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APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Akua Kuenyehia
Judge Erkki Kouroula
Judge Anita Ušacka

SITUATION IN THE REPUBLIC OF KENYA

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

Public

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”

Source: Office of the Prosecutor

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The Office of the Prosecutor

Fatou Bensouda

James Stewart

Counsel for the Defence

For William Samoei Ruto:

Karim Khan

David Hooper

For Joshua Arap Sang:

Joseph Kipchumba Kigen-Katwa

Caroline Buisman

Legal Representatives of the Victims

Wilfred Nderitu

The Office of Public Counsel for Victims

Paolina Massidda

REGISTRY

Registrar

Herman von Hebel

Deputy Registrar

Didier Preira

Victims and Witnesses Unit

Patrick Craig

Introduction

1. On 16 August 2013, the Single Judge of Pre-Trial Chamber II rejected the Prosecution's Request pursuant to Article 61(9) to extend the temporal scope of one of the four locations of the charges by two days. She stated that the absence of any justification as to the belated nature of the Prosecutor's Request would unduly compromise the rights of the accused under Article 67(1)(a) to (c). The Prosecution submits that the Single Judge applied a wrong legal standard. The Single Judge established a presumption of unfairness due to the lateness of the Request and failed to consider other relevant factors as well as the rights and interests at stake. Although the Chamber's decision under Article 61(9) is discretionary, a comprehensive reading of the statutory framework requires the Chamber to balance a number of factors as well as the affected rights and interests. First, the Chamber should determine whether the Request causes an unfair prejudice to the accused by assessing the type of amendment requested, its impact in light of the overall case and whether there is any available remedy that can minimise the prejudice to the accused. Second, the Chamber should also consider the factors supporting the amendment, in particular, the Prosecution's duty to establish the truth and its right to continue its investigations after confirmation, the rights of the victims to participate in the proceedings where their interests are affected, and the nature of the amendment requested and whether it is supported by evidence. Third and finally, the Chamber should ponder the two set of factors. If the amendment still causes an unfair prejudice to the rights of the accused, it should be rejected. Otherwise, it should be granted. This test is supported by the jurisprudence of the Appeals Chamber in rulings on redactions and non-disclosure as well as jurisprudence of the *ad hoc* tribunals on amendment of charges.

Statement of Facts

2. In the Amended Document Containing the Charges (“Amended DCC”) filed on 15 August 2011, the Prosecution 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 (in particular, Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town and Nandi Hills town.¹
3. On 23 January 2012, the Chamber issued, by majority, its “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b)” (the “Confirmation Decision”), in which it confirmed the charges against William Samoei Ruto and Joshua Arap Sang to the extent specified in the decision, and committed two accused 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
4. In relation 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 2008⁶ 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

¹ ICC-01/09-01/11-261-AnxA, para.133.

² ICC-01/09-01/11-373.

³ Confirmation Decision, paras.167,174.

⁴ *Ibid.*, para.180.

⁵ *Ibid.*, paras.211,216.

⁶ *Ibid.*, paras.228,254,274. See also paras.349, 367.

⁷ *Ibid.*

greater Eldoret on 30 and 31 December 2007. Similarly, the Majority found that crimes of murder, deportation or forcible transfer and persecution had been committed in Turbo town on 31 December 2007, in Kapsabet town from 30 December 2007 until 16 January 2008, and in Nandi Hills town from 30 December 2007 until 2 January 2008.

5. On 28 December 2012, Trial Chamber V stated that “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.”⁸
6. 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)” 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 Request”).⁹ The Prosecution explained that the proposed amendment was the result of evidence obtained after Confirmation,¹⁰ and that it did not involve the addition of new charges or the substitution of more serious charges, or affect the legal characterisation of the underlying facts.¹¹ The Prosecution also clarified that the Defence was on notice that the Prosecution case included 30 and 31 of December 2007 at least since Confirmation.¹² The Prosecution then listed the supporting evidence. Out of the five locations in Eldoret area where crimes were allegedly committed, the

⁸ ICC-01/09-01/11-522, para.19.

