

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 10 September 2015

**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 Redacted Version of**

**Decision on the Defence's Applications for Leave to Appeal the "Decision on  
Prosecution Request for Admission of Prior Recorded Testimony"**

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 Essa Faal

Ms Shyamala Alagendra

**Counsel for Joshua Arap Sang**

Mr Joseph Kipchumba Kigen-Katwa

Ms Caroline Buisman

**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**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**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*, pursuant to Article 82(1)(d) of the Rome Statute (the ‘Statute’), renders this ‘Decision on the Defence’s Applications for Leave to Appeal the “Decision on Prosecution Request for Admission of Prior Recorded Testimony”’.

## I. PROCEDURAL HISTORY

1. On 19 August 2015, the Chamber rendered the ‘Decision on Prosecution Request for Admission of Prior Recorded Testimony’.<sup>1</sup> The Chamber, by majority, admitted into evidence for the truth of its contents and in their entirety pursuant to Rule 68 of the Rules of Procedure and Evidence (the ‘Rules’), the prior recorded testimonies and related material of [REDACTED] of [REDACTED] witnesses (the ‘Impugned Decision’).<sup>2</sup> In his partly concurring opinion, Judge Eboe-Osuji admitted, pursuant to Article 69(3) of the Statute, the written statements, transcripts of interviews and related material of all [REDACTED] witnesses, but with the following limitation: as regards those of the witnesses who had appeared in court and given testimony, only the answers that they gave to specific questions in the courtroom in relation to the out-of-court statements may be considered for the truth of their contents.<sup>3</sup>
2. On 25 August 2015, the defence team for Mr Sang (the ‘Sang Defence’) and the defence team for Mr Ruto (the ‘Ruto Defence’, together the ‘Defence’), filed

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<sup>1</sup> ICC-01/09-01/11-1938-Conf + Conf-Anx. A public redacted version was filed simultaneously. A corrigendum of both the confidential and public versions were filed on 28 August 2015, ICC-01/09-01/11-1938-Conf-Corr + Conf-Anx-Corr & Conf-Corr-AnxII and ICC-01/09-01/11-1938-Corr-Red2 + Anx-Corr-Red2.

<sup>2</sup> ICC-01/09-01/11-1938-Conf-Corr.

<sup>3</sup> ICC-01/09-01/11-1938-Conf-Anx-Corr, paras 1-2.

applications for leave to appeal the Impugned Decision (the ‘Ruto Defence Application’, the ‘Sang Defence Application’, together, the ‘Applications’).<sup>4</sup>

3. On 31 August 2015, the Office of the Prosecutor (the ‘Prosecution’), filed its response to the Applications (the ‘Response’).<sup>5</sup>

## II. SUBMISSIONS

### *Sang Defence*

4. The Sang Defence requests leave to appeal what it identifies as a ‘core issue’, namely: whether or not the essence and terms of Rule 68 of the Rules, as amended by the Assembly of States Parties (the ‘ASP’) resolution in November 2013, was appropriately defined and applied in this case.<sup>6</sup> As part of this main issue, the Sang Defence also identifies the following ten ‘sub-issues’:<sup>7</sup>
  - a) Whether Article 24(2) of the Statute applies to substantive, but not procedural, issues;
  - b) Whether the ASP’s inclusion of a reference to Article 51(4) of the Statute, was an indirect reference to the Situation in the Republic of Kenya;
  - c) Whether the term ‘retroactive’ in Article 51(4) of the Statute would only bar the use of an amendment in relation to a right to which the Defence had been previously entitled;

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<sup>4</sup> Sang Defence Request for Leave to Appeal the Decision on Prosecution Request for Admission of Prior Recorded Testimony, ICC-01/09-01/11-1939-Conf (a public redacted version was filed simultaneously, ICC-01/09-01/11-1939-Red); Ruto Defence application for leave to appeal the “Decision on Prosecution Request for Admission of Prior Recorded Testimony”, ICC-01/09-01/11-1940-Conf (a public redacted version was filed simultaneously, ICC-01/09-01/11-1940-Red).

