

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 27 June 2013

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

**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’”**

Source: Defence for Mr. William Samoei Ruto

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. 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 On 24 June 2013, the Prosecution filed the “Prosecution’s Application for Leave to Appeal the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’” (“Application”).² For the reasons detailed in this response, the Defence of Mr. William Samoei Ruto (“Defence”) respectfully submits that the Application should be dismissed.

2. The grounds and arguments advanced in the Application are speculative, theoretical, remote or implausible, or a combination of the same. Properly considered, the Application constitutes a “mere disagreement” with the findings of the majority and is at its core an attempted appeal on policy grounds alone. This is impermissible. The only circumstance under which leave to appeal may be granted against an interlocutory decision of the Chamber is if the requirements detailed in Article 82(1)(d) of the Statute are cumulatively fulfilled. However, neither of the two Issues³ identified in the Application are appealable issues within the terms of Article 82(1)(d) of the Statute. Further, and in any event, should the Trial Chamber find that either or both Issues are appealable, neither meets the criteria for leave to appeal pursuant to Article 82(1)(d). Accordingly, the Defence respectfully requests that the Trial Chamber dismiss the Application.

¹ ICC-01/09-01/11-777.

² ICC-01/09-01/11-783.

³ The Issues are framed and defined at Application, para. 4(i) and (ii).

II. Submissions

(a) Failure to identify any appealable issues

3. Contrary to the Prosecution's position, neither of the two Issues identified in the Application constitutes an appealable issue.⁴ A proper consideration of both issues purportedly identified and advanced by the Prosecution in its application reveals that both fail to satisfy the requirement that an issue "emanate from the ruling of the decision concerned".⁵ On this basis alone, the Application should be dismissed.
4. The First Issue, as framed by the Prosecution, does not arise from the Decision. The Defence submits that the First Issue should properly be considered as two issues: Issue 1(a) (the scope of the requirement under Article 63(1) that the accused be present during the trial) and Issue 1(b) (whether, or to what extent, the Trial Chamber has a discretionary power to excuse an accused from attending most of the trial).⁶
5. Dealing first with Issue 1(a), an analysis of the Decision establishes that the scope of the requirement under Article 63(1) that the accused be present during trial is not a finding of the Majority that is disputed by the Prosecution. The Majority found that the default position is that an accused must be continuously present.⁷ The Defence presumes that the Prosecution agrees with this finding. While a mere dispute with a Trial Chamber's decision is not sufficient for the grant of leave to appeal,⁸ some dispute between the applicant and the Chamber must exist otherwise the issue simply becomes an abstract legal question and so falls foul of the prohibition against seeking leave to appeal

⁴ Application, para. 4.

⁵ ICC-01/05-01/08-532, para. 12.

⁶ Currently, these sub-issues are set out as the First Issue at Application, para. 4(i).

⁷ See, e.g., Decision, paras. 40, 42, 49.

⁸ ICC-01/09-01/11-168, para. 9.

abstract questions.⁹ Therefore, on the basis that Issue 1(a) as presently framed does not raise any point in dispute between the Prosecution and the Majority, resolving Issue 1(a) would not be determinative in these proceedings.¹⁰ As Issue 1(a) is not an appealable issue, it should be dismissed.

6. The Defence submits that Issue 1(b) and the Second Issue can be dealt with together as both concern the availability of discretionary powers and each is effectively a slightly different formulation of the same issue. In this regard, the Defence notes that, by their very terms, Issue 1(b) and the Second Issue presented by the Prosecution recognise that the Majority found that the Chamber did have the discretionary power to grant Mr. Ruto's request for an excusal from continuous presence at trial. The Prosecution has a contrary view; it believes the Chamber did not have such a power. The Prosecution, thus, disagrees with the Majority. But questions over which there is merely disagreement or conflicting opinion are not appealable issues.¹¹ On this basis, Issue 1(b) and the Second Issue are not appealable issues and should be dismissed.
7. In addition, the Defence submits that Issue 1(b) can also be dismissed on the basis that the issue as framed in the relevant part of paragraph 4(i) (whether, or to what extent, the Trial Chamber has a discretionary power to excuse an accused from attending most of the trial) is not the issue which the Prosecution actually seeks leave to appeal. The real issue is revealed at paragraph 11 of the Application where the Prosecution argues that the question at issue is "whether an individual accused of very serious crimes holding certain official functions may be excused from continuous presence at trial, while others are not." A plain reading of paragraph 49 of the Decision establishes that this issue does not

⁹ ICC-01/05-01/08-75, para. 11.

