

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No. ICC-01/09-01/11 OA 6

Date: 13 December 2013

THE APPEALS CHAMBER

Before:

**Judge Sang-Hyun Song, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka**

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF THE PROSECUTOR v. WILLIAM SAMOEI RUTO AND
JOSHUA ARAP SANG**

Public Document

**Decision on the Prosecutor's appeal against the "Decision on the Prosecution's
Request to Amend the Updated Document Containing the Charges Pursuant to
Article 61(9) of the Statute"**



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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr Fabricio Guariglia

Counsel for Mr William Samoei Ruto
Mr Karim A.A. Khan
Mr David Hooper

Legal Representatives of the Victims
Mr Wilfred Nderitu

Counsel for Mr Joshua Arap Sang
Mr Joseph Kipchumba Kigen-Katwa
Ms Caroline Buisman

REGISTRY

Registrar
Mr Herman von Hebel



The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled “Decision on the ‘Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’” of 16 August 2013 (ICC-01/09-01/11-859), and

Having before it the “Application to Participate in the Interlocutory Appeal filed by the Prosecution against the ‘Decision on the “Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’” of 26 September 2013 (ICC-01/09-01/11-991), and the “Prosecution’s request pursuant to Regulation 28(2)” of 3 October 2013 (ICC-01/09-01/11-1010),

After deliberation,

Renders by majority, Judge Anita Ušacka dissenting, the following

DECISION

1. The “Prosecution appeal against the ‘Decision on the ‘Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’” is dismissed as inadmissible.
2. The “Application to Participate in the Interlocutory Appeal filed by the Prosecution against the ‘Decision on the “Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’”” is rejected.
3. The “Prosecution’s request pursuant to Regulation 28(2)” is rejected.

REASONS

I. PROCEDURAL HISTORY

1. On 23 January 2012, Pre-Trial Chamber II (hereinafter: “Pre-Trial Chamber”) issued, by majority, the “Decision on the Confirmation of Charges Pursuant to Article

61(7)(a) and (b) of the Rome Statute”¹ (hereinafter: “Confirmation Decision”), confirming the charges brought by the Prosecutor against Messrs Ruto and Sang to the extent specified therein,² and committing the two accused persons to trial on the charges as confirmed.³ With regard to the temporal framework of the crimes allegedly committed in the greater Eldoret area, the Pre-Trial Chamber confirmed the charges against the two accused for crimes committed “between 1 January 2008 and 4 January 2008”.⁴

2. On 29 March 2012, the Presidency assigned the case against Messrs Ruto and Sang to Trial Chamber V.⁵

3. On 21 August 2012, the Prosecutor submitted the “Prosecution’s Updated Document Containing the Charges pursuant to the Trial Chamber’s Order (ICC-01/09-01/11-448)”⁶ (hereinafter: “Updated Document Containing the Charges”), alleging that the crimes committed in the greater Eldoret area began “on or about 30 December 2007”.⁷ On 28 November 2012, she followed the same approach in the “Prosecution’s Submissions of the Charges against William Samoei Ruto and Joshua Arap Sang”⁸ (hereinafter: “Modified Charges Section”).

4. On 28 December 2012, Trial Chamber V ordered the Prosecutor to amend both the Updated Document Containing the Charges and the Modified Charges Section in order to reflect the limited temporal scope of the charges confirmed by the Pre-Trial Chamber, *inter alia*, in respect of the crimes allegedly committed in the greater Eldoret area, namely “between 1 January 2008 and 4 January 2008”.⁹

¹ ICC-01/09-01/11-373.

² Confirmation Decision, paras 349, 367, p. 138.

³ Confirmation Decision, p. 138.

⁴ Confirmation Decision, paras 349(b), 367(b), p. 138(e), (f). Para. 22 refers to the “Prosecution’s Amended Document Containing the Charges and List of Evidence submitted pursuant to Article 61(3) and Rules 121(3), (4) and (5)” of 15 August 2011, ICC-01/09-01/11-261 and confidential annexes), in which she alleged that the suspects committed crimes against humanity in different locations, including the greater Eldoret area, “[f]rom on or about 30 December 2007 to the end of January 2008”; see ICC-01/09-01/11-261-AnxA, paras 77-82, referring to incidents between 30 December 2007 and 1st January 2008 in the Greater Eldoret area.

⁵ “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.

⁶ ICC-01/09-01/11-448-AnxA.

⁷ Updated Document Containing the Charges, para. 30.

⁸ ICC-01/09-01/11-486, ICC-01/09-01/11-486-AnxA, pp. 3 *et seq.*

⁹ “Decision on the content of the updated document containing the charges”, ICC-01/09-01/11-522, para. 29.

5. On 7 January 2013, the Prosecutor submitted the “Prosecution’s Submission of the Updated Document Containing the Charges pursuant to the Decision on the content of the updated document containing the charges (ICC-01/09-01/11-522)”,¹⁰ reflecting the temporal scope confirmed in the Confirmation Decision.