⁹ ICC-01/09-01/11-824.

¹⁰ ICC-01/09-01/11-824, para.10.

¹¹ ICC-01/09-01/11-824, para.17.

¹² ICC-01/09-01/11-824, para.19.

evidence related to four: Kimumu, Langas, Yamumbi and Huruma. The temporal scope of Kiambaa was not affected:

- In **Kimumu**, Witness P-0189 heard gunshots and reports of Kikuyu buildings being burned on the night of 30 December 2007.¹³ Witness P-0469 was part of a group of Kikuyu forced to flee the area after seeing the targeted burning of their homes on 30-31 December 2007, and also witnessed an elderly Kikuyu man being beaten in the street by Kalenjin youths on 30 December.¹⁴ Witness P-0475 suffered similar losses and saw the same beating incident, and later heard that victim died from his injuries.¹⁵ She also saw local Kalenjin on 31 December directing groups of Kalenjin youths arriving via lorry to burn only Kikuyu houses in Kimumu.¹⁶
- On 31 December 2007 in **Langas**, Witness P-0189 saw looting, including her own home, the burning of Kikuyu property, roadblocks established by Kalenjin, and several Kikuyu who had been shot by arrows, some of whom were dead.¹⁷ Witness P-0376 states that a building owned by a Kikuyu on a nearby property was burned down during the night of 29 December or early morning of 30 December 2007, and his house was burned the next day.¹⁸ Also on 31 December 2007, he witnessed a group of Kalenjin youths armed with bows and arrows, the selective burning of Kikuyu properties, and Kikuyu who had been killed or wounded by arrows or blunt force trauma.¹⁹ Witness P-0410 saw Kikuyu homes being looted in Langas on 30-31 December 2007, Kalenjin youth patrolling the area with grey-painted faces, and Kikuyu arriving at the Langas police station with arrow wounds.²⁰ He also heard a KASS FM broadcast on 31 December 2007 calling for the Kalenjin to “evacuate the foreigners” from the Rift Valley.²¹

¹³ KEN-OTP-0076-0515-at-0519. Disclosed 9 January 2013.

¹⁴ KEN-OTP-0082-0072-at-0079-0084. Disclosed 9 January 2013.

¹⁵ KEN-OTP-0082-0051-at-0056. Disclosed 9 January 2013.

¹⁶ *Ibid.*, at 0058.

¹⁷ KEN-OTP-0076-0515-at-0520-0524.

¹⁸ KEN-OTP-0076-0537-at-0541-0545. Disclosed 30 November 2012.

¹⁹ *Ibid.*

²⁰ KEN-OTP-0083-0348-at-0356-0359. Disclosed 9 January 2013.

²¹ *Ibid.*, 0358.

Witness P-0438 saw large organised groups of Kalenjin youths passing through Langas on 31 December 2007.²² He witnessed his home and those of twenty other Kikuyu looted and burned by a group of Kalenjin, and saw a young girl hacked to death as she ran from her home.²³

- In **Yamumbi**, Witness P-0378 recalls Kikuyu houses near the Kalenjin neighbourhood burning during the night of the announcement of the election results, and the next day (31 December 2007) saw groups of Kalenjin youth with ash-covered faces, armed with bows and arrows, burning Kikuyu properties and chasing them from their homes.²⁴ She also saw her husband hacked to death in the street on 31 December 2007 by around 10 Kalenjin.²⁵ Witness P-0405 was warned by a Kalenjin woman on 30 December 2007 that a Kalenjin attack on Yamumbi was imminent; later that day he saw Kikuyu houses being burned and a group of about 10 Kalenjin youths with painted faces and bows and arrows moving towards Yamumbi.²⁶ The burning of Kikuyu homes by Kalenjin continued into the next day (31 December 2007), forcing the Kikuyu to flee the area.²⁷ Witness P-0423 saw his house as well as other Kikuyu homes set alight by Kalenjin youths on 30-31 December 2007, and also saw the body of his friend who had been cut to death defending his home on 31 December.²⁸
- In **Huruma**, Witness P-0487 saw his Kikuyu neighbours' houses being burned on 30 December 2007 by 30-40 Kalenjin youths armed with bows and arrows.²⁹ The next day, he also saw large groups of Kalenjin youths arriving via lorry and group of Kalenjin murder a Kikuyu elder murdered using machetes and rungas.³⁰

