

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 26 August 2013

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE REPUBLIC OF KENYA

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

Public Document

**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)**

Source: The Office of the Prosecutor

Document 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 Victims

Wilfred Nderitu

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Paola Massida

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Herman Von Hebel

Counsel Support Section

Deputy Registrar

Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Prosecution's case is, and has always been, that Mr. Ruto and Mr. Sang are responsible for the widespread and systematic attack against civilian PNU supporters in Turbo town, Eldoret area, Kapsabet town and Nandi Hills town from on or about 30 December 2007 until the end of January 2008 through acts of murder, deportation or forcible transfer and persecution. In its Confirmation Decision, Pre-Trial Chamber II expressly confirmed the charges with respect to these incidents in the greater Eldoret area for the period 1 to 4 January 2008 and expressly rejected the charges for the period after 4 January 2008. It made no mention of the factual allegations pertaining to incidents in greater Eldoret on 30 and 31 December 2007.

2. The Prosecution was of the view that the factual allegations regarding Eldoret on 30 and 31 December 2007 could still be put forward at trial as they had not been expressly rejected. However, in order to proceed to trial on safe grounds, on 22 July 2013 the Prosecution requested a confined amendment of the charges to expressly include 30 and 31 December 2007 in its Document Containing the Charges with respect to the Eldoret incidents ("Prosecution's Request"). On 16 August 2013, the Single Judge of Pre-Trial Chamber II ("Single Judge") rejected the Prosecution's Request on the grounds that it lacked justification as to its tardiness, showed lack of diligence, organization and efficiency by the Prosecution and would result in an unfair burden for the Defence which would require much time to conduct its investigation ("Decision").

3. The Prosecution seeks leave to appeal the Decision on two issues: (1) the determination of the criteria pursuant to Article 61(9) that a Chamber ought to consider to permit the amendment of charges after the charges are confirmed and before the trial has begun ("First Issue"); and (2) whether the scope of the Single Judge's discretion pursuant to Article 61(9) permits the Single Judge to reject the

Prosecution's application to amend the charges due to the Prosecution's purported "lack of diligence, organization and efficiency" and "absence of any justification as to the belated nature of the Prosecutor's Request" ("Second Issue"). The Prosecution submits that the two issues arise from the Decision and meet the criteria for leave to appeal under Article 82(1)(d).

Background

4. In the Amended DCC filed on 15 August 2011, the Prosecution presented its case as encompassing 30 and 31 December 2007 and argued that "from on or about 30 December 2007 to the end of January 2008", Network perpetrators committed acts of murder, deportation or forcible transfer, and persecution in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town and Nandi Hills town.¹
5. On 23 January 2012, the Chamber issued, by majority, its "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute" (the "Confirmation Decision"), in which, inter alia, it confirmed the charges presented against William Samoei Ruto ("Mr. Ruto") and Joshua Arap Sang ("Mr. Sang") to the extent specified in the decision, and committed two accused persons to trial.² With respect to the chapeau elements, the Chamber found that "there is sufficient evidence to establish substantial grounds to believe that between 30 December 2007 and 16 January 2008, an attack took place against specific groups of the Kenyan civilian population, namely perceived PNU supporters, in the four locations referred to in the counts";³ that this attack was widespread and systematic;⁴ and that the Network acted pursuant to a policy.⁵

¹ ICC-01/09-01/11-261-AnxA, para.133.

² ICC-01/09-01/11-373.

³ Confirmation Decision, paras.167, 174.

⁴ Confirmation Decision, para.180.

⁵ Confirmation Decision, paras.211, 216.