6. On 25 February 2013, in the “Prosecution’s Updated Pre-Trial Brief”¹¹ (hereinafter: “Updated Pre-Trial Brief”), the Prosecutor nevertheless stated once again that the evidence at hand establishes that Messrs Ruto and Sang “are criminally responsible, as charged, for the crimes against humanity [...] in the locations of [...] the greater Eldoret area [...] between on or about 30 December 2007 to 16 January 2008.”¹²

7. On 21 May 2013, the Presidency constituted Trial Chamber V(a) (hereinafter: “Trial Chamber”) and assigned to it the case against Messrs Ruto and Sang.¹³

8. On 3 June 2013, the Trial Chamber set the date for the start of the trial for 10 September 2013.¹⁴

9. On 22 July 2013, the Prosecutor filed before the Pre-Trial Chamber the “Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute”¹⁵ (hereinafter: “Prosecutor’s Request to Amend the Charges”).

10. On 2 August 2013, Mr Ruto filed his response to the Prosecutor’s Request to Amend the Charges¹⁶ (hereinafter: “Mr Ruto’s Response to the Prosecutor’s Request to Amend the Charges”). On 13 August 2013 Mr Sang filed his response thereto.¹⁷

¹⁰ ICC-01/09-01/11-533-AnxA and the *Corrigendum* thereto ICC-01/09-01/11-533-AnxA-Corr of 25 January 2013.

¹¹ ICC-01/09-01/11-625-Conf-AnxB.

¹² Updated Pre-Trial Brief, para. 203; *see also* paras 159, 163-191.

¹³ “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.

¹⁴ “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.

¹⁵ ICC-01/09-01/11-824-Conf. Pursuant to Pre-Trial Chamber II’s “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, dated 16 August 2013, the document was reclassified as public.

¹⁶ “Defence Response to ‘Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’”, ICC-01/09-01/11-836-Conf.

11. On 16 August 2013, the Pre-Trial Chamber, its functions being exercised by 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’”¹⁸ (hereinafter: “Impugned Decision”). Considering, *inter alia*, the timing of the Prosecutor’s Request to Amend the Charges, the Pre-Trial Chamber held that “[i]f such procedural performance were to be tolerated, this would taint the fairness and expeditiousness of the entire proceedings”.¹⁹ The Pre-Trial Chamber concluded that granting the Prosecutor’s Request to Amend the Charges

would unduly compromise the rights of the accused persons to be informed promptly of the nature, cause and content of the charges, to have adequate time and facilities for the preparation of their defence and to be tried without undue delay, as provided in articles 67(l)(a) to (c) of the Statute.²⁰

12. Consequently, the Pre-Trial Chamber rejected the Prosecutor’s Request to Amend the Charges.²¹

13. On 26 August 2013, the Prosecutor applied for leave to appeal the Impugned Decision.²²

14. On 30 August 2013, Mr Ruto and Mr Sang filed their respective responses thereto.²³

15. On 6 September 2013, the Pre-Trial Chamber granted leave to appeal the Impugned Decision in relation to the following issue, namely:

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

¹⁷ “Sang Defence Response to Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute”, ICC-01/09-01/11-853-Conf.

¹⁸ ICC-01/09-01/11-859.

¹⁹ Impugned Decision, para. 41.

²⁰ Impugned Decision, para. 42.

²¹ Impugned Decision, para. 42, p. 14.

²² “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)”, ICC-01/09-01/11-880.

²³ “Defence Response to 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)”, ICC-01/09-01/11-893; “Defence response to 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-01/09-01/11-894.

particular case, the Single Judge abused her discretion in rejecting the Amendment Request.²⁴

16. On 10 September 2013, the opening statements were heard before the Trial Chamber.²⁵

17. On 19 September 2013, the Prosecutor filed the “Prosecution appeal against the ‘Decision on the Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’”²⁶ (hereinafter: “Document in Support of the Appeal”), requesting that the Appeals Chamber:

(i) [f]ind that the Single Judge erred in the test or procedure that she applied to reject the Prosecut[or]’s Request [To Amend the Charges], confirm the correct test and apply it to the [r]equest, and therefore, grant the Prosecut[or]’s [r]equest to amend the temporal scope of the charges to include crimes committed in the greater Eldoret area on 30 and 31 December 2007 [...]

(ii) In the alternative, to find that the Single Judge erred in the test she applied to reject the Prosecut[or]’s Request [To Amend the Charges], confirm the correct test, and to apply the test to the Prosecut[or]’s Request [To Amend the Charges] and instruct the Pre-Trial Chamber to authorize the amendment of the temporal scope of the charges on an expedited basis.

(iii) In the further alternative, to find that the Single Judge erred in the test that she applied to reject the Prosecut[or]’s Request [To Amend the Charges], confirm the correct test, and to instruct the Pre-Trial Chamber to apply the correct test and make a new determination on an expedited basis.²⁷

18. The Prosecutor submits, *inter alia*, that “an amendment is still permitted until the start of the trial subject to the Chamber’s authorization”.²⁸ She contends that, although the trial in this case commenced on 10 September 2013, “this does not render this appeal moot”.²⁹

²⁴ “Decision on the Prosecutor’s Request for Leave to Appeal the Decision Rejecting the Amendment of the Charges (ICC-01/09-01/11-859)”, (hereinafter: “Decision on the Prosecutor’s Request for Leave to Appeal”), ICC-01/09-01/11-912, para. 67, p. 27. It should be noted that whereas the Prosecutor requested leave to appeal the Impugned Decision with respect to two issues, the Single Judge, acting on behalf of the Pre-Trial Chamber, found that, as pointed out by Messrs Ruto and Sang, both issues were interrelated. Therefore, the Single Judge took her decision on both submitted issues together and reformulated them in one issue, as quoted above; *see* paras 24, 36, 37, 59, 66, 67 of the Decision on the Prosecutor’s Request for Leave to Appeal.

