

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 30 August 2013

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding
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

**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)**

Source: Defence for Mr. William Samoei Ruto

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

The Office of the Prosecutor

Ms. Fatou Bensouda, Prosecutor
Mr. James Stewart, Deputy Prosecutor
Mr. Anton Steynberg, Senior Trial
Lawyer

Counsel for William Ruto

Mr. Karim A.A. Khan QC
Mr. David Hooper QC
Mr. Essa Faal
Ms. Shyamala Alagendra

Counsel for Joshua Sang

Mr. Joseph Kipchumba Kigen-Katwa
Mr. Silas Chekera

Legal Representatives of the Victims

Mr. Wilfred Nderitu

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms. Paolina Massidda

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. On 16 August 2013, the Single Judge of Pre-Trial Chamber II (“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”* (“Decision”).¹ On 26 August 2013, the Prosecution filed 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) (“Application”).² For the reasons detailed in this response, the Defence of Mr. William Samoei Ruto (“Defence”) respectfully submits that the Application should be dismissed.

2. At the outset, the Defence observes that submissions seeking to remedy deficiencies in an original application or to argue the merits of an appeal have no place in a request for leave to appeal an interlocutory decision.³ The sole matter at issue is whether or not the requirements detailed in Article 82(1)(d) of the Rome Statute (“Statute”) are cumulatively fulfilled. Therefore, the Prosecution’s extensive and, in the Defence’s submission, unconvincing arguments⁴ seeking to address one of the *lacunae*⁵ in its original Article 61(9) request identified by the Single Judge⁶ regarding why it waited almost seven months before requesting permission to extend the temporal scope of the charges should be ignored. The Prosecution’s submissions regarding what it “will argue before the Appeals Chamber” or “demonstrate before the Appeals

¹ ICC-01/09-01/11-859.

² ICC-01/09-01/11-880.

³ ICC-02/04-01/05-20-US-Exp, para. 15.

⁴ See, e.g., Application, paras. 1, 2, 26.

⁵ Contrary to the Prosecution’s submission, the request to extend the temporal scope of the charges was not rejected “solely on the basis of its purported tardiness and inefficiency” (Application, para. 31). The other deficiency identified by the Single Judge was the Prosecution’s failure to demonstrate that “the Defence will not be prejudiced as a result of granting permission for the proposed amendment at this stage” (Decision, para. 39).

⁶ Decision, para. 38 (“the Prosecutor fails to provide the Chamber with any justification or valid reasons for such procedural conduct and excessive delays as outlined above”).

Chamber” if the Application is granted should similarly be ignored as irrelevant.⁷

3. In relation to the fulfilment of the correct statutory criteria for the grant of leave to appeal, the Defence submits that neither of the two Issues⁸ identified in the Application are appealable issues within the terms of Article 82(1)(d) of the Statute. Further, and in any event, should the Trial Chamber find that either or both Issues are appealable, neither satisfies the criteria for leave to appeal an interlocutory decision pursuant to Article 82(1)(d).

II. Submissions

(a) The Prosecution fails to identify any appealable issues

4. Contrary to the Prosecution’s position, neither of the two Issues identified in the Application constitutes an appealable issue.⁹ A proper consideration of both reveals that they fail to satisfy the requirement that an issue “emanate from the ruling of the decision concerned”.¹⁰ On this basis alone, the Application should be dismissed.
5. The First Issue, as framed by the Prosecution, does not arise from the Decision and boils down to “‘nothing more than a disagreement’ with a finding of the Chamber”.¹¹ The Prosecution argues that the First Issue arises from the Decision because “the Single Judge failed to take into account other relevant criteria which she did consider in the cited decision issued in the *Kenyatta* case.”¹² The Prosecution’s approach can be criticised because it appears to advocate that the Single Judge should have undertaken an artificial and ultimately futile exercise

⁷ Application, paras. 24, 31 and 32.

⁸ The Issues are framed and defined at Application, para. 19.

⁹ Application, para. 4.

¹⁰ ICC-01/05-01/08-532, para. 12.

¹¹ ICC-01/04-01/07-727, p. 16 citing to ICC-01/04-01/06-168, para. 9 and ICC-01/04-01/06-915, para 71.

