Dissenting Opinion of Judge Eboe-Osuji

1. It follows not necessarily that a dissenting position in an impugned decision should result in a dissenting opinion in the decision on an application for leave to appeal the impugned decision.[1] But, in the present matter, I regret my inability to concur in the decision of my highly esteemed colleagues, in their rejection of the application for leave to appeal the 'Decision on the Submission of Auxiliary Documents' (the 'Impugned Decision'), issued by Majority on 10 June 2015,[2] from which I dissented. For the reasons that follow, leave should be granted to appeal the Impugned Decision.

2. I am persuaded by the minimum consideration of actionable sympathy for the applicant's argument that interlocutory appellate resolution of the question presented in the Impugned Decision has a real potential to affect significantly both the fair conduct and the outcome of the trial. I am also persuaded that what makes it so is the fundamental nature of the right of the accused to adequate notice of the charges.

3. I am unable to share the assertion of my colleagues (as they denied appellate leave) to the effect that paragraphs 18 and 19 of their Impugned Decision 'set out the reasons why the Confirmation Decision provides adequate notice of the charges to the Defence, and consequently why a UDCC is not necessary in this case.'[3] As they particularised that assertion in its full amplitude: 'The Majority emphasised that the Confirmation Decision "clearly" contained the facts and circumstances which underline the crimes charged and confirmed, "thus satisfying the minimum requirements of Article 67(1)(a) of the Statute" and providing adequate notice of the charges to the accused.'[4]

4. In my own respectful view, the Impugned Decision touches the question of clarity of the charges only tangentially, and only in the manner of begging the question. It may further be observed with the greatest respect that the focus of the Impugned Decision was principally in the manner of arguments as to why a Trial Chamber should, as a matter of principle, be disempowered from permitting or requiring a UDCC to be issued. The focus

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[1] In the *Ruto and Sang* case, for instance, I had concurred in the decision rejecting leave to appeal an impugned decision in that case from which I had partly dissented: see *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang (Decision on Defence Applications for Leave to Appeal the 'Decision on the Implementation of the Pre-Trial Chamber's Order regarding the Property and Assets of the Accused)* dated 10 February 2015, ICC-01/09-01/11-1811-Conf.

[2] *Decision on Narcisse Arido's Request for Leave to Appeal the 'Decision on the Submission of Auxiliary Documents'*, ICC-01/05-01/13-1089.

[3] See *ibid*, para. 15.

[4] See *ibid*, para. 15.

was less on *demonstrating* how it is that the confirmation decision in this case has made the charges so clear and adequate, as to leave the UDCC to do nothing more than add sheen upon the existing and demonstrable clarity—despite the many variances between the Prosecutor's indictment and the confirmation decision in the present case. In the circumstances, the seven and half lines of paragraph 19 of the Impugned Decision, in its mere assertion of clarity of the charges, becomes, to my mind, unsatisfying in its ability to deliver the question of clear notice of the charges from the desirability of interlocutory appellate review for purposes of article 82(1)(d) of the Statute.

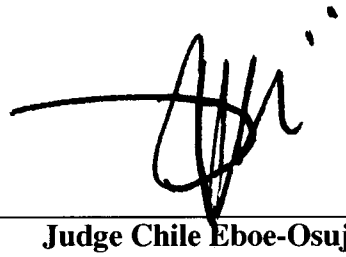
5. I should perhaps note, at this juncture, the Prosecution's contention that appellate intervention is unwarranted in the present case as it is not clear that the Majority and I were at odds as to whether the accused have received proper notice of the charges.[5] But, that, in my view, is quite beside the point for present purposes. For, even an unmistakable concurrence among all members of the Trial Chamber that the confirmation decision made the charges clear would not necessarily foreclose the need for interlocutory appellate resolution of a question so fundamental as to whether or not the accused has received adequate notice of the charges, where an accused persists in that complaint.

6. Finally, the Majority reasons that the UDCC is rendered unnecessary in this case because the Chamber had unanimously invited the Prosecution to file a 'pre-trial brief': and, to that extent, any further need for additional notice will be resolved in that way.[6] I have my doubts. My doubt is not that a pre-trial brief may not furnish further clarity to the charges. It certainly may. But there is more to the matter. And, the concern, rather, is that a pre-trial brief is never identical to a UDCC—in purpose, value and circumstances—such that engages any syllogism to the effect that clarification of the charges by way of a pre-trial brief effectively makes a UDCC a superfluous process. Notably, the pre-trial brief is a document typically filed late, close to the commencement of the trial. That may raise questions as to whether the accused has been 'informed promptly' of the charges within the meaning of article 67(1)(a) of the Statute, to the extent of what is needed to be clarified as to the charges. The filing of the pre-trial brief and its timing may also get tangled up in other concerns in the case, such as questions about witness protection and so on, since, for instance, the pre-trial brief typically requires an indication of which witness is being used to prove which element of the charge. Finally, unlike a UDCC, the pre-trial brief is not a document in the nature of an

[5] See *ibid*, para. 9.
[6] See *ibid*, para. 16.

indictment. And, it is particularly doubtful that conviction may be properly founded upon what is only to be found in a pre-trial brief.

7. It is for the foregoing reasons that I would grant leave to appeal.



Judge Chile Eboe-Osuji, Presiding

Dated 22 July 2015

At The Hague, the Netherlands