



Original: English

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

Date: 5 May 2014

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 application for leave to appeal the “Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation”

Sources: Defence for Mr. William Samoei Ruto

Document 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 A. A. Khan QC
Mr. David Hooper QC
Mr. Essa Faal
Dato' Shyamala Alagendra

Counsel for Joshua Arap Sang

Mr. Joseph Kipchumba Kigen-Katwa
Ms. Caroline Buisman

Legal Representatives of the Victims

Mr. Wilfred Nderitu

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(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

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. On 17 April 2014, the Majority of Trial Chamber V(A), Judge Herrera Carbuccion dissenting, issued the *Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation*.¹ In the Decision, the Majority found that: "(i) [the Chamber] has the power to compel the testimony of witnesses; (ii) pursuant to article 93(1)(d) and (l) of the Statute, [the Chamber] can, by way of requests for cooperation, obligate Kenya both to serve summonses and to assist in compelling the attendance (before the Chamber) of the witnesses thus summonsed; (iii) there are no provisions in Kenyan domestic law that prohibit this kind of cooperation request; and, (iv) the Prosecution has justified the issuance of the summonses to compel the appearance of the Eight Witnesses."²
2. On 29 April 2014, the *Dissenting Opinion of Judge Herrera Carbuccion on the 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation'* ("Dissent") was issued.³ In the Dissent, Her Honour Judge Herrera Carbuccion states that she disagrees with the Majority's finding that:

*"pursuant to Article 93(1)(d) and (l) of the Statute, it [the Chamber] can, by way of requests for cooperation, obligate Kenya both to serve summonses and to assist in compelling the attendance (before the Chamber) of the witnesses thus summonsed'."*⁴

3. The defence for Mr. William Samoei Ruto ("Defence") seeks leave to appeal the Decision on three issues which arise from it and meet the criteria for leave to appeal under Article 82(1)(d) of the Rome Statute ("Statute").

II. Applicable Law

4. According to this Court's well-established jurisprudence, a successful application for leave to appeal an interlocutory decision under Article 82(1)(d) of

¹ ICC-01/09-01/11-1274. Two subsequent corrected versions of the decision have been filed. See ICC-01/09-01/11-1274-Corr and ICC-01/09-01/11-1274-Corr2. The second corrected version will be referred to herein as the "**Decision**".

² Decision, para. 193.

³ ICC-01/09-01/11-1274-Anx.

⁴ Dissent, para. 1.

the Statute⁵ must satisfy the following criteria:⁶

- (i) Whether the matter is an “appealable issue”;
- (ii) Whether the issue at hand could significantly affect either the:
 - a. Fair and expeditious conduct of the proceedings, or
 - b. The outcome of the trial; and
- (iii) Whether, in the opinion of the Chamber, an immediate resolution of the issue by the Appeals Chamber could materially advance the proceedings.

5. The criteria set out in subparagraphs (i), (ii) and (iii) above are cumulative. Accordingly, failure to fulfil one or more of these requirements is fatal to an application for leave to appeal.⁷

III. Submissions

(a) *The three Issues on which the Defence seek leave to appeal*

6. The Defence seeks leave to appeal the Decision on the following three issues (“Issues”):
- (i) Whether the Decision, in so far as it obligates Kenya to compel the appearance before the Chamber of witnesses subject to an ICC summons, breaches the Court's obligations under Articles 21 and 22 of the Statute, in particular the principle of legality and the guarantees of due process (“First Issue”).

⁵ Article 82(1)(d) of the Statute provides that a party may appeal “[a] decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”

⁶ See, e.g., *Prosecutor v. Banda & Jerbo*, Decision on the Prosecution’s Application for Leave to Appeal the “Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence”, ICC-02/05-03/09-179, 13 July 2011 (“**Decision on Leave to Appeal Disqualification of Counsel Decision**”), para. 5; *Prosecutor v. Banda & Jerbo*, Decision on the Prosecution’s Application for Leave to Appeal the “Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation”, ICC-02/05-03/09-243, 1 November 2011 (“**Decision on Leave to Appeal Translation of Statements**”), para. 5.