²⁵ ICC-01/09-01/11-T-27-ENG ET WT, pp. 13 *et seq.*

²⁶ ICC-01/09-01/11-956 (OA 6).

²⁷ Document in Support of the Appeal, para. 34.

²⁸ Document in Support of the Appeal, para. 9.

²⁹ Document in Support of the Appeal, para. 36.

19. On 26 September 2013, the common legal representative for victims requested leave to participate in the present appeal³⁰ (hereinafter: “Victims’ Request for Participation”).

20. On 30 September 2013, Mr Ruto filed the “Defence response to the ‘Prosecution appeal against the “Decision on the Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute””³¹ (hereinafter: “Mr Ruto’s Response to the Document in Support of the Appeal”). He requests, pursuant to article 61 (9) of the Statute and considering that the trial in this case commenced on 10 September 2013, that the Appeals Chamber “declare the appeal moot”³² or, in the alternative, “(a) dismiss the appeal, and (b) confirm the [Impugned] Decision”.³³

21. On the same day, Mr Sang filed the “Sang Defence Response to Prosecution Appeal against the ‘Decision on the Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute””³⁴ (hereinafter: “Mr Sang’s Response to the Document in Support of the Appeal”), submitting that “the [P]rosecution’s appeal should be dismissed”, for similar reasons to those submitted by Mr Ruto.³⁵

22. On 2 October 2013, following an order from the Appeals Chamber,³⁶ the Prosecutor filed her response to the Victims’ Request for Participation, indicating that she did not object to it.³⁷ Neither Mr Ruto nor Mr Sang filed a response.

23. On 3 October 2013, the Prosecutor filed the “Prosecution’s request pursuant to Regulation 28(2)”³⁸ (hereinafter: “Regulation 28 (2) Request”). Referring to

³⁰ “Application to Participate in the Interlocutory Appeal filed by the Prosecution against the ‘Decision on the “Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute””, ICC-01/09-01/11-991 (OA 6).

³¹ ICC-01/09-01/11-999 (OA 6).

³² Mr Ruto’s Response to the Document in Support of the Appeal, paras 4-9, 32.

³³ Mr Ruto’s Response to the Document in Support of the Appeal, para. 33.

³⁴ ICC-01/09-01/11-1001 (OA 6).

³⁵ Mr Sang’s Response to the Document in Support of the Appeal, paras 6-10, 34.

³⁶ “Order on the filing of a response to the request by the Common Legal Representative for victims to participate in the appeal against Pre-Trial Chamber II’s decision of 16 August 2013”, 27 September 2013, ICC-01/09-01/11-996 (OA 6).

³⁷ “Prosecution Response to the Common Legal Representative’s ‘Application to Participate in the Interlocutory Appeal filed by the Prosecution against the ‘Decision on the “Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute””, ICC-01/09-01/11-1008 (OA 6).

Mr Ruto's submission that she "jettison[ed] the Issue certified for appeal in favour of one [she] considers more convenient",³⁹ the Prosecutor "invites the Appeals Chamber to request from [her] limited clarifications within one working day in the Appeal against the [Impugned] Decision".⁴⁰

24. On 4 October 2013, Mr Ruto filed the "Defence response to the Prosecution's request pursuant to Regulation 28(2)",⁴¹ requesting that the Appeals Chamber reject the Regulation 28 (2) Request.

II. DETERMINATION BY THE APPEALS CHAMBER

25. The Appeals Chamber notes that, in this appeal, the Prosecutor seeks an amendment of the temporal scope of the charges against Mr Ruto and Mr Sang,⁴² or at least that the Pre-Trial Chamber determine once again whether or not to grant the Prosecutor's Request to Amend the Charges.⁴³ Before addressing the merits of the Prosecutor's arguments as to why the Impugned Decision was erroneous, the Appeals Chamber has to consider whether the relief sought can, at this point in time, still be granted. If it cannot, there is no reason for the Appeals Chamber to address the merits of the appeal, and it would have to be dismissed. Were the Appeals Chamber to address the merits of the appeal regardless, it would, in effect, be giving an advisory opinion, which is not the Appeals Chamber's role.⁴⁴

³⁸ ICC-01/09-01/11-1010 (OA 6).

³⁹ Mr Ruto's Response to the Document in Support of the Appeal, para. 19 (*see also* paras 18, 20, 25).

⁴⁰ Regulation 28 (2) Request, paras 4, 7-8, 10.

⁴¹ ICC-01/09-01/11-1012 (OA 6).

⁴² The Appeals Chamber takes no position on whether the modification of the temporal scope of the charges sought by the Prosecutor would be an amendment of the charges or the addition of additional charges, as this question is irrelevant for the determination of the present matter. In the analysis that follows, the modification sought is referred to as an amendment, as this is the term used by the Prosecutor.

⁴³ Document in Support of the Appeal, para. 34.

