

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/09-01/11
Date: 24 September 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 Ruto Defence's Application for Leave to Appeal the 'Decision on the Prosecution's Request to Add New Witnesses to its List of Witnesses'

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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**Victims Participation and Reparations
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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 its Decision on Ruto Defence’s Application for Leave to Appeal the ‘Decision on the Prosecution’s Request to Add New Witnesses to its List of Witnesses’.

I. BACKGROUND AND SUBMISSIONS

1. On 3 September 2013, the Chamber issued the ‘Decision on the Prosecution’s Request to Add New Witnesses to its List of Witnesses’ (the ‘Impugned Decision’),¹ in which it granted two separate requests of the Office of the Prosecutor (the ‘Prosecution’) to add a person to the Prosecution’s list of witnesses.
2. The next day, the defence team for Mr Ruto (the ‘Ruto Defence’) filed the ‘Defence Application for Leave to Appeal the “Decision on the Prosecution’s Requests to Add New Witnesses to its List of Witnesses” and Request for: (1) Adjournment Following the Opening of Trial Proceedings and (2) Variation of time limits pursuant to Regulation 35 of the Regulations of the Court’ (the ‘Application’).²
3. Besides the application for leave to appeal, which will be dealt with in detail below, the Ruto Defence made two further requests in the Application. The second of these requests, the request for variation of time limits, became moot by the Chamber’s shortening of deadlines for responses to the Application and order requiring the parties to make their responses orally during the 9 September 2013 status conference.³

¹ ICC-01/09-01/11-899.

² ICC-01/09-01/11-905-Conf.

³ Order regarding Responses to the Ruto Defence Request for Leave to Appeal the “Decision on the Prosecution’s Requests to Add New Witnesses to its List of Witnesses” and related Requests, 5 September 2013, ICC-01/09-01/11-906.

4. On 9 September 2013, during the status conference, the Chamber issued an oral decision on the adjournment request included in the Application, rejecting it.⁴ During the aforementioned status conference, the Chamber also announced that a decision on the remaining relief requested in the Application, i.e. the application for leave to appeal, would be issued in due course.⁵ The current decision therefore only deals with the application for leave to appeal the Chamber's decision to authorise the Prosecution to add two persons to its witness list.

The Application

5. In the Application, the Ruto Defence seeks leave to appeal the Impugned Decision in relation to the following two issues:
- (i) 'Whether the Trial Chamber erred in authorising the addition of the two witnesses to the Prosecution's list of witnesses by failing to assess whether:
 - (a) any replacement for the evidence of former Witness 534 is required; and
 - (b) the evidence of Witnesses P-604 and P-613 actually replaces the evidence that would have been given by former Witness P-534' (the 'First Issue');
 - (ii) 'Whether the Trial Chamber erred in holding that defence investigations into the credibility of witnesses "do not necessarily need to take place prior to the commencement of trial" by not first considering whether the Defence has a right to undertake such investigations prior to the commencement of trial pursuant to Article 67(1)(b) of the Rome Statute and if so, the circumstances under which this right may be abridged' (the 'Second Issue').⁶
6. The Ruto Defence submits that both issues arise from the Impugned Decision.⁷ As to the First Issue, it submits that in granting the addition of P-604 and P-613 to the

⁴ Transcript of hearing on 9 September 2013, ICC-01/09-01/11-T-26-CONF-ENG ET, page 52, lines 17-25.

⁵ ICC-01/09-01/11-T-26-CONF-ENG ET, page 50, lines 21-22.

⁶ Application, ICC-01/09-01/11-905-Conf, para. 17.

⁷ Application, ICC-01/09-01/11-905-Conf, paras 21-22.