¹⁰ Note the Appeals Chamber's dicta that "[a]n issue is an identifiable subject or topic requiring a decision for its resolution" (ICC-01/09-01/11-168, para. 9).

¹¹ ICC-01/04-168, para. 9.

emanate from the Decision because the Majority's test for excusal from continuous presence at trial is not framed by reference to an accused's official position but by whether he or she can demonstrate "exceptional circumstances".

(b) The two Issues do not significantly affect the fair and expeditious conduct of the proceedings

8. Neither of the two Issues identified by the Prosecution significantly affects the fair and expeditious conduct of proceedings. At the outset, the Defence notes that the Prosecution does not submit that the fairness and expeditiousness of the proceedings would be "significantly" affected by the two Issues, as required by this prong of the Article 82(1)(d) test. Indeed, no such plausible argument can be made. Whilst this alone obviates the need to consider the remainder of the Prosecution's submissions, the Defence shall proceed to do so for the sake of completeness and in the hope that such submissions are of assistance to the Chamber in determining the Application.
9. In support of its argument that the two Issues affect (though not "significantly") the fair conduct of the proceedings, the Prosecution asserts that the Issues "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."¹² This question is unduly narrow, constructed to artificially support the Prosecution's submissions, and is not supported by a proper analysis of the Decision.
10. Contrary to the Prosecution's submissions, in articulating a test for the excusal of any accused from continuous presence at trial, the focus of the Majority was not on the official position of an accused. Rather, the test articulated by the

¹² Application, para. 11.

Majority is whether an accused can demonstrate “exceptional circumstances” which justify the exercise of the Trial Chamber’s discretion under Article 64(6)(f).¹³ While the Majority found “exceptional circumstances” arising where an accused occupies the office of the executive Vice President of State, this was identified simply as one example of such exceptional circumstances and relevant in this particular case.¹⁴ The Majority did not exclusively define “exceptional circumstances” by reference to an accused’s official position. This is clearly established by the Majority’s statements that “[t]he 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” and “[i]t 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.”¹⁵

11. While the threshold for “exceptional circumstances” is set high, the situations which may fall within its scope are clearly broad. This is evident from the plain language of the test itself, as highlighted above. For example, arguably, if a spouse or young child of an accused fell seriously ill, such a situation could be advanced by that accused as amounting to “exceptional circumstances”. Such an application would be determined by the Trial Chamber on its merits. It must also be borne in mind that various other accused before this Court have already been excused from continuous presence at trial, albeit that the periods of absence were shorter than those granted in this case, without any reference being made to “official positions”. In *Bemba*, the accused’s absence from trial proceedings was excused on at least two occasions and proceedings continued

¹³ Decision, para. 49.

¹⁴ *Ibid.*

¹⁵ *Ibid* (emphasis added).

in his absence.¹⁶ Mr. Bemba's absence was not an aberration. It must have been – and was – based on the discretionary judicial power which permits absence from trial notwithstanding the terms of Article 63 of the Statute. This example combined with a proper reading of the Decision establishes that no question of the differential treatment of accused based on official position, or indeed on any basis, arises. All accused (including, of course, Mr. Sang, whose “same treatment” the Prosecution raises as an issue in support of its position,¹⁷ despite the fact that Counsel for Mr. Sang stated very clearly that Mr. Sang wishes to be present throughout trial¹⁸) can avail themselves of a request to be excused from continuous presence at trial provided they can show exceptional circumstances – a test that will be determined on a case by case basis.

12. The Defence is unclear of the relevance of the Prosecution's argument at paragraph 12 of its application because it fails to advance any link between the selected statement taken from the Decision and the two Issues postulated. A general statement in the Decision that the matter before it raises issues of fairness does not automatically mean that the two Issues crafted by the Prosecution affect the fairness of proceedings – significantly or otherwise. This is particularly so when it is disputed that the Issues advanced by the Prosecution arise from the Decision at all.¹⁹ The Defence submits that arguments which are not completely or are improperly formulated, such as those advanced in paragraph 12 of the Application, should be ignored.

