

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 18 July 2013

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

Decision on Prosecution's Application for Leave to Appeal the 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial'

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 Kioko Kilukumi

Ms Shyamala Alagendra

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa

Mr Silas Chekera

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

Registrar

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

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*, having considered Article 82(1)(d) of the Rome Statute (the ‘Statute’), renders, by majority, Judge Eboe-Osuji dissenting, its Decision on Prosecution’s Application for Leave to Appeal the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’.

I. BACKGROUND AND SUBMISSIONS

1. On 18 June 2013, the Chamber issued by majority, Judge Herrera Carbuccion dissenting, the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’ (‘Impugned Decision’),¹ in which it granted, within the limits of certain conditions, the request of the Defence for William Ruto (‘Ruto Defence’) for permission to not be continuously present in court during his trial.
2. On 24 June 2013, the Office of the Prosecutor (‘Prosecution’) filed the ‘Prosecution’s Application for Leave to Appeal the “Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial”’ (the ‘Leave Application’), whereby it seeks leave to appeal the Impugned Decision in relation to the following two issues:
 - (i) ‘The scope of the requirement under Article 63(1) that the accused be present during the trial and whether, or to what extent, the Trial Chamber has a discretionary power to excuse an accused from attending most of the trial’ (‘First Issue’);

¹ ICC-01/09-01/11-777.

(ii) 'Whether the test for an excusal of the accused developed by the Majority is supported by the applicable law' ('Second Issue').²

3. The Prosecution submits that both issues arise from the Impugned Decision. With respect to the First Issue, the Prosecution refers to the conclusions of the Majority of the Chamber that the Chamber has discretion to permit reasonable exceptions to the presence of the accused during the trial³ and that the language of Article 63(1) of the Statute and the object of Article 27 of the Statute do not implicate any restraint on the discretion of the Court to excuse the accused from the duty of presence.⁴ The Prosecution submits that as a result of these findings, the Majority excused Mr Ruto from being present during most of the trial, including the totality of the evidentiary phase.⁵ As regards the Second Issue, the Prosecution submits that the Majority established and applied its test for excusal based on 'exceptional circumstances', which extend to 'situations in which an accused person has important functions of an extraordinary dimension to perform'.⁶
4. The Prosecution contends that the First and Second Issues affect the fair conduct of the proceedings, as they raise the question whether an accused holding certain official functions may be excused from continuous presence at the trial, while others are not.⁷ The Prosecution notes that Mr Sang 'would not be entitled to the same treatment under the law'.⁸ It submits that the Majority examined the matter in light of the Chamber's duty to ensure that the trial is fair, which, in the view of the Prosecution, demonstrates that the both issues go to the heart of the fairness of the proceedings.⁹

² ICC-01/09-01/11-783, para. 4.

³ ICC-01/09-01/11-783, para. 6, citing to ICC-01/09-01/11-777, paras 49, 104.

⁴ ICC-01/09-01/11-783, para. 7, citing to ICC-01/09-01/11-777, paras 43, 71, 75.

⁵ ICC-01/09-01/11-783, para. 8, citing to ICC-01/09-01/11-777, para. 3(a).

⁶ ICC-01/09-01/11-783, para. 9, citing to ICC-01/09-01/11-777, paras 3(b), 49-50, 53.

⁷ ICC-01/09-01/11-783, para. 11.

⁸ ICC-01/09-01/11-783, para. 11.

⁹ ICC-01/09-01/11-783, para. 12.

The Prosecution contends that the duty of one party translates into a corresponding right of the other, and that a violation of this right of the Prosecution and the victims affects the fairness of the proceedings. As an example it refers to situations where the Prosecution may want to identify the accused through a witness.¹⁰

