

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 6 September 2013

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

**SITUATION IN THE REPUBLIC OF KENYA
IN THE CASE OF THE PROSECUTOR V. WILLIAM SAMOEI RUTO AND
JOSHUA ARAP SANG**

Public

**Decision on the Prosecutor's Request for Leave to Appeal the Decision
Rejecting the Amendment of the Charges (ICC-01/09-01/11-859)**

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor

Counsel for William Samoei Ruto

Karim A. A. Khan
David Hooper

Counsel for Joshua Arap Sang

Joseph Kipchumba Kigen-Katwa
Silas Chekera

Legal Representatives of the Victims

Wilfred Nderitu

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

Other

Appeals Chamber
Trial Chamber V(a)

REGISTRY

Registrar & Deputy Registrar

Herman von Hebel, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”)¹ of the International Criminal Court (the “Court”) issues this decision on the “Prosecution’s Application for leave to Appeal the ‘Decision on the Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’ (ICC-01/09-01/11-859)” (the “Application”).²

I. PROCEDURAL HISTORY AND BACKGROUND

1. On 23 January 2012, the Chamber issued, by majority, in the case of the *Prosecutor v. William Samoei Ruto, Henry Kirpono Kosgey and Joshua Arap Sang* the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” (the “Confirmation of Charges Decision”),³ in which it, *inter alia*, confirmed the charges presented against William Samoei Ruto (“Mr. Ruto”) and Joshua Arap Sang (“Mr. Sang”) to the extent specified in the decision,⁴ and committed the two accused persons to trial on the charges as confirmed.⁵ With regard to the temporal framework of the crimes allegedly committed in the greater Eldoret area, the Chamber confirmed the charges against the two accused for the period “between 1 January 2008 and 4 January 2008”.⁶

2. On 29 March 2012, Trial Chamber V was seized of the present case.⁷

3. On 21 August 2012, the Prosecutor submitted the “Prosecution’s Updated Document Containing the Charges pursuant to the Trial Chamber’s Order

¹ Pre-Trial Chamber II, “Decision Designating a Single Judge”, ICC-01/09-01/11-6.

² ICC-01/09-01/11-880.

³ Pre-Trial Chamber II, ICC-01/09-01/11-373.

⁴ Pre-Trial Chamber II, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, 23 January 2012, ICC-01/09-01/11-373, paras 349, 367, p. 138.

⁵ Pre-Trial Chamber II, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, 23 January 2012, ICC-01/09-01/11-373, p. 138.

⁶ Pre-Trial Chamber II, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, 23 January 2012, ICC-01/09-01/11-373, paras 349 and 367.

⁷ Presidency, “Decision constituting Trial Chamber V and referring to it the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*”, ICC-01/09-01/11-406.

(ICC-01/09-01/11-439)" (the "Updated DCC") in the present case, alleging, *inter alia*, that the crimes committed in the greater Eldoret area began on or about 30 December 2007.⁸

4. On 28 December 2012, Trial Chamber V ordered the Prosecutor to amend the Updated DCC in order to "reflect the limited temporal scope for each crime and location as specified in the Confirmation Decision"⁹ issued by this Chamber, including those allegedly committed in the greater Eldoret area, namely "between 1 January 2008 and 4 January 2008".

5. On 7 January 2013, the Prosecutor re-submitted the Updated DCC in conformity with the order of Trial Chamber V.¹⁰ It was alleged that the crimes in the greater Eldoret area were committed "from 1 January to 4 January 2008".¹¹

6. On 21 May 2013, the Presidency constituted Trial Chamber V(a) and assigned to it the present case.¹²

7. On 3 June 2013, Trial Chamber V(a) set the date for the start of the trial for 10 September 2013.¹³

8. On 22 July 2013, the Chamber received the "Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute" (the "Amendment Request").¹⁴

⁸ ICC-01/09-01/11-448; ICC-01/09-01/11-448-AnxA, p. 39.

⁹ Trial Chamber V, "Decision on the content of the updated document containing the charges", ICC-01/09-01/11-522, para. 29.

¹⁰ ICC-01/09-01/11-533-AnxA-Corr.

¹¹ ICC-01/09-01/11-533-AnxA-Corr, para. 71.

¹² Presidency, "Decision constituting Trial Chamber V(a) and Trial Chamber V(b) and referring to them the cases of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* and *The Prosecutor v. Uhuru Muigai Kenyatta*", ICC-01/09-01/11-745.

¹³ Trial Chamber V(a), "Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date", ICC-01/09-01/11-762, p. 35. Originally, the start date for trial was set for 10 April 2013, see Trial Chamber V, "Decision on the schedule leading up to trial", 9 July 2012, ICC-01/09-01/11-440. Trial Chamber V thereafter vacated the start date of the trial for Defence preparation purposes and set the new date for trial for 28 May 2013, see Trial Chamber V, "Decision concerning the start date of trial", 8 March 2013, ICC-01/09-01/11-642.

¹⁴ ICC-01/09-01/11-824 with confidential Annex A and confidential *ex parte* Annexes B-M.

9. On 2 August 2013, the Defence of Mr. Ruto filed the “Defence Response to Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute”¹⁵.

10. On 13 August 2013, the Chamber received the “Sang Defence Response to Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute”¹⁶.

11. On 16 August 2013, the Single Judge issued the “Decision on the Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute” (the “16 August 2013 Decision”) in which she rejected the Amendment Request.¹⁷

12. On 26 August 2013, the Prosecutor lodged the Application requesting that the Single Judge grant leave to appeal the 16 August 2013 Decision on two grounds.¹⁸

13. On 30 August 2013, the Defence of Mr. Ruto¹⁹ and Mr. Sang²⁰ submitted each responses to the Application in which they requested the Chamber to dismiss it.

