Dissenting Opinion of Judge Eboe-Osuji

1. I regret my inability to join my highly esteemed colleagues in their decision granting the leave to appeal that the Prosecutor seeks.

2. Although presented under the guise of the tests indicated in article 82(1)(d) of the Statute, there is an enduring worry that the application for leave to appeal is really motivated by the need to test the correctness of the Chamber's resolution of a novel legal question for the Court—a resolution with which the party seeking leave disagrees. But lingering questions about the correctness of a novel legal proposition contained in a decision is never reason enough to grant leave for an interlocutory appeal in this Court, regardless of the profundity of the legal question involved. Nor does mere disagreement suffice to grant leave. In considering what would amount to sufficient reason to grant leave, it needs to be kept in mind that in almost every decision that a Chamber makes, it is generally possible for the losing party to disagree with the Chamber. The earliest formal opportunity for the party to register that disagreement is presented by the procedure of request for leave to appeal the decision. In making that request, it all but tasks the imagination of counsel very minimally to hitch the disagreement with the Chamber's decision onto the argument that to wait for the opportunity of final appeal on the merits to litigate the disagreement entails the *possibility* of a *risk* that the Appeals Chamber *may* overrule the Trial Chamber on the relevant point of the decision and *possibly* nullify every step traceable to the point; thus resulting in ultimate delay, *if* the steps in question may be required to be repeated. But, this is an argument that is always present in every decision except the very plainest that any Chamber may make. It can thus not be a desirable basis to grant leave to launch an interlocutory appeal. It would render pointless the constraining requirements laid down in article 82(1)(d) of the Statute, for grant of leave for interlocutory appeals.

3. Leave is not granted to appeal decisions of Trial Chambers, out of fear of the possibility or risk of what may or may not happen in an appeal on the merits of the case. The controlling general element of article 82(1)(d) is rather that the issue sought to be appealed must be one that 'would significantly' affect the fair and expeditious conduct of the proceedings or the outcome of the trial. It is important to stress that the question is not whether the issue 'would' affect the fair conduct of the case or its outcome, without considering how 'significantly' so. Nor is the question whether the issue 'may'—not would—affect fair trial or the outcome, even though significantly. For leave to be granted, it needs to be seen that the issue *would significantly* affect the outcome of the trial or the fair and expeditious conduct of the proceedings. Both words—'would significantly'—must be given their juristic values.

4. The interpretation of article 82(1)(d) is elaborated in an individual opinion in the decision on the leave application presented by the Defence in the *Banda and Jerbo* case for leave to appeal Trial Chamber IV's decision on stay of proceedings;[1] and was reiterated in a later separate concurring

[1] See *Prosecutor v Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus (Decision on the "Defence*

opinion in the decision of Trial Chamber V (as it then was) on the application for leave to appeal the decision on witness preparation.[2] I shall not repeat the reasoning here.

*

5. In aiming to pass the required test in terms of an issue that 'would significantly' affect fair trial or the outcome, what is required is a clear articulation of a concrete issue that is readily apparent. Strained speculation as to the possibility or a risk that may or may not arise in the end is insufficient to meet the test. And that is all that has been done by the Prosecution in their request for leave. I am persuaded by the submissions of the Defence in their responding argument that the Prosecution's application for leave should be denied for failure to make the case for the grant of the requested leave.

6. The failings of the Prosecution request in this regard are particularly highlighted by certain elements of their submissions. First, they partly base their case of the possibility of unfairness of the trial on the argument that Mr Sang, the second accused, would not have benefitted from a similar treatment. This argument is necessarily speculative and strange. This is because (a) the Sang Defence had supported the application for excusal that the Ruto Defence had presented for the benefit of Mr Ruto; and, (b) the Sang Defence made clear that Mr Sang was seeking no similar relief for himself, and clearly stipulating that Mr Sang intended to be present at his trial throughout. It is therefore difficult to the see how the decision results in unfairness to Sang.

