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No.: ICC-01/09-01/11
Date: 30 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

**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’”**

Source: Defence for Mr. Joshua arap Sang

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

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I. Introduction

1. The Defence for Mr. Joshua arap Sang ("Defence") hereby responds 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 ("Application")"*.¹
2. In its Application, the prosecution submits that it has identified two appealable 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").
3. The Defence submits that the Prosecutor's Application should be dismissed on the following grounds:
 - (i) The Application fails to properly identify any appealable issue;
 - (ii) The Application fails to demonstrate that the issues would significantly affect the fairness and expeditiousness of the proceedings vis-à-vis the Prosecution;
 - (iii) The Application fails to demonstrate that an immediate resolution by the Appeals Chamber of the contested decision may materially advance the proceedings.
4. Accordingly, the Defence submits that the Prosecution has failed to meet the requirements under Article 82(1)(d) for leave to appeal to be granted. Therefore, the Defence respectfully requests that the Chamber dismiss the Application.

II. Procedural History

5. 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

¹ ICC-01/09-01/11-880 ("Request").

the Statute” whereby it requested permission to ‘amend the charges for the purpose of extending the temporal scope of the crimes alleged in Counts 1 to 6 in the greater Eldoret area from “1 January to 4 January 2008” to “30 December 2007 to 4 January 2008.”’²

6. On 2 August, the Ruto defence team filed its response to the Request.³ Similarly, on 13 August 2013, the Sang defence team filed its response.⁴ Both teams argue, *inter alia*, that these amendments would be unfair to the Defence and highly prejudicial to the fair trial rights of the Accused in this case.
7. On 16 August, the Single Judge of Pre-Trial Chamber I rejected the prosecution’s Request on the grounds that it ‘would result in an unfair burden for the Defence, which would require much time to conduct its investigation on the extended temporal scope of the charges in the greater Eldoret area.’⁵ This decision was mostly based on the fact that the prosecution’s belated Request was made too close to the start of the trial.

III. Submissions

a) Failure to identify an appealable issue

8. The Defence submits that the two ‘issues’ raised by the prosecution are not distinguishable. They both arise from the Single Judge’s determination that the Prosecution was not diligent or efficient in bringing forth its application. Both issues challenge the Single Judge’s use of her discretion in refusing to allow the Prosecution to broaden the temporal scope of the charges, thereby adding additional factual allegations to the confirmed charges. This refusal, it is submitted, falls squarely within the judge’s discretion and is not appealable.
9. Accordingly, neither of the two ‘issues’ identified in the Prosecution’s application constitute an appealable subject. Indeed, the arguments advanced in the Prosecution’s application constitute a mere disagreement with the Single Judge’s

² ICC-01/09-01/11-824, para 1 (“Request”).

³ ICC-01/09-01/11-836-Conf

⁴ ICC-01/09-01/11-853-Conf

⁵ ICC-01/09-01/11-859, paras 38-42

decision. The Appeals Chamber has held that ‘an issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.’⁶

10. Even 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”.⁷
11. The Prosecution also agrees that the Single Judge’s decision on amending the charges should take into account the “Prosecution’s Request and an evaluation of *other relevant information*.”⁸ Looking at the Decision, the Single Judge did bear in mind the Prosecution’s request together with other relevant information, including, and not limited to, the fairness and expeditiousness of the proceedings and the rights of the accused.
12. As noted by the Single Judge, the Prosecution has attempted to blind side the Chamber on no less than two occasions by adding language meant to broaden the temporal scope of the case in its Updated Document Containing the Charges. This constitutes a blatant attempt to usurp the powers of the Chamber. Indeed, this Application could and should have been made much earlier in the proceedings. Allowing the suggested modification of the DCC, at this stage, would greatly affect the rights of the accused.
13. The Prosecution argument that the Single Judge only considered some ‘other relevant information’ and not others, is a mere disagreement with the decision and indeed a conflict of opinion. This does not warrant a consideration by the Appeals Chamber.
14. Moreover, it is disingenuous for the Prosecution to assert that it was of the view that “the factual allegations regarding Eldoret on 30 and 31 December 2007 could still be

⁶ ICC-01/04-168 OA3, paras. 9

⁷ ICC-01/09-01/11-880, para. 33 citing ICC-02/05-02/09-267 and ICC-01/04-01/07-2035.

⁸ ICC-01/09-01/11-880, para 22

put forward at trial as they had not been expressly rejected”.⁹ When the Trial Chamber ordered the Prosecution to amend the Updated DCC to reflect the limited temporal scope contained within the Confirmation Decision,¹⁰ it removed the earlier dates of 30th and 31st December 2007.¹¹ This clearly indicates that it understood that the Pre-Trial Chamber had “specifically declined to confirm part of the charges in relation to the temporal scope of the crimes”,¹² including 30th and 31st December 2007. It is also clear from the language itself in the confirmation decision that the dates now sought to be included were excluded by the Pre-Trial Chamber. By providing a clear temporary scope of the charges, the Pre-Trial Chamber indisputably and explicitly excluded all other dates.