Prosecution's witness list, the Chamber 'did not consider, nor state that it needed to consider [...] whether (a) any replacement for the evidence of former Witness 534 is *actually required vis-à-vis* the Prosecution's core case; and (b) the evidence of witnesses P-604 and P-613 *actually replaces* the evidence that would have been given by former Witness P-534'.⁸ It submits that '[t]he Chamber simply accepted that this was the case without providing any explanation or reasoning thereof'.⁹ The Ruto Defence contends that it submitted in its responses that no replacement evidence for Witness 534 was necessary and had pointed to the Pre-Trial Brief in this regard, and that it had submitted that the Prosecution has failed to substantiate that the evidence expected to be given by P-604 and P-613 could indeed be considered as a replacement of the evidence that Witness 534 had been expected to give.¹⁰ According to the Ruto Defence, the First Issue is not merely a question over which there is disagreement or a conflicting opinion, but rather 'goes to the heart of the legal criteria that a Trial Chamber must evaluate when considering whether to allow the addition of witnesses to the Prosecution's List of Witnesses after the final disclosure deadline and whether the Trial Chamber must provide its reasoning for each criteria regarding whether the requirement has been met'.¹¹

7. As to the Second Issue, the Ruto Defence submits that the Chamber incorrectly interpreted the right of the accused under Article 67(1)(b) of the Statute, when it found that investigations into the credibility of the new witnesses do not necessarily need to take place prior to the commencement of trial, and that the calling of the new witnesses towards the end of the Prosecution's case would leave sufficient time to carry out such investigations.¹² The Ruto Defence contends that carrying out investigations into the credibility of a witness is 'a fundamental right that an accused

⁸ Application, ICC-01/09-01/11-905-Conf, para. 19 (emphasis in original).

⁹ Application, ICC-01/09-01/11-905-Conf, para. 19.

¹⁰ Application, ICC-01/09-01/11-905-Conf, para. 20.

¹¹ Application, ICC-01/09-01/11-905-Conf, para. 21.

¹² Application, ICC-01/09-01/11-905-Conf, para. 23.

person must be placed in a position to exercise prior to the commencement of trial [...] and which may only be impinged upon in limited circumstances'.¹³

8. The Ruto Defence submits that the First and Second Issues significantly affect the fair and expeditious conduct of proceedings, because they concern disclosure and the rights of the accused pursuant to Article 67(1)(b) of the Statute. It argues that if the Chamber 'wrongly decided the First and Second Issues the impingement of Mr. Ruto's rights may therefore be "undue" and accordingly the fairness of the proceedings may be significantly affected'.¹⁴ Furthermore, it argues that the Chamber's finding that the Defence will have sufficient time to carry out investigations into these witnesses during the proceedings, does not address the Defence's inability to incorporate any relevant information arising out of these investigations into the opening statements or put such information to the prosecution witnesses that will be called prior to the conclusion of the Defence's investigations.¹⁵ In addition, the Ruto Defence avers that the effect on the fairness of the proceedings will be compounded by future requests by the Prosecution to replace other witnesses, which the Ruto Defence presumes the Prosecution will file 'on the basis of the test set out' by the Chamber.¹⁶
9. The Ruto Defence also submits that the expeditiousness of proceedings may be significantly affected, because if the Impugned Decision would be quashed, the 'valuable time' of the Chamber, parties and participants in the examination and cross-examination of these witnesses and the putting of additional questions to other witnesses, 'will have been unnecessarily and improperly engaged'. It adds that any recalling of witnesses required as a result of the Defence's investigations into P-604 and P-613 not having been completed prior to the commencement of trial, as well as

¹³ Application, ICC-01/09-01/11-905-Conf, para. 23.

¹⁴ Application, ICC-01/09-01/11-905-Conf, paras 26-27.

¹⁵ Application, ICC-01/09-01/11-905-Conf, para. 28.