⁴⁴ *See for example Situation in Darfur, Sudan*, "Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 6 December 2007", 18 June 2008, ICC-02/05-138 (OA OA 2 OA 3), para. 18; *Situation in the Democratic Republic of Congo*, "Decision on Victims Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 24 December 2007", 30 June 2008, ICC-01/04-503 (OA 4 OA 5 OA 6), para. 30; *See also Prosecutor v. Thomas Lubanga Dyilo*, "Decision of the Appeals Chamber upon the Registrar's Requests of 5 April 2007", 27 April 2007, ICC-01/04-01/06-873 (OA 8), para. 6; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility

26. Article 61 (9) of the Statute provides as follows:

After the charges are confirmed and *before the trial has begun*, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After the commencement of trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges. [emphasis added]

27. The wording of this provision prescribes that an amendment of the charges is no longer possible after the trial has begun. In that regard, the Appeals Chamber notes that opening statements in the present case were made on 10 September 2013 and the first witness was heard on 17 September 2013.⁴⁵ Accordingly, irrespective of the precise moment at which the trial begins within the meaning of article 61 (9) of the Statute, in the instant case, the trial has commenced.

28. The Appeals Chamber notes that the Prosecutor submits that despite the wording of article 61 (9) of the Statute, her appeal is not moot. In support of this submission, the Prosecutor argues (i) that she asked for an amendment of the charges before the opening of the trial,⁴⁶ and (ii) that “[a]ppellate jurisdiction, if intervening correctively, or instructing a lower chamber to make a new determination, will seek to re-instate the *status quo ante* and restore the party’s situation as it was at the time when the right was affected by the lower Court”,⁴⁷ relying primarily on domestic cases from the United States and the legislation of other States.⁴⁸

29. As to the Prosecutor’s first argument, the Appeals Chamber notes that the Prosecutor’s Request to Amend the Charges was filed before the Pre-Trial Chamber on 22 July 2013, i.e. before the commencement of the trial. Nevertheless, the Appeals Chamber finds that the wording of article 61 (9) of the Statute (“the Prosecutor may,

of the Case”, 25 September 2009, ICC-01/04-01/07-1497, (OA 8), para. 38; *Prosecutor v. Joseph Kony et al.*, “Judgment on the appeals of the Defence against the decisions entitled ‘Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06’ of Pre-Trial Chamber II”, 23 February 2009, ICC-02/04 (OA), para. 9. See also *Prosecutor v. Callixte Mbarushimana*, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled ‘Decision on the confirmation of charges’”, 30 May 2012, ICC-01/04-01/10-514 (OA 4), para. 68.

⁴⁵ ICC-01/09-01/11-T-29-Red2-ENG WT, pp. 8 *et seq.*

⁴⁶ Document in Support of the Appeal, para. 36.

⁴⁷ Document in Support of the Appeal, para. 36 (footnotes omitted).

⁴⁸ Document in Support of the Appeal, para. 36.

with the permission of the Pre-Trial Chamber [...] amend the charges”) indicates that not only the request to amend the charges has to be filed before the commencement of the trial, but also that the entire process of amending the charges must be completed by that time, including the granting of permission for the amendment by the Pre-Trial Chamber. The purpose of this is obvious: at the beginning of the trial, its parameters must be clear. The only modification possible under the Court’s legal framework thereafter is a change to the legal characterisation of the facts pursuant to regulation 55 of the Regulations of the Court, as already clarified by the Appeals Chamber in its “Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled ‘Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’”.⁴⁹

30. Concerning the relationship between article 61 (9) of the Statute and regulation 55 of the Regulations of the Court, the Appeals Chamber has held:

[T]he Appeals Chamber recalls that article 61 (9) addresses primarily the powers of the Prosecutor to seek an amendment, addition or substitution of the charges, at his or her own initiative and prior to the commencement of the trial; the terms of the provision do not exclude the possibility that a Trial Chamber modifies the legal characterisation of the facts on its own motion once the trial has commenced. Regulation 55 fits within the procedural framework because at the confirmation hearing, the Prosecutor needs only to “support each charge with sufficient evidence to establish substantial grounds to believe”, whereas during trial, the onus is on the Prosecutor to prove “guilt beyond reasonable doubt”. Thus, in the Appeals Chamber’s view, article 61 (9) of the Statute and Regulation 55 address different powers of different entities at different stages of the procedure, and the two provisions are therefore not inherently incompatible.⁵⁰

The Appeals Chamber recalls that regulation 55 of the Regulations of the Court was introduced precisely to mitigate the fact that after the commencement of the trial the charges cannot be amended (including by the addition of more serious charges).⁵¹

31. Therefore, the Appeals Chamber finds that, once the trial has commenced, it is no longer possible to amend or to add to the charges, irrespective of when the Prosecutor filed her request to amend the charges. The Appeals Chamber does not

⁴⁹ 8 December 2009, ICC-01/04-01/06-2205 (OA 15 OA 16).

⁵⁰ *Lubanga OA 15 OA 16 Judgment*, para. 77.