6. With regard to the temporal framework of the crimes of murder, deportation or forcible transfer and persecution, allegedly committed in the greater Eldoret area, the Chamber confirmed the charges against the two accused for crimes committed “between 1 January 2008 and 4 January 2008”⁶ and explicitly rejected that the evidence demonstrated to the required threshold that crimes had been committed after the 4 of January.⁷ There was no explicit reference to incidents in greater Eldoret on 30 and 31 December 2007.
7. On 29 March 2012, Trial Chamber V was seized of the case against Mr. Ruto and Mr. Sang.⁸
8. On 21 August 2012, the Prosecutor submitted its “Updated DCC”, alleging that the crimes committed in the greater Eldoret area began on or about 30 December 2007.⁹
9. On 28 December 2012, Trial Chamber V in its “Decision on the content of the updated document containing the charges”¹⁰ stated the following with respect to the Confirmation Decision:

“[T]he confirmation decision alone is not meant to serve as an authoritative statement of facts and circumstances described in the charges as well as of their legal characterisation on which the trial should proceed [...]”.¹¹

“[I]n the Chamber's view, the Confirmation Decision cannot be expected to serve as the only authoritative statement of the charges for the trial. The Chamber is of the view that the description of the charges in the DCC, amended to harmonise it with the findings made in the Confirmation Decision, rather than the

⁶ Ibid., paras.228 (murder), 254 (deportation or forcible transfer), 274 (persecution). See also paras.349, 367.

⁷ Ibid., paras.228 (murder), 254 (deportation or forcible transfer), 274 (persecution).

⁸ ICC-01/09-01/11-406.

⁹ ICC-01/09-01/11-448.

¹⁰ ICC-01/09-01/11-522.

¹¹ ICC-01/09-01/11-522, para.16.

Confirmation Decision itself, provides a sufficiently authoritative statement of the charges relevant to the trial proceedings.”¹²

10. With respect to the factual allegations not expressly referred to in the Confirmation Decision, Trial Chamber V stated:

“[W]hen determining whether there is sufficient evidence to establish substantial grounds to believe that the crimes charged were committed, the Pre-Trial Chamber may not have examined in detail, in its Confirmation Decision, each factual allegation contained in the DCC and it may have chosen to focus on only some selected allegations and evidence sufficient for the task before it. However, *this does not mean that the Pre-Trial Chamber did not confirm the charges themselves, as well as the facts and circumstances described in those charges and their legal characterisation, unless it explicitly declined to do so. [...]*”¹³

11. In assessing the adequacy between the Confirmation Decision and the Updated DCC, Trial Chamber V noted that the Pre-Trial Chamber had “specifically declined to confirm part of the charges in relation to the temporal scope of the crimes” and ordered the Prosecution to amend the Updated DCC to reflect the limited temporal scope contained within the Confirmation Decision.¹⁴ With respect to the acts of murder and deportation or forcible transfer in Eldoret, the Trial Chamber referred to paragraphs 228 and 254 of the Confirmation Decision where Pre-Trial Chamber I had expressly confirmed the temporal scope of 1 to 4 January 2008 and expressly rejected that after 4 January.¹⁵

12. On 7 January 2013, the Prosecutor re-submitted the Updated DCC in conformity with the order of Trial Chamber V.¹⁶

¹² ICC-01/09-01/11-522, para.18.

¹³ ICC-01/09-01/11-522, para.19. Emphasis added.

¹⁴ ICC-01/09-01/11-522, para.29.

¹⁵ ICC-01/09-01/11-522, para.28, see fns.44, 47, 49.

¹⁶ ICC-01/09-01/11-533-AnxA-Corr.

13. On 25 February 2013, the Prosecution submitted its “Updated Pre-Trial Brief”, alleging that crimes in greater Eldoret began “on or about 30 December 2007, and in the wake of the announcement of the presidential elections”.¹⁷
14. On 21 May 2013, the Presidency constituted Trial Chamber V(a) and assigned to it the case against Mr. Ruto and Mr. Sang.¹⁸
15. On 3 June 2013, Trial Chamber V(a) set the date for the start of the trial for 10 September 2013.¹⁹
16. On 22 July 2013, the Prosecution filed before Pre-Trial Chamber I its “Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute” whereby it requested an extension of the temporal scope of the charges to include 30 and 31 December 2007 with respect to the crimes allegedly committed in the greater Eldoret area (“Prosecution’s Request”).²⁰ The Prosecution explained that the proposed amendment was the result of evidence obtained after the Confirmation hearing,²¹ that it did not involve the addition of new charges or the substitution of more serious charges, nor did it affect the legal characterisation of the underlying facts,²² and that the Defence was on notice that the Prosecution case included 30 and 31 of December 2007 at least since the Confirmation of Charges.²³
17. On 2 and 13 August 2013, Mr. Ruto and Mr. Sang filed their responses to the Prosecution’s Request.²⁴
18. On 16 August, the Single Judge of Pre-Trial Chamber I rejected the Prosecution’s Request on the grounds that it lacked any justification as to its belated filing,