¹² Application, para. 23.

in the instant case when assessing the Prosecution's original Article 61(9) request ("Original Request").¹³

6. In the Decision, the Single Judge correctly identified that an amendment to the charges under Article 61(9) of the Statute is not as of right but must be properly "supported and justified".¹⁴ In weighing any justifications advanced by the Prosecution, the Single Judge also correctly identified that there might 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.¹⁵ In the Decision, the Single Judge clearly concluded that stage one – advancement of sufficient justifications underpinning the Article 61(9) request – had not been satisfied by the Prosecution.¹⁶ On this basis alone the Single Judge was entitled to dismiss the Original Request. Nevertheless, the Single Judge proceeded to assess whether other interests such as the rights of the Defence would be prejudiced by the grant of the request and concluded in the affirmative.¹⁷ Having reasonably concluded at this stage that the Original Request was devoid of merit, the Single Judge was not required to continue assessing the request against the other criteria identified in the *Kenyatta* case. To do so, would have been completely unnecessary and redundant.
7. Similarly, in reaching the Decision, the Single Judge was not required to consider "the fact that the 'particular dates' had not been *expressly rejected* in the Confirmation of Charges."¹⁸ From the plain terms of the Confirmation Decision it is glaringly evident that the temporal boundaries of the charges for the Greater Eldoret area were fixed so as to exclude 30 and 31 December 2007.¹⁹ The

¹³ ICC-01/09-01/11-824.

¹⁴ Decision, para. 31 citing to ICC-01/0902/11-700-Cor, para. 21.

¹⁵ Decision, paras. 31, 32.

¹⁶ Decision, para. 38.

¹⁷ Decision, paras. 39, 40.

¹⁸ Application, paras. 25, 26.

¹⁹ ICC-01/09-01/11-373, paras. 349, 367

Prosecution's arguments regarding the erroneous assumptions which it made concerning the possible approaches which might be taken to the temporal limits of the charges at this Court amount to no more than an *ex post facto* and impermissible attempt to fill the justification gaps identified by the Single Judge in the Original request.²⁰ There was, accordingly, no need for the Single Judge to undertake a second, artificial and wholly unnecessary exercise when considering the original request to extend the temporal scope of the charges.

8. Based on the reasonable approach taken by the Single Judge to the assessment of the Original Request outlined above, it is evident that the First Issue does not arise from the Decision. There was no failure to identify or apply the proper criteria when assessing a request submitted pursuant to Article 61(9) of the Statute. The error was rather the Prosecution's failure to submit a sufficiently detailed and substantiated request which merited consideration by reference to a more extensive list of criteria.

9. The second purported Issue can be swiftly dealt with. This Issue does not arise from the Decision because it is founded on a misstatement of the Single Judge's reasoning. Contrary to the Prosecution's complaints, the Single Judge did not reject the original request based on delay alone or in order to simply penalise the Prosecution.²¹ Rather, the Single Judge found that the excessive delays undermined "the Prosecutor's argument that rejecting the requested amendment would cause 'monumental' prejudice to her case".²² Moreover, the Single Judge found that the delays would cause undue prejudice to the accused.²³ In short, it was the implications and consequences of the Prosecution's failures which led the Single Judge to reach the Decision, rather

²⁰ Application, para. 26.

²¹ Application, paras. 28-30.

²² Decision, para. 38.

²³ Decision, paras. 39-40.

than the failures alone. Thus, the second Issue does not constitute an issue within the meaning of Article 82(1)(d) of the Statute.

(b) The two Issues do not significantly affect the fair and expeditious conduct of the proceedings