5. The Prosecution further argues that there is a risk that the entire trial proceedings may be nullified should the Appeals Chamber find that the presence of the accused during ‘the bulk of the trial’ is a non-derogable legal requirement.¹¹ The Prosecution submits that repeating the proceedings affects the expeditiousness because it would significantly delay the overall determination of responsibility of Mr Ruto.¹² Additionally, the Prosecution submits that the expeditious conduct of the proceedings may be affected due to procedural steps taken in the situations that the Prosecution will argue that the physical presence of the accused is required and that litigation related to such presence will delay the proceedings.¹³ Finally, the Prosecution submits that, for the same reasons, a resolution of the First and Second Issues by the Appeals Chamber will materially advance the proceedings and avert any future risks to the efficiency and integrity of the proceedings.¹⁴ The Prosecution also argues that the question of the presence of the accused at trial is a live issue in the on-going cases of the *Prosecutor v. Uhuru Muigai Kenyatta* and the *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*.¹⁵

¹⁰ ICC-01/09-01/11-783, para. 13.

¹¹ ICC-01/09-01/11-783, paras 14 and 16.

¹² ICC-01/09-01/11-783, paras 13-14 and 16.

¹³ ICC-01/09-01/11-783, para. 16.

¹⁴ ICC-01/09-01/11-783, paras 16-18.

¹⁵ ICC-01/09-01/11-783, para. 19.

6. On 27 June 2013, the Ruto Defence filed a response to the Leave Application, requesting the Chamber to reject it (the 'Defence Response').¹⁶

7. The Ruto Defence contends that the Prosecution failed to identify any appealable issues, as the First and Second Issues do not arise from the Impugned Decision. It submits that the Majority found that the default position is that the accused must be continuously present at trial and, as such, the scope of the requirement that the accused be present during trial (part of the First Issue) does not thus raise any point in dispute between the Prosecution and the Majority.¹⁷ The Ruto Defence argues that the Prosecution merely has a contrary view to that of the Majority with respect to the Chamber's discretionary power to grant Mr Ruto's request for an excusal from continuous presence at trial.¹⁸ With respect to the Second Issue, the Ruto Defence observes that the question identified by the Prosecution of whether an individual holding official functions may be excused from continuous presence at trial is not the issue which the Prosecution actually seeks to appeal, as the Majority's test is framed by reference to 'exceptional circumstances', rather than an official position.¹⁹

8. The Ruto Defence submits that the Prosecution does not put forward that the fairness and expeditiousness would be 'significantly' affected by the two issues.²⁰ The Ruto Defence argues that the general statement in the Impugned Decision that the matter before the Chamber raises issues of fairness does not automatically mean that the two Issues affect the fairness of the proceedings.²¹ It contends that in situations where proceedings are conducted in the absence of the accused the central issue is whether it

¹⁶ Defence Response to the "Prosecution's Application for Leave to Appeal the 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial'", ICC-01/09-01/11-788.

¹⁷ ICC-01/09-01/11-788, paras 4-5.

¹⁸ ICC-01/09-01/11-788, para. 6.

¹⁹ ICC-01/09-01/11-788, para. 7.

²⁰ ICC-01/09-01/11-788, para. 8.

²¹ ICC-01/09-01/11-788, para. 12.

is fair to the accused to continue trial in his or her absence and that no enquiry is made regarding the rights of the prosecution or the victims.²² The Ruto Defence observes that the Prosecution's submissions are inaccurate in some aspects, as Mr Ruto is not excused from attending 'the totality of the evidentiary phase of the trial'.²³ As regards the unfairness which, according to the Prosecution, may arise in relation to a dock identification of the accused, the Ruto Defence submits that it is within the Chamber's power to direct Mr Ruto to attend court if an issue of identification were to arise and that the Ruto Defence undertook that it would not challenge the validity of dock identification.²⁴

9. With reference to the Prosecution's assertion that the First and Second Issues are likely to be raised as part of an appeal against a decision of acquittal or conviction, the Ruto Defence submits that Mr Ruto is precluded from raising on appeal any natural consequence of his own voluntary absence from the courtroom and that, as far as the Prosecution's appeal is concerned, it is difficult to identify what this theoretical appeal point might be.²⁵ The Ruto Defence submits that the Prosecution's argument that the Impugned Decision may cause delays in the proceedings is speculative and unfounded, as the decision provides that Mr Ruto will be required to attend any hearing if so directed by the Chamber.²⁶

10. As regards the Prosecution's argument that an immediate resolution of First and Second Issues by the Appeals Chamber will materially advance the proceedings, the Ruto Defence contends that the Impugned Decision 'will in reality have little effect on the trial' and that the Prosecution does not articulate why the permitted absence of Mr

²² ICC-01/09-01/11-788, para. 13.