<sup>5</sup> Prosecution’s Consolidated Response to Ruto Defence’s and Sang Defence’s applications for leave to appeal the “Decision on Prosecution Request for Admission of Prior Recorded Testimony,” (ICC-01/09-01/11-1938-Conf, 19 August 2015), ICC-01/09-01/11-1945-Conf.

<sup>6</sup> ICC-01/09-01/11-1939-Red, para. 3.

<sup>7</sup> ICC-01/09-01/11-1939-Red, para. 3.

- d) Whether the term 'detrimental' could only be defined in relation to a rule which could not be equally taken advantage of by all the parties to the proceedings, rather than general prejudice;
  - e) Whether the term 'testimony' could be defined to include unsworn, unrecorded statements taken by an interested party;
  - f) Whether the term 'failure to testify' could be interpreted to include the testimony of witnesses who appeared and answered Prosecution's questions, but recanted all or fundamental parts of their prior recorded testimony;
  - g) Whether Mr Sang's right pursuant to Article 67(1)(e) of the Statute was respected, given the admitted statements include allegations which were not raised by the Prosecution in its examination of the witnesses;
  - h) Whether the correct standard of proof for determining interference was 'evidence of sufficient specificity and probative value';
  - i) Whether all relevant factors were properly considered and weighed when making a finding on 'interference'; and
  - j) Whether fair trial concerns, such as the right to expeditious trial, principle of orality and admission of evidence going to the acts and conducts of the accused and the interests of justice, were appropriately considered.
5. The Sang Defence acknowledges that it is not sufficient, for the purposes of granting leave to appeal, that an issue is either of general interest or may arise again in the future. However, it submits that this could still be considered by the Chamber in support of granting the Sang Defence Application.<sup>8</sup>
6. With reference to the criteria of Article 82(1)(d) of the Statute, the Sang Defence submits that the issues arise from the Impugned Decision, since if

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<sup>8</sup> ICC-01/09-01/11-1939-Red, para. 9.

any of these issues were reversed, the Impugned Decision ‘could not stand’.<sup>9</sup> It thereafter sets out how each of the sub-issues arises from specific paragraphs of the Impugned Decision.<sup>10</sup>

7. As regards the fair and expeditious conduct of proceedings, the Sang Defence argues that the Impugned Decision violates the accused’s right to be protected from retroactive application of a provision that is detrimental. It also submits that the Impugned Decision infringes the accused’s right to confront incriminating evidence, as the admitted statements are ‘full of unverified and untested evidence’, as the Prosecution ‘chose to leave significant portions of the witnesses’ prior statements untouched’ during examination and cross-examination.<sup>11</sup> Moreover, the Sang Defence states that it is now adversely affected by the uncertainty of not knowing whether the allegations contained in the prior recorded testimonies will remain on the record, pending a final resolution by the Appeals Chamber.<sup>12</sup> It also submits that the Impugned Decision affects the expeditiousness of proceedings, as it may result in the need to recall witnesses and a longer Defence case.<sup>13</sup> Relating to the outcome of the trial, the Sang Defence argues that the Impugned Decision admitted evidence that is central to the case.<sup>14</sup>
8. Finally, as regards the second prong of Article 82(1)(d), the Sang Defence submits that an immediate resolution by the Appeals Chamber would materially advance proceedings, particularly in relation to the ‘no case to answer’ motion and the eventual need to put on a Defence case. Moreover, it

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<sup>9</sup> ICC-01/09-01/11-1939-Red, para. 11.

<sup>10</sup> ICC-01/09-01/11-1939-Red, paras 12-21.

<sup>11</sup> ICC-01/09-01/11-1939-Red, paras 22-25.

<sup>12</sup> ICC-01/09-01/11-1939-Red, para. 26.

<sup>13</sup> ICC-01/09-01/11-1939-Red, paras 27-28.