¹⁶ For the first occasion, see ICC-01/05-01/08-T-183-Red-ENG CT WT, pp. 1-2. In relation to the second occasion, on 12 April 2013, and during the public session part of proceedings, the accused, Mr. Bemba, asked for authorisation to be absent from part of the afternoon proceedings that day. His request was granted and proceedings continued in his absence. The Defence is unable to provide a transcript reference as currently the whole transcript (even that part relating to the public session) is classified as confidential.

¹⁷ Application, para. 11.

¹⁸ ICC-01/09-01/11-T-23-Red-ENG WT, 15 May 2013, p. 17, 7-11.

¹⁹ See *supra*, paras. 3-7.

13. The Prosecution's arguments that the absence of the accused will affect the interests of the victims and the Prosecution and, thus, the fairness of proceedings, are similarly without merit.²⁰ At the international level including, as indicated above, at this Court, it is well established that proceedings can take place in the absence of an accused without any issue of fairness to victims or the Prosecution arising.²¹ Absence may be due to a variety of reasons including illness or non-cooperation and is dealt with by the relevant Chamber as a matter of waiver. In such situations, the plain fact is that the central issue is whether it is fair to the accused to continue trial in his or her absence; no enquiry is made regarding the rights of the Prosecution or the victims.²²
14. While not central to the Defence's arguments in response to the Application, the Defence considers it necessary to note that the Prosecution's submissions on the parameters of the Decision are inaccurate. Contrary to the submissions of the Prosecution, Mr. Ruto is not excused from attending "the totality of the evidentiary phase of the trial".²³ Mr. Ruto will also attend trial "when victims present their views and concerns in person".²⁴ This requirement further undermines the Prosecution's arguments on fairness and the interests of victims.
15. The weakness of the Prosecution's position on the issue of fairness is additionally revealed by the one example it cites as a situation where unfairness to the Prosecution may arise – a dock identification of the accused.²⁵ Leaving

²⁰ Application, para. 13.

²¹ For example, the trial of Mr. Barayagwiza was conducted entirely in his absence. Only the accused raised this as an appeal point, which was dismissed by the ICTR Appeals Chamber. See *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgement (AC), 28 November 2007 ("*Nahimana* Appeal Judgement"), para. 107 ("It clearly emerges from the aforementioned concurring instruments and jurisprudence that, however firmly the right of the accused to be tried in his presence may be established in international law, that did not [...] preclude the beneficiary of such right from refusing to exercise it.").

²² *Nahimana* Appeal Judgement, para. 109.

²³ Application, para. 8.

²⁴ Decision, Disposition, para. 1(iii).

²⁵ Application, para. 13.

aside the fact that there are a myriad of practical ways to deal with this relatively minor issue in this case,²⁶ the Decision specifically provides that Mr. Ruto must attend hearings when “directed by the Chamber”.²⁷ Accordingly, if any real issue of identification were to arise, it is within the Chamber’s power to direct Mr. Ruto to attend court. In any event, in response to a question posed by His Honour, Judge Eboe-Osuji, at the 15 May 2013 status conference on this very issue, the Defence undertook that it would not challenge the validity of a witness having identified Mr. Ruto from the dock.²⁸ Clearly, therefore, no real question of fairness to the Prosecution arises from the Decision.

16. The Prosecution’s assertion that “the two Issues are likely to be raised as part of an appeal against a decision of acquittal or conviction” and, thus, affect the expeditious conduct of the proceedings is, on any reading of the argument, implausible.²⁹ Given the specific terms of the waiver required by the Trial Chamber and filed with the Registry,³⁰ Mr. Ruto is precluded from raising on appeal “any natural consequence of [his] own voluntary absence from the courtroom.”³¹ Glaringly, the Application is silent as to the appeal point the Prosecution is likely to raise. Indeed, it is difficult, if not impossible, to identify what this theoretical prosecution appeal point might be.³² Therefore, the Defence submits that the Prosecution’s claim that there is “a risk that the entire trial proceedings are nullified” must be dismissed as unsupported, theoretical and entirely speculative hyperbole.³³

²⁶ If the identification of Mr. Ruto by a witness is considered necessary by the Prosecution, then a photograph which the Defence will stipulate is of Mr Ruto, could be used. In fact, it is open to question whether a defence stipulation would be necessary bearing in mind the considerable number of public photographs and videos which exist of Mr. Ruto.

