ and that a Trial Chamber does have discretion to excuse an accused from presence at trial.⁶ Second, the Assembly of States Parties (“ASP”) recently adopted various amendments to the Rules,⁷ including Rule 134quater, that clarify the scope and application of Article 63(1).⁸ Third, the terms of the waiver filed in the Court record preclude Mr. Ruto from raising on appeal “*any natural consequence of [his] own voluntary absence from the courtroom*”.⁹ Fourth, the Prosecution fail to articulate any reasonable prosecution appeal point based on excusal which might be raised. Properly considered, the Application is simply “*motivated by the need to test the correctness of the Chamber’s*

¹ ICC-01/09-01/11-1189.

² The Issues are framed and defined at Application, para. 1.

³ See Application, paras. 4, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17.

⁴ See *infra* paragraph 19, quoting from the Dissenting Opinion of His Honour Judge Eboe-Osuji in the *Kenyatta* case (ICC-01/09-02/11-863-Anx-Corr, para. 14).

⁵ ICC-01/09-01/11-1066 OA 5 (“Ruto Excusal Judgment”), para. 55.

⁶ Ruto Excusal Judgment, para. 61.

⁷ These are Rule 134bis and 134ter.

⁸ ICC-01/09-01/11-1186 (“Decision”), para. 55.

⁹ ICC-01/09-01/11-1151-Anx, para. 3.

resolution of a novel legal question for the Court”.¹⁰ Indeed, the Prosecution admits exactly this as its basis for seeking leave to appeal when it states: “[T]he Decision raises a novel legal question additional to those in the 2013 Decision”.¹¹ However, *“lingering questions about the correctness of a novel legal proposition...is never reason enough to grant leave for interlocutory appeal”*.¹²

3. As argued below, the Defence submits that the Prosecution fails to transform its – in the Defence view, unfounded – doubt about the correctness of the Decision into cogent and compelling arguments which meet the Article 82(1)(d) threshold.

II. Submissions

(a) Preliminary issue

4. The Prosecution erroneously predicates much of its argument on the fact that, because leave to appeal the 2013 Decision¹³ was granted, leave should be granted on the same basis in this instance.¹⁴ This is an overly simplistic view which does not withstand scrutiny.
5. The legal landscape is not the same as that existent in 2013. Leave to appeal the 2013 Decision was granted in respect of two issues which, at core, concerned whether the Trial Chamber had discretion to grant the excusal of an accused from continuous presence at trial.¹⁵ As noted above, the Appeals Chamber did not subscribe to the absolutist approach originally advanced by the

¹⁰ Dissenting Opinion of his Honour Judge Eboe-Osuji, ICC-01/09-01/11-817-Anx, para. 2. Of note in this regard are Application, paras. 4 (“it is necessary and prudent for the Appeals Chamber to review the Decision on an interlocutory basis”), 12 (“[u]ntil the Issues are conclusively resolved by the Appeals Chamber, there is legal uncertainty...”), 16 (“[a]n 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”) and 17 (“[g]ranting leave to appeal will also give the Appeals Chamber the opportunity to address the reasoning implicit in the Decision...”).

¹¹ Application, para. 4.

¹² Dissenting Opinion of his Honour Judge Eboe-Osuji, ICC-01/09-01/11-817-Anx, para. 2.

¹³ ICC-01/09-01/11-777. The term “2013 Decision” is defined at Application, para. 3.

¹⁴ Application, paras. 3, 4, 8, 9, 11, 13 and 15.

¹⁵ ICC-01/09-01/11-817, para. 2.

Prosecution¹⁶ and affirmatively held that there is discretion to excuse an accused's presence at trial. Through the recent Rules amendments, the Court's legislature, the ASP, has also clarified the intentions and views of States Parties regarding the general interpretation and application of Article 63(1) in light of the minimal information and lack of clarity in the Statute's *travaux préparatoires*. These significant developments cannot be ignored and the Prosecution's arguments which seek to hark back to a point antecedent to them should be rejected.

(b) Failure to identify any appealable issues

6. Contrary to the Prosecution's position, neither of the two Issues identified in the Application constitutes an appealable issue.¹⁷ A proper consideration of both reveals that they constitute mere divergences of opinion regarding the determination made by the Trial Chamber in the Decision.¹⁸ On this basis alone, the Application should be dismissed.
7. Encompassed within the First Issue, as framed by the Prosecution, is the essence of the second argument made by the Prosecution in the response to the Defence's request for excusal pursuant to Rule 134*quater*, namely that "[t]he reading of Rule 134*quater* advanced in the Request fails, because it violates at least three provisions of the Statute".¹⁹ This argument was duly considered and dismissed by the Trial Chamber in the Decision. The settled jurisprudence of this Court is that it is not permissible for a party to rehash an issue again on appeal.²⁰

¹⁶ See, e.g., ICC-01/09-01/11-831, paras. 1 and 10.