<sup>14</sup> ICC-01/09-01/11-1939-Red, paras 29-30.

argues that it would be difficult to reverse the consequences of the admission of these prior recorded testimonies if left to an appeal of the final judgment.<sup>15</sup>

### *Ruto Defence*

9. The Ruto Defence requests leave to appeal on eleven issues, which can be summarised as follows:<sup>16</sup>
- a) Whether the Impugned Decision erred when it determined that: (i) the Prosecution's request was not altering anything which the Defence was entitled to as a matter of right; (ii) the application of Rule 68 is not detrimental to the accused; (iii) and Rule 68 is of neutral application;
  - b) Whether the Impugned Decision erred in law when it found that the amended Rule 68 does not fall under Article 24(2) of the Statute because the principle of non-retroactivity is more applicable to matters of substance than to those of procedure;
  - c) Whether the Impugned Decision erred when it considered Article 51(4) of the Statute;
  - d) Whether the Impugned Decision erred in law when it determined that written statements and transcripts of interviews taken in accordance with Rules 111 and 112 of the Rules are 'prior recorded testimony' for the purposes of Rule 68;
  - e) Whether the Impugned Decision erred in law when it interpreted the requirement of Rule 68(2)(d)(i), that a witness must have 'failed to give evidence with respect to a material aspect' included in his prior recorded testimony, purposively rather than in accordance with its ordinary meaning;

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<sup>15</sup> ICC-01/09-01/11-1939-Red, paras 31-34.

<sup>16</sup> ICC-01/09-01/11-1940-Red, para. 4.

- f) Whether the Impugned Decision erred when it failed to provide sufficient reasoning regarding the standard of proof it adopted for evaluating the conditions of Rule 68 admissibility;
- g) Whether the Impugned Decision erred in its assessment of 'interference' for Witness [REDACTED] and Witness [REDACTED];
- h) Whether the Impugned Decision erred in its determination of 'indicia of reliability';
- i) Whether the Impugned Decision erred in its assessment of whether the prior recorded testimonies go to the acts and conduct of the accused;
- j) Whether the Impugned Decision erred in its assessment of the 'interests of justice' requirement;
- k) Whether the Impugned Decision erred by failing to limit the admission of the prior recorded testimony of all the relevant witnesses, save for Witness [REDACTED], only to those portions of the out-of-court statements specifically put by the Prosecution during questioning of the witnesses.

10. As regards the Article 82(1)(d) criteria, the Ruto Defence submits that all the above issues are appealable, as they arise from the Impugned Decision, which did not take into consideration the rights of the accused and 'any of the accepted rules of statutory interpretation'.<sup>17</sup> Moreover, it identifies how the contrary position for some of these issues is set out in the partly concurring opinion of Judge Eboe-Osuji.<sup>18</sup> The Ruto Defence then amply describes how the Impugned Decision dealt with the various appealable issues identified above.<sup>19</sup>

11. In relation to the first prong of Article 82(1)(d), the Ruto Defence argues that the issues concern the accused's right to a fair trial to confront witnesses,

<sup>17</sup> ICC-01/09-01/11-1940-Red, paras 5-8.

<sup>18</sup> ICC-01/09-01/11-1940-Red, paras 9-10.

<sup>19</sup> ICC-01/09-01/11-1940-Red, paras 11-23.



particularly since the admitted evidence is central to the case, albeit largely uncorroborated hearsay. It also argues that the fairness of proceedings would be affected by the uncertainty as to whether this evidence would be admitted, pending a final resolution by the Appeals Chamber.<sup>20</sup> Referring to the expeditiousness of proceedings, the Ruto Defence states that the Impugned Decision lengthens the proceedings, as the defence would have to revise its strategy, would need to carry out investigations, and witnesses would have to be called in a Defence case to deal with the admitted evidence.<sup>21</sup> As regards the outcome of the trial, the Ruto Defence submits that the Impugned Decision directly relates to the amount and type of evidence that the Chamber will consider when making a decision pursuant to Article 74 of the Statute.<sup>22</sup>

12. Finally, concerning whether the immediate resolution of the issues by the Appeals Chamber could materially advance the proceedings, the Ruto Defence argues that, given the admitted evidence's importance, a decision by the Appeals Chamber would impact every aspect of the trial going forward. In its view, this would have a bearing on the evidence to be addressed in any 'no case to answer' motion, the witnesses to be called in any Defence case, as well as the evidence to be relied on in an Article 74 judgment.<sup>23</sup>

### *Prosecution*

13. Although the Prosecution disagrees with the Defence in their submissions that the Impugned Decision contains errors, it concurs that the Article 82(1)(d) criteria is met for certain issues identified by the Defence.<sup>24</sup> It agrees that the issues related to the interpretation of the amended Rule 68, Articles 24(1) and

<sup>20</sup> ICC-01/09-01/11-1940-Red, paras 24-28.