¹⁷ ICC-01/09-01/11-625-Conf-AnxB, para.159.

¹⁸ ICC-01/09-01/11-745.

¹⁹ ICC-01/09-01/11-762, p.35.

²⁰ ICC-01/09-01/11-824.

²¹ ICC-01/09-01/11-824, para.10.

²² ICC-01/09-01/11-824, para.17.

²³ ICC-01/09-01/11-824, para.19.

²⁴ ICC-01/09-01/11-836-Conf and ICC-01/09-01/11-853-Conf.

showed lack of diligence, organization and efficiency and would result in an unfair burden for the Defence which would require much time to conduct its investigation (“the Decision”).²⁵

Submissions

19. Pursuant to Article 82(1)(d), the Prosecution seeks leave to appeal the Decision on the following two issues:

- The determination of the criteria pursuant to Article 61(9) that a Chamber ought to consider to permit the amendment of charges after the charges are confirmed and before the trial has begun (“First Issue”).
- Whether the scope of the Single Judge’s discretion pursuant to Article 61(9) permits the Single Judge to reject the Prosecution’s application to amend the charges due to the Prosecution’s purported “lack of diligence, organization and efficiency”²⁶ and “absence of any justification as to the belated nature of the Prosecutor’s Request”²⁷ (“Second Issue”).

20. As developed below, the two issues arise out of the Decision and constitute appealable issues pursuant to Article 82(1)(d).²⁸

(a) The First Issue arises from the Decision

21. The Single Judge referred to a prior decision issued in the *Kenyatta* case, in which she granted a Prosecution’s application to amend the charges, and indicated that the Prosecution’s Request needed to be “properly supported and justified”.²⁹ The Single Judge further noted that the “Prosecutor should not benefit from an unfettered right to resort to article 61(9) of the Statute at her ease [...] if such permission will negatively affect other competing interests, such as the fairness and expeditiousness of the proceedings, which would result in causing prejudice

²⁵ ICC-01/09-01/11-859.

²⁶ Decision, para.41.

²⁷ Decision, para.42.

²⁸ ICC-01/04-168 OA3, paras. 9-10. See also, ICC-01/04-01/06-1433 OA11, DissOp. Judge Song, para.4.

²⁹ Decision, para.31 referring to ICC-01/09-02/11-700-Corr, para.21.

to the rights of the accused”.³⁰ Therefore, her decision on amending the charges would take into account the “Prosecution’s Request and an evaluation of *other* relevant information”.³¹

22. However, and in considering the Prosecution’s application, the Single Judge only considered the following factors: first, “the lack of diligence, organization and efficiency on the part of the Prosecutor”;³² including, the purported absence of “any justification or valid reasons for [the Prosecution’s] procedural conduct and excessive delays”³³ and second, the extra time allegedly required by the Defence to investigate the extended temporal scope of the charges.³⁴

23. The Single Judge failed to take into account other relevant criteria which she did consider in the cited decision issued in the *Kenyatta* case. In that matter the Single Judge indicated that a decision of whether to grant permission to amend the charges confirmed would consider the Prosecutor’s Request and other relevant information³⁵ and was “guided by many factors which aim at drawing a balance between the different competing interests at stake including the specific circumstances of the case, the fairness of the proceedings, their expeditiousness, and the interest of the accused person as well as that of the victims”.³⁶ The Single Judge further considered that “the Prosecutor is seeking to re-insert a specific factual allegation that was already known to the Defence and addressed in the Confirmation of Charges Decision [and] its re-insertion has no effect on the legal characterization of the facts”.³⁷

24. If leave to appeal is granted, the Prosecution will argue before the Appeals Chamber that the Single Judge’s discretion is not unlimited and certain criteria

³⁰ Decision, para.31.