7. Second, the position of the Prosecution is not readily reconciled with the idea of fairness of the trial and expeditiousness in the conduct of the proceedings, in light of their ultimate submission that there is no discretion in a Trial Chamber to conduct a trial in the absence of the accused. The present case palpably demonstrates the flaw in that position. Take the instance of where an accused person in the position of the accused in the present case chooses the path of illegitimate self-help, by deciding to abscond from his own trial, because the Prosecution had prevailed in opposing the request for excusal from continuous presence at trial. Quite naturally, such a course of action would be the wrong one on the part of any accused. The Prosecution will no doubt make a request for an arrest warrant. If an arrest warrant is issued and still defied, the question must then arise as to what should become of the trial. If the Prosecution's position were to generate the controlling law, it must mean that the trial must come to a complete stop until the time—if ever—that the accused is arrested and brought before the Chamber for his trial to proceed or continue. This would be so because, as the Prosecution sees it, there is no discretion in the Trial Chamber to proceed with a trial in the absence of the accused. It is truly difficult to see how fair or speedy trial, at the instance of the victims, is achieved in those circumstances. It is harder to see how that position is consistent with the aspiration of justice for the victims.

Application for Leave to Appeal the 'Decision on the Defence request for a temporary stay of proceedings'"), Dissenting Opinion of Judge Eboe-Osuji, dated 17 December 2012.

[2] *Prosecutor v William Samoei Ruto & Joshua Arap Sang(Decision on the joint defence request for leave to appeal the decision on witness preparation)* Concurring Separate Opinion of Judge Eboe-Osuji, dated 11 February 2013.

*

8. One further misconception implicated in the Prosecution's submissions is the view of equality before the law that they presented. The essential point of the Prosecution in this regard is that all accused persons must be treated in the same manner, irrespective of the peculiar dictates of their individual circumstances. There is much that is wrong with that view. Not the least of which is that a view of *equality* so facile may permit no difference of any sort between the Prosecutor herself and the accused in any way, since article 27 provides that the Statute 'shall apply equally to all persons without any distinction based on official capacity'. But that view of equality, typically canvassed on the basis of 'equality of arms', has been repeatedly rejected in the jurisprudence of international criminal law. As the matter was once put at the Appeals Chamber of the ICTY, the idea of equality is 'to give each party equal access to the processes of the Tribunal, or equal opportunity to seek procedural relief where relief is needed.'[3] It does not mean a right to equality of relief, 'even when the circumstances are quite different in each case' and when no basis is shown for granting equal relief.[4]

*

9. I do not accept that the rejection of such a view of equality in the administration of international criminal justice works only to permit specific circumstances of the prosecutor's position that allow for reasonable differences in comparison to the defence. It should also permit reasonable differences between or among accused persons according to the particular circumstances of each, as long as every accused has 'equal opportunity to seek [the] procedural relief' in question. Hence, some accused persons may qualify to have their attendance before the Court to be regulated by the regime of summons to appear or judicial interim release, while arrest warrants and pre-trial detention govern the attendance of others; many will be required to stand trial, but some may be discharged on humanitarian grounds for lack of fitness to stand trial; and so on.

10. It is therefore misconceived to argue that the legal norm of equality before the law is violated by a narrow test that requires each accused to show exceptional circumstances that may be considered reasonable to grant them excusal from continuous presence at trial. In the present case, the demands of the office of executive vice president of a particular country, in light of the outline of the duties of that office in the country's constitution, were considered to have met the test. The applicable test, correctly understood, would not, for instance, preclude a medical practitioner of rare skill and specialty from similarly qualifying for excusal from continuous presence at trial in the particular circumstances of his own case, if he or she is required to attend to patients somewhere else while the trial continues.

11. But it may be adequate for present purposes to consider the matter from the interpretation and application of the opening sentence appearing in article 14 of the International Covenant on

[3] *Prosecutor v Kordić & Cerkez (Decision on Application by Mario Cerkez for Extension of Time to File His Respondent's Brief)* 11 September 2001 [ICTY Appeals Chamber] para 7.
[4] Ibid, para 9.