10. The wording of the first prong of the Article 82(1)(d) test is clear on its terms – an appealable issue must significantly affect the fair and expeditious conduct of the proceedings. The inclusion of the word “significantly” is not without import but underlines that “*an interlocutory decision can only be appealed in exceptional circumstances*”.²⁴
11. The Prosecution’s first argument that the Decision will prevent it from fully presenting its case in court clearly does not meet the requisite threshold of significance for leave to appeal to be granted.²⁵ Save for the temporal scope of the charges, the broad parameters of the case against Mr. Ruto on which the Prosecution will proceed to trial are the same as those presented in the Amended Document Containing the Charges filed on 15 August 2011.²⁶ Therefore, the plain fact is that Prosecution will be able to present its case alleging murder, deportation or forcible transfer and persecution against both accused for all locations originally placed before the Pre-Trial Chamber at confirmation but within the temporal boundaries determined by the Pre-Trial Chamber. In addition, and as properly noted by the Single Judge,²⁷ the Prosecution’s delay in making the Original Request, notwithstanding a clear direction by the Trial Chamber in December 2012 regarding the fixed limits of the temporal scope of the charges,²⁸ undermines the Prosecution’s arguments that it considered this matter to be of such significance to its case presentation.

²⁴ ICC-01/04-01/06-915, para. 28.

²⁵ Application, para. 35.

²⁶ See Application, para. 4 citing to ICC-01/09-01/11-261-AnxA, para. 133.

²⁷ Decision, para. 38.

²⁸ ICC-01/09-01/11-522.

12. The Prosecution's second argument concerning fairness is also unconvincing. According to the Court's established jurisprudence, the rights and interests of the victims are secondary to and must not result in prejudice to the fair trial rights of an accused.²⁹ As discussed above, the Single Judge concluded that, not only had the Prosecution failed to properly justify and support the Original Request, but the grant of same "*would result in an unfair burden for the Defence*" that "*would unduly compromise the rights of the accused persons to be informed 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*".³⁰ Having made this determination, and given the clear deficiencies in the Application, the Single Judge was compelled to reject the Application. As no other considerations could justify such an impingement on the the fundamental rights of the accused persons, it was both unnecessary and contrary to the principle of judicial economy³¹ to explicitly evaluate such considerations.
13. Equally devoid of merit is the argument that the fairness of the proceedings involves consideration of the interests of witnesses interviewed post-confirmation and who provide evidence which relates to the excluded dates.³² No "significant" unfairness is caused to these individuals because, as the Prosecution admits, the evidence of these individuals will still be used in proceedings.³³ The Defence also questions whether the interests of these individuals is even relevant to this prong of the Article 82(1)(d) test. The correct interpretation appears to be rather that fairness should be measured by

²⁹ See, e.g., Statute, Article 68(1); ICC-02/05-02/09-121, para. 5; ICC-01/05-01/08-320, para. 96.

³⁰ Decision, para. 42.

³¹ See, for example, Separate opinion of Judge Cuno Tarfusser to the Decision on the Confirmation of Charges in the *Prosecutor v. Bahar Idriss Abu Gara* (ICC-02/05-02/09-243-Red, 8 February 2010) at paras. 3-10 (Opining, in the context of the confirmation of charges process, that once the Chamber had determined that the "lacunae and shortcomings exposed by the mere factual assessment of the evidence are so basic and fundamental the Chamber need not conduct a detailed analysis of the legal issues pertaining to the merits of the case".).

³² Application, para. 37.

³³ Application, para. 37.

reference to those actually directly participating in the proceedings, namely the parties and participants.

14. The two arguments advanced by the Prosecution that the two Issues will affect (though not “significantly”) the expeditious conduct of the proceedings do not withstand scrutiny.³⁴ In respect of the first, if a simple narrowing of the temporal scope of the charges will require not only “*the Prosecution...to reassess its case theory and strategy as well as the presentation of the evidence*” but conduct “*further investigations and...[even] add new evidence and witnesses*”, then it begs the question as to how the Prosecution has been proposing to prove and present its case to date and indicates the existence of more fundamental problems unconnected to the Decision. The Decision did not trigger an expansion of the case to be presented by the Prosecution which is the scenario to which the Prosecution’s submissions seem more apposite. The reality, rather than the possibility,³⁵ must be that any changes in strategy and case presentation triggered by the Decision will be minimal and eminently manageable by professional and experienced prosecutors. Indeed, this appears to be acknowledged by the Prosecution itself in footnote 62 of the Application which states that “the order of the first 10 witnesses remains unaffected”.
15. The Prosecution’s second attempt to argue that the expeditious conduct of proceedings is engaged is confusing but apparently seeks to rely on the inclusion of the fair trial rights of the accused in the criteria applied to assess an Article 61(9) request.³⁶ Clearly, the fair trial rights of the accused (including the right to be tried without undue delay)³⁷ are engaged where the charges are

³⁴ Application, paras. 38-40.