⁵¹ *Lubanga OA 15 OA 16 Judgment*, para. 77.

consider that this unduly prejudices the Prosecutor: if she identifies a need to seek an amendment of the charges shortly before the scheduled start of a trial, she may ask for a postponement of the trial until the amendment process, including any potential appeal in that regard, is concluded. The Appeals Chamber notes that, despite having modified her document containing the charges filed with the Trial Chamber in August 2012 to include the 30 and 31 of December 2007⁵² and having included the same temporal scope in the Prosecution's Updated Pre-Trial Brief in February 2013,⁵³ the Prosecutor filed the Prosecutor's Request to Amend the Charges on 22 July 2013, i.e. seven weeks before the scheduled commencement of the trial. She did not, however, seek a postponement of the trial at that point in time. Nor did she seek a postponement of the trial when the Pre-Trial Chamber, on 6 September 2013, granted her leave to appeal the Impugned Decision, even though it was clear that the appeal could not be decided before the start of the trial. In that regard, the Appeals Chamber notes that, on 9 September 2013, a status conference was held before the Trial Chamber where a postponement of the trial was discussed. However, once again, the Prosecutor did not request a postponement of the trial.⁵⁴

32. The Appeals Chamber is not persuaded by the Prosecutor's second argument. The Prosecutor does not refer to any provision in the Court's legal framework that would support her position and would lead the Appeals Chamber to conclude that, despite article 61 (9) of the Statute, the charges may still be amended at this point in time. The applicability of the legislation and case law relied upon by the Prosecutor⁵⁵ is doubtful in light of the clear wording of article 21 (1) of the Statute.⁵⁶ In addition, not all of the sources cited by the Prosecutor appear to support her submissions. For

⁵² See *supra*, para. 3.

⁵³ See *supra*, para. 6.

⁵⁴ ICC-01/09-01/11-T-26-CONF-ENG, p. 35 lines 21-24; p. 37, lines 2, 20-23; p. 58, lines 3-6.

⁵⁵ Document in Support of the Appeal, para. 36 and related footnotes.

⁵⁶ Article 21 (1) of the Statute provides that the Court must apply first the Statute, Rules of Procedure and Evidence and Elements of Crimes, second applicable treaties and the principles and rules of international law and third "[f]ailing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards" (emphasis added). Concerning the hierarchy of sources established by article 21 (1) of the Statute, see *Situation in the Democratic Republic of Congo*, "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 2013, ICC-01/04-168 (OA 3), paras 23 *et seq.*; see also, *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006", 14 December 2006, ICC-01/04-01/06-772 (OA 4), para. 34.

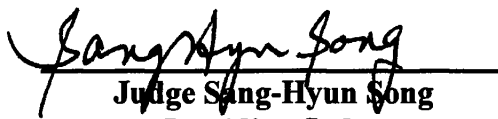
example, in one of the cases referred to by the Prosecutor, the United States Court of Appeals for the 7th Circuit held that “[i]f an event occurs during appeal that eliminates the court’s power to provide relief, the appeal is moot”.⁵⁷ In light of article 61 (9) of the Statute, this is precisely the situation the Prosecutor faces now: the charges cannot be amended after the trial has begun, eliminating the Appeals Chamber’s power to grant her the relief sought. For the above reasons, the relief sought by the Prosecutor – namely the amendment of the charges either by the Appeals Chamber or by the Pre-Trial Chamber, or a reversal of the Impugned Decision and an instruction to the Pre-Trial Chamber to decide anew on the Prosecutor’s request⁵⁸ – cannot be granted in the present circumstances. Therefore, the Prosecutor’s appeal is inadmissible and must be dismissed.

III. VICTIMS’ REQUEST FOR PARTICIPATION AND THE REGULATION 28 (2) REQUEST

33. The Appeals Chamber recalls that, on 26 September 2013, the Victims’ Request for Participation was filed and that, on 3 October 2013, the Prosecutor filed her Regulation 28 (2) Request. As the Appeals Chamber has decided that the Prosecutor’s appeal must be dismissed, the Appeals Chamber considers that both the Victims’ Request for Participation and the Regulation 28 (2) Request must be rejected as well, as granting the two requests would serve no purpose in the present proceedings.

Judge Anita Ušacka appends a dissenting opinion to the present decision.

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


 Judge Sang-Hyun Song
 Presiding Judge

⁵⁷ United States Court of Appeals, Seventh Circuit, *Jay Stone, et al., Plaintiffs-Appellants, v. BOARD OF ELECTION COMMISSIONERS FOR the CITY OF CHICAGO, Defendant-Appellee*, 4 May 2011, No. 11-1085, p. 2.

⁵⁸ Document in Support of the Appeal, para. 34 (i) to (iii).

Dated this 13th day of December 2013

At The Hague, The Netherlands



Dissenting Opinion of Judge Anita Ušacka

1. I respectfully disagree with my colleagues' decision to dismiss this appeal as inadmissible. The dismissal is based on an interpretation given to article 61 (9) of the Statute which is, to my mind, merely one of several possible ways to address the period of time during which charges may be amended. In my view, the first sentence of article 61 (9) of the Statute should be read in a way that provides a potential remedy for the Prosecutor's request, if any error is found on the merits of the appeal. Accordingly, in my opinion, the correct course of action would have been for the Appeals Chamber to first address the merits of the appeal. Only after addressing the merits could the Appeals Chamber have fully assessed the implications of dismissing the appeal.

I. BACKGROUND

2. On 16 August 2013, the Pre-Trial Chamber (Single Judge) issued the Impugned Decision, rejecting the Prosecutor's Request to Amend the Charges. In the view of the Pre-Trial Chamber, the Prosecutor's handling of the request revealed a "lack of efficiency and due diligence"¹, particularly by filing the Request to Amend the Charges almost seven months after the date of issuance of Trial Chamber V's decision on the updated document containing the charges on 28 December 2012² and failing to provide any justification for this delay.³

3. On Friday, 6 September 2013, the Pre-Trial Chamber granted leave to appeal the Impugned Decision in relation to the following issue:

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.⁴


4. On Tuesday, 10 September 2013, the trial against Mr Ruto and Mr Sang commenced. The Document in Support of the Appeal was filed within the time limit of ten days after the decision granting leave was rendered, i.e. on 19 September 2013.