II. APPLICABLE LAW

14. The Single Judge notes article 82(1)(d) of the Rome Statute (the “Statute”), rule 155 of the Rules of Procedure and Evidence and regulation 65 of the Regulations of the Court.

15. Article 82(1)(d) of the Statute reads, in relevant part:

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

[...]

(d) 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

¹⁵ ICC-01/09-01/11-836-Conf.

¹⁶ ICC-01/09-01/11-853-Conf.

¹⁷ Pre-Trial Chamber II, ICC-01/09-01/11-859.

¹⁸ ICC-01/09-01/11-880.

¹⁹ ICC-01/09-01/11-893.

²⁰ ICC-01/09-01/11-894.

the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

16. The Single Judge, mindful of the exceptional character of the remedy of the interlocutory appeal,²¹ recalls that for leave to be granted, the following specific requirements must be met:²²

²¹ See, for example, Pre-Trial Chamber II, "Decision on Prosecutor's Application for Leave to Appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58", 19 August 2005, ICC-02/04-01/05-20, paras 15-19; Pre-Trial Chamber II, "Decision on Prosecutor's Application for Leave to Appeal Dated the 15th Day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal Dated the 11th Day of May 2006", 10 July 2006, ICC-02/04-01/05-90, paras 19-21; Pre-Trial Chamber I, "Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges", 24 May 2007, ICC-01/04-01/06-915, paras 20 and 28; Pre-Trial Chamber III, "Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure", 25 August 2008, ICC-01/05-01/08-75, para. 6; Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Leave to Appeal the 'Decision Pursuant to Articles 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo'", 18 September 2009, ICC-01/05-01/08-532, para. 12; Pre-Trial Chamber II, "Decision on the 'Prosecution's Application for Leave to Appeal the *Decision Setting the Regime for Evidence Disclosure and Other Related Matters (ICC-01/09-01/11-44)'*", 2 May 2011, ICC-01/09-01/11-74, para. 7; Pre-Trial Chamber II, "Decision on the 'Prosecution's Application for Leave to Appeal the *Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali'*", 1 April 2011, ICC-01/09-02/11-27, para. 6; Pre-Trial Chamber II, "Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges", 9 March 2012, ICC-01/09-02/11-406, para. 20; Pre-Trial Chamber II, "Decision on the Defences' Applications for Leave to Appeal the Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 9 March 2012, ICC-01/09-01/11-399, para. 12; see also, Trial Chamber II, "Decision on the Prosecutor's Application for Leave to Appeal the Decision on Redactions Rendered on 10 February 2009", 6 March 2009, ICC-01/04-01/07-946-tENG, para. 11.

²² See also, for example, Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, paras 9-19; Pre-Trial Chamber I, "Decision on Libya application for leave to appeal and request for reconsideration of the 'Decision on the *Urgent Defence Request'*", 24 April 2013, ICC-01/11-01/11-316, paras 25-26; Pre-Trial Chamber II, "Decision on the 'Prosecution's Application for leave to Appeal the *Decision Setting the Regime for Evidence Disclosure and Other Related Matters (ICC-01/09-01/11-44)'*", 2 May 2011, ICC-01/09-01/11-74, paras 7-8; Pre-Trial Chamber I, "Decision on the Prosecutor's Application for Leave to Appeal the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'", 24 June 2009, ICC-02/05-01/09-21, pp. 4-5; Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Leave to Appeal the 'Decision Pursuant to Articles 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo'", 18 September 2009, ICC-01/05-01/08-532, paras 14-24; Pre-Trial Chamber I, "Decision on the 'Prosecution's Application for Leave to Appeal the *Decision on the Confirmation of Charges'*", 23 April 2010, ICC-02/05-02/09-267, pp. 5-6; See also recently, Pre-Trial Chamber I, "Decision on the 'Demande d'autorisation d'interjeter appel de la décision de la Chambre Préliminaire I «on three applications for leave to appeal» (ICC-02/11-01/11-307) et plus

a) the decision must involve an “issue” that would significantly affect (i) *both* the “fair” and “expeditious” conduct of the proceedings; *or* (ii) the outcome of the trial; and

b) in the view of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber is warranted as it may materially advance the proceedings.

17. In the following, the Single Judge recalls some key findings of the Court’s jurisprudence which guide her in deciding whether or not the alleged “issue” warrants consideration by the Appeals Chamber.

18. According to established jurisprudence, an “issue” is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or 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”.²³

19. “Fairness” in the context of article 82(1)(d) of the Statute “is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it (articles 64(2) and 67(1)) and article 21(3)”.²⁴ “Expediency”, an

précisément de la décision de refus d’autoriser la défense à interjeter appel de la «Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court» (ICC-02/11-01/11-286-Conf)”, 7 February 2013, ICC-02/11-01/11-389, para. 22; Pre-Trial Chamber I, “Decision on the ‘Demande d’autorisation d’interjeter appel de la «Decision on the Requête de la Défense aux fins de levée de certaines expurgations accordées par la Juge unique au Procureur dans sa Décision du 13 novembre 2012 (ICC-02/11-01/11-294)» (ICC-02/11-01/11-322)”, 6 February 2013, ICC-02/11-01/11-383, para. 16; Pre-Trial Chamber I, “Decision on three applications for leave to appeal”, 29 November 2012, ICC-02/11-01/11-307, paras 18-20.

²³ Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 9.

²⁴ Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 11.

