

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **18 May 2015**

Date of public redacted version: **11 December 2017**

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 Requests to Excuse Mr Ruto and Mr Sang from Trial
pursuant to Rule 134 *ter***

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

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

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 regard to Articles 63(1), 64(2), and 67(1)(d) of the Rome Statute (the ‘Statute’) and Rule 134 *ter* of the Rules of Procedure and Evidence (the ‘Rules’), issues the following ‘Decision on the Defence Requests to Excuse Mr Ruto and Mr Sang from Trial pursuant to Rule 134 *ter*’.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. During a discussion on the subject of in-court protective measures for [REDACTED] (the ‘Witness’), [REDACTED], the defence team for Mr Ruto (the ‘Ruto Defence’) raised the possibility of the accused being excused during the testimony of the Witness, to secure the Witness’s willingness to testify and be examined by the parties.¹
2. The Ruto Defence submitted that the best way to secure a completely confidential hearing would be to excuse both accused from attending the hearing, since there was considerable information about the Witness in the press, and the absence of Mr Ruto and Mr Sang would surely be noted by the people of Kenya which would raise suspicions that hearings were taking place.²
3. On 28 April 2015, having heard the Ruto Defence’s oral request, the Chamber directed the Ruto Defence to provide for Mr Ruto’s waiver of his right to be present during the examination of the Witness.³ The Chamber further directed the defence team for Mr Sang (the ‘Sang Defence’) to inform the Chamber of its views on the Ruto Defence proposal, and, if it was in agreement, to request Mr

¹ [REDACTED].

² [REDACTED].

³ [REDACTED].

Sang's excusal in writing, including by submitting the required waiver by the accused of his right to be present.⁴

4. On 30 April 2015, the Ruto Defence submitted a copy of Mr Ruto's signed waiver.⁵ On that same date, the Sang Defence submitted a written request (the 'Request') for Mr Sang to be excused from attending the hearing during which the examination of the Witness would take place and instead be represented by his counsel.⁶
5. In the Request, the Sang Defence recalls the difficulties encountered in securing the appearance of the Witness and informed the Chamber that it does not object to the additional protective measure of hearing the testimony of the Witness entirely in closed session.⁷ Moreover, the Sang Defence affirms that it shares the Ruto Defence's proposal to excuse the accused from attending the examination of the Witness, in order to avoid speculation as to why the accused would be required to be at the Court. In the view of the Sang Defence, the absence of the two accused would be a requirement to give satisfactory effect to the protective measure of *in camera* testimony.⁸
6. The Sang Defence submits that the conditions to be excused, as provided in Rule 134 *ter* of the Rules, are met, since there are exceptional circumstances to justify Mr Sang's absence, namely to reduce the risk of the public speculating and avoid it being discovered that the Witness's testimony is taking place.⁹ It stresses that there are no other adequate alternative measures in order to avoid speculation that 'the presence of the accused in The Hague is required for the purpose of

⁴ [REDACTED].

⁵ Defence Submission of Copy of Mr. Ruto's Signed Waiver, ICC-01/09-01/11-1867-Conf with Confidential Annex A.

⁶ Sang Defence Request for Mr. Sang's Excusal during the testimony of [REDACTED], ICC-01/09-01/11-1868-Conf with Confidential Annex A.

⁷ Request, ICC-01/09-01/11-1868-Conf, para. 4.

⁸ Request, ICC-01/09-01/11-1868-Conf, para. 5.

⁹ Request, ICC-01/09-01/11-1868-Conf, para. 5.

attending [the Witness's] examination'.¹⁰ The Sang Defence further refers to recent interviews by the counsel for the Witness in national proceedings in the Netherlands, which have revealed information that could identify the Witness, therefore requiring additional measures to be taken to ensure his protection.¹¹

7. The Sang Defence states that Mr Sang's rights will be fully guaranteed in his absence through his representation by counsel, as expressed in the copy of Mr Sang's signed waiver.¹²
8. The Office of the Prosecutor (the 'Prosecution') has, at this stage, not responded to the excusal requests, but the Chamber notes that during the status conference, at the time the oral request was made on behalf of Mr Ruto, the Prosecution did not oppose his excusal in order to ensure the testimony of the Witness.

II. ANALYSIS

9. The Chamber recalls that pursuant to Article 63(1) of the Statute, the accused in principle have an obligation to be present during the trial, but that '[d]uring the course of prolonged criminal proceedings, unforeseen circumstances may arise, necessitating the absence of the accused person on a temporary basis'.¹³
10. The Chamber shall only grant the request of the accused to be excused during part of their trial, if it is satisfied that: a) exceptional circumstances exist to justify the absence of the accused; b) alternative measures have been considered and are deemed to be inadequate; c) the accused explicitly waived their right to be present at the trial; d) the rights of the accused will be fully ensured in their

¹⁰ Request, ICC-01/09-01/11-1868-Conf, para. 6.

¹¹ Request, ICC-01/09-01/11-1868-Conf, para. 6.

¹² Request, ICC-01/09-01/11-1868-Conf, para. 8; and ICC-01/09-01/11-1868-Conf-AnxA.

¹³ Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial" ('Appeals Judgment'), 25 October 2013, ICC-01/09-01/11 OA 5, paras 50 and 56.

absence; e) the decision has been taken with due regard to the subject matter of the specific hearing that the accused would not attend; and f) the absences of the accused are limited to that which is strictly necessary.¹⁴

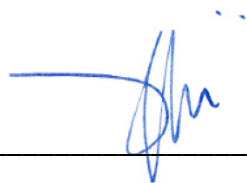
11. Both the Ruto Defence and the Sang Defence agree that exceptional circumstances exist and that the hearing of the Witness's testimony in fully closed session is warranted to facilitate his appearance. The Chamber accepts that, for this particular Witness, the accused's presence at the seat of the Court is likely to be connected in the minds of the public with his testimony because he has been referred to as the last Prosecution witness in the media. The Chamber has also found previously that fully confidential hearings for the Witness's testimony are necessary to avoid the Witness being identified. In these circumstances, the Chamber finds that the excusal of the accused is also required to achieve those ends.
12. The Chamber recalls that alternative measures have already been considered and the hearing has been adjourned on several occasions. Moreover, both accused have expressly waived their right to be present at trial and the Chamber considers that their rights will be fully ensured in their absence through the attendance of their counsel.
13. Finally, the Chamber notes that the decision on the absence of the accused will be limited to the testimony of the Witness, taking into account the Witness's security concerns and the fairness and expeditiousness of the trial.
14. In light of the foregoing, the Chamber excuses the accused from attending the hearings during which the Witness will testify.

¹⁴ Rule 134*ter* of the Rules; and Appeals Judgment, ICC-01/09-01/11 OA 5, para. 62.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the excusal requests for Mr Ruto and Mr Sang.


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



Judge Chile Eboe-Osuji
(Presiding)



Judge Olga Herrera Carbuccion



Judge Robert Fremr

Dated 18 May 2015

At The Hague, The Netherlands