⁷ Decision on Leave to Appeal Disqualification of Counsel Decision, para. 6; Decision on Leave to Appeal Translation of Statements, para. 6.

- (ii) Whether the Majority erred in holding that Article 93(1)(e) does not comprehensively address States Parties' obligations with respect to facilitating the appearance of witnesses before the Court and that Kenya may be obligated pursuant to Articles 93(1)(d) and (l) to not only serve summonses but to compel the attendance of the witnesses thus summonsed ("Second Issue").
- (iii) Whether the Majority erred by requiring the existence of a law expressly prohibiting the enforcement of an ICC summons to be necessary in order for Kenya to submit in good faith that such assistance is prohibited by its domestic law per Article 93(1)(l) as opposed to Kenya demonstrating in good faith that existing fundamental legal principles of general application, such as the internationally recognised human rights standards of the principle of legality and the prohibition against retroactive penalties, prohibit said assistance ("Third Issue").

(b) Each Issue constitutes an appealable issue pursuant to Article 82(1)(d)

7. For the purposes of Article 82(1)(d), an appealable issue must emanate from the ruling of the impugned decision,⁸ must be an *"identifiable subject or topic requiring a decision for its resolution"* and *"not merely a question over which there is disagreement or conflicting opinion"*,⁹ and its resolution must be *"essential for the determination of matters arising in the judicial cause under examination"*.¹⁰ As set out below, the three Issues satisfy these requirements and are appealable issues.
8. The various issues engaged in the litigation are addressed in the Decision by reference to four questions.¹¹ The three Issues are interrelated and arise from the Majority's answers to the first three questions.
9. The First Issue arises from the Majority's conclusion to its first question¹² – that *"as a general proposition"*¹³ a Chamber *"has the power to compel the testimony of*

⁸ See, e.g., *Prosecutor v. Lubanga*, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, ICC-01/04-01/06-915, 24 May 2007, paras. 56-59; Decision on Leave to Appeal Translation of Statements, para. 10.

⁹ *Situation in the Democratic Republic of Congo*, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006 ("**Decision on Extraordinary Review Application**"), para. 9.

¹⁰ Decision on Extraordinary Review Application, para. 9.

¹¹ Decision, para. 59.

witnesses".¹⁴ The primary basis for this determination was reliance on the principle of implied powers, as a general principle of international law, and as codified in Article 4(1) of the Statute.¹⁵ While, later in its discussion, the Majority recognised that Article 4(2) of the Statute contains "*the qualifier 'as provided in this Statute'*",¹⁶ which necessitates "*an examination of the provisions of the Rome Statute that affect – positively or negatively – the Court's power to avail itself of the obligations incumbent upon States Parties*",¹⁷ the Defence submits that the Majority erred in the Decision by failing to properly consider Articles 21 (which establishes the hierarchy of applicable law and enshrines the obligation to interpret the law consistent with internationally recognised human rights) and 22 (which enshrines the principle of *nullum crimen sine lege*). This failure is identified in the Dissent.¹⁸ Accordingly, the First Issue is an appealable issue.

10. The Second Issue emanates from the answer to the second question,¹⁹ namely the Majority's conclusion that "*pursuant to article 93(1)(d) and (l) of the Statute, [the Chamber] can, by way of requests for cooperation, obligate Kenya both to serve summons and to assist in compelling the attendance (before the Chamber) of the witnesses thus summonsed*".²⁰ The second part of the Second Issue derives directly from this finding. Indeed, Her Honour Judge Herrera Carbuca's observations on this finding constitute the crux of the Dissent.²¹ Additionally, in arriving at the aforementioned conclusion on the second question, the Majority stated that it "*is not convinced that the requirement in article 93(1)(e), that States Parties shall provide*

¹² The first question is framed as: "Whether an ICC Trial Chamber is competent to subpoena witnesses, as a general proposition, to appear before an ICC Trial Chamber." See Decision, para. 59(i).