²² KEN-OTP-0080-0315-at-0324-0330. Disclosed 9 January 2013.

²³ *Ibid.*, 0328.

²⁴ KEN-OTP-0080-0158-at-0161-0163. Disclosed 9 January 2013.

²⁵ *Ibid.*, 0162-0163.

²⁶ KEN-OTP-0078-2216-at-2225-2232. Disclosed 9 January 2013.

²⁷ *Ibid.*, 2229-2232.

²⁸ KEN-OTP-0080-0134-at-0140-0145. Disclosed 30 November 2012.

²⁹ KEN-OTP-0085-0046-at-0055. Disclosed 9 January 2013.

³⁰ *Ibid.*, 0056-0058.

Witness P-0508³¹ and Witness P-0535³² saw Kalenjin burning Kikuyu homes on 30-31 December 2007, and P-0508 also witnessed Kalenjin shooting Kikuyu with bows and arrows on 31 December 2007.³³

7. On 16 August, the Single Judge of Pre-Trial Chamber I rejected the Prosecution's Request ("Decision").³⁴ The Single Judge stated that in deciding on the Prosecution's Request it is necessary to consider "other competing interests, such as the fairness and expeditiousness which would result in causing prejudice to the rights of the accused".³⁵ Accordingly, the Single Judge correctly determined that "in arriving at a proper and balanced decision on the Request, [she] shall take into consideration '[the] diverse factors affecting the case *sub judice*'".³⁶ However, and contrary to this statement of law, the Single Judge limited her determination to one factor, namely the timing of the Request. According to the Decision, the "belated nature of the Prosecutor's Request"³⁷ and the absence of any justification for such delay,³⁸ from which the Single Judge infers "lack of diligence, organization and efficiency on the part of the Prosecution",³⁹ and "unduly compromise the rights of the accused".⁴⁰ It was on that basis alone that the Single Judge rejected the Request.⁴¹
8. On 6 September 2013, the Single Judge granted the Prosecution's application for leave to appeal the Decision.⁴²

³¹ KEN-OTP-0088-0554-at-0557-0559. Disclosed 9 January 2013.

³² KEN-OTP-0088-0570-at-0574-0577. Disclosed 2 January 2013.

³³ KEN-OTP-0088-0554-at-0558.

³⁴ ICC-01/09-01/11-859.

³⁵ Decision, para.31.

³⁶ Decision, para.32.

³⁷ Decision, paras.42,38.

³⁸ Decision, paras.38,42.

³⁹ Decision, para.41.

⁴⁰ Decision, para.42.

⁴¹ Decision, para.42.

⁴² ICC-01/09-01/11-912, para.67.

**Ground of Appeal: the Single Judge erred in law and procedure in her decision
under Article 61(9)**

9. Article 61(9) permits amendment of charges after the confirmation hearing but before the commencement of trial with permission of the Pre-Trial Chamber. Therefore, the general rule is that an amendment is still permitted until the start of the trial subject to the Chamber's authorization.

