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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

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

Source: Office of the Prosecutor

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The Office of the Prosecutor

Counsel for William Samoei Ruto

Mr Karim A A 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

Defence Support Section

Victims and Witnesses Unit

Mr Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. On 18 June 2013, the Majority of Trial Chamber V(a) ("Chamber") issued the "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial" ("Decision").¹ The Majority granted the defence's request, allowing Mr Ruto to be absent from trial "within the limits of certain conditions"² and with the exception of certain moments during trial.³ The Majority found that "a careful look at the Court's Statute in its particular provisions and in its entirety, and its particular context, as well as its broader context of general international law, does not lead to a finding of inevitable incompatibility between the conduct of the inquiry into questions of Mr Ruto's individual criminal responsibility, on the one hand, and, on the other, the granting of the Defence's request for the excusal of Mr Ruto from continuous presence during his trial, in order to allow him to attend to his duties as Deputy President of Kenya."⁴ Judge Herrera Carbuccion appended a dissenting opinion ("Dissenting Opinion").⁵
2. The Prosecution seeks leave to appeal the Decision on two fundamental legal issues that go to the interpretation and application of the principle enshrined in Article 63(1) whereby "[t]he accused shall be present during the trial". The Prosecution submits that the two issues arise from the Decision and meet the criteria for leave to appeal under Article 82(1)(d).
3. As established by the jurisprudence of the Court, the correctness of the Decision is irrelevant to an application for leave to appeal under Article 82(1)(d). The sole question is whether the Issues involved in the Decision meet the criteria set out in that provision.⁶

¹ ICC-01/09-01/11-777.

² Decision, para.2.

³ Decision, para.3.

⁴ Decision, para.109.

⁵ ICC-01/09-01/11-777-Anx2.

⁶ ICC-02/04-01/05-20-US-Exp, para. 22.

Submissions

4. Pursuant to Article 82(1)(d), the Prosecution seeks leave to appeal the Decision on 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");
 - (ii) Whether the test for an excusal of the accused developed by the Majority is supported by the applicable law ("Second Issue").
5. Both Issues are interrelated, and both constitute appealable issues pursuant to Article 82(1)(d).⁷ The scope of the mandate that the accused be present during the trial and any discretion of the Chamber in that respect, as well as the circumstances under which Mr Ruto may be excused, were essential questions for the determination of the Defence request for excusal of Mr Ruto from continuous presence at trial.

(a) The First Issue arises from the Decision

6. That the First Issue arises from the Decision is evidenced by the following findings: "[the Majority] considers that the general rule as to presence, dictated by the duty on the accused to be present, is one of continuous presence at trial. In exceptional circumstances, however, the Chamber may exercise its discretion under Article 64(6)(f) of the Statute to excuse an accused, on a case-by-case basis,

⁷ The Appeals Chamber has held that "only 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 disagreement of a conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. It may be legal or factual or a mixed one." ICC-01/04-168 OA3, paras. 9-10. See also, ICC-01/04-01/06-1433 OA11, Dissenting Opinion of Judge Song, para. 4, specifying that "[a] decision 'involves' an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made."

from continuous presence at trial.”⁸ The Majority further elaborated on this matter by ruling as follows: “[t]he outcome of this litigation hinges upon the recognition that presence of the accused during the trial is not only a right (by virtue of Article 67(l)(d)), but also a duty on the accused (by virtue of Article 63(1)). From the perspective of the imperatives of judicial control, the presence of the accused as a question of his duty establishes the default position. But reading the Statute as a whole and taking into account, in its interpretation and application, the general body of international law, of which the Statute forms a part, there remains a residue of discretion in the Trial Chamber to permit reasonable exceptions to that default position. This is to be done on a case-by-case basis. And it requires the balancing of all the interests concerned.”⁹

7. In addition, the Majority found that “from the perspective of plain language [of Article 63(1)] that says that the 'accused shall' be present during the trial does not implicate any apparent or implied restraint on the discretion of the Court to excuse the accused in a reasonable way from the duty imposed on him to be present during the trial.”¹⁰ It also ruled that “The object of Article 27 is not to remove from the Trial Chamber all discretion to excuse an accused from continuous presence in an ongoing trial, when the excusal is recommended by the functions implicit in the office that he or she occupies.”¹¹ Finally, the Majority ruled that “[t]he discretion of the court to conduct trials in the absence of absconding accused is also a firmly established feature of common law systems.”¹²

⁸ Decision, para.49; see also paras.109-110.

⁹ Decision, para.104.

¹⁰ Decision, para.43.

¹¹ Decision, para.71; see also para.99.

¹² Decision, para.75.