“attribute of a fair trial”,²⁵ is closely linked to the concept of proceedings “within a reasonable time”, namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned.²⁶

20. According to the jurisprudence of the Appeals Chamber, the “outcome of the trial” is affected “where the possibility of error in an interlocutory or intermediate decision may have a bearing thereupon”.²⁷ In deciding a request under article 82(1)(d) of the Statute, the Pre-Trial Chamber “must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence”.²⁸

21. A determination that the issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial does not automatically qualify it as a subject of appeal. Pursuant to article 82(1)(d) of the Statute, the issue must be such “for which, in the opinion of the Pre-Trial [...] Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”. To materially “advance” the proceedings has been identified by the Appeals Chamber as to “move forward” “by ensuring that the proceedings follow the right course”.²⁹ Whether this is the case involves an assessment by the relevant Chamber as to whether the authoritative decision by the Appeals

²⁵ Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 11.

²⁶ Pre-Trial Chamber III, “Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure”, 25 August 2008, ICC-01/05-01/08-75, para. 18.

²⁷ Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 13.

²⁸ Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 13.

²⁹ Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 15.

Chamber will rid “the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial”.³⁰

22. Concerning the requirements set out in paragraph 16 (a) and (b) above, the Single Judge recalls that they are cumulative. Failure in demonstrating that one of the requirements in (a) and (b) is fulfilled makes it unnecessary for the Single Judge to address the remaining requirements under article 82(1)(d) of the Statute.

III. THE ISSUES

23. The Prosecutor seeks the Chamber’s leave to appeal the 16 August 2013 Decision on two Issues. She considers the First and Second Issues to be “connected”³¹ and develops joint arguments with respect to the criteria of article 82(1)(d) of the Statute in relation to both.³² The Defence follow in their responses the same approach.³³ For the sake of clarity, the Issues are presented separately while the parties’ arguments in relation to the article 82(1)(d) criteria are reflected below, in the section addressing the Second Issue.

The First Issue

24. The Prosecutor requests leave to appeal the 16 August 2013 Decision with respect to the Single Judge’s “determination of the criteria pursuant to [a]rticle 61(9) [of the Statute] that a Chamber ought to consider to permit the amendment of charges after the charges are confirmed and before the trial has begun”.³⁴

³⁰ Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 14.

³¹ ICC-01/09-01/11-880, para. 34.

³² ICC-01/09-01/11-880, paras 34-43.

³³ ICC-01/09-01/11-893, paras 10-18; ICC-01/09-01/11-894, paras 16-23.

³⁴ ICC-01/09-01/11-880, para. 19.

Arguments of the Prosecutor

25. The Prosecutor avers that this issue arises from the 16 August 2013 Decision.³⁵ In the opinion of the Prosecutor, while the Single Judge indicated, by reference to a previous article 61(9) decision in the case of *The Prosecutor v. Uhuru Muigai Kenyatta* (the “Kenyatta case”), that she would take “other relevant factors” into account when deciding on amending the charges, she “only considered” two factors, namely, first, “the lack of diligence, organization and efficiency on the part of the Prosecutor”, including the purported absence of ‘any justification or valid reasons for the Prosecutor’s procedural conduct and excessive delays’” and, second, the “extra time allegedly required by the Defence to investigate the extended temporal scope of the charges”.³⁶

26. The Prosecutor maintains that the Single Judge failed to take into account “other relevant criteria which she did consider in the cited decision issued in the *Kenyatta* case”.³⁷ In the “specific circumstances of [the present] case”, these factors would include, according to the Prosecutor, (i) the concrete type of amendment requested “which [...] does not entail the addition of new charges nor the substitution of more serious charges but rather an adjustment to the temporal scope of some of the alleged incidents underlying the charges by a matter of two days”; (ii) whether the Prosecutor had presented evidence in support of her Amendment Request; (iii) whether the requested amendments involved “completely new matters” or whether the accused was on notice of the allegations concerned and the underlying evidence, and was in a position to already prepare his defence; (iv) the rights and interests of witnesses and victims and the fairness of the proceedings *vis-à-vis* them; (v) the Prosecutor’s right and duty to establish the truth pursuant to article 54(1)(a) of the Statute; (vi) the “existence of a reparable and adequate remedy to any prejudice

³⁵ ICC-01/09-01/11-880, para. 20.

³⁶ ICC-01/09-01/11-880, para. 22.

³⁷ ICC-01/09-01/11-880, para. 23.

suffered by the Defence”;³⁸ and (vii) the fact that Pre-Trial Chamber II had not “*expressly rejected*” those “particular dates”, *i.e.* 30 and 31 December 2007 in relation to crimes committed in the greater Eldoret area, in the Confirmation of Charges Decision.³⁹

Arguments of the Defence of Mr. Ruto and Mr. Sang

27. The Defence of Mr. Ruto avers that the First Issue is not an appealable issue arising from the 16 August 2013 Decision.⁴⁰ Alternatively, it argues that the Issue does not meet the criteria pursuant to article 82(1)(d) of the Statute.⁴¹

28. In the view of the Defence, the Prosecutor’s First Issue constitutes “nothing more than a disagreement” with a finding of the Single Judge.⁴² The Defence avers that the Single Judge “correctly identified” that an article 61(9) request must be “properly supported and justified”.⁴³ It agrees with the Single Judge’s finding that there may be “other competing interests which might tip the judicial scales against granting the request because to do otherwise would cause prejudice to the rights of the accused”.⁴⁴ The Defence argues that the Single Judge, at “stage one”, concluded that the justifications provided by the Prosecutor in her request under article 61(9) of the Statute had proven to be insufficient, and the Single Judge was therefore “entitled to dismiss” the request “on this basis alone”.⁴⁵ However, the Defence points out that the Single Judge further grounded her rejection of the Amendment Request on the potential prejudice caused to the rights of the accused. Considering that the Amendment Request “was devoid of merit”, the Defence avers that the “Single Judge was not required to continue assessing the request against the other

³⁸ ICC-01/09-01/11-880, para. 24.

³⁹ ICC-01/09-01/11-880, para. 25.