10. The purported discretionary nature of the Chamber's permission has certain limitations; in particular, the Chamber needs to consider and balance different criteria as well as the rights and interests which are recognized by the statutory framework and are affected by the amendment. First, the Chamber must assess the impact that a proposed amendment has on the rights of the accused, including whether measures are available to mitigate such impact. Second, the Chamber must consider all legitimate factors in favour of an amendment of the charges. Third, it must balance the two sets of factors against each other. If the impact of a proposed amendment on the rights of the accused outweighs other factors, thus causing an unfair prejudice, then the request should be rejected. Otherwise, it must be granted. The Appeals Chamber has endorsed a similar process for decisions on redactions and non-disclosure,⁴³ and Chambers of the ICTY applied it specifically for decisions on amendments of charges.⁴⁴

11. In this case, the Single Judge did not properly follow this process. Instead, she (a) applied an erroneous presumption that a late request to amend the charges (i.e. a request filed shortly before the commencement of the trial) in and of itself is unfair; (b) incorrectly evaluated the impact that the proposed amendment has on the rights of the accused in this case; and (c) failed to take into consideration relevant factors in favour of the proposed amendment. As a result, the Single Judge erroneously rejected the Prosecution's Request.

⁴³ ICC-01/04-01/07-475OA, paras.72-73.

⁴⁴ *Halilović* Decision, para.24; *Mladić* Decision, para.40.

12. The errors raised under this ground of appeal are not related to the manner in which the Single Judge weighed the evidence supporting the amendment, but concern the legal test or procedure that a Chamber must follow before issuing a decision under Article 61(9). The Prosecution submits that the Single Judge committed a mixed error of law and procedure in its decision under Article 61(9) and, as a result, the Appeals Chamber should not defer to the Single Judge's discretion, but conduct a *de novo* review and reach its own conclusion.⁴⁵

Arguments

A. Erroneous presumption that the lateness of a request to amend the charges in itself is unfair

13. The Single Judge concluded that the amendment would be unfair for the Defence due to the "belated nature of the Prosecutor's Request" and the Prosecution's lack of justification as to the lateness.⁴⁶ This finding establishes a presumption that an amendment of the charges made shortly prior to the commencement of the trial is automatically unfair and needs to be rejected unless the Prosecution provides a proper justification with respect to the tardiness.⁴⁷ Such a presumption is inconsistent with the plain wording of Article 61(9).
14. Article 61(9) provides that "[a]fter 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."⁴⁸ This provision establishes a rule regarding the timing of amendment of the charges and effectively creates a

⁴⁵On the standard of review for legal errors:ICC-02/05-03/09-295OA, para.20. If a procedural error entails a defective interpretation and/or application of a non-discretionary procedural provision, this closely relates to an error of law and the appropriate standard of review should accordingly be applied. See C.Staker in Triffterer (ed.),p.1019.

⁴⁶ Decision, paras.42,38.

⁴⁷ Decision, paras.38,42. The requirement of providing "justification as to the belated nature" of the Request is different from the legitimate onus on the Prosecution to "set out the factual or legal justifications for amendments". *Muhimana* Decision, para.4.

⁴⁸ Emphasis added.

presumption that amendments of the charges are permissible up until the trial has begun.

15. As it is developed below, this presumption is rebuttable if the amendment causes an unfair prejudice to the accused. The Chamber needs to determine whether this is the case, and will reject the Request if it finds that the amendment causes an unfair prejudice. However, the fact that a request for an amendment pursuant to Article 61(9) was made shortly before the start of the trial does not automatically causes unfair prejudice. Otherwise the rule allowing an amendment until the commencement of the trial would have no meaning.

B. Erroneous assessment of the prejudice of the amendment to the rights of the accused

16. The Single Judge stated that “one cannot assume that the Defence is currently in a fair position to prepare its case on the basis of facts and charges related to particular dates which were explicitly rejected by this Chamber in the Confirmation of Charges Decision”.⁴⁹ Then, after noting the absence of any justification as to the belated nature of Prosecution’s Request, the Single Judge concluded that the amendment “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” and that this “would unduly compromise the rights of the accused person [...] as provided in articles 67(1)(a) to (c)”.⁵⁰
17. The Single Judge therefore concluded that the rights of the accused would be unduly prejudiced and that further investigations would be required as a result of the amendment. However, the Single Judge reached this conclusion in the abstract and without any analysis of the type of amendment requested. She did

⁴⁹ Decision, para.40.