²³ ICC-01/09-01/11-788, para. 14.

²⁴ ICC-01/09-01/11-788, para. 15.

²⁵ ICC-01/09-01/11-788, para. 16.

²⁶ ICC-01/09-01/11-788, para. 17.

Ruto will have such an effect on the proceedings that they may later be nullified.²⁷ The Ruto Defence observes that the Prosecution's submissions concerning the possible implications of the Impugned Decision for other cases are irrelevant and are made in disregard of the established jurisprudence.²⁸

11. The Defence for Mr Joshua Arap Sang did not file any submission.

II. ANALYSIS OF THE LEGAL FRAMEWORK

12. The mere dispute over the correctness of a Chamber's reasoning does not constitute sufficient reason to be granted leave to appeal an interlocutory decision.²⁹ The party seeking leave to appeal must identify a specific 'issue' which has been dealt with in the relevant decision and which constitutes the appealable subject.³⁰

13. The Appeals Chamber has held that '[a]n issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one.'³¹

²⁷ ICC-01/09-01/11-788, paras 19-20.

²⁸ ICC-01/09-01/11-788, para. 21.

²⁹ *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, which states that '[o]nly an 'issue' may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is a disagreement or conflicting opinion [...]'. The Appeals Chamber's reasoning in this regard is consistent with the jurisprudence of the *ad hoc* tribunals on this issue. See ICTY, Trial Chamber, *Prosecutor v. Karadžić*; Decision on Accused's Application for Certification to Appeal Denial of Motion for Judgement of Acquittal Under Rule 98 Bis, 18 July 2012, IT-95-5/18-T, para. 6 (further citations therein); ICTR, Trial Chamber III, *Prosecutor v. Nzabonimana*, Decision on Defence Motion for Leave to Appeal the Trial Chamber's Decision on the Defence Request to Call Prosecution Investigators, 10 May 2011, ICTR-98-44D-T, para. 12 (further citations therein); ICTR, Trial Chamber II, *Prosecutor v. Bizimungu et al.*, Decision on Casimir Bizimungu's Request for Certification to Appeal the Decision on Casimir Bizimungu's Motion in Reconsideration of the Trial Chamber's Decision dated February 8, 2007, in Relation to Condition (B) Requested by the United States Government, 22 May 2007, ICTR-99-50-T, para. 7; ICTY, Trial Chamber, *Prosecutor v. Slobodan Milosević*, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding, 20 June 2005, IT-02-54-T, paras 3-5.

³⁰ ICC-01/04-168, para. 9.

³¹ ICC-01/04-168, para. 9.

14. When examining the Leave Application, the Chamber regard to the following cumulative³² criteria:

- a) Whether the matter is an ‘appealable issue’;
- b) Whether going forward with the trial on the basis of the Chamber’s determination of the Issues as set out in the Impugned Decision would, if the Appeals Chamber were at a later stage to disagree with the Chamber’s determination, significantly affect:
 - i. the fair and expeditious conduct of the proceedings; or
 - ii. the outcome of the trial; and
- c) Whether, in the opinion of the Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

15. The requirement of fairness is closely linked to the concepts of ‘equality of arms’ or balance between the parties during the proceedings.³³ As such, this requirement can also operate to the benefit of the Prosecution.³⁴

16. As previously held by the Trial Chamber III, it 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 Further, it is

³² *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the prosecution and defence applications for leave to appeal the “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 26 January 2011, ICC-01/05-01/08-1169, para. 23; and Decision on the joint defence request for leave to appeal the decision on witness preparation, 11 February 2013, ICC-01/09-01/11-596, paras 4-6.

³³ *Situation in Uganda*, Decision on Prosecutor’s application for leave to appeal in part Pre-Trial Chamber II’s decision on the Prosecutor’s applications for warrants of arrest under Article 58, 19 August 2005, ICC-02/04-01/05-20-US-Exp, para. 30; *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor’s Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 18 September 2009, ICC-01/05-01/08-532, para. 18.