15. Accordingly, the Prosecutor’s claim that the dates of 30 and 31 December 2007 have not been explicitly rejected holds no ground and cannot form the basis of an appealable issue.

b) The First and Second Issue do not advance the fairness and expeditiousness of the proceedings

16. The Prosecutor’s arguments are wholly contradictory. On the one hand, she attempts to downplay the significance of her request to broaden the temporary scope of the charges and include two additional days. Her Application refers to a mere “specificity of dates of alleged offences”.¹³ On the other hand, the Prosecutor claims that the dismissal of her request affects the fairness and expeditiousness of the proceedings to such an extent that an immediate resolution by the Appeals Chamber is warranted. In reality, the request does not concern a mere specificity of dates but the addition of factual allegations, which at this stage, “would cause a “monumental” prejudice” to the Defence.¹⁴
17. The Prosecution further argues that without this amendment, it may be required to re-assess its case theory and strategy as well as the case presentation, which would require further investigations and applications to add new evidence and

⁹ ICC-01/09-01/11-880, para. 2.

¹⁰ Decision on the content of the updated document containing the charges, ICC-01/09-01/11-522, para. 29.

¹¹ ICC-01/09-11-533-AnxA-Corr.

¹² Supra note 8, para. 29.

¹³ ICC-01/09-01/11-880, para. 26.

¹⁴ ICC-01/09-01/11-859, para. 38.

witnesses.¹⁵ This begs the question: Why would the Prosecution arrange its case and strategy with information not confirmed and therefore disallowed in the Document Containing Charges? This again shows the Prosecution's persistent disregard for the Chamber's role in confirming the charges and limiting their scope.

18. Additionally, this proves that this information existed well in advance – so much so that the prosecution have built a whole case theory and strategy around it. If indeed this information existed and has served as such an important part of the prosecution case, why was it not brought forth by the Prosecution much earlier? This cannot be deemed 'new evidence', and goes to prove the Single Judge's assessment of the lack of diligence, organization and efficiency on the part of the Prosecutor.
19. The Defence sees this as an attempt by the prosecution to bury it in more material, which would need to be analyzed and investigated before trial. This in no way expedites the proceedings. By contrast, it would unduly delay the proceedings because the Defence would require substantial additional time to investigate the new factual allegations. The requested addition of allegations would also adversely affect the fairness of the proceedings vis-à-vis the Defence because it would significantly increase its workload close to the commencement of trial. Whilst the Defence is used to swimming against the tide, it is a mere 11 days before trial and thus a mammoth task for the Defence.
20. In this regard, the Defence agrees with the Single Judge's observation that the Prosecution's request '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.'¹⁶
21. Accordingly, whilst the Defence agrees that the issues significantly affect the fairness and expeditiousness, it does so in an adverse manner. In no way do the issues advance the fairness and expeditiousness of the proceedings. Rather, the issues have an adverse impact on the fairness and expeditiousness of the proceedings.

¹⁵ ICC-01/09-01/11-880, para 38

¹⁶ ICC-01/09-01/11-859.

22. In light of the above arguments, the Defence submits that, even if the Pre-Trial Chamber finds that the issues identified by the Prosecution are appealable, it should dismiss the Application on the ground that the issues do not advance the fairness and expeditiousness of the proceedings.

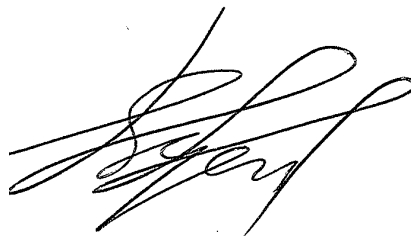
c) An immediate resolution by the Appeals Chamber will not materially advance the proceedings

23. The Defence submits that an immediate resolution by the Appeals Chamber will not materially advance the proceedings. Such a resolution at this stage would delay the proceedings and thus adversely affect the proceedings. If the temporal scope of the charges would be broadened at this stage, the Defence would require additional time to investigate and would thus not be ready to start the trial in ten days. Accordingly, the Application is filed far too late for an immediate resolution by the Appeals Chamber to materially advance the proceedings.

IV. Relief Requested

24. As more fully argued above, the Defence requests the Pre-Trial Chamber to:
- a. dismiss the Application and request for leave to appeal on all grounds; and
 - b. confirm the Decision as set out by the Single Judge.

Respectfully submitted,



Joseph Kipchumba Kigen-Katwa
On behalf of Joshua arap Sang
Dated this 30 August 2013
In Nairobi, Kenya