³¹ Decision, para.32 referring to ICC-01/09-02/11-700-Corr, para.21.

³² Decision, para.41.

³³ Decision, para.38. See also para.42.

³⁴ Decision, para.42. See also paras.39-40.

³⁵ ICC-01/09-02/11-700-Corr, para.21.

³⁶ ICC-01/09-02/11-700-Corr, para.32.

³⁷ ICC-01/09-02/11-700-Corr, para.41.

should always be taken into account in issuing a decision under Article 61(9). In the specific circumstances of this case, this would include, *inter alia*: (1) the concrete type of amendment requested by the Prosecution which, in this case, 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;³⁸ (2) whether the Prosecution had presented evidence that supported the requested amendment;³⁹ (3) whether the requested amendments were completely new matters, or conversely whether the Defence was on notice of the allegations concerned (i.e. that crimes committed on 30 and 31 December were part of the Prosecution's case) and of the underlying evidence and was therefore in a position to prepare its defence against those allegations;⁴⁰ (4) the rights and interests of the witnesses and victims and the fairness of the proceedings *vis-à-vis* them;⁴¹ (5) the Prosecution's right and duty to establish the truth under Article 54(1)(a) and, consequently, to continue investigations after the confirmation of charges, where required;⁴² or (6) the existence of a reparable and adequate remedy to any prejudice suffered by the Defence.

25. Further, the Single Judge failed to consider "*other* relevant information" to the case⁴³ - chiefly, and contrary to the Single Judge's finding, the fact that the "particular dates" had not been *expressly rejected* in the Confirmation of Charges.⁴⁴ Indeed, and as noted above, the Pre-Trial Chamber confirmed charges of murder, persecution, deportation or forcible transfer in the greater Eldoret area from 1 to 4

³⁸ Prosecution's Request, para.12.

³⁹ ICC-01/09-02/11-700-Corr, para.32.

⁴⁰ The Prosecution argued from the outset and at the Confirmation Hearing that since on or about 30 December 2007 until the end of January 2008 members of the Network attacked the locations of Turbo town, the greater Eldoret area, Kapsabet town and Nandi Hills town to permanently expel PNU supporters. Further, the Chamber confirmed the existence of a widespread and systematic attack against a civilian population and the existence of a policy to commit an attack from 30 December 2007 until 16 January 2008 in the four locations. See Confirmation Decision, paras.167, 174, 180 and 211 and 216.

⁴¹ ICC-01/09-02/11-700-Corr, para.32.

⁴² ICC-01/09-02/11-700-Corr, para.35 that quoted ICC-01/04-01/06-568OA3, para.52.

⁴³ Decision, para.32.

⁴⁴ Decision, para.40.

January 2008 and “explicitly rejected” that crimes occurred in that location thereafter. The Confirmation Decision was silent on 30 and 31 December 2007.⁴⁵ In fact, the Pre-Trial Chamber had confirmed the existence of a widespread and systematic attack carried out by Network perpetrators as well as the existence of a policy to commit such attack from 30 December 2007 until 16 January 2008 in the four locations referred to in the counts, thus including the greater Eldoret area.⁴⁶

26. The fact that the crimes committed on 30 and 31 December 2007 in Eldoret had not been expressly rejected, contrary to the crimes committed after 4 January 2008, led the Prosecution to assume that it could still put forward those factual allegations at trial. Further, the approach to the temporal scope of charges differs between domestic jurisdictions. In many legal systems substantial latitude is permitted regarding the specificity of dates of alleged offences. Time is usually not of the essence. The Prosecution’s understanding was perfectly plausible in light of Trial Chamber V’s ruling in this case which clarified that the Chamber in the Confirmation Decision did not need to address all factual allegations put forward in the DCC and that only those facts and circumstances that had been explicitly declined could be considered as not confirmed.⁴⁷