¹⁶ Application, ICC-01/09-01/11-905-Conf, para. 29.

the further addition of 'replacement witnesses', would further impact on the expeditiousness of the proceedings.¹⁷

10. The Ruto Defence contends that an immediate resolution of the two issues by the Appeals Chamber will materially advance the proceedings as the 'doubt over the correctness of the decision [...] casts a cloud over the entirety of the proceedings'.¹⁸ It further submits that should the Chamber allow the replacement of other witnesses following future requests by the Prosecution to add new witnesses, there is a 'very real danger' that the Defence would face a case that is substantially different from the one it was facing 'prior to the issuance of the Impugned Decision', in which case 'doubts as to whether Mr. Ruto's Article 67(1)(a) and (b) rights have been fully respected will be so deep as to erode all credibility in these proceedings'.¹⁹

Responses to the Application

11. The Prosecution responded orally to the Application on 9 September 2013, opposing the application for leave to appeal. It averred that the First and Second Issues do not arise out of the Impugned Decision, and that these issues do not meet the criteria set out in Article 82(1)(d) of the Statute.²⁰ It submitted that the First Issue is based on the flawed assumption that because the Chamber did not explicitly state that it assessed whether a replacement of the evidence of former Witness 534 was necessary and whether the evidence that would be provided by P-604 and P-613 in fact replaces it, does not mean that the Chamber did not consider whether this was the case. According to the Prosecution, the First Issue is based 'entirely on a misrepresentation

¹⁷ Application, ICC-01/09-01/11-905-Conf, para. 31.

¹⁸ Application, ICC-01/09-01/11-905-Conf, para. 33.

¹⁹ Application, ICC-01/09-01/11-905-Conf, para. 34.

²⁰ ICC-01/09-01/11-T-26-CONF-ENG ET, page 13, lines 1-3.

and misinterpretation' of the Impugned Decision and should be rejected for this reason alone.²¹

12. As to the Second Issue, the Prosecution submitted that it is based on the incorrect assumption that the Chamber did not consider whether the Defence has a right to undertake investigations into the credibility of witnesses prior to the commencement of trial. It pointed to two paragraphs of the Impugned Decision in which the Chamber discussed the right of the accused to have adequate time and facilities for the preparation of his defence, and the possible prejudice to the Defence.²² The Prosecution concluded that 'what the Defence attempts to present as an issue amounts to nothing more than a disagreement with the conclusions of the Chamber in this regard' and that the Second Issue should therefore be rejected.²³
13. The Prosecution added that the First and Second Issues do not significantly impact on the fairness of the proceedings as the Chamber considered the potential prejudice and has taken adequate measures to mitigate any prejudice that may be suffered by the Defence.²⁴ It further contended that the Ruto Defence speculates as to the possibility of further witnesses being added, but that this does not affect the fairness of the Impugned Decision.²⁵ In addition, the Prosecution submitted that the replacement of witnesses does not significantly affect the expeditious conduct of the proceedings, or outcome.²⁶
14. The defence team for Mr Sang (the 'Sang Defence') expressed its support for the Application on 9 September 2013. It argued that if the Chamber analysed whether the

²¹ ICC-01/09-01/11-T-26-CONF-ENG ET, page 14, lines 13-15.

²² ICC-01/09-01/11-T-26-CONF-ENG ET, page 14, lines 20-25 ; page 15, lines 1-3.

²³ ICC-01/09-01/11-T-26-CONF-ENG ET, page 15, lines 4-10.

²⁴ ICC-01/09-01/11-T-26-CONF-ENG ET, page 15, line 11 and further; page 16, lines 1-4.

²⁵ ICC-01/09-01/11-T-26-CONF-ENG ET, page 16, line 14.