<sup>21</sup> ICC-01/09-01/11-1940-Red, paras 29-31.

<sup>22</sup> ICC-01/09-01/11-1940-Red, paras 32-34.

<sup>23</sup> ICC-01/09-01/11-1940-Red, paras 35-36.

<sup>24</sup> ICC-01/09-01/11-1945-Conf, paras 4 and 6.

51(4) of the Statute meet the Article 82(1)(d) criteria. However, the Prosecution argues that leave to appeal should be rejected in respect of other additional matters included in some of these legal issues, namely the concept of 'detriment' and the standard of proof adopted by the Impugned Decision.<sup>25</sup>

14. The Prosecution submits that other issues, related to the application of the above law to the facts, are not appealable, as they are mere disagreements that repeat prior submissions or are based either on a misinterpretation or misapprehension of the Impugned Decision. In its view, the Impugned Decision appropriately assessed the requirements under Rule 68 of the Rules, needing not to recite every factor it has considered, but providing a clear basis for its conclusion. Moreover, the Prosecution states that some of these disagreements are based on the separate partly concurring opinion, but do not arise from the Impugned Decision. Moreover, the Prosecution states that when leave to appeal is sought in respect of a decision based on an exercise of discretion, the limited scope of appellate intervention should be considered to deny leave to appeal.<sup>26</sup>

15. As regards the Article 82(1)(d) criteria, the Prosecution contends that this provision cannot be used to litigate abstract or hypothetical issues or those that are of general interest. In its view, the Defence submissions constitute mere speculation with no concrete elaboration of a negative impact. The Prosecution submits that, at best, the 'Defence's claims are mere disagreements with the Chamber's detailed analysis of the issues'.<sup>27</sup> Finally, the Prosecution contends that the Impugned Decision makes it clear that the assessment of evidence for

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<sup>25</sup> ICC-01/09-01/11-1945-Conf, paras 6-10.

<sup>26</sup> ICC-01/09-01/11-1945-Conf, paras 11-39.

<sup>27</sup> ICC-01/09-01/11-1945-Conf, paras 40-44.

the purpose of admissibility is a distinct question from the weight ultimately accorded to the evidence.<sup>28</sup>

### III. APPLICABLE LAW

16. Article 82(1)(d) of the Statute sets out the requirements applicable to the granting of a request for leave to appeal, which are as follows:

- a) whether the decision involves an issue that would significantly affect:
  - i. the fair and expeditiousness conduct of proceedings; or
  - ii. the outcome of the trial; and
- b) for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

17. The Chamber recalls that, for the purposes of the first prong of this test, the Appeals Chamber has defined an 'issue' as 'an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion'.<sup>29</sup>

18. The Appeals Chamber has held that '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'.<sup>30</sup>

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<sup>28</sup> ICC-01/09-01/11-1945-Conf, para. 45.

<sup>29</sup> *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 April 2006, ICC-01/04-168, para. 9.

<sup>30</sup> ICC-01/04-168, para. 20.

#### IV. ANALYSIS AND CONCLUSIONS

19. It must first be determined whether the issues raised in the Defence Applications are 'appealable issues' within the meaning of the jurisprudence of the Court. As a preliminary observation, it may be noted that considerable overlap exists between the issues as phrased by the Ruto Defence and those 'sub-issues' proposed by the Sang Defence. Furthermore, certain issues appear to be subsumed by other issues.<sup>31</sup>

20. When assessing the issues, it is clear to the Chamber that some of them deal with the same questions. In light of their overlap, the Chamber considers it warranted to combine them into related issues.<sup>32</sup> In accordance with its discretion to formulate appealable issues,<sup>33</sup> the Chamber will therefore reformulate them as follows:

- i. Whether the amended Rule 68 of the Rules can be applied in this case without offending Articles 24(2) and 51(4) of the Statute ('First Issue');
- ii. Whether written statements and transcripts of interviews taken in accordance with Rules 111 and 112 of the Rules can qualify as 'prior recorded testimony' for the purpose of Rule 68 (2)(c) and (d), to be admitted for the truth of their contents ('Second Issue')
- iii. Whether written statements and transcripts of interviews taken in accordance with Rules 111 and 112 of the Rules can be admitted in their entirety for the purpose of Rule 68 (2)(c) and (d) ('Third Issue');

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<sup>31</sup> Decision on defence applications for leave to appeal the "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation" and the request of the Government of Kenya to submit amicus curiae observations, 23 May 2014, ICC-01/09-01/11-1313, para. 39.