³⁵ The Prosecution’s own submissions indicate speculation as to the actual effect of the Decision with its repetition of the word “may”. See Application, para. 15 (“the Prosecution may need to reassess its case theory and strategy as well as the presentation of the evidence...This may require further investigations and, if necessary, applications to add new evidence and witnesses”) (emphasis added).

³⁶ Application, para. 16.

³⁷ Statute, Article 67(1)(c).

expanded beyond those confirmed by the Pre-Trial Chamber at an advanced stage in the proceedings requiring, as correctly identified by the Single Judge, “much [more] time [being granted to the Defence] to conduct its investigation on the extended temporal scope of the charges in the greater Eldoret area”.³⁸ However, this analysis indicates that the Decision correctly protected the expeditious conduct of proceedings and, thus, granting leave to appeal on the two Issues will have the converse effect.

(c) The two Issues do not significantly affect the outcome of the trial

16. In the first place, the Prosecution’s argument at paragraph 41 of the Application is tautological and, thus, should be dismissed. This alternate prong of the Article 82(1)(d) test concerns issues which would have a significant impact on the outcome of trial *vis-à-vis* the charges that are before the Trial Chamber. The fact that any evidence of crimes committed on either 30 or 31 December 2007 will not be considered for the purposes of judgment is the necessary outcome of “excluding” these dates from the temporal scope of the charges before the Trial Chamber. To find otherwise would, for example, mean that any issue arising from the 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.
17. Further, and in any event, the threshold of significance is certainly not reached regarding the impact of the Decision on the outcome of the trial. The Defence refers to its submissions at paragraph 11 above regarding the scope of the case which the Prosecution sought to confirm and the one presently before the Trial Chamber. This establishes that the outcome of the trial is not affected to the extent that leave to appeal should be granted.³⁹

³⁸ Decision, para. 42.

³⁹ See *Prosecutor v. Bemba*, Decision on the Prosecutor's Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 18 September 2009, ICC-01/05-01/08-532, para. 86 (“*The Chamber acknowledges that even*

(d) Immediate resolution of the two Issues by the Appeals Chamber will not materially advance the proceedings

18. The fundamental flaw with the Prosecution's final arguments is that they are predicated on arguments which the Defence submit are without foundation. Contrary to the Prosecution's submissions⁴⁰ and as argued above, the Single Judge did not fail to apply the correct criteria when assessing the Original Request, nor did the Single Judge reject the Original Request simply to penalise the Prosecution.⁴¹ Further, and in any event, the primary purpose of the final limb of the Article 82(1)(d) test is to guard against decisions which might later "unravel the judicial process".⁴² There is no reasoned basis on which to conclude that the Decision – which excludes 2 days from the scope of the charges – risks such a cataclysmic effect on the conduct of proceedings.⁴³

III. Relief sought

19. For the reasons set out above, the Defence respectfully requests that the Trial Chamber reject the Prosecution's application for leave to appeal the Decision.

Respectfully submitted,



Karim A.A. Khan QC

though the Second issue in arguendo may affect the outcome of the trial as three charges have not been confirmed by the Chamber, it, however, does not do so in a significant manner. The Chamber recalls that the Prosecutor in his closing statement at the Hearing highlighted that '[t]he main physical acts underpinning the charges of rape, torture and outrages upon personal dignity is rape in this case'. In light of this assessment of the Prosecutor, the Chamber concurs that with the charges confirmed in the present case the Chamber has captured all main facts presented by the Prosecutor." (internal citations omitted).

⁴⁰ Application, para. 42.

⁴¹ See *supra* para. 9.

⁴² ICC-01/04-168 OA3, para. 16.

⁴³ This is, of course, a different consideration than that of the heavy burden that the Single Judge determined would be placed on the Defence should it have to investigate, at this very late stage in proceedings, allegations regarding Eldoret falling on 30 and 31 December 2007.

Lead Counsel for Mr. William Samoei Ruto

Dated this 30th Day of August 2013
At The Hague, the Netherlands