⁵⁰ Decision, para.42.

also not make any reference to the facts of this case, or analyse the concrete impact that the amendment had on the case or on the rights of the accused. The Single Judge further failed to assess whether any measures are available to mitigate any impact that the amendment would have on the fairness of the proceedings. The only argument to support her conclusion was the alleged lack of justification of the Prosecution as to the lateness of its request.

18. This reasoning is patently wrong. The Single Judge applied an erroneous legal standard in determining that the accused's rights were unduly prejudiced. The Prosecution concedes that an amendment of charges may have an impact on the rights of the accused under Article 67, in particular, the right to be informed promptly and in detail of the charges under Article 67(1)(a) and can potentially also have an impact on the rights under Articles 67(1)(b) and (c). However, the extent of the impact will vary depending on the type of amendment and the circumstances of the case as well as on the availability of remedies that could minimise the prejudice. A Chamber cannot adequately determine the existence and extent of a prejudice to the rights of the accused without conducting such analysis.
19. This position is consistent with the jurisprudence of the Appeals Chamber and that of the UN *ad hoc* tribunals. First, in a similar scenario, namely in determining requests for non-disclosure and redactions, the Appeals Chamber has stated that the relevant Chamber "must carefully assess the type of information in respect of which authorisation for non-disclosure is sought [as well as] an overall view of the proceedings as a whole, tak[ing] fully into account the individual facts and circumstances of each case and each specific request [...]".⁵¹
20. Second, the jurisprudence of the UN *ad hoc* tribunals is similarly of assistance, in particular, in light of the similarity between Article 61(9) and Rule 50(A)(i)(b),

⁵¹ ICC-01/04-01/07-475OA, para.69.

which also requires leave of the Judge who confirmed the indictment (or a Judge assigned by the President) after confirmation of the indictment. When appraised with a request to modify the indictment, Chambers of those tribunals have considered, first, the concrete type of amendment and whether it constitutes a new charge⁵² and second, whether the amendment causes an *unfair* prejudice to the accused.⁵³ Further, and in order to make a determination on the unfairness of the prejudice, two factors have been considered: whether the amendment deprives the accused of an adequate opportunity to prepare an effective defence, and whether the amendment adversely affects the accused's right to be tried without delay.⁵⁴ Moreover, whether any delay resulting from the amendment denies the accused right to be tried without undue delay will depend on the circumstances of the particular case, including any improper tactical advantage sought by the Prosecution, and the exceptional character, the general complexity and difficulties inherent in the investigation of crimes that fall within the jurisdiction of these tribunals.⁵⁵

21. As it is explained below, the Chamber erroneously ignored all of the foregoing factors.

(a) The Single Judge failed to consider the type of amendment requested

22. The Single Judge erred in not assessing the type of amendment requested in light of the case as a whole.⁵⁶ As noted above, the accused was facing charges for factual allegations constituting crimes of murder, deportation or forcible transfer and persecution in Turbo town on 31 December 2007; in five locations of Eldoret area (Kiambaa, Kimumu, Langas, Yamumbi and Huruma) from 1 until 4 of

⁵² *Halilović* Decision, para. 24; *Mladić* Decision, para.40.

⁵³ *Mladić* Decision, para.21. The word « unfairly » is used in order to emphasise that an amendment will not be refused merely because it assists the prosecution quite fairly to obtain a conviction. *Brđanin and Talić* Decision of 7 June 2001, para.3; *Brđanin and Talić* Decision of 26 June 2001, para.50; *Halilović* Decision, para. 22.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ ICC-01/04-01/07-475OA, para.69.

January 2008; in Kapsabet town from 30 December to 16 January 2008; and in Nandi Hills town from 30 December 2007 to 2 January 2008.