¹ Impugned Decision, para. 35.

² Impugned Decision, para. 37.

³ Impugned Decision, para. 38.

⁴ Decision on the Prosecutor's Request for Leave to Appeal, para. 67, p. 26.



5. The requested amendment seeks to include in the scope of the charges events that took place on 30 and 31 December 2007 in the greater Eldoret area.⁵ This is based on the following:

6. On 15 August 2011, the Prosecutor requested that the Pre-Trial Chamber confirm charges for crimes allegedly committed as part of an attack that occurred in different areas of Kenya, including in the greater Eldoret area.⁶ On 23 January 2012, the Pre-Trial Chamber confirmed charges relevant to the greater Eldoret area for crimes allegedly committed between 1 January 2008 and 4 January 2008, noting that the Prosecutor had alleged attacks in that area starting from 30 December 2007.⁷ In addition, the Pre-Trial Chamber confirmed that the overall attack relevant to all locations in Kenya started on 30 December 2007 and ended on 16 January 2008.⁸ The Prosecutor included both in the Updated Document Containing the Charges filed on 21 August 2012 and in the Modified Charges Section filed on 28 November 2012 before the Trial Chamber that the overall attack relevant to all of the locations in Kenya, including the greater Eldoret area, occurred between 30 December 2007 and 16 January 2008, but specified incidents occurring in the greater Eldoret area for dates occurring on or after 1 January 2008.⁹ On 28 December 2012, Trial Chamber V ordered the Prosecutor to amend the Updated Document Containing the Charges in order to reflect the limited temporal scope of the charges confirmed by the Pre-Trial Chamber.¹⁰ In this decision, Trial Chamber V also noted that the Pre-Trial Chamber had made findings limiting the temporal scope of specific charges in different areas, including the greater Eldoret area.¹¹ Thereafter, the Prosecutor submitted a newly updated document containing the charges on 7 January 2013¹² and submitted the Updated Pre-Trial Brief on 25 February 2013.

7. On 22 July 2013, the Prosecutor filed a request to amend the charges in relation to events that took place in the greater Eldoret area on 30 and 31 December 2007,

⁵ Prosecutor's Request to Amend the Charges, para. 1.

⁶ "Document Containing the Charges", ICC-01/09-01/11-261-AnxA, paras 77-86.

⁷ Confirmation Decision, paras 253, 254, 349, 367.

⁸ Confirmation Decision, para. 174.

⁹ Updated Document Containing the Charges, paras 26, 30, 71-86.

¹⁰ "Decision on the content of the updated document containing the charges", ICC-01/09-01/11-522.

¹¹ "Decision on the content of the updated document containing the charges", ICC-01/09-01/11-522, para. 28, footnote 47.

¹² "Prosecution's Submission of Updated Document Containing the Charges pursuant to the Decision on the content of the updated document containing the charges (ICC-01/09-01/11-522)", ICC-01/09-01/11-533-AnxA.

thereby initiating the proceedings that led to this appeal.¹³ It should be noted that, according to the Prosecutor, the evidence supporting the crimes that were allegedly committed during this time period was collected only after the confirmation of charges and disclosed to Mr Ruto and Mr Sang in January 2013.¹⁴

II. REASONS

8. In reaching my conclusions, I have considered the following issues:

A. Interpretation of Article 61 (9) of the Statute

9. Article 61 (9) of the Statute reads:

After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

10. The first sentence of this provision proscribes that the Prosecutor may only amend the charges in the time period “[a]fter the charges are confirmed and before the trial has begun”. Based on this provision, one could assume that, if the Prosecutor had submitted a request for amendment of the charges to the competent Chamber after the commencement of the trial, the request would have been rejected.

11. However, the present case differs from this scenario. The Prosecutor’s Request to Amend the Charges was filed on 22 July 2013, approximately seven weeks before the commencement of the trial. Although the Pre-Trial Chamber rejected the request, it nevertheless granted the Prosecutor leave to appeal the Impugned Decision (before the commencement of the trial) and thereby allowed the Appeals Chamber to review this decision.

1. Interpretation of the Majority

12. Instead of considering the Impugned Decision on the basis of the issue for which leave was granted – i.e. whether the Pre-Trial Chamber has discretion in deciding on an amendment request and, if so, how it should exercise such discretion – my colleagues ignore the issue on appeal on the basis of an issue arising from their

¹³ Prosecutor’s Request to Amend the Charges.

¹⁴ See Prosecutor’s Request to Amend the Charges, paras 11-14 (footnotes 13-33).

interpretation of the first sentence of article 61 (9) of the Statute, namely, whether an amendment to the charges can be granted *after* the commencement of the trial where the amendment request was filed *before* the commencement of the trial.

13. The Majority appear to assume that the interpretation of article 61 (9) of the Statute is a straightforward matter.¹⁵ It bases its conclusion primarily on a textual interpretation of a part of that provision,¹⁶ focusing on the five words “before the trial has begun” and reading the word “amend” as exclusively referring to a fully concluded amendment process. The Majority also rely on its own understanding of the purpose of this part of the provision, namely, that “at the beginning of the trial, its parameters must be clear”.¹⁷ The Majority do not, however, rely on a systematic interpretation of article 61 of the Statute. It does not take into account article 61 of the Statute in its entirety, its place in Part V of the Statute (“Investigation and Prosecution”), the full content of paragraph 9 of that article, the purpose of the confirmation proceedings, or the implications on the rights of the accused if a trial were to commence while an amendment request is pending.