¹⁷ Application, paras. 5-7.

¹⁸ As recently recalled by this Trial Chamber, an "issue" is "an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion." See ICC-01/09-01/11-1154, para. 20 citing to ICC-01/04-168, para. 9.

¹⁹ ICC-01/09-01/11-1135, para. 3.

²⁰ See, e.g., ICC-01/04-551, paras. 16 and 17.

8. The Second Issue also amounts to a mere disagreement with the Trial Chamber. Effectively, the Prosecution disagrees with the manner in which the Trial Chamber exercised its discretion as regards two of the limbs of the Rule 134*quater* test, namely the interests of justice component and the requirement to have due regard to the subject matter of the specific hearings in question.
9. Indeed, it is of concern that the Prosecution's interest may be wider than the two identified Issues. In the final paragraph of the Application, the Prosecution states that "*granting leave to appeal will...give the Appeals Chamber the opportunity to address the reasoning implicit in the Decision that the Assembly of States Parties can alter the terms of a statutory provision by way of an amendment to the Rules.*"²¹ This is improper. Only issues certified by the Trial Chamber can be canvassed before the Appeals Chamber else the requirement to identify specific issues for appeal would be rendered futile and unnecessary.

(c) The Issues do not significantly affect the fair and expeditious conduct of the proceedings

10. Neither of the two Issues identified by the Prosecution significantly affects the fair and expeditious conduct of proceedings.
11. Dealing first with expeditiousness, the Prosecution's assertion at paragraph 8 of the Application that "[i]t 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" and, thus, "*parts of the trial not attended by Mr. Ruto [will have] to be re-heard*" is implausible.²² Such an assertion is predicated on the highly speculative, if not fanciful, fear that two separate stages in the appeals process will be satisfied. As noted above, it is difficult, if not impossible, to identify what theoretical point of appeal based on Mr. Ruto's excusal could reasonably

²¹ Application, para. 17.

²² The Prosecution's arguments at paragraphs 9 and 10 of the Application simply repeat the concern that the Decision will be successfully challenged on final appeal and re-hearings ordered.

be raised by either Party. The specific terms of Mr. Ruto's waiver prevent him from raising on appeal any issue arising from his requested absence from the courtroom.²³ Further, the Application is silent as to any appeal point the Prosecution could raise.²⁴ In addition, even in the highly unlikely scenario that a Party was able to formulate an arguable appeal issue, His Honour Judge Eboe-Osuji's observation that "*the mere appellate finding of an error in the decision of a court of first instance does not always result in the imposition of a drastic appellate remedy*" is pertinent and underlines the hypothetical nature of the Prosecution's argument.²⁵

12. The reality is that the Decision serves to ensure the expeditious conduct of the trial. The grant of excusal pursuant to Rule 134^{quater} means no adjournments and changes to the trial schedule have been sought due to the functions of an "*important and extraordinary [...] dimension*" which Mr. Ruto is required to fulfil as Deputy President of the Republic of Kenya.²⁶
13. As regards fairness, the Prosecution makes no attempt to advance any new arguments but recycles the position that, "[u]ntil the Issues are conclusively resolved by the Appeals Chamber, there is legal uncertainty...[and] [i]t is this uncertainty that significantly affects the fairness of proceedings".²⁷ For the reasons set out above, this position is erroneous and effectively amounts to a mere disagreement with the Trial Chamber's Decision.²⁸ This is not sufficient basis for the grant of leave to appeal and, thus, the Prosecution's arguments on fairness should be rejected.

²³ ICC-01/09-01/11-782-Anx.

²⁴ The Defence is not aware of any case at any of the international courts and tribunals to date where the accused's absence from trial has been raised by the Prosecution on appeal.

²⁵ Dissenting Opinion of His Honour Judge Eboe-Osuji, ICC-01/09-01/11-817-Anx, para. 13.

²⁶ ICC-01/09-01/11-777, paras. 50-51.

²⁷ Application, para. 12. See also para. 11.

²⁸ ICC-01/09-01/11-168, para. 9.