¹³ Decision, para. 59(i).

¹⁴ Decision, para. 193(i).

¹⁵ Decision, paras. 83-87, 94, 104-110. See also Dissent, para. 19.

¹⁶ Decision, para. 110.

¹⁷ Decision, para. 110.

¹⁸ Dissent, paras. 20-24.

¹⁹ The Decision frames the second question as follows: "Whether a Trial Chamber is competent to obligate a State Party to compel a witness to appear before the Chamber further to the Trial Chamber's subpoena to that witness". See Decision, para. 59(ii).

²⁰ Decision, para. 193(ii).

²¹ Dissent, para. 1.

*assistance in the manner of 'facilitating voluntary appearance of witnesses' is the only assistance that States Parties are required to give".*²² The Majority also found that "[t]he construction urged by the Defence and the Attorney-General is not reasonable. For, it requires reading the article 93(1)(e) in isolation".²³ With these findings the Majority concluded that the Statute did not expressly and comprehensively deal with the appearance of witnesses before the Court via Article 93(1)(e) and, thus, that recourse could be had to Articles 93(1)(d) and (l).²⁴ The Second Issue, therefore, arises from the Decision.

11. The Third Issue emanates from the Majority's answer to the third question addressed in the Decision.²⁵ In this regard, the Majority held that "*there are no provisions in Kenyan domestic law that prohibit [a] cooperation request*" which obligates Kenya to serve and enforce summonses.²⁶ Central to the Majority's reasoning on this point was the finding that "*no one has brought to the attention of the Chamber any bona fide law of Kenya that specially precludes an obligation on Kenya to assist the ICC in the facilitation of compelled appearance of a witness under an ICC subpoena for purposes of appearance before a Trial Chamber.*"²⁷ The focus of the Majority's inquiry into whether Article 93(1)(l)'s national law exception applied was, therefore, on identifying the existence of an express domestic law prohibiting, specifically, the enforcement of an ICC summons. The detailed Decision provides no indication that consideration was given to the Attorney-General's clear statement that "*under the law of the Republic of Kenya, which has*

²² Decision, para. 147.

²³ Decision, para. 148.

²⁴ See also Decision, para. 118 ("The Chamber's rejection of the arguments of the Defence and the Attorney-General takes into account their argument that the adjective 'voluntary' was deliberately employed to qualify 'appearance', in the drafting history of article 93(1)(e)").

²⁵ The third question posed in the Decision is: "Whether a request to compel the appearance of a witness is prohibited by Kenyan law or by the Rome Statute operating as part of the laws of Kenya". See Decision, para. 59(iii).

²⁶ Decision, para. 193(iii).

²⁷ Decision, para. 160 (emphasis added). See also Decision, para. 158 ("clarification was repeatedly sought...whether there was any Kenyan law that *prohibits* Kenya as a State Party from complying with an ICC request for the facilitation of the compelled appearance of a witness before the Trial Chamber...the Attorney-General and the Defence avoided giving an answer to that question...The Defence filed further written submissions at length; but they provided no such information").

domesticated the Rome Statute, the Government of the Republic of Kenya cannot...without violating the [Kenyan] constitution compel any person who does not volunteer to be a witness to become a witness"²⁸ or the submissions of the Defence and the Attorney-General that the relief requested by the Prosecution contravenes internationally recognised human rights standards, which are also recognized under Kenyan law.²⁹ These submissions were, thus, impliedly rejected. This rejection does not mean that the Issue can be dismissed merely as a "question over which there is disagreement or conflicting opinion". Rather, this Third Issue is an extension of the First and is "essential for the determination of matters arising in the judicial cause under examination". Similar to Her Honour Judge Herrera Carbuccion's argument that the Court cannot "possibly compel an individual and subject him or her to penalties or impose restrictions to his or her liberty based on an 'implicit' power not expressly defined in the Rome Statute or any other ICC provision",³⁰ the Defence submits that Article 93(3) of the Statute authorises Kenya to decline