14. In that respect, it is recalled that the Document in Support of the Appeal was filed on 19 September 2013, i.e. nine days after the commencement of the trial. If it were clear that the amendment process needed to have been fully concluded before the commencement of the trial and that the Prosecutor’s relief could no longer be granted, the Appeals Chamber would have had to immediately dismiss the appeal *in limine* for a number of reasons, primarily for reasons of expeditiousness and judicial economy.

2. Interpretation of the right of the Prosecutor to “amend” the charges

15. The word “amend” in article 61 (9) of the Statute imports the notion of changing “an otherwise final text”.¹⁸ The relevant “text” is the Prosecutor’s document containing the charges, as confirmed by the Pre-Trial Chamber pursuant to article

¹⁵ In this context, I note that despite the fact that the application and interpretation of article 61 (9) of the Statute in relation to the applicable timeframe for seeking an amendment lies primarily within the powers of the Pre-Trial Chamber, the Majority approaches the matter without the benefit of a ruling of the Pre-Trial Chamber on the issue.

¹⁶ See “Decision on the Prosecutor’s appeal against the “Decision on the Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute” (hereinafter: “Majority Decision”), 13 December 2013, ICC-01/09-01/11 (OA 6), para. 27.

¹⁷ See Majority Decision, para. 29.

¹⁸ B. A. Garner (ed.), *Black’s Law Dictionary* (West, 8th Edition, 2004), p. 89.

61 (7) of the Statute. Thus, an “amendment” refers to any alteration to the document containing the charges. If the amendment request is more fundamental, i.e. if the Prosecutor seeks to add additional charges or to substitute more serious charges, the second sentence of article 61 (9) of the Statute clarifies that the Pre-Trial Chamber must hold a confirmation hearing. In the present case, the Prosecutor sought an amendment that, in her opinion, did not require a confirmation hearing, because it “is a minor adjustment to the temporal scope of some of the alleged crimes by a matter of two days”.¹⁹

16. The word “amend” is used as a verb in its active form in article 61 (9) of the Statute; it is the Prosecutor who may “with the permission of the Pre-Trial Chamber” amend the charges. However, there are at least two possible options as to the correct interpretation of the word “amend” in this context. First, it can be read as requiring a request from the Prosecutor to the Pre-Trial Chamber for permission to amend the charges. Second, it can be read as requiring the Pre-Trial Chamber to grant permission to amend the charges before the commencement of the trial. Possibly, it could even mean that the Prosecutor is required to file an amended document containing the charges before the commencement of the trial.

17. In support of the first option, it is important to note that the phrase “permission of the Pre-Trial Chamber” is connected by the word “and” with the phrase “after notice to the accused”. Evidently, the accused is notified at the time the Prosecutor seeks an amendment. Therefore, the act of seeking an amendment, as opposed to having been granted an amendment (or filing an amended document containing the charges) could be considered sufficient in order to fall within the timeframe required by article 61 (9) of the Statute.

18. In further support of the first option, I note that the first sentence of article 61 (9) of the Statute suggests that the Prosecutor has a right to amend the charges *during the entirety of this period*, i.e. up until the moment the trial begins. If the first sentence of article 61 (9) of the Statute is read as requiring the amendment process to be fully concluded, the Prosecutor would be required to foresee how long the amendment process would take, which could include, for example, the length of a

¹⁹ Prosecutor’s Request to Amend the Charges, para. 17.

confirmation hearing if a more fundamental amendment is requested, and/or of appeal proceedings, if leave to appeal a decision denying an amendment is granted.²⁰

19. However, to require the Prosecutor to take into account the length of amendment proceedings would, in my view, be at odds with the fact that the Trial Chamber may commence the trial at any time. There is no legal provision requiring the Trial Chamber to postpone the commencement date of the trial to account for proceedings relevant to the Prosecutor's request to amend the charges. Rather, this is a matter solely within the discretion of the Trial Chamber. While the Prosecutor may seek a postponement of the trial date, such a request does not *automatically* lead to a Trial Chamber postponing the commencement of the trial.

20. In sum, if the view of the Majority was correct, at least the following scenarios would make a request to amend the charges submitted before the commencement of the trial moot: first, where the trial commences while the Pre-Trial Chamber is still in the process of considering the Prosecutor's request to amend the charges; second, as is the case in the appeal-at-hand, where leave to appeal was granted by the Pre-Trial Chamber shortly before the trial commences (thus allowing the defence to raise the argument that the appeal is moot); third, where the trial commences, for example, one day before the delivery of the appeal judgment; or fourth, where, at the time of the commencement of trial, the matter is before the Pre-Trial Chamber because it has been remanded by the Appeals Chamber for new consideration.

3. Considerations relevant to a purposive interpretation

21. The Majority refer, in paragraphs 29 and 30 of their decision, to the relationship between article 61 (9) of the Statute and regulation 55 of the Regulations of the Court. Regulation 55 of the Regulations of the Court was apparently adopted on the understanding that the Prosecutor could no longer *seek* an amendment of the charges after the commencement of the trial.²¹ Therefore, the main purpose of regulation 55 of

²⁰ See regulation 65 of the Regulations of the Court.