⁴⁰ ICC-01/09-01/11-893, paras 4 and 8.

⁴¹ ICC-01/09-01/11-893, para. 3.

⁴² ICC-01/09-01/11-893, para. 5.

⁴³ ICC-01/09-01/11-893, para. 6.

⁴⁴ ICC-01/09-01/11-893, para. 6.

⁴⁵ ICC-01/09-01/11-893, para. 6.

criteria identified in the *Kenyatta* case”.⁴⁶ Accordingly, the Defence concludes that “there was no failure to identify or apply the proper criteria when assessing an [article 61(9)] request”.⁴⁷

29. The Defence also contests the Prosecutor’s allegation that the particular dates had not been expressly rejected in the Confirmation of Charges Decision. It purports that it is “glaringly evident” from the “plain terms of [that decision]” that “the temporal boundaries of the charges for the Greater Eldoret area were fixed so as to exclude 30 and 31 December 2007”.⁴⁸

30. The Defence of Mr. Sang argues that the Prosecutor “fails to properly identify any appealable issue”.⁴⁹ It argues that the First and Second Issues are “not distinguishable”⁵⁰ and proceeds to develop its arguments in relation to both Issues. In essence, the Defence contends that “refusing to allow the Prosecutor to broaden the temporal scope of the charges, thereby adding additional factual allegations to the confirmed charges”, falls “squarely within the judge’s discretion and is not appealable”.⁵¹ According to the Defence the Prosecutor’s arguments constitute “a mere disagreement with the Single Judge’s decision”.⁵² The Single Judge took other relevant factors into account when deciding on the Amendment Request, “including, and not limited to, the fairness and expeditiousness [of] the proceedings and the rights of the accused”, the Defence added.⁵³ The Prosecutor’s argument that the Single Judge only considered “some ‘other relevant information’ and not others”, in the view of the Defence is a “mere disagreement with the decision and indeed a conflict of opinion”.⁵⁴

⁴⁶ ICC-01/09-01/11-893, para. 6.

⁴⁷ ICC-01/09-01/11-893, para. 8.

⁴⁸ ICC-01/09-01/11-893, para. 7.

⁴⁹ ICC-01/09-01/11-894, para. 3(i).

⁵⁰ ICC-01/09-01/11-894, para. 8.

⁵¹ ICC-01/09-01/11-894, para. 8.

⁵² ICC-01/09-01/11-894, para. 9.

⁵³ ICC-01/09-01/11-894, para. 11.

⁵⁴ ICC-01/09-01/11-894, para. 13.

31. Lastly, the Defence also claims that the dates sought to be included by the Prosecutor were “indisputably and explicitly excluded” by the Chamber in its Confirmation of Charges Decision.⁵⁵

Conclusions of the Single Judge

32. It is recalled that in the 16 August 2013 Decision, after having confirmed the Chamber’s jurisdiction to entertain the Amendment Request, the Single Judge proceeded to address the requirements of article 61(9) of the Statute. The Single Judge contemplated whether article 61(9) was properly employed by the Prosecutor in the specific circumstances of the case. As was stated in the 16 August 2013 Decision,

“[...] the Prosecutor should not benefit from an unfettered right to resort to article 61(9) of the Statute at her ease, particularly, if such permission will negatively affect other competing interests, such as the fairness and expeditiousness of the proceedings, which would result in causing prejudice to the rights of the accused”.⁵⁶

33. The consideration of relevant factors, such as the prejudice caused to the rights of the accused, when entertaining any article 61(9) request follows from the wording of article 61(9) of the Statute. It allows the Prosecutor to proceed amending the charges post-confirmation only upon having received the “*permission* of the Pre-Trial Chamber” to do so (emphasis added). As was explained in the context of the *Kenyatta* case,

“[...] whether to grant permission to amend the charges confirmed should be taken upon an assessment of all relevant circumstances surrounding the case at this stage of the proceedings. This entails consideration of the Prosecutor’s [Amendment] Request and an evaluation of other relevant information which the Pre-Trial Chamber could seek if necessary for the purposes of its final decision. To say otherwise would mean that the word ‘permission’ in the text of article 61(9) [of the Statute] has no added value”.⁵⁷

⁵⁵ ICC-01/09-01/11-894, paras 14 and 15.

⁵⁶ Pre-Trial Chamber II, “Decision on the ‘Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’”, 16 August 2013, ICC-01/09-01/11-859, para. 31.

⁵⁷ Pre-Trial Chamber II, “Corrigendum to ‘Decision on the *Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute*’”, 21 March 2013, ICC-01/09-01/11-700-Corr, para. 21.

34. This is acknowledged and accepted by the Prosecutor herself when submitting that an article 61(9) decision is discretionary in nature⁵⁸ and proposing other relevant information which the Single Judge ought to take into consideration.⁵⁹

35. The Single Judge observes that in the 16 August 2013 Decision several factors were indeed discussed, such as (i) the Prosecutor's right to continue her investigation post-confirmation of charges in order to establish the truth, albeit with limitations;⁶⁰ (ii) the Prosecutor's lack of diligence, organization and efficiency and her failure to submit the Amendment Request in time;⁶¹ (iii) the Prosecutor's failure to provide justification or valid reasons for such procedural conduct and excessive delays;⁶² (iv) the prejudice caused to the Defence at this stage of the proceedings;⁶³ and (v) considerations of expeditiousness of the proceedings⁶⁴. These factors were decisive for not granting "permission" for the requested amendment. Thus, in view of the decision to reject the Amendment Request, it was not necessary to explore further the two procedural venues provided in article 61(9) of the Statute namely, whether the charges may be amended by the Prosecutor or whether a hearing to confirm those charges must be held.

⁵⁸ See ICC-01/09-01/11-880, para. 33.