Civil and Political Rights, saying: 'All persons shall be equal before the courts and tribunals.' Indeed, this provision has not been permitted to eliminate the recognition of reasonable differences in the particular circumstances of persons appearing before the Courts. It should be helpful in that regard to note the following observations of Professor Manfred Nowak, a renowned human rights expert, in his commentary on the Covenant on Civil and Political Rights: 'the fact that the plaintiff and the respondent in civil matters or the prosecutor and the accused in criminal cases have different rights does not violate this provision, so long as this does not contravene the principle of "equality of arms"; [footnote omitted] similarly, diplomatic privilege or parliamentary immunity is not affected'[internal footnote omitted].[5]

*

12. It is of course the case that beyond the arguments presented by a party seeking leave to appeal, a Chamber may itself form the opinion that leave should be granted regardless of the arguments of the party seeking the leave. Indeed, article 82(1)(d) is ultimately anchored on 'the opinion of the ... Chamber [that] an immediate resolution [of the issue] by the Appeals Chamber may materially advance the proceedings.' Still, such an opinion of the Chamber must necessarily proceed from the normative premises stipulated initially in article 82(1)(d) that the issue presented is 'an issue that *would significantly* affect the fair and expeditious conduct of the proceedings or the outcome of the trial'. Hence, the *suo motu* opinion of the Chamber granting leave should be just as solidly grounded in a realistic prognostication of the forensic consequences of an error in a decision, as must be the submissions of the party seeking leave to appeal the decision.

13. With respect, I am unable to see that solid grounding in the reasoning of my highly esteemed colleagues in the Majority granting leave. For purposes of interlocutory appeal, the Majority's worry as to the *possibility* of a *risk* that the Appeals Chamber *may* disagree with the Trial Chamber in relation to the existence of the excusal discretion is just as speculative in the mouth of the Majority as it is in that of the Prosecution. It is thus insufficient to warrant the grant of leave in the terms of article 82(1)(d). For, in my opinion, also in need of demonstration are the harmful consequences of any such appellate finding of an error in the Trial Chamber's decision regarding the existence and exercise of the discretion in question. In other words, the mere appellate finding of an error in the decision of a court of first instance does not always result in the imposition of a drastic appellate remedy. It is for that reason that the feared harm (i.e. of what 'would significantly affect') needs credibly to be demonstrated as resulting from the feared error (implicated in the impugned decision). Appellate courts do not, for instance, nullify proceedings below on the basis of harmless errors. It is for that reason that article 82(1)(d) requires a showing that the issue presented for interlocutory appeal is 'an issue that that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial'.

[5] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd revised edition (2005). p 309.

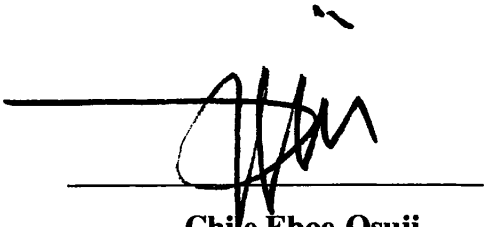
14. The speculation in the decision of the Majority as to the possibility of the risk is all too clear when it is considered that the articulation of the implicated risk needs to be formulated not only at the level of the possibility that the Appeals Chamber may disagree with the Trial Chamber as to the existence or exercise of the discretion to grant excusal from continuous presence at trial; but for the risk, to be credible, it need also to be articulated in terms of the *likelihood* of the Appeals Chamber correcting the error in the manner that may necessitate retrial of some or all portions of the case as feared. For, it cannot be supposed that the presence of an error will automatically result in a particular form of corrective remedy. To the extent that it is not possible to assay that likelihood, the harm in the error is not made out. It is particularly not established that 'the delay contemplated in the Leave Application *is so extensive*.' The proposition is entirely speculative.

*

15. As a final matter, I note that the reasoning of the Majority correctly mentions that Appeals Chamber's jurisprudence indicates (also correctly) that 'expeditiousness is an important component of a fair trial' and that '[t]he expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial'. But the correctness of those propositions as general statements does not relieve ICC judges from giving effect to the specific meanings that the wording of article 82(1)(d) suggests when the adjectives 'fair' and 'expeditious' are used to modify 'conduct of the proceedings'. Such a specific meaning must necessarily overtake the ordinary legal usage that 'expeditiousness is an important component of a fair trial' or that '[t]he expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial'. In my view, the correct approach, for purposes of article 82(1)(d), will be to put the concept of 'expeditious' conduct of the proceeding to its own specific service, while allowing the remainder of the broader notion of *fair trial* to be governed in other respects by the phrase 'fair ... conduct of the proceedings'. That avoids the problem of conflated legal concepts.

16. For the foregoing reasons, I would dismiss the application for leave.

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



Chile Eboe-Osuji
Presiding Judge

Dated 18 July 2013

At The Hague, The Netherlands