²⁷ Decision, Disposition, para. 1(ix).

²⁸ ICC-01/09-01/11-T-23-Red-ENG WT, 15 May 2013, p. 23, lines 10-15.

²⁹ Application, para. 15.

³⁰ A member of the Ruto Defence hand delivered Mr. Ruto’s original signed waiver to the Court Management Services of the Registry on 24 June 2013.

³¹ ICC-01/09-01/11-782-Anx, para. 3.

³² The Defence is not aware of any case at any of the international courts and tribunals to date where the accused’s absence from trial has been raised by the Prosecution on appeal.

³³ Application, para. 15.

17. In paragraph 16 of the Application, the Prosecution again resorts to highly speculative and unfounded arguments regarding how the Decision might result in delays to the proceedings. Contrary to the Prosecution's assertion, the Decision does not attempt to foresee every instance in which the physical presence of Mr. Ruto will be required. Rather, the Decision properly and carefully provides that Mr. Ruto will be required to attend any hearing if so "directed by the Chamber".³⁴ Accordingly, where Mr Ruto's presence is considered "indispensable" by the Chamber, he will be required to attend. A ruling by the Chamber on Mr. Ruto's attendance will be no different from any other ruling issued by the Trial Chamber during the course of trial and, therefore, no more or less likely to result in delay.

(c) Immediate resolution of the two Issues by the Appeals Chamber will not materially advance the proceedings

18. As the Prosecution correctly notes, the primary purpose of the final limb of the Article 82(1)(d) test is to guard against decisions which might later "unravel the judicial process".³⁵
19. The Decision granted Mr. Ruto's request to be absent from trial "within the limits of certain conditions"³⁶ and with the exception of certain moments during trial.³⁷ Other than in this limited respect, the Decision has no other effect on the conduct of proceedings and the trial will proceed as normal. It is, therefore, clear that the Decision will in reality have little effect on the trial. Bearing in mind the limits of the Decision, it is difficult to accept that it might later "unravel the judicial process". This is particularly so when the request to be

³⁴ Decision, Disposition, para. 1(ix).

³⁵ Application, para. 17 (citing ICC-01/04-168 OA3, para. 16).

³⁶ Decision, para. 2.

³⁷ *Ibid.*, para. 3.

excused was at the instance of the accused and the accused, having been fully informed of the implications, has signed a detailed waiver.

20. The paucity of the Prosecution's pleadings on this point is evidenced by the fact that they are completely unsupported. Nowhere does the Prosecution articulate why the permitted absence of Mr. Ruto at various stages of the trial will have such a cataclysmic effect on proceedings such that they may later be nullified.³⁸
21. Finally, the Prosecution's arguments concerning the possible implications of the Decision for the *Kenyatta* and *Banda and Jerbo* cases are irrelevant and are made in blatant disregard for the Court's established jurisprudence.³⁹ It is a matter of trite law at this Court that "[i]t 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."⁴⁰ The Prosecution's submissions on this point betray the underlying policy motivation of its application and should be disregarded.

³⁸ Application, para. 18.

³⁹ Application, para. 19.

⁴⁰ See, e.g., ICC-02/05-03/09-428, para. 11 (citing to ICC-01/05-01/08-1169, para. 25); ICC-02/04-01/05-20-US-Exp (unsealed pursuant to Decision ICC-02/04-01/05-52), para. 21; and ICC-01/04-01/06-1191, para. 11. This is in contrast to, for example, the Special Court for Sierra Leone where Trial Chamber I held that the first limb of the leave to appeal standard – exceptional circumstances – may exist where the question for appeal raises serious issues of fundamental legal importance to the Special Court for Sierra Leone. See *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-2004-15-T-357, Decision on Defence Applications for Leave to Appeal Ruling of the 3rd February 2005 on the Exclusion of Statements of Witness TF1-141, 28 April 2005, para. 26.

III. Relief sought

22. For the reasons set out above, the Defence respectfully requests that the Trial Chamber reject the Prosecution's application for leave to appeal the Decision.

Respectfully submitted,



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Lead Counsel for Mr. William Samoei Ruto

Dated this 27th Day of June 2013
At Nairobi, Kenya