27. Finally, the Prosecution notes that Chambers of this Court have previously granted leave to appeal respecting a similar issue, in particular, the relevant criteria that the Chamber should consider in granting redactions pursuant to Rule 81(2) and (4).⁴⁸ As in the instant case, the Chamber’s decision on a party’s application for redactions should consider and balance different competing interests.

⁴⁵ ICC-01/09-01/11-373, paras.228 and 254 referred to in ICC-01/09-01/11-522, para.8, fns.44 and 47.

⁴⁶ ICC-01/09-01/11-373, paras.167, 174, 180 and 211.

⁴⁸ ICC-01/04-01/06-489, p.12 referring to ICC-01/04-01/06-165-Conf-Exp.

⁴⁸ ICC-01/04-01/06-489, p.12 referring to ICC-01/04-01/06-165-Conf-Exp.

(b) The Second Issue arises from the Decision

28. The Single Judge rejected the Prosecution's Request and thereby effectively penalized the Prosecution for its delay in requesting the amendment and the lack of justification for the belated nature of the request. Thus, the Second Issue arises from the Decision. The Single Judge devotes a large part of the Decision to the Prosecution's "lack of efficiency and due diligence" in requesting a belated extension of the temporal scope of the charges, as compared with the case against Mr. Kenyatta.⁴⁹ The Single Judge notes that Trial Chamber V issued on 28 December 2012 two decisions in the two cases concerning the content of the updated document containing the charges. In both cases, the Chamber requested the Prosecution to adjust the document containing the charges to either the geographical or temporal scope of the confirmation decision. On 22 January 2013, the Prosecution filed its request pursuant to Article 61(9) to amend the charges against Mr. Kenyatta. The Single Judge notes that "[r]egrettably, this was not the path followed by the Prosecutor in the present case" and "instead of approaching the Chamber right after the issuance of the Trial Chamber V's decision, as she did in the Kenyatta Case, the Prosecutor refrained from submitting her Request for almost seven months as of the date of issuance of the Trial Chamber's said decision".⁵⁰

29. The Single Judge concludes that, notwithstanding the particularities of each case which may prompt delays, "the Prosecutor fail[ed] to provide the chamber with any justification or valid reasons for such procedural conduct and excessive delays".⁵¹ She further adds that "if one compares the Prosecutor's follow up in this case concerning her request for amendment of charges [...] with the manner in which the Prosecutor handled a similar request in the Kenyatta Case, the lack of diligence, organization and efficiency becomes evident. If such procedural

⁴⁹ Decision, para.36.

⁵⁰ Decision, para.37.

⁵¹ Decision, para.38.

performance were to be tolerated, this would taint the fairness and expeditiousness of the proceedings.”⁵²

30. From the foregoing, it is clear that the Single Judge rejected the Prosecution’s Request because it considered that it had belatedly applied for the amendment of the charges and this could not be tolerated. The clear implication is that, if the present request had been filed at the same time as the request in the *Kenyatta* case, the Single Judge would not have hesitated to grant it.

31. If leave to appeal is granted, the Prosecution will argue before the Appeals Chamber that the discretion of the Single Judge under Article 61(9) is not unfettered and denying a request that is otherwise justified and where this may cause significant damage to the Prosecution’s case, solely on the basis of its purported tardiness and inefficiency, is a disproportionate measure and constitutes an abuse of the Single Judge’s discretion. This is particularly so where the prejudice allegedly caused to the Defence by the requested amendment is not irremediable and could more appropriately be remedied by the granting of extra time for preparation by the Trial Chamber, which is in the best position to determine the extent to which this may be necessary.