³⁴ ICC-02/04-01/05-20-US-Exp, para. 31; ICC-01/05-01/08-532, para. 18.

³⁵ ICC-01/05-01/08-1169, para. 25. See also ICC-02/04-01/05-20-US-Exp, para. 21; *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191, para. 11.

insufficient that an appeal may be legitimate or even necessary at some future stage, as opposed to requiring immediate resolution by the Appeals Chamber in order to materially advance the proceedings.³⁶ However, as held by the Appeals Chamber, ‘the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue. By the plain terms of article 82 (1) (d) of the Statute, a Pre-Trial or Trial Chamber may certify such a decision on its own accord’.³⁷ The Chamber in its determination whether leave to appeal should be granted is thus not limited to the arguments put forward by the party seeking leave.

III. ANALYSIS OF THE ISSUES AND CONCLUSION

17. The Chamber must first determine whether the First and Second Issues are ‘appealable issues’ within the meaning of the jurisprudence of the Court. The Impugned Decision acknowledges that the accused has a duty to be present and that in exceptional circumstances the Chamber may exercise its discretion to excuse the accused from continuous presence at trial.³⁸ The outcome of the decision, whereby Mr Ruto is excused, under certain conditions, from continuous presence at trial at times other than the listed hearings, is largely based on the Majority’s findings on that discretion.³⁹ The Chamber therefore accepts that the issue of the scope of the requirement of presence and the Chamber’s discretionary power to excuse an accused from attending most of the trial arises from the Impugned Decision. It does not agree with the argument of the Ruto Defence that the scope of the required presence does not raise any point in dispute between the Prosecution and the Majority⁴⁰ and considers that the Prosecution’s submissions do not merely reflect a disagreement with the Majority’s

³⁶ ICC-01/05-01/08-1169, para. 25.

³⁷ ICC-01/04-168, para. 20.

³⁸ ICC-01/09-01/11-777, para. 49.

³⁹ ICC-01/09-01/11-777, para. 104(a)-(b).

⁴⁰ ICC-01/09-01/11-788, para. 5.

decision. As the Prosecution appears to link the scope of the requirement with the issue of the Chamber's discretion, this is an issue that requires determination.

18. The Second Issue concerns the test for the excusal from continuous presence at trial developed by the Majority, which is based on exceptional circumstances, which in the present case relate to the important tasks arising from the official function that Mr Ruto holds.⁴¹ While the Ruto Defence is correct in arguing that the test is not framed by reference to an accused's official position, the functions which Mr Ruto performs were considered by the Majority when assessing whether the requirements of the test were met in the specific circumstances of Mr Ruto and therefore the Second Issue identified by the Prosecution arises from the Impugned Decision.
19. The Chamber is therefore satisfied that the First and Second Issues are appealable issues within the meaning of Article 82(1)(d) of the Statute.
20. The Chamber now turns to the second criterion: whether the issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.
21. The Prosecution's has phrased its second line of argumentation along the alleged consequences for the expeditious conduct of the proceedings. However, as part of its arguments the Prosecution focusses on the 'risk that the entire trial proceedings are nullified and must be repeated if the Appeals Chamber finds that the presence of the accused during the bulk of the trial is a non-derogable legal requirement under the Statute'.⁴² This submission conflates the two prongs of the first part of Article 82(1)(d) of the Statute as the argument combines i) 'a risk that the entire trial proceedings are

⁴¹ ICC-01/09-01/11-777, paras 49-50.

⁴² ICC-01/09-01/11-783, paras 15-18.

nullified',⁴³ which clearly would significantly impact on the outcome of the trial, and ii) the subsequent effect on the expeditious conduct of the proceedings because 'the entire trial proceedings [...] must be repeated'.⁴⁴ Given that the alleged risk of nullification of the entire trial proceedings is the most far-reaching – and thus most – 'significant', consequence raised by the Prosecution and because the requirements of Article 82(1)(d) of the Statute are phrased in the alternative, the Chamber will first explore the affect the First and Second Issues may have on the outcome of the trial.