²⁸ ICC-01/09-01/11-T-86-CONF-ENG ET, p. 49, lines 18-21. See also ICC-01/09-01/11-T-86-CONF-ENG ET, p. 94, line 14, to p. 95, line 20 ("MR MUIGAI: We – you -- this is a court that is recognised by the law of the Republic of Kenya as a court that has a limited jurisdiction - may I add a very limited jurisdiction - in its application to the Kenyan State and the Kenyan people, and that application is confined to the trial of war crimes and crimes against humanity. Now, if you've ever looked at our Penal Code, we have more than 300/400 criminal offences. So to call this Court a Kenyan court for purposes of that would be inaccurate. It's a Kenyan court in a metaphorical sense, the way the East African court is, the way the African Court of Justice is, the way the International Court of Justice is a court that Kenya ascribes to by treaty. So let me come back to the last point and state this. The constitution -- I'm sorry, the application of the International Crimes Act in fulfilment of Kenya's international treaty obligation, as contained in the Vienna Convention, requires me to keep asking myself what was the context and object and purpose of the treaty? And may I tell you, my Lord Chairman, Mr President, what my answer is? The purpose of the treaty was to create a fair, independent, impartial tribunal that would effect justice in matters of international criminal law as defined. Further, that jurisdiction being a limited jurisdiction, the Statute is permissive. The Statute was intended to show under what circumstances you can do something. For the attorney general, or the DPP, or the Minister of the Interior to arrogate themselves extra penumbra powers by saying, "I have looked at the International Crimes Act. Nothing says I cannot send you to The Hague, at least until Monday. I know they will come back. The Prosecutor told me he will send you back." And the victim -- and this is a real victim then. And the victim asks me, "Why would you do that?" And I said to him, "Show me something that says I can't do it." This is what law -- this is why the Magna Carta was written, that all these plenary powers of kings and unaccountable individuals should be subordinated to law. If this Court was invited to find that we have opened a new era in which the attorney general, or the DPP, or a minister says, "Anything not prohibited in this law is permitted to me and right now I think I would like to smack your face, show me something that says I can't do it." PRESIDING JUDGE EBOE-OSUJI: Mr Attorney -- MR MUIGAI: It would be preposterous").

²⁹ The standards specifically identified were the principle of legal certainty and the prohibition against the imposition of retroactive penalties. See Additional Defence submissions on the corrected and amended version of "Prosecution's request under article 64(6)(b) and article 93 to summon witnesses", ICC-01/09-01/11-1200-Conf, 4 March 2014, paras. 46-54; ICC-01/09-01/11-T-86-CONF-ENG ET, p. 84, lines 1-7.

³⁰ Dissent, para. 23.

to act on a request from the Court where such request contravenes existing fundamental legal principles of general application – here, human rights principles. The Third Issue is, therefore, an appealable issue.

(c) The three Issues significantly affect the fair conduct of proceedings

12. The jurisprudence confirms that “*the concept of fairness of proceedings under article 82(1)(d) of the Statute requires looking into the broad concept of a fair trial enshrined in human rights instruments. This is consistent with the essence of the Statute, which requires that the application of its provisions be consonant with internationally recognised human rights*”.³¹

13. Further, in respect of the admission of evidence, Article 69(7) of the Statute expressly engages fundamental fair trial rights and guarantees of due process by providing that:

Evidence obtained by means of a violation of this Statute or internationally recognised human rights shall not be admissible if:

- (a) *The violation casts substantial doubt on the reliability of the evidence; or*
- (b) *The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.*

14. At core, the three Issues raise the question whether individuals (repeatedly assured on previous occasions by the Prosecution that they were participating in a voluntary process)³² can now be compelled against their will, and under pain of undefined penalties, to appear as witnesses and give admissible evidence in proceedings before this Court. If these Issues were wrongly decided, the result will be that a significant portion of the testimony elicited during the Prosecution case will, in respect of the First and Third Issues, have been obtained in

³¹ *Situation in Uganda*, Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-112, 19 December 2007, para. 26.