32. Further, the Prosecution will demonstrate before the Appeals Chamber, should leave be granted, that its actions did not “lack diligence, organization and efficiency”.⁵³ The Prosecution understood that for the purposes of trial, the relevant conduct still included the facts and circumstances related to the greater Eldoret area in 30 and 31 December 2007, in particular, as they had not been explicitly rejected. Further and as also indicated above, time is usually not of the essence and it is not uncommon in certain jurisdictions to allow certain flexibility with respect to the specificity of the dates of the alleged crimes. This is reasonable

⁵² Decision, para.41.

⁵³ Decision, para.41.

in light of the nature of the criminal actions being prosecuted in this Court and the fallible nature of the witnesses' recollection.

33. Finally, the Prosecution acknowledges that the Chamber's "permission" under Article 61(9) is a discretionary decision and notes that some chambers have rejected applications for leave to appeal under Article 82(1)(d) on the grounds that the Chamber's rulings were managerial or discretionary and had been taken in light of the concrete facts of the case.⁵⁴ However, this does not mean that such discretion is unfettered and cannot be subject to appellate review if the Prosecution raises an issue that goes beyond a mere disagreement with the Chamber and the requirements under Article 82(1)(d) are met - as occurs in the instant case.

(c) The first and second issues affect the fairness of the proceedings

34. The First and Second issues are connected because they both relate to the factors and circumstances that a Chamber ought to consider when exercising its discretion pursuant to Article 61(9). Both issues affect the fairness of the proceedings.

35. First, both issues impact on the Prosecution's ability to exercise the powers and fulfil the duties listed in Article 54,⁵⁵ including its ability to present its case.⁵⁶ As a result of the Chamber's Decision that effectively amputates a significant part of its case, the Prosecution may be deprived from fully presenting its case in court as it may not be able to fully prosecute the accused for the crimes of murder, deportation or forcible transfer and persecution committed in the greater Eldoret area on 30 and 31 December 2007.⁵⁷ Moreover, the Decision severely curtails the

⁵⁴ ICC-02/05-02/09-267; ICC-01/04-01/07-2035.

⁵⁵ ICC-01/04-135-tEN, paras. 38-39.

⁵⁶ ICC-02/04-01/05-90 (reclassified pursuant to ICC-02/04-01/05-135), para. 24.

⁵⁷ While the Prosecution may not be able to present as factual allegations to prosecute the accused the crimes committed in the greater Eldoret area on 30 and 31 December 2008, the presentation of that evidence will still be relevant to support factual allegations confirmed in the Confirmation Decision, including the contextual elements. See ICC-01/11-01/11-344, para.125: Pre-Trial Chamber I has stated that "events which may have

Prosecution's ability to establish the truth and frustrates the purpose of the supplementary investigations conducted to satisfy such obligation.

36. Second, the Decision and its exclusion of the two dates from the charges with respect to the greater Eldoret area affects the fairness of the proceedings *vis-à-vis* the victims of those incidents.⁵⁸ Contrary to the *Kenyatta* Decision,⁵⁹ there is no reference anywhere in the Decision to the need of balancing the interests of victims in determining the Prosecution's Request. The exclusion of the two dates can effectively deprive victims of a judicial finding as to the guilt or innocence of the accused, and the ability to seek reparations following their possible conviction with respect to those incidents. In particular, and with respect to the Second Issue, it is disproportionate and unfair to penalize the victims for the Prosecution's purported lack of efficiency, organization and due diligence⁶⁰ and for not providing a valid explanation for the delay.⁶¹

37. Third, the Decision is also unfair with respect to witnesses who provided statements to the Prosecution with respect to the dates excluded, thus risking their safety and that of their families. The evidence of those witnesses, although it may be used to support other factual allegations which have been expressly confirmed, will not serve to support an eventual conviction of the accused with respect to the Eldoret crimes during 30 and 31 December 2007.