22. The 'outcome of the trial' on the trial level can only be a judgment (pursuant to Article 74 of the Statute) in which an accused is found individually criminally responsible for all or parts of the counts as confirmed, or not to be, i.e. a pronouncement of guilt or an acquittal. However, during the subsequent appeals proceedings, the Statute provides the Appeals Chamber with other options in which it can 'significantly affect' the outcome of the trial proceedings, including the repetition of (certain parts of) the trial proceedings as envisaged by the Prosecution.⁴⁵ Consequently, the First and Second Issues may indeed significantly affect the outcome of the trial.⁴⁶ If the Appeals Chamber during appeals proceedings pursuant to Article 81 of the Statute, if applicable, 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.

⁴³ ICC-01/09-01/11-783, para. 15.

⁴⁴ ICC-01/09-01/11-783, para. 15.

⁴⁵ Article 83 of the Statute lists that the Appeals Chamber, besides reversing or amending the decision, may order a new trial before a different Trial Chamber or remand a factual issue back to the original Trial Chamber.

⁴⁶ The Appeals Chamber held that the outcome of the trial warrants review of a decision by the Appeals Chamber "where the possibility of error in an interlocutory or intermediate decision may have a bearing thereupon. The [...] Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence." ICC-01/04-168, para. 13.

23. Moreover, 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 the trial proceedings and therefore on its expeditiousness. The Appeals Chamber's jurisprudence indicates that 'expeditiousness is an important component of a fair trial'⁴⁷ and that '[t]he expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial'.⁴⁸ Not every delay in the proceedings would impact on the fairness and both components of the first prong of Article 82(1)(d) need to be met independently. Indeed, in order to guarantee a fair trial, it may be necessary to allow for delays in the proceedings, as was done in the present case when the defence was given additional time to prepare for trial,⁴⁹ without these consequences on the expeditiousness having an effect on the fairness of the proceedings. However, the delay contemplated in the Leave Application is so extensive that this would ultimately also affect the fairness of proceedings – especially when considering that this delay could be prevented by a review of the Impugned Decision by the Appeals Chamber.
24. In addition, the fairness of the proceedings in its own merits would be affected by the uncertainty that the parties are be faced with, pending final resolution of the matter by the Appeals Chamber, during the trial proceedings and the drafting of their closing briefs and arguments, when the contention whether the evidence adduced during

⁴⁷ *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011, ICC-01/05-01/08-1386, para 55.

⁴⁸ ICC-01/04-168, para. 11; see also *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution and Defence application for leave to appeal the Decision on the confirmation of charges, 24 May 2007, ICC-01/04-01/06-915, para. 24, in which Pre-Trial Chamber I adds to Appeals Chamber's wording that the proceedings in a particular case should be evaluated "as a whole". The inclusion of expeditiousness as a component of fair trial is consistent with international human rights law (see the provisions quoted by the Appeals Chamber in ICC-01/04-168, para. 11, accompanying footnote 13) and the right to be tried without undue delay is laid down in Article 67(1)(c) of the Statute.

⁴⁹ Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date, 3 June 2013, ICC-01/09-01/11-762.

sessions that Mr Ruto was not present in the courtroom can be relied on, or would be in need of repetition in the future, remains.

25. For these reasons, the majority of the Chamber is satisfied that the resolution of the two Issues in the Impugned Decision during appeals proceedings has the potential to significantly affect the outcome of the trial as well as the fair and expeditious conduct of the proceedings and that therefore an immediate resolution by the Appeals Chamber may materially advance the proceedings.

FOR THE FOREGOING REASONS, THE CHAMBER, by majority, Judge Eboe-Osuji dissenting, HEREBY

GRANTS leave to the Prosecution to appeal the Impugned Decision on the First and Second Issue.


Judge Eboe-Osuji appends a dissenting opinion.

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

Judge Chile Eboe-Osuji
(Presiding)



Judge Olga Herrera Carbuccia



Judge Robert Fremr

Dated 18 July 2013

At The Hague, The Netherlands

No. ICC-01/09-01/11

14/14

18 July 2013