²¹ See Appeals Chamber, "Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'" (hereinafter: "Lubanga OA 15 OA 16 Judgment"), 8 December 2009, ICC-01/04-01/06-2205 (OA 15 OA 16), para. 77.

the Regulations of the Court was to avoid impunity gaps and to promote judicial economy.²²

22. In accepting this, in my view, article 61 (9) of the Statute should also be interpreted so as to allow the Prosecutor to close impunity gaps as long as she still has the right to seek an amendment of the charges. In that case, the amendment process would, at times, only conclude after the commencement of the trial. It would then be the task of the Trial Chamber to either postpone the commencement of the trial or, at the beginning of the trial, take the measures necessary to afford the defence an opportunity to prepare an effective defence in relation to the additional charges.

4. Conclusion

23. These considerations reveal that the issue of when the Prosecutor may seek an amendment and whether the amendment process must be finalised before the commencement of the trial are not easily answered and have many implications. Imposing a requirement that the amendment proceedings must be concluded before the commencement of the trial, in my view, limits considerably the scope of application of the Prosecutor's right to amend the charges and appears to be contrary to the overall purpose of article 61 (9) of the Statute.

B. Mootness

24. Mr Ruto and Mr Sang as well as the Prosecutor raise arguments relevant to the "mootness" of the appeal. In addressing these arguments, the Majority refer, in paragraphs 28 and 32 of their decision, to the concept of mootness.²³

25. The concept of mootness has not yet been comprehensively addressed by the Chambers of the Court. There are examples from the jurisprudence of the Appeals Chamber where arguments have been dismissed as moot and mootness, as such, has been discussed and was rejected as being applicable to certain appeals.²⁴ In addition,

²² See e.g. Lubanga OA 15 OA 16 Judgment, para. 77.

²³ The doctrine of mootness has existed for a long time and is well-developed in, *inter alia*, the United States, Canada and South Africa. In these jurisdictions, courts consider a request moot if it is not based on a live issue in a case or controversy (see Canada, Supreme Court, *Borowski v. Canada (Attorney General)*, 9 March 1989, [1989] 1 SCR 342; United States, Supreme Court, *DeFunis v. Odegaard*, 23 April 1974, 416 U.S. 312 (1974)). However, there are some important exceptions. When adjudicating such cases, the courts in these countries address mootness as an issue of justiciability. However, if one of the exceptions is applicable, they nevertheless decide the disputed issue.

²⁴ Appeals Chamber, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Decision on the request for suspensive effect and related issues", 18 July 2013, ICC-01/11-01/11-387 (OA 4), para. 17;

the Appeals Chamber dismissed requests as moot, although arguably, at least one of them was not admissible in any case.²⁵

26. It appears that the Majority are well aware of the doctrine of mootness and the scope of its application. They apply elements of this doctrine, albeit without mentioning ‘mootness’ explicitly, to the appeal-at-hand. In my opinion, it would have been in the interests of the further development of the Court’s jurisprudence to more comprehensibly address the concept of “mootness”, including possible exceptions if the mootness doctrine was found to be applicable to the Court.

C. Effective remedy

27. The Majority’s view in this appeal is that the Prosecutor’s appeal can be decided without considering its merits, focusing on the request of Mr Ruto and Mr Sang. However, only when addressing the merits can the question of whether the Pre-Trial Chamber erred be answered. Further, only if the Appeals Chamber found an error, would it be in the position to fully appreciate the consequences of such an error and to decide on an effective remedy for the prejudice, if any, suffered by the Prosecutor in the proceedings-at-hand. In that case, the main questions to be asked would be: what remedy would be available to the Prosecutor for the erroneous rejection of her amendment request? How would the Prosecutor be able to avoid an impunity gap (if any) with respect to these events? And how could the Prosecutor/ Court protect the interests of witnesses and victims?

D. Conclusion

28. For the aforementioned reasons, I disagree with how the Majority interprets article 61 (9) of the Statute. I consider that the appeal is justiciable and therefore find

Trial Chamber II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled ‘Decision on the Motion of the defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings’”, 12 July 2010, ICC-01/04-01/07-2259 (OA 10), para. 66, and Dissenting Opinion by Judges Kourula and Trendafilova, para. 97; Appeals Chamber, *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled ‘Decision on Applications for Provisional Release’”, 19 August 2011, ICC-01/05-01/08-2151-Red (OA 7), para. 20; Appeals Chamber, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Judgment on the appeal of the Prosecutor against the ‘Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules’ of Pre-Trial Chamber I”, Dissenting Opinion of Judges Pikis and Ntanda Nsereko, 26 November 2008, ICC-01/04-01/07-776 (OA 7), para. 4.

²⁵ See *Situation in the Republic of Kenya*, “Decision on the Request for Disqualification of the Prosecutor in the Investigation against Mr David Nyekorach-Matsanga”, 11 July 2012, ICC-01/09-96-Red (OA 2), paras 19-20.

that the Appeals Chamber should have addressed the merits of the appeal. Therefore, I cannot agree with my colleagues' decision to dismiss the appeal as inadmissible.

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



Judge Anita Ušacka

Dated this 13th day of December 2013

At The Hague, The Netherlands