⁵⁹ See ICC-01/09-01/11-880, paras 23-25.

⁶⁰ Pre-Trial Chamber II, "Decision on the 'Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute'", 16 August 2013, ICC-01/09-01/11-859, para. 34.

⁶¹ Pre-Trial Chamber II, "Decision on the 'Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute'", 16 August 2013, ICC-01/09-01/11-859, paras 35-37, 38, 40 and 41.

⁶² Pre-Trial Chamber II, "Decision on the 'Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute'", 16 August 2013, ICC-01/09-01/11-859, para. 38.

⁶³ Pre-Trial Chamber II, "Decision on the 'Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute'", 16 August 2013, ICC-01/09-01/11-859, paras 40 and 42.

⁶⁴ Pre-Trial Chamber II, "Decision on the 'Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute'", 16 August 2013, ICC-01/09-01/11-859, para. 42.

36. As indicated above, the Prosecutor does not challenge the fact that the Single Judge may draw upon “other relevant factors” when entertaining an article 61(9) amendment request. To the contrary, the Prosecutor proposes a series of factors that the Chamber ought to consider. Further, the Prosecutor does not advance any arguments that the factors the Single Judge took into account were outright improper. Rather, it appears from the substance of the Prosecutor’s submission that she takes issue with the Single Judge’s exercise of discretion as a result of which the Single Judge rejected the Amendment Request. Considering all of the above, the Single Judge finds that, as correctly pointed out by the Defence,⁶⁵ the First and the Second Issues, as presented by the Prosecutor, are interrelated and thus the First Issue is subsumed by the Second one, as the exercise of discretion necessarily involves consideration of factors. Therefore, the Single Judge will take her decision on the First Issue together with the Second Issue.

The Second Issue

37. The Prosecutor requests leave to appeal the 16 August 2013 Decision with respect to “whether the Single Judge’s discretion pursuant to [a]rticle 61(9) [of the Statute] permits the Single Judge to reject the Prosecut[or’s] application to amend the charges due to the Prosecut[or’s] purported ‘lack of diligence, organization and efficiency’ and ‘absence of any justification as to the belated nature of the Prosecutor’s Request’”.⁶⁶

Arguments of the Prosecutor

38. The Prosecutor purports that this issue arises from the 16 August 2013 Decision.⁶⁷ The Prosecutor contends that by rejecting the Amendment Request, the Single Judge “effectively penalized the Prosecut[or] for [her] delay in requesting the amendment and the lack of justification for the belated nature of

⁶⁵ ICC-01/09-01/11-894, para. 8.

⁶⁶ ICC-01/09-01/11-880, para. 19.

⁶⁷ ICC-01/09-01/11-880, paras 20 and 28.

the request”.⁶⁸ She infers from the Single Judge’s determinations that, had she submitted the request for amendment at the same time as in the *Kenyatta* case, “the Single Judge would not have hesitated to grant it”.⁶⁹

39. The Prosecutor acknowledges that “the Chamber’s ‘permission’ under [a]rticle 61(9) [of the Statute] is a discretionary decision”,⁷⁰ but argues that the Single Judge’s discretion under article 61(9) of the Statute “is not unfettered”⁷¹. She claims that the Single Judge’s decision to deny the request for an amendment “that is otherwise justified and where this may cause significant damage to the Prosecut[or’s] case, solely on the basis of its purported tardiness [...] is a disproportionate measure and constitutes an abuse of the Single Judge’s discretion” given that the prejudice allegedly caused to the Defence is “not irremediable”.⁷²

40. The Prosecutor avers that both the First and Second Issue affect the fairness of the proceedings in that they impact on the Prosecutor’s ability to exercise her powers and fulfil her duties under article 54 of the Statute, including the ability to present the case.⁷³ She contends that the 16 August 2013 Decision “amputates a significant part of [the] case” with the consequence that she may be “deprived from fully presenting [the] case in court” without the additional crimes committed in greater Eldoret area on 30 and 31 December 2007.⁷⁴ The 16 August 2013 Decision also allegedly “curtails the Prosecut[or’s] ability to establish the truth”.⁷⁵

41. Further, the Prosecutor maintains that excluding the dates in question from the charges “affects the fairness of the proceedings *vis-à-vis* the victims of those

⁶⁸ ICC-01/09-01/11-880, para. 28; see also para. 30.

⁶⁹ ICC-01/09-01/11-880, para. 30.

⁷⁰ ICC-01/09-01/11-880, para. 33.

⁷¹ ICC-01/09-01/11-880, paras 31 and 33.

⁷² ICC-01/09-01/11-880, para. 31.

⁷³ ICC-01/09-01/11-880, para. 35.

⁷⁴ ICC-01/09-01/11-880, para. 35.

⁷⁵ ICC-01/09-01/11-880, para. 35.

incidents” as they are deprived “of a judicial finding”.⁷⁶ With reference, in particular, to the Second Issue, the Prosecutor alleges that it is “disproportionate and unfair to penalize the victims” for the Prosecutor’s purported “lack of efficiency, organization, and due diligence and for not providing a valid explanation for the delay”.⁷⁷

42. Moreover, the Prosecutor asserts that the 16 August 2013 Decision is “unfair with respect to witnesses who provided statements to the Prosecut[or] with respect to the dates excluded” which will “not serve to support an eventual conviction of the accused with respect to the Eldoret crimes during 30 and 31 December 2007”.⁷⁸

43. The Prosecutor further claims that both Issues affect the expeditious conduct of the proceedings. The Prosecutor’s case is detrimentally affected because “[the 16 August 2013 Decision] curtails its temporal scope for the purposes of the guilt or innocence of the accused in the greater Eldoret area”.⁷⁹ As a consequence, the Prosecutor may have to re-assess her case theory and strategy, the presentation of evidence, including the order of witnesses, and consider further investigative activities which entail “further litigation and delays”.⁸⁰

44. Finally, the Prosecutor makes reference to the Single Judge’s findings in the 16 August 2013 Decision concerning the potential prejudice to the rights of the Defence. She purports that, consequently, both Issues, which address the question of factors to be taken into account when applying article 61(9) of the Statute, “have an impact on the fairness and expeditiousness of the proceedings with respect to the rights of the accused”.⁸¹

⁷⁶ ICC-01/09-01/11-880, para. 36.