8. As a result of the above findings, the Majority excused Mr Ruto from being present during most of the trial, including the totality of the evidentiary phase of the trial, and it only required his presence for a few instances.¹³

(b) The Second Issue arises from the Decision

9. In its Decision, the Majority established and applied a test for the excusal of an accused from continuous presence at trial: “In exceptional circumstances [...] the Chamber may exercise its discretion under Article 64(6)(f) of the Statute to excuse an accused, on a case-by-case basis, from continuous presence at trial. [...] The exceptional circumstances that would make such excusal reasonable would include situations in which an accused person has important functions of an extraordinary dimension to perform. It will not be possible to prescribe a hard and fast template for the test. It will be for each Trial Chamber to appraise the situation according to its own judgement. But it suffices, for now, to venture the view that the functions that meet the test are not ones that many people are in a position to perform at the same time and in the same sphere of operation. [...] In the Chamber's consideration, the demands of the office of the executive vice president of a State may meet the requirements of the test, depending on what those functions are. For, few tasks are more important and extraordinary in their dimension as to have a principal role in the management of the affairs and destiny of a State and all its people, and their relationship with the world, for any period of time.”¹⁴
10. In addition, the Majority found that with respect to Article 63(1), it “is neither reasonable nor necessary to interpret the provision in a manner that eliminates the discretion of the Trial Chamber reasonably to permit the accused to carry out his duties as his country's executive Deputy Head of State who, as an accused, remains fully subject to the jurisdiction of the Court for purposes of the inquiry

¹³ Decision, para.3(a).

¹⁴ Decision, paras.49-50.

into his individual criminal responsibility under the Court's Statute.”¹⁵ It also concluded that “[t]he absence [of Mr Ruto] from continuous presence at the trial [...] must always be seen to be directed towards performance of Mr Ruto’s duties of state”.¹⁶

(c) The two Issues affect the fair conduct of the proceedings

11. According to Articles 21(3) and 27, all accused must be treated equally before the law. This is a fundamental pillar of the fairness of proceedings before the Court, as acknowledged by the Majority.¹⁷ The two Issues affect the fair conduct of the proceedings because they raise the question whether an individual accused of very serious crimes holding certain official functions may be excused from continuous presence at the trial, while others are not. The Majority specifically found that excusal is reasonable and legitimate where “an accused person has important functions of an extraordinary dimension to perform. [...] [T]he functions that meet the test are not ones that many people are in a position to perform at the same time and in the same sphere of operation.”¹⁸ This test necessarily excludes most persons from being excused and thereby leads to a difference in treatment of accused persons. For instance, in this case, the Majority ruled that Mr Ruto was excused from his continuous presence at the trial because he holds the “office of the executive vice president of a State”.¹⁹ This does not apply to Mr Ruto’s co-accused, Mr Sang, who accordingly would not be entitled to the same treatment under the law. The Dissenting Judge specifically pointed out that “all persons shall be equal before courts and tribunals and no accused should be accorded privileged treatment [...]. Mr Ruto should not be given a

¹⁵ Decision, para.53; see also paras.109-110.

¹⁶ Decision, para.3(b).

¹⁷ Decision, para.65.

¹⁸ Decision, para.49.

¹⁹ Decision, para.49.

different legal status on the basis of his personal position as Deputy President of the Republic of Kenya".²⁰

12. In addition, the Majority expressly stated that to examine the matter before the Chamber in light of its duty under Article 64(2) to ensure that the trial is fair is "significant [in a] principal respect [...]".²¹ This demonstrates that the two Issues go to the heart of the fairness of the proceedings.

13. The Dissenting Judge also referred to the "interests of the victims and those of the Prosecution" and that in this regard "the absence of the accused could significantly affect the fairness of the proceedings".²² The Majority found that in principle, an accused has a *duty* to be present during the trial,²³ which is subject to "judicial control".²⁴ Because of the adversarial nature of the proceedings, the duty of one party translates into a corresponding right of the other. This right of the Prosecution and the victims, if violated, affects the fairness of the proceedings. For instance, there may be situations where the Prosecution wants to identify the accused through a witness. As found by the Dissenting Judge, this right could be affected by the absence of the accused.²⁵

(d) The two Issues affect the expeditious conduct of the proceedings

14. The expeditious conduct means timely and efficient conduct of proceedings.²⁶

This principle requires that decisions at all stages do not unnecessarily delay the

²⁰ Dissenting Opinion, para.7.

²¹ Decision, para.33; see also paras.47, 107.

²² Dissenting Opinion, para.6.

²³ Decision, paras.40, 42.

²⁴ Decision, paras.44, 53, 104.

²⁵ Dissenting Opinion, para.11.