³² See Dissent, fn. 21.

contravention of fundamental human rights standards and guarantees of due process,³³ and, in respect of the Second Issue, without any proper statutory legal basis. The admission of such evidence will inevitably affect the fairness of proceedings.

15. Building on the foregoing and applying the previous reasoning of a Majority of this Chamber, the Defence submits that the *“fairness of the proceedings on its own merits would be affected by the uncertainty that the parties are faced with, pending final resolution of the matter by the Appeals Chamber, during the trial proceedings and the drafting of their closing briefs and arguments, when the contention whether the evidence adduced [from the compelled witnesses] can be relied on...remains”*.³⁴
16. Additionally, it is submitted that the Trial Chamber must pay *“due regard”* to fairness in the trial process for witnesses. This is recognised in Article 64(2) of the Statute which provides that a Trial Chamber *“shall ensure that a trial is fair and expeditious and is conducted with...due regard for the protection of...witnesses.”* “Protection” in this context can be read broadly to encompass not only physical protection but also human rights protection. If, as stated above, any or all of the Issues were wrongly decided, and the eight witnesses who are the subject of the Decision are compelled by the Court and Kenya to testify in breach of their human rights and without a proper statutory legal basis, the fair conduct of proceedings vis-à-vis these witnesses will have been significantly affected. Further, and as noted in the Dissent, witness security concerns are engaged, which per Article 64(2) are linked to the fair and expeditious conduct of proceedings, because *“the ICC, particularly the Victims and Witnesses Unit (VWU), cannot guarantee the safety and well-being of the witness.”*³⁵ Therefore, for this

³³ Dissent, paras. 22-24, 26.

³⁴ Decision on Prosecution’s Application for Leave to Appeal the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’, ICC-01/09-01/11-817, 18 July 2013 (“**Decision on Leave to Appeal Excusal**”), para. 24.

³⁵ Dissent, para. 25.

additional reason, the three Issues significantly affect the fair conduct of proceedings.

17. Finally, the three Issues also concern the question as to whether the principle of voluntary appearance is enshrined in the Statute and in the Kenyan domestic legislation which implements the Statute. This question significantly affects the fair conduct of proceedings because it is submitted that voluntariness has intrinsic value in protecting the rights of an accused. Arguably, compelled witnesses, who appear before the Chamber in order to avoid fines and/or imprisonment, will feel coerced into adopting their original statements, even though prior to being compelled these witnesses went to great lengths to dissociate themselves from the content thereof. The creation of a coercive environment and the rejection of the principle of voluntary appearance, thus, significantly engage issues of fairness.

(d) The three Issues significantly affect the expeditious conduct of the proceedings

18. The “expeditious conduct of proceedings” has been held “to be closely linked to the concept of judicial proceedings ‘within a reasonable time’”.³⁶ This finding complements the statutory fair trial right to be tried without undue delay.³⁷
19. In relation to all three Issues, the arguments on whether the “expeditiousness” of the proceedings is significantly affected are the same. The effect of the Decision is that Kenya is now obligated to provide the detailed assistance ordered by the Majority.³⁸ In order to provide this assistance, it can be reasonably assumed that a series of legal and practical steps will require to be taken such as: (i) locating

³⁶ *Prosecutor v. Bemba*, Decision on the Prosecutor’s Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, ICC-01/05-01/08-532, 18 September 2009, para. 20.

³⁷ Statute, Article 67(1)(c).