<sup>32</sup> ICC-01/09-01/11-1313, para. 40.

<sup>33</sup> See *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 April 2006, ICC-01/04-168, para. 20.

- iv. Whether the Impugned Decision erred in its assessment of the concept of 'failure to give evidence with respect to a material aspect' pursuant to Rule 68(2)(d)(i) of the Rules ('Fourth Issue');
  - v. Whether the Impugned Decision applied the appropriate standard of proof when evaluating whether the conditions under Rule 68(2)(c) and (d) of the Rules were met, including, in particular, in its assessment of the existence of 'interference' ('Fifth Issue');
  - vi. Whether the Impugned Decision erred in its interpretation and/or application of the concepts of 'indicia of reliability' and 'acts and conduct of the accused' pursuant to Rule 68(2)(c) and (d) of the Rules ('Sixth Issue'); and
  - vii. Whether the Impugned Decision erred in its consideration of 'interests of justice' pursuant to Rule 68(2)(d) of the Rules ('Seventh Issue').
21. The Chamber considers that all of the issues identified above are appealable pursuant to Article 82(1)(d) of the Statute, as they arise from the Impugned Decision.
22. The Chamber now turns to the second criterion: whether the above issues, as rephrased, would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.
23. The Chamber is of the view that the fairness and expeditiousness of the proceedings would be significantly affected. The Chamber agrees with the Defence that the identified issues relate to incriminatory evidence that has been admitted into the record and which could significantly impact the length of the proceedings.
24. The Chamber emphasises that the admission of the prior recorded testimonies, by way of the Impugned Decision, is entirely without prejudice to the weight, if

any, which the Chamber may ultimately give them in its consideration of the evidence. Nonetheless, noting the scope and content of the prior recorded testimonies, the Chamber is of the view that the prior recorded testimonies, if relied upon, objectively may be expected to have a significant impact on the outcome of the trial.

25. In addition, if the Appeals Chamber, during proceedings pursuant to Article 81 of the Statute, if applicable, were to find the Impugned Decision to be in error, this may lead to the admitted prior recorded testimonies being declared inadmissible. The fact that these materials relate to [REDACTED] out of the 28 Prosecution's non-expert witnesses would have a significant bearing on the outcome of the trial.
26. As to the question of whether the proceedings may be materially advanced by an immediate resolution of the Appeals Chamber, the Chamber considers that for the same reasons above, prompt resolution by the Appeals Chamber through an interlocutory appeal is necessary.<sup>34</sup>
27. For these reasons, the Chamber is satisfied that the resolution of the above issues in the Impugned Decision during interlocutory 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 an immediate resolution by the Appeals Chamber may materially advance the proceedings.

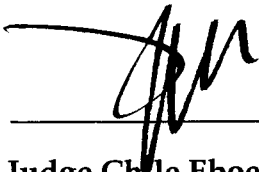
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<sup>34</sup> ICC-01/09-01/11-1313, para. 53.

**FOR THE FOREGOING REASONS, THE CHAMBER, HEREBY**

**GRANTS** the Ruto Defence and the Sang Defence, jointly, leave to appeal the Impugned Decision on the issues, as identified in paragraph 20 above.

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



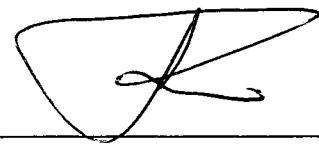
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**Judge Chile Eboe-Osuji**  
(Presiding)



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**Judge Olga Herrera Carbuccion**



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**Judge Robert Fremr**

Dated 10 September 2015

At The Hague, The Netherlands