²⁶ Expeditious proceedings are intimately connected with the efficient administration of international justice. See *Prosecutor v Norman, Kallon and Gbao*, SCSL-2004-07, 08 and 09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003 ("Norman Decision on Application for Stay"): "the Court's obligation to do justice expeditiously and effectively, as well as fairly." (para.6); "we can only do justice that is expeditious, fair and efficient" (para.25); *Prosecutor v Milosevic*, IT-02-54-T, Decision on Two Prosecution Requests for Certification of Appeal Against Decision of the Trial Chamber, 6 May 2003, where in relation to each of the two grounds the Chamber noted that the issue "will significantly affect the efficient and expeditious conduct of the proceedings".

overall determination of responsibility.²⁷ Pre-Trial Chamber II considered that one aspect of expeditiousness in this context is if an issue “would entail the risk that lengthy and costly trial activities are nullified at a later stage.”²⁸

15. If this trial is conducted largely in the absence of Mr Ruto according to the terms of the Decision, then the two Issues are likely to be raised as part of an appeal against a decision of acquittal or conviction pursuant to Article 81. There is accordingly a 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. This will significantly delay the overall determination of responsibility of Mr Ruto.
16. In addition, there may be procedural steps where the Prosecution will argue that the fair and efficient conduct of the proceedings requires the physical presence of Mr Ruto beyond the instances foreseen in the Decision. As indicated by the Dissenting Judge, there may be instances where the presence of the accused is indispensable.²⁹ Such cases are likely to give rise to lengthy litigation between the parties and participants and require decisions from the Trial Chamber, and possibly also from the Appeals Chamber, which will delay the proceedings. Therefore, to resolve the two Issues now through an authoritative decision by the Appeals Chamber will significantly impact on the expeditious conduct of the proceedings.

²⁷ Delay and promptness of proceedings must be judged in the context of the situations that the Court has jurisdiction over, the complexity of the issues and the circumstances in which investigations take place.

²⁸ ICC-02/04-01/05-20 (unsealed pursuant to ICC-02/04-01/05-52), para.36. The Prosecution notes that this can also be properly viewed as an element relevant to whether the immediate resolution of the issue will materially advance the proceedings – see e.g. ICC-01/04-168 OA3, para.16.

²⁹ Dissenting Opinion, para.11.

(e) Immediate resolution by the Appeals Chamber of the two Issues may materially advance the proceedings

17. As stated by the Appeals Chamber, this requirement means that “prompt reference of the issue to the court of appeal” and its “authoritative determination” will help the proceedings ‘move forward’ by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings.”³⁰ Otherwise, a wrong decision on an issue in the context of Article 82(1)(d), unless remedied on appeal, will entail a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process.³¹

18. As discussed above, there is a risk that a trial that is largely conducted in the absence of the accused may later be nullified by the Appeals Chamber. For that reason, immediate resolution by the Appeals Chamber of the two Issues will significantly advance the proceedings by settling the Issues through an authoritative decision already at this stage and avert any future risks to the efficiency and integrity of proceedings in the instant case. In this sense, intervention by the Appeals Chamber will ensure legal certainty and predictability in the proceedings. Similarly, it will also ensure that continuous and time consuming litigation by the parties on whether the accused’s presence at the trial is required for specific procedural steps beyond the instances identified in the Decision is avoided.

19. In addition, the Appeals Chamber has also confirmed that for the purposes of Article 82(1)(d) the notion of proceedings is “not confined to the proceedings in

³⁰ ICC-01/04-168 OA3, paras.14-15, 18.

³¹ ICC-01/04-168 OA3, para.16.

hand but extends to the proceedings prior and subsequent thereto.”³² The question of the presence at trial of the accused is a live issue also in other ongoing cases where the accused are not in detention. In particular, the Defence of Mr Kenyatta, the Head of State of the Republic of Kenya, filed a request to follow the trial via video link.³³ The Trial Chamber in that case (which includes the two Judges in the Majority of the Impugned Decision) has not yet ruled on this request. Immediate resolution of this issue will give substantial guidance on whether Mr Kenyatta’s request is supportable under the Court’s legal framework. In addition, in the case against *Banda* and *Jerbo*, Trial Chamber IV’s decision concerning the trial commencement date discusses major difficulties faced by Mr Banda in arriving at the Court and it takes into account a six-month period for him to travel to The Hague.³⁴ Although in that case the Trial Chamber ordered that the accused be physically present during the trial,³⁵ that issue may be re-litigated as a consequence of the appealed Decision, since the trial against Mr Banda has not yet commenced. The Prosecution notes that Mr Banda also appears to hold some official function in the Liberation and Justice Movement, which is currently conducting peace negotiations with the Government of Sudan.³⁶

³² ICC-01/04-168, para. 12; see also para.17: “The term ‘proceedings’ in the second part of article 82(1)(d) of the Statute can have no different meaning from the one ascribed to it in the first part of the paragraph, encompassing the proceedings in their entirety.”

³³ ICC-01/09-02/11-667.

³⁴ ICC-02/05-03/09-455, para.16.

³⁵ ICC-02/05-03/09-455, para.21.

³⁶ ICC-02/05-03/09-T-17-ENG, page 24, lines 1-9.

Relief sought

20. For the reasons set out above, the Prosecution requests that the Trial Chamber grant leave to appeal the Decision pursuant to Article 82(1)(d).



Fatou Bensouda, Prosecutor

Dated this 24th day of June 2013

At The Hague, The Netherlands