³⁸ Decision, pp. 77-78.

the eight witnesses;³⁹ (ii) enacting any primary or secondary domestic legislation required to properly give effect to the Decision including legislation which will link ICC summonses to domestic enforcement mechanisms and determine the penalties to be imposed in the case of non-compliance with an ICC summons;⁴⁰ (iii) implementing the required modalities for the taking of the witnesses' testimony via video-link or at a location in Kenya; and (iv) putting in place the necessary security arrangements both for the protection of witnesses and for the conduct of any proceedings held *in situ*.⁴¹ In respect of step (ii), if primary legislation is required, then that will require the involvement of Parliament and obtaining the requisite parliamentary majority to pass the legislation. This will be a lengthy process. As regards step (iii), the Defence recalls the Registry's previous submissions that the time frame for implementing a suitable video-link between The Hague and Nairobi would take a minimum of 2 months.⁴² For step (iv), the Defence notes that the Plenary's decision not to change the location of this trial to Kenya was based in part on security concerns⁴³ that the Prosecution then shared,⁴⁴ albeit there appears to have been a complete *volte face* by the Prosecution for the purposes of this litigation. If proceedings are to be held *in*

³⁹ The Defence recalls the Prosecution's position that it is only "[t]o the best of the Prosecution's knowledge [that] all seven witnesses are currently in Kenya" (see ICC-01/09-01/11-120-Conf-Red-Corr2, para. 5). The basis of the Prosecution's statement is further undermined by the fact that the Prosecution has lost contact with a number of the witnesses. In addition, the Government of Kenya was unable to confirm the witnesses whereabouts since it did not know their identities (see ICC-01/09-01/11-T-86-CONF-ENG ET, p. 56, lines 12-17).

⁴⁰ While the Defence acknowledges that there is domestic legislation in place to enforce domestic summonses issued by Kenyan courts (see the Kenyan Criminal Procedure Code, Ch. 75 (Rev 2009), sections 144-149 available at <http://www.kenyalaw.org/Downloads/Acts/Criminal%20Procedure%20Code.pdf>), it appears from a plain reading of the legislation that the provisions do not currently apply to the enforcement of summonses issued by the Court. Nor are there any specific provisions dealing with these matters in the Kenyan International Crimes Act 2008 ("ICA"). The Defence notes the Majority's statement that "section 4(2) of the ICA gives [Articles 64(6)(b) and 93] the direct force of law in Kenya, by virtue of the operation of section 4(1) of the ICA (see Decision, para. 177). However, even accepting this reasoning, the Defence does not believe it provides the necessary link between the issuance of an ICC summons and the enforcement of summonses in Kenyan criminal procedure.

⁴¹ Indeed, see the concerns raised in the Dissent about witness security issues. See Dissent, para. 25.

⁴² Registry's submissions on modalities of a video-link, ICC-01/09-01/11-673, 9 April 2013, p. 7.

⁴³ Decision of the Plenary of Judges on the Joint Defence Application for a Change of Place where the Court Shall Sit for Trial in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-875-Anx ("Plenary Trial Location Decision"), para. 22.

⁴⁴ The Prosecution's stated position in July last year was that it "is...of the view [that] it may not be in the interest[s] of justice that any part of the trial be held in Kenya" (see Plenary Trial Location Decision, para. 47 (internal footnotes omitted)).

situ, then in conformity with the Plenary's ruling, a new security assessment will be required.⁴⁵ This is yet another factor which will impact on the timeframe for implementing modalities and may necessitate further submissions including from the Government of Kenya.

20. Clearly, all the above mentioned required implementing steps (and others not anticipated by the Defence in this application) and realities will engage a considerable period of time and may involve further litigation,⁴⁶ therefore, seriously impacting on the expeditiousness of these proceedings. Accordingly, trial "*within a reasonable time*" is significantly engaged by the three Issues.
21. Moreover, the Defence submits that the inevitable delay triggered by the implementation of the Decision is "*so extensive that this would ultimately also affect the fairness of proceedings – especially when considering that this [potentially improper] delay could be prevented by a review of the...Decision by the Appeals Chamber.*"⁴⁷ The three Issues, thus, significantly affect the fair and expeditious conduct of the proceedings.

(e) *The three Issues significantly affect the outcome of the trial*

22. Bearing in mind the disjunctive nature of this limb of the certification test, the Defence submits that, even if the Trial Chamber determines that none of the Issues significantly affect the "fair and expeditious conduct of proceedings", the three Issues significantly affect the outcome of the trial.
23. The Appeals Chamber has elucidated that this part of the Article 82(1)(d) test requires the Chamber to "*ponder the possible implications of a given issue being wrongly decided on the outcome of the case*", a process which "*involves a forecast of*

⁴⁵ Plenary Trial Location Decision, para. 24.