(d) The First and Second Issues affect the expeditiousness of the proceedings

38. The Chamber's Decision detrimentally affects the Prosecution's case because it curtails its temporal scope for the purposes of the guilt or innocence of the accused in the greater Eldoret area. Therefore, the Prosecution may need to

occurred outside the parameters of the case may still be indicative or corroborative of other facts or events that took place within that timeframe".

⁵⁸ ICC-01/04-01/06-2463, para.30.

⁵⁹ ICC-01/09-02/11-700-Corr, para.32.

⁶⁰ Decision, para.41.

⁶¹ Decision, paras.38, 42.

reassess its case theory and strategy as well as the presentation of the evidence, including the order of the witnesses.⁶² This may require further investigations and if necessary, applications to add new evidence and witnesses and therefore further litigation and delays.

39. In the *Lubanga* case, Trial Chamber I held in granting leave to appeal the issue of the interpretation of Regulation 55 by the Chamber that the “the course of the trial may be significantly changed” and “is likely to have consequences as regards the evidence which it is considered necessary to put before the Chamber, as well as the time needed for future preparation by, and the resources of, the parties and participants.”⁶³ Further, other Chambers have indicated that “[i]t is for the Prosecution to design its strategy and it “may need to adjust [its] ‘strategy [...] and selection of evidence in order to neutralize or mitigate the [alleged] prejudice to [the] case’”. Thus, there is a real potential for delay to the trial”.⁶⁴

40. Finally, the Single Judge considered that any amendment to the charges would impact on the fairness and expeditiousness of the proceedings vis-à-vis the Defence rights, and that this factor should be considered in granting or denying the Prosecution’s application.⁶⁵ In fact, the Single Judge rejected the Prosecution’s Request on the grounds that it “would unduly compromise the rights of the accused” to be informed promptly of the charges, to have the adequate time and facilities to prepare the defence and to have a trial without delay pursuant to Article 67(1)(a) to (c).⁶⁶ Thus, the Prosecution submits that the First and Second issues, which deal with the relevant criteria to determine whether an amendment should be permitted, have an impact on the fairness and expeditiousness of the proceedings with respect to the rights of the accused.

⁶² The Prosecution notes that the order of the first 10 witnesses remains unaffected.

⁶³ ICC-01/04-01/06-2107, para.29.

⁶⁴ ICC-01/09-02/11-253, para.33; ICC-02/05-03/09-179, para.19.

⁶⁵ Decision, para.31 and ICC-01/09-02/11-700-Corr, para.32.

⁶⁶ Decision, para.42.

(e) The First and Second Issues affect the outcome of the trial

41. By excluding 30 and 31 December 2007 in the greater Eldoret area from the scope of the trial, the Prosecution is not permitted to charge and prosecute the accused for the crimes committed in those locations during those dates. As a result, the Chamber will not be able to determine the accused's innocence or guilt with respect to those factual allegations, thus impacting the content of the Article 74 Judgement. Consequently, the outcome of the trial is affected by the Decision.⁶⁷

(f) The First and Second Issues materially advance the proceedings

42. The determination by the Appeals Chamber of the criteria that a Chamber ought to consider in granting or denying permission to amend the charges pursuant to Article 61(9), and the possibility of denying such authorisation to penalize purportedly belated and inefficient actions of the Prosecution, 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. It will also assess whether the Judge's refusal to make the confined amendment requested was an adequate and proportionate response to the Request's purported shortcomings. In this sense, it should be beyond dispute that there is a need to "[r]emov[e] doubts about the correctness of [the] decision".⁶⁸

43. Further, the intervention of the Appeals Chamber will permit these proceedings to move forward on safe grounds and with the certainty that the factual scope of the trial includes all factual allegations.

⁶⁷ ICC-02/11-01/11-464, para.38; ICC-01/09-01/11-817, para.22.

⁶⁸ ICC-01/04-168, paras.14-15,18.

Relief sought

44. For the reasons set out above, the Prosecution requests that the Pre-Trial Chamber grant leave to appeal the two issues identified above.



Fatou Bensouda,
Prosecutor

Dated this 26th day of August, 2013

At The Hague, The Netherlands