⁷⁷ ICC-01/09-01/11-880, para. 36.

⁷⁸ ICC-01/09-01/11-880, para. 37.

⁷⁹ ICC-01/09-01/11-880, para. 38.

⁸⁰ ICC-01/09-01/11-880, para. 38.

⁸¹ ICC-01/09-01/11-880, para. 40.

45. As regards the question whether the First and Second Issues significantly affect the “outcome of the trial”, the Prosecutor maintains that by excluding the dates concerned from the charges, the “[Trial] Chamber will not be able to determine the accused’s innocence or guilt with respect to those factual allegations” in its article 74 judgement. Hence, it is averred, the outcome of the trial is affected by the 16 August 2013 Decision.⁸²

46. In the opinion of the Prosecutor, a determination of the Appeals Chamber on both Issues will materially advance the proceedings because “it will remove any doubts as to whether the Single Judge had excessively or erroneously relied on certain criteria or omitted to consider other necessary factors” and will assess whether the 16 August 2013 Decision was “an adequate and proportionate response to the [Amendment] Request’s purported shortcomings”.⁸³ According to the Prosecutor, the intervention of the Appeals Chamber “will permit these proceedings to move forward [...] with the certainty that the factual scope of the trial includes all factual allegations”.⁸⁴

Arguments of the Defence of Mr. Ruto and Mr. Sang

47. The Defence of Mr. Ruto contends that the Second Issue is not an appealable issue arising from the 16 August 2013 Decision.⁸⁵ Alternatively, it argues that it does not meet the criteria pursuant to article 82(1)(d) of the Statute.⁸⁶

48. According to the Defence, the Second Issue “is founded on a misstatement of the Single Judge’s reasoning”.⁸⁷ It suggests that “the Single Judge did not reject the original [Amendment Request] based on delay alone or in order to simply penalise the [Prosecutor]”.⁸⁸ Rather, the Single Judge “found that the

⁸² ICC-01/09-01/11-880, para. 41.

⁸³ ICC-01/09-01/11-880, para. 42.

⁸⁴ ICC-01/09-01/11-880, para. 43.

⁸⁵ ICC-01/09-01/11-893, paras 4 and 9.

⁸⁶ ICC-01/09-01/11-893, para. 3.

⁸⁷ ICC-01/09-01/11-893, para. 9.

⁸⁸ ICC-01/09-01/11-893, para. 9.

excessive delays undermined the Prosecut[or's] argument that rejecting the [Amendment Request] would cause 'monumental' prejudice to her case".⁸⁹ In the opinion of the Defence, it was "the implications and consequences of the Prosecut[or's] failures which led the Single Judge to reach the [16 August 2013] Decision, rather than the failures alone".⁹⁰

49. With regard to the question whether the criteria of article 82(1)(d) of the Statute have been met, the Defence claims that neither of the two Issues significantly affects the fair and expeditious conduct of the proceedings.⁹¹ In response to the Prosecutor's argument that she may not be able to present fully the case in court, the Defence argues that the Prosecutor *is* able to present the case against both accused for the alleged commission of the relevant crimes in all locations presented before the Chamber, albeit within the temporal boundaries determined in the Confirmation of Charges Decision.⁹² Recalling the Trial Chamber's direction regarding the temporal scope of the charges as early as 28 December 2012, the Defence sees the Prosecutor's argument, that this issue was of significance to her case, to be undermined.⁹³

50. Concerning the Prosecutor's argument that the Issues affect the "fairness of the proceedings *vis-à-vis* the victims", the Defence replies that such interests "are secondary to and must not result in prejudice to the fair trial rights of an accused".⁹⁴ In the opinion of the Defence, given the "clear deficiencies in the [Amendment Request]", the Single Judge "was compelled to reject" such request.⁹⁵ As "no other consideration could justify such an impingement on the fundamental rights of the accused persons" it was "both unnecessary and

⁸⁹ ICC-01/09-01/11-893, para. 9.

⁹⁰ ICC-01/09-01/11-893, para. 9.

⁹¹ ICC-01/09-01/11-893, paras 10-15.

⁹² ICC-01/09-01/11-893, para. 11.

⁹³ ICC-01/09-01/11-893, para. 11.

⁹⁴ ICC-01/09-01/11-893, para. 12.

⁹⁵ ICC-01/09-01/11-893, para. 12.

contrary to the principle of judicial economy to explicitly evaluate such considerations”, according to the Defence.⁹⁶

51. The Defence equally rejects the Prosecutor’s argument that the Issues affect the fairness *vis-à-vis* witnesses interviewed post-confirmation of charges, and it questions, in the first place, whether the interests of these individuals are relevant for an assessment of fairness within the meaning of article 82(1)(d) of the Statute.⁹⁷ It is maintained that this evidence may still be used in the proceedings, a factor which the Prosecutor acknowledges in her Application.⁹⁸

52. The Defence further purports that neither Issue affects the expeditious conduct of the proceedings. In response to the Prosecutor’s argument that she may “reassess [the] case theory and strategy as well as the presentation of evidence”, the Defence raises the question how the Prosecutor could have proposed to prove and present the case, as it stands, to date. It argues that the 16 August 2013 Decision did not “trigger an expansion of the case to be presented” by the Prosecutor and suggests that the changes emanating from the 16 August 2013 Decision “will be minimal and eminently manageable by professional and experienced prosecutors”.⁹⁹ Moreover, the Defence avers that granting leave to appeal the 16 August 2013 Decision on the two Issues will have a converse effect on the expeditiousness of the proceedings, an interest that the 16 August 2013 Decision sought to protect.¹⁰⁰

53. According to the Defence, the arguments of the Prosecutor regarding the purported impact on the “outcome of the trial” due to the exclusion of the dates concerned must be rejected as they are “tautological”.¹⁰¹ The fact that the evidence in support of the crimes allegedly committed on 30 and 31 December 2007 “will not be considered for the purposes of judgment is the necessary

⁹⁶ ICC-01/09-01/11-893, para. 12.