²⁶ ICC-01/09-01/11-T-26-CONF-ENG ET, page 16, lines 18-23.

new witness was a real replacement, this should be obvious and manifest from the Impugned Decision.²⁷ It further submitted that the replacement of witnesses affects the fairness of proceedings as it is likely the question will arise again and it therefore would welcome clarification of the law on this matter.²⁸

15. The Sang Defence averred that it will have to allocate time and resources into investigating the new witnesses, which 'would affect the expeditious trial on the part of the Defence'.²⁹

16. The Common Legal Representative of Victims responded to the Application on 9 September 2013, submitting that there is no requirement for the Chamber to expressly make a determination as to the replacement of the evidence of one witness by another, and that the Chamber's decision to grant the Prosecution's requests necessarily implies that it considered that the new evidence would replace that of the former witness.³⁰ It further submitted that the Impugned Decision was in line with the fundamental principle that allows the parties to decide on the witnesses and evidence they wish to call.³¹

II. ANALYSIS OF THE LEGAL FRAMEWORK

17. Merely disputing the correctness of a Chamber's reasoning does not constitute sufficient reason to be granted leave to appeal an interlocutory decision.³² The party

²⁷ ICC-01/09-01/11-T-26-CONF-ENG ET, page 20, lines 20-24.

²⁸ ICC-01/09-01/11-T-26-CONF-ENG ET, page 20, line 25; page 21, lines 1-4

²⁹ ICC-01/09-01/11-T-26-CONF-ENG ET, page 21, lines 5-8.

³⁰ ICC-01/09-01/11-T-26-CONF-ENG ET, page 22, line 3 and further

³¹ ICC-01/09-01/11-T-26-CONF-ENG ET, page 22, lines 15-19.

³² *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

seeking leave to appeal must identify a specific ‘issue’ which has been dealt with in the relevant decision and which constitutes the appealable subject.³³ The Appeals Chamber has held that such ‘[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.’³⁴

18. When examining the Application, in respect of the request for leave to appeal, the Chamber has regard to the following cumulative³⁵ 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.

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.

³³ ICC-01/04-168, para. 9.

³⁴ ICC-01/04-168, para. 9.

³⁵ *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.

19. The significance of this third criterion requires underscoring. It makes the “opinion of the Chamber” about the efficiency of the appeal, in the particular circumstances, the ultimate factor in the granting of leave to appeal, regardless of the merits of the two earlier criteria.
20. As previously held by 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.³⁶ Further, it is 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.³⁷ 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’.³⁸ In its determination whether leave to appeal should be granted, the Chamber is thus not limited to the arguments put forward by the party seeking leave.

III. ANALYSIS OF THE ISSUES AND CONCLUSION

21. The Chamber will first determine whether the matters the Defence seeks to appeal are ‘appealable issues’ within the meaning of the jurisprudence of the Court. The Ruto Defence has formulated two issues for appeal. The Chamber considers that the First Issue is no more than a repetition of the submissions made as part of the litigation that preceded the Impugned Decision. These submissions relate to two questions, the

³⁶ 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.

³⁷ ICC-01/05-01/08-1169, para. 25.

³⁸ ICC-01/04-168, para. 20.

answers to which, in the Ruto Defence's view, should have guided the Chamber in analysing the Prosecution's requests.

22. The Ruto Defence contends that the framework of questions it proposed consist of 'legal criteria' that 'must' be evaluated by the Chamber 'when considering whether to allow the addition of witnesses to the Prosecution's List of Witnesses after the final disclosure deadline'.³⁹ Furthermore, the Ruto Defence avers that the Chamber 'must provide its reasoning for each criteria regarding whether the requirement has been met'.⁴⁰
23. As to the first question that the Ruto Defence argues the Chamber failed to assess, it should have been clear to the Ruto Defence that in granting the Prosecution's requests to be allowed to replace the evidence initially expected to be given by former Witness 534, the Chamber acknowledged the relevance of the evidence for the Prosecution's case. Whether or not the Chamber was *required* to do so, is thus of no relevance. As such, the alleged failure to assess the first question does not arise out of the Impugned Decision.
24. As to the second question the Ruto Defence puts forward as 'legal criterion', the Ruto Defence fails to recognise that the Chamber in the Impugned Decision considered the need for additional investigations regarding the subject matter of P-604 and P-613's anticipated testimonies 'in light of the particular circumstances' of the requested replacement of former Witness 534 by P-604 and P-613.⁴¹ Furthermore, the Prosecution set out in its requests how P-604 and P-613's expected evidence would serve to replace that of former Witness 534, and it provided the Chamber with the witness statements of both persons. The fact that the Defence itself was not able to make such an

³⁹ Application, ICC-01/09-01/11-905-Conf, para. 21.