(d) The Issues would not significantly affect the outcome of the trial

14. In paragraphs 13 and 14 of the Application the Prosecution resorts to repetition of a combination of two arguments already dealt with above in support of the position that the Issues would significantly affect the outcome of the trial, namely the risk of partial or total nullification of those parts of the trial conducted in Mr. Ruto's absence and reliance on findings made by the Majority of the Trial Chamber when granting leave to appeal the 2013 Decision. As already argued, the Prosecution fails to credibly and compellingly establish that there is a real rather than theoretical risk of nullification by the Appeals Chamber.²⁹ In addition, the reasoning underlying the grant of leave to appeal the 2013 Decision cannot be applied automatically to the Application. The bare fact is that the protracted litigation and the ASP's discussions and actions regarding the previously little considered Article 63(1) has resulted in a greater understanding of the scope and application of this statutory provision removing any uncertainties which may have existed at the time the 2013 Decision was issued.³⁰

(e) Immediate resolution of the Issues by the Appeals Chamber will not materially advance the proceedings

15. As extensively argued above, the Prosecution fails to establish the "concrete risk that a trial from which the Accused has been granted excusal...may later be nullified by the Appeals Chamber".³¹ The remaining two arguments made by the Prosecution under this limb of the Article 82(1)(d) test can also be dismissed.
16. First, it appears that the Prosecution misconstrue the Appeals Chamber's dicta from a judgement rendered in the *Situation in the Democratic Republic of Congo* by seeking to assert that the term "proceedings" in Article 82(1)(d) applies to

²⁹ *Supra*, paras. 2 and 11.

³⁰ *Supra*, paras. 4 and 5.

³¹ Application, para. 15.

proceedings subsequent and unconnected to the instant case.³² This is incorrect. Instead, the Appeals Chamber found that the term encompasses “*the proceedings in their entirety*”, meaning the proceedings at first instance and appellate level in one particular case.³³

17. Second, and building on the foregoing, the Prosecution’s arguments concerning the need “*to improve certainty for future cases [via] [a]n authoritative ruling from the Appeals Chamber*” are irrelevant and are made in blatant disregard for the Court’s established jurisprudence.³⁴ It is a matter of trite law at this Court that “*[i]t is not sufficient for the purposes of granting leave to appeal that the issue for which leave to appeal is sought is of general interest or that it may arise in future pre-trial or trial proceedings.*”³⁵ The Prosecution’s submissions on this point betray the underlying policy motivation of its application and should be disregarded.
18. The Prosecution’s selective citation, at paragraph 16 of the Application, to His Honour Judge Eboe-Osuji’s Dissenting Opinion in the *Kenyatta* case is perhaps most telling as regards both the Prosecution’s true motivations in seeking leave to appeal and its inability to answer a critical and glaring defect in the Application – as addressed at paragraph 10 above. While the learned Judge did indeed suggest, as the Prosecution notes, that further clarity from the Appeals Chamber on issues associated with a Trial Chamber’s discretionary authority to excuse an accused person from attending trial would be helpful, these observations were made, of course, prior to the clarifying action of the ASP through unanimous amendment of the Rules.

³² Application, para. 16.

³³ ICC-01/4-168, para. 17.

³⁴ Application, para. 16.

³⁵ See, e.g., ICC-02/05-03/09-428, para. 11 (citing to ICC-01/05-01/08-1169, para. 25); ICC-02/04-01/05-20-US-Exp (unsealed pursuant to Decision ICC-02/04-01/05-52), para. 21; and ICC-01/04-01/06-1191, para. 11. This is in contrast to, for example, the Special Court for Sierra Leone where Trial Chamber I held that the first limb of the leave to appeal standard – exceptional circumstances – may exist where the question for appeal raises serious issues of fundamental legal importance to the Special Court for Sierra Leone. See *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-2004-15-T-357, Decision on Defence Applications for Leave to Appeal Ruling of the 3rd February 2005 on the Exclusion of Statements of Witness TF1-141, 28 April 2005, para. 26.

19. The Prosecution, not surprisingly, ignores the key finding of His Honour that is actually relevant to and determinative of the present application:³⁶

[T]he Prosecutor's request for leave to appeal the Kenyatta decision will not meet the strict test of interlocutory appeals under article 82(1)(d) of the Statute.... The request for leave to appeal the Kenyatta decision on the basis of article 82(1)(d) is even weaker than the request for leave in the Ruto case. It is weaker because a primary argument in the Ruto leave request was that the testimony of witnesses heard during the trial may be required to be repeated if the Appeals Chamber found in the end that there was no discretion to grant excusal from presence at trial. With the Appeals Chamber's confirmation of the discretion to grant excusal, that concern is now largely negated.

III. Relief sought

20. For the reasons set out above, the Defence respectfully requests that the Trial Chamber reject the Prosecution's Application for leave to appeal the Decision.

Respectfully submitted,



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Lead Counsel for Mr. William Samoei Ruto

Dated this 28th Day of February 2014
At The Hague, Netherlands

³⁶ ICC-01/09-02/11-863-Anx-Corr, para. 14 (emphasis added).