⁴⁶ The potential need for further submissions on modalities was acknowledged by the Prosecution in its original request (see ICC-01/09-01/11-1120-Conf-Red-Corr2, para. 3).

⁴⁷ Decision on Leave to Appeal Excusal, para. 23.

the consequences of such an occurrence."⁴⁸ Further, a Majority of this Chamber has previously held that arguments concerning the risk of nullification of the trial proceedings should be considered under this part of the Article 82(1)(d) test.⁴⁹

24. If the three Issues were wrongly decided, the consequences will significantly affect the outcome of the trial, namely the Article 74 judgement.⁵⁰ The judgement will be based, in part, on compelled witness testimony which should not be before the Court because, in respect of the First and Third Issues, the testimony will have been obtained in contravention of fundamental human rights standards and guarantees of due process, and, in respect of the Second Issue, the testimony will have been obtained without any proper statutory legal basis. If Mr. Ruto is ultimately convicted, the first ground of appeal against conviction will likely be that those parts of the judgement based on compelled testimony should be nullified for the reasons set out in each of the Issues. Accordingly, applying the previous reasoning of a Majority of this Chamber, "*[i]f the Appeals Chamber during appeals proceedings pursuant to Article 81 of the Statute...were to find the Majority's decision to be in error, the risk of the partial...nullification of...those parts of the hearings [based on compelled witness testimony] is such that the outcome of the trial is significantly affected by the issues raised*".⁵¹

(f) *Immediate resolution of the three Issues by the Appeals Chamber could materially advance the proceedings*

25. The term "advance" in this prong of the test requires that the immediate and "authoritative determination" by the Appeals Chamber of the issues will "ensur[e] that the proceedings follow the right course" by "[r]emoving doubts about the correctness of a decision or mapping a course of action along the right lines [...]".⁵²

⁴⁸ Decision on Extraordinary Review Application, para. 13.

⁴⁹ Decision on Leave to Appeal Excusal, para. 21.

⁵⁰ Decision on Leave to Appeal Excusal, para. 22.

⁵¹ Decision on Leave to Appeal Excusal, para. 22.

⁵² Decision on Extraordinary Review Application, para. 15.

26. An immediate resolution of the three Issues by the Appeals Chamber will materially advance the proceedings in this case for the following two reasons.
27. First, if leave to appeal is denied, it is likely that the Decision's impact will be wider than the current eight witnesses because it is reasonable to anticipate that the Prosecution will submit further requests for witnesses to be compelled to testify. Simply put, if the Decision is wrong, it will taint the case going forwards. Determination of the three Issues by the Appeals Chamber at this stage would, therefore, ensure that proceedings "*follow the right course*", and "*provides a safety net for the integrity of the proceedings*".⁵³
28. Further, and in light of the submissions in paragraph 24 above, the Defence submits that immediate resolution of the Issues by the Appeals Chamber will materially advance proceedings, because it will determine important issues at this stage in proceedings rather than reserving them for a subsequent appeal which would "*unravel the judicial process*."⁵⁴

IV. Relief requested

29. For the reasons set out above, the Defence respectfully requests that the Trial Chamber grant leave to appeal the three Issues discussed above pursuant to Article 82(1)(d) of the Statute.

⁵³ Decision on Extraordinary Review Application, para. 15.

⁵⁴ Decision on Extraordinary Review Application, para. 16. *See also Prosecutor v. Muthaura et al.*, Decision on the Prosecution's Application for Leave to Appeal the 'Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11-185)', ICC-01/09-02/11-253, 18 August 2011, para. 37.

Respectfully submitted,



Karim A.A. Khan QC

Lead Counsel for Mr. William Samoei Ruto

Dated this 5th Day of May 2014
At The Hague, the Netherlands