⁴⁰ Application, ICC-01/09-01/11-905-Conf, para. 21.

⁴¹ See Impugned Decision, ICC-01/09-01/11-899, para. 19.

assessment, as much of the information provided to the Chamber was redacted from the Defence, does not justify the Ruto Defence's assertion that the Chamber did not consider whether the expected evidence could indeed serve as a replacement; nor does the Chamber's decision not to make specific reference to parts of the expected testimony, of which significant portions at the time were still redacted from the Defence.

25. Moreover, in its responses, the Ruto Defence provided no reasoning, or any references to law or jurisprudence, why the Chamber would be under an obligation to follow the 'criteria' or 'requirements' put forward. Also in the Application, the Ruto Defence does not provide any legal basis why the Chamber should have considered the requests along the proposed framework. Without any reasoning why the Chamber erred, this issue can be no reason to appeal the Impugned Decision. In fact, the alleged 'failure to assess' the requests along the proposed framework is no more than the Ruto Defence mere disagreement with the Chamber's exercise of discretion.
26. In any event, considering that the Ruto Defence argument in this regard involves concerns about the possibility of duplication of Prosecution witnesses as to the facts to which the concerned witnesses may testify, the Defence misunderstands the legal signification of the Chamber's exercise of power to avoid possible duplication in the anticipated testimonies of witnesses to be called in a case. The exercise of the Chamber's power in that regard entails a discretion on the part of the Chamber, for purposes of efficient trial management. It entails no obligation on the Chamber as an incident of a right in the opposing party. Hence, no issue arises for appeal in that regard.
27. The aforementioned considerations make it very clear that the Defence's First Issue does not form an appealable issue.

28. The Ruto Defence's Second Issue is framed as an alleged failure by the Chamber to properly consider the rights of the accused under Article 67(1)(b) of the Statute by not granting the requested time for investigations prior to the commencement of trial. In responding to the Prosecution's requests to add new witnesses, the Ruto Defence argued that it should be granted an adjournment of three months. The Chamber considered the request for adjournment and determined that no adjournment was necessary as the Defence would have sufficient time during the Prosecution case, prior to the testimony of the new witnesses, to carry out additional investigations, which the Chamber considered to be only of limited nature. However, in setting out the Second Issue, the Defence fails to acknowledge that the Chamber in the Impugned Decision did consider the rights of the accused under Article 67(1)(b) and set out why the Chamber considered that the accused would have adequate time and facilities for the preparation of the defence and that therefore this right was not negatively affected by the Chamber's decision to allow the addition of the two new witnesses.⁴² The Chamber notes that it had exceptionally taken into account certain Prosecution *ex parte* submissions and materials (classified *ex parte* for purposes of witness protection). In the circumstances, the Chamber had satisfied itself that the information revealed in the *ex parte* submissions and filings do not reveal a need for extensive further investigations by the Defence, in light of disclosures already made in the case. The Chamber ordered the Prosecution to notify the *ex parte* information to the Defence by 9 September 2013, so that the Defence would be in a position to better understand the Chamber's decision.⁴³ At the time of filing the application for leave to appeal, the Ruto Defence was thus not able to appreciate the complete Chamber's reasoning, it should be able to do so now that it has received the *ex parte* versions of the requests.

⁴² See Impugned Decision, ICC-01/09-01/11-899, paras 17-19.

⁴³ Impugned Decision, ICC-01/09-01/11-899, para. 28.