⁹⁷ ICC-01/09-01/11-893, para. 13.

⁹⁸ ICC-01/09-01/11-893, para. 13.

⁹⁹ ICC-01/09-01/11-893, para. 14.

¹⁰⁰ ICC-01/09-01/11-893, para. 15.

¹⁰¹ ICC-01/09-01/11-893, para. 16.

outcome of ‘excluding’ these dates from the temporal scope of the charges”.¹⁰² Otherwise, the Defence continues, any non-confirmation of a charge would “automatically significantly impact on the outcome of the trial, because, necessarily, it will not be considered for purposes of judgment”.¹⁰³ Further, by comparing the scope of the case proposed to be confirmed by the Pre-Trial Chamber and the scope of the case presently before the Trial Chamber, the Defence contends that the outcome of the trial is not *significantly* affected to the extent that leave should be granted.¹⁰⁴

54. Lastly, the Defence is of the view that an immediate resolution of the two Issues by the Appeals Chamber would not advance the proceedings.¹⁰⁵ It rehearses its previous arguments that the Single Judge, “did not fail to apply the correct criteria” and neither did she reject the Prosecutor’s Amendment Request “simply to penalise the Prosecut[or]”.¹⁰⁶ The Defence suggests that the last limb of the article 82(1)(d) test is “to guard against decisions which might later ‘unravel the judicial process’”.¹⁰⁷ According to the Defence for Mr. Ruto, “there is no reasoned basis on which to conclude that the [16 August 2013] Decision – which excludes 2 days from the scope of the charges – risks such a cataclysmic effect on the conduct of the proceedings”.¹⁰⁸

55. The Defence of Mr. Sang presented its arguments in relation to the Second Issue already in the context of the First Issue as it deems both Issues, as presented by the Prosecutor, “not distinguishable”.¹⁰⁹ Therefore, reference is made to its line of argumentation in relation to the First Issue summarized above.

¹⁰² ICC-01/09-01/11-893, para. 16.

¹⁰³ ICC-01/09-01/11-893, para. 16.

¹⁰⁴ ICC-01/09-01/11-893, para. 17.

¹⁰⁵ ICC-01/09-01/11-893, para. 18.

¹⁰⁶ ICC-01/09-01/11-893, para. 18.

¹⁰⁷ ICC-01/09-01/11-893, para. 18.

¹⁰⁸ ICC-01/09-01/11-893, para. 18.

¹⁰⁹ ICC-01/09-01/11-894, para. 8.

56. However, the Defence of Mr. Sang maintains that the First and Second Issues “do not advance the fairness and expeditiousness of the proceedings” but rather “have an adverse impact on the fairness and expeditiousness of the proceedings”.¹¹⁰ At the outset, it is alleged that the “addition of factual allegations” would cause “a ‘monumental’ prejudice to the Defence”.¹¹¹ With regard to the Prosecutor’s argument that she may have to re-assess her case theory and strategy as well as the presentation of evidence, which, in turn, may require further investigative activities, the Defence questions how the Prosecutor could have arranged the case and strategy “with information not confirmed and therefore disallowed in the Document Containing [the] Charges”.¹¹² It also raises purportedly the question why the Prosecutor did not bring forth earlier the relevant information surrounding the events on 30 and 31 December 2007, which “existed well in advance”.¹¹³ The Defence is of the view that the introduction of new material before trial would not expedite the proceedings but “unduly delay” them as the Defence would require additional time to investigate the new factual allegations.¹¹⁴

57. Lastly, the Defence submits that an immediate resolution of the two Issues by the Appeals Chamber will not materially advance the proceedings. Should the temporal scope of the case be broadened, the Defence notes it would require more time to investigate and “thus would not be ready to start the trial in ten days”.¹¹⁵ The Defence avers that the Application requesting leave to appeal the 16 August 2013 Decision is filed “far too late for an immediate resolution by the Appeals Chamber to materially advance the proceedings”.¹¹⁶

¹¹⁰ ICC-01/09-01/11-894, paras 21 and 22

¹¹¹ ICC-01/09-01/11-894, para. 16.

¹¹² ICC-01/09-01/11-894, para. 17.

¹¹³ ICC-01/09-01/11-894, para. 18.

¹¹⁴ ICC-01/09-01/11-894, para. 19.

¹¹⁵ ICC-01/09-01/11-894, para. 23.

¹¹⁶ ICC-01/09-01/11-894, para. 23.

58. In its relief sought, the Defence of Mr. Sang requests the Chamber “to confirm the [16 August 2013] Decision as set out by the Single Judge”.¹¹⁷

Conclusions of the Single Judge

59. The Second Issue, which, as explained above, also captures the First Issue, relates to the question whether the Single Judge was entitled to reject the Amendment Request on grounds of the Prosecutor’s procedural conduct in the context of all the specific circumstances of the proceedings in the present case. It arises from the 16 August 2013 Decision and constitutes “a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”.¹¹⁸

60. The Single Judge is, however, not satisfied that the Second Issue significantly affects both the fair *and* expeditious conduct of the proceedings. The Single Judge will first address the “expeditiousness”-prong of the statutory test in article 82(1)(d) of the Statute.