29. The Ruto Defence does not put forward any other arguments why the Second Issue arises from the Impugned Decision. What is more, the majority of the submissions on the Second Issue made in the Application were in fact not previously made during the litigation.
30. Given the Chamber's conclusion that the First and Second Issues do not constitute appealable issues, the Chamber need not consider the cumulative second and third criteria for leave to appeal, but it considers it nevertheless relevant to make to following observations.
31. The Ruto Defence has stressed the 'unique circumstances of this case where the defence will vigorously challenge the credibility of and examine in-depth the connections between Prosecution witnesses',⁴⁴ but it fails to explain why this is any different from other cases before this Court, or other international criminal cases, so as to warrant special consideration in the assessment of any impact on the fairness and expeditiousness of the proceedings and/or outcome of the trial.
32. The Ruto Defence's submissions as to why the First and Second Issues would significantly affect the fair and expeditious outcome of the proceedings rely, in large part, on the possible impact on the fairness of the proceedings by the potential granting of possible future requests for additions of other new witnesses. Besides the fact that no requests for addition of witnesses are currently pending, the Chamber recalls that it previously held in its 3 June 2013 Decision that any requests to add new persons to the witness list will be considered on a case-by-case basis, taking into account the circumstances at the time.⁴⁵

⁴⁴ Application, ICC-01/09-01/11-905-Conf, para. 7.

⁴⁵ ICC-01/09-01/11-762, para. 38.

33. Furthermore, the alleged significant effect on the expeditiousness of the proceedings due to the extra time needed for the testimony of two new witnesses clashes with the amount of adjournment time the Ruto Defence requested. In the face of alleged prejudice so significant that appellate intervention is warranted, the Ruto Defence indicates that an adjournment of only four weeks ‘will properly balance the legitimate interests of the Defence with the Trial Chamber’s trial management duties responsibility to ensure efficient proceedings’.⁴⁶ Such a request calls into question whether the immediate resolution by the Appeals Chamber would materially advance the proceedings, irrespective of the fact that the adjournment request was rejected. By jointly requesting an adjournment of four weeks, the Ruto Defence undercuts its own arguments as to the need for immediate resolution by the Appeals Chamber.
34. As to the need for the immediate resolution by the Appeals Chamber, the Chamber further considers that the use of the wording ‘in the opinion of the Chamber’ in the third criterion of Article 82(1)(d), as listed in the above section analysing of the legal framework,⁴⁷ makes clear that the assessment of whether an immediate resolution by the Appeals Chamber may be considered to materially advance the proceedings, is for the Chamber to make. However, the Ruto Defence’s submissions about doubts over the correctness of the decision casting a cloud over the entirety of the proceedings⁴⁸ and the credibility of the proceedings⁴⁹ appear to represent solely its own view. The Ruto Defence does not present the Chamber with any arguments on the basis of which the Chamber could conclude that the doubts it alleges would in fact arise. In the current circumstances, the Chamber does not itself see any reason why immediate resolution of the matter would materially advance the current proceedings.

⁴⁶ Application, ICC-01/09-01/11-905-Conf, para. 37.

⁴⁷ See para. 18 above.

⁴⁸ Application, ICC-01/09-01/11-905-Conf, para. 33.

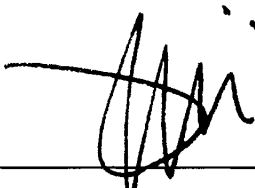
⁴⁹ Application, ICC-01/09-01/11-905-Conf, para. 34.

35. For the foregoing reasons, the Chamber rejects the application for leave to appeal the Decision on the Prosecution's Requests to Add New Witnesses to its List of Witnesses.

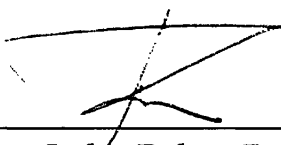
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Ruto Defence's request for leave to appeal the Impugned Decision on the First and Second Issue.

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



Judge Chile Eboe-Osuji
(Presiding)

Judge Olga Herrera Carbuccion

Judge Robert Fremr

Dated 24 September 2013

At The Hague, The Netherlands