61. At the outset, it is noted that in response to the Prosecutor’s procedural conduct, the 16 August 2013 Decision aims at protecting the expeditious conduct of these proceedings: it is recalled that the commencement of the trial, which was postponed twice already,¹¹⁹ is set to start on 10 September 2013. The Prosecutor was informed by Trial Chamber V on 28 December 2012 that crimes allegedly committed on 30 and 31 December 2007 in the greater Eldoret area were not part of the charges confirmed.¹²⁰ The Amendment Request, seeking to expand the temporal scope of the case, was lodged seven weeks before the commencement of the trial, and seven months after the Prosecutor had received

¹¹⁷ ICC-01/09-01/11-894, para. 24(b).

¹¹⁸ Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 9.

¹¹⁹ See footnote 13 above.

¹²⁰ Trial Chamber V, “Decision on the content of the updated document containing the charges”, 28 December 2012, ICC-01/09-01/11-522.

directions from the Trial Chamber that the temporal scope of the case, as confirmed by the Pre-Trial Chamber, did not include the particular dates of 30 and 31 December 2007. No reasons were given as to why the Prosecutor remained inactive for such a long period of time and approached the Pre-Trial Chamber only at this advanced stage of the proceedings, while the Prosecutor should have been aware of the consequences that the proposed amendment would have for all concerned in the case and for the overall proceedings. More specifically, no arguments were put forth as to how the procedural consequences of the Amendment Request (*i.e.* a possible hearing on the charges to be amended, preparation of the Defence) could be reconciled with the right of the accused “to be tried without undue delay”¹²¹ and in accordance with the time schedule adopted by Trial Chamber V(a) in charge of the case at hand. As explained in the 16 August 2013 Decision, “if such procedural performance were to be tolerated, this would taint the fairness and expeditiousness of the entire proceedings”.¹²²

62. The argument that the Prosecutor may have to re-assess the case theory and strategy and the presentation of the evidence unless two additional dates are added to the charges is not convincing. It must be assumed that the Prosecutor has prepared the case for trial on the charges as confirmed by the Chamber. It is unclear from the submissions of the Prosecutor how the two additional rejected days of 30 and 31 December 2007 (which if granted would have actually expanded the charges) necessitate further investigative activities for the presentation of the present case as delineated on 23 January 2012 in the Confirmation of Charges Decision.

63. Equally untenable is the Prosecutor’s argument that the Single Judge’s reference to the fairness and expeditiousness of the proceedings *vis-à-vis* the

¹²¹ Article 67(1)(c) of the Statute.

¹²² Pre-Trial Chamber II, “Decision on the ‘Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’”, 16 August 2013, ICC-01/09-01/11-859, para. 41.

Defence demonstrates the fulfilment of the criteria of article 82(1)(d) of the Statute. No specific arguments were advanced in this regard showing how the Issues affect significantly the expeditious conduct of the proceedings.

64. In light of the above, the 16 August 2013 Decision does not significantly affect the expeditious conduct of the proceedings. As the Prosecutor failed to demonstrate this statutory requirement, the “fairness”-prong within article 82(1)(d) of the Statute will not be further examined.

65. That said, the Single Judge notes that article 82(1)(d) of the Statute provides that leave to appeal a decision may be granted in case the issue claimed by either party would, in the alternative, significantly affect the “outcome of the trial”. As explicated by the Appeals Chamber, this can be assumed “where the possibility of error in an interlocutory or intermediate decision may have a bearing”¹²³ on the outcome of the trial. The Single Judge accepts that, in the circumstances of the present case, the Second Issue resulting from the exercise of her discretion, would significantly affect the outcome of the trial as additional crimes allegedly committed in the course of 30 and 31 December 2007 will not form the factual basis upon which the judgment pursuant to article 74 of the Statute will be rendered.

66. Moreover, the Single Judge is of the view that the Second Issue warrants the immediate intervention of the Appeals Chamber as this would materially advance, “move forward”¹²⁴ the proceedings. It will provide, in the view of the Single Judge, authoritative guidance by “mapping a course of action along the right lines”¹²⁵ which touches upon the competence of the Pre-Trial Chamber,

¹²³ Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 13.

¹²⁴ Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 15.

¹²⁵ Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 15.

the responsibilities of the Prosecutor and the rights of the Defence. The Appeals Chamber resolution of the matter will ensure that the 16 August 2013 Decision does not “cloud or unravel the judicial process”,¹²⁶ but rather ensure that the proceedings “follow the right course”,¹²⁷ considering that the trial is scheduled to start on 10 September 2013.

67. However, as article 82(1)(d) of the Statute does not confer a right to appeal an interlocutory decision but leaves it to the Chamber’s discretion to certify an appealable issue,¹²⁸ the Single Judge deems it crucial to re-define the Second Issue to ensure more clarity which could assist the Appeals Chamber in addressing the matter under appeal. Considering all of the above, the Single Judge therefore opines that the following question be brought to the immediate attention of the Appeals Chamber:

“Whether the Single Judge erred in interpreting the term ‘permission’ referred to in article 61(9) of the Statute so as to include factors relevant to the specificities of the case when exercising her discretion; and whether, consequently, in this particular case, the Single Judge abused her discretion in rejecting the Amendment Request”.

¹²⁶ Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 16.

¹²⁷ Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 15.

¹²⁸ Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 20.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

grants the Prosecutor leave to appeal the 16 August 2013 Decision on the issue as framed by the Single Judge in paragraph 67 of the present decision.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Friday, 6 September 2013

At The Hague, The Netherlands