23. The Prosecution was seeking to extend by two days (30 and 31 December 2007) the temporal scope of factual allegations regarding murders, forcible transfer or deportation and persecution with respect to four out of five locations of Eldoret area only, in particular, Kimumu, Langas, Yamumbi and Huruma. The Prosecution's requested amendment was therefore limited: it had a very confined temporal and geographical scope and it had no bearing on the other three areas of the charges (nor in Kiambaa village within Eldoret) and it referred to factual allegations (deaths and attacks against civilians) which were already included in the charges in those very same locations from 1 to 4 January 2008.
24. The evidence supporting the amendment squarely falls within the Prosecution's case as confirmed by the Majority, namely, that "a course of conduct involving the multiple commission of acts referred to in [Article 7(1)] against any civilian population, pursuant to or in furtherance of an organizational policy" took place in Kenya from 30 December until 16 January 2012 within the terms of Article 7(2)(a). The criminal acts committed on 30 and 31 December form part of this same course of conduct. Further, the amendment did not affect the legal qualification of the facts contained in the charges and, most notably, did not entail the addition of new charges or the substitution of the existing charges for other, more serious ones.⁵⁷

(b) The Single Judge failed to consider the impact of the amendment requested on the rights of the accused in light of the facts of the case

25. The Single Judge generally found that "authorizing an amendment of the charges [...] would result in an unfair burden to the Defence, which would require much time to conduct its investigation on the extended temporal scope of

⁵⁷ Prosecution Request, para.17.

the charges in the greater Eldoret area. This course of action would unduly compromise the rights of the accused persons [...] as provided in articles 67(1)(a) to (c)".⁵⁸ As noted above, these findings are made in the abstract and are not related to the circumstances of the case. Unfairness cannot be generally assumed due to the lateness of a Request. Rather, a finding to that effect must always be made on a case-by-case basis, taking into account the relevant facts and circumstances of the case.

26. The Prosecution notes that the impact of the amendment on the rights of the accused under Article 67(1)(a) to (c) was also limited. First, on 23 January 2012 the Majority confirmed that 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" between 30 December 2007 and 16 January 2008;⁵⁹ that this attack was widespread and systematic;⁶⁰ and that the Network acted pursuant to a policy.⁶¹ Thus, the contextual elements of widespread and systematic attack against civilian population and State policy did include the 30 and 31 December 2007 with respect to the four locations, including Eldoret area. Second, the Prosecution had disclosed the statements of the relevant witnesses between November 2012 and January 2013 and had included them in its list of witnesses filed in January 2013.⁶² Thus, the Defence had knowledge of the evidence and of the fact that the Prosecution would rely on that evidence more than nine months before the commencement of trial.
27. Even if the accused could not be convicted for murders and deportations or forcible transfer and persecutions of civilians on 30 and 31 December 2007 in Eldoret area, the Prosecution was permitted to rely on such evidence to demonstrate the existence of the contextual elements and to infer the commission

⁵⁸ Decision, para.42.

⁵⁹ Confirmation Decision, paras.167,174.

⁶⁰ *Ibid.*, para.180.

⁶¹ *Ibid.*, paras.211,216.

⁶² ICC-01/09-01/11-540-AnxA.

of crimes committed in Eldoret from 1 to 4 January 2008 and elsewhere in Kenya.⁶³ Therefore, the Defence would in any event need to analyse and investigate the evidence relating to deaths and attacks against civilians in Eldoret area on 30 and 31 December 2007.

(c) The Single Judge failed to consider remedies that could mitigate any prejudice

28. Finally, the Single Judge failed to consider whether remedies, which could address or mitigate any prejudice caused to the rights of the accused, were available.⁶⁴ For example, the Single Judge could have considered the possibility of the Trial Chamber moving the witnesses related to the crimes of Eldoret to the end of the Prosecution case. Considering that the evidence can be divided into four different geographical areas in the territory of Kenya, that measure could have permitted further investigations without causing any delay to the start of the trial.

C. Failure to take into consideration and balance relevant factors favoring the proposed amendment

29. The Single Judge correctly found that “in arriving at a proper and balanced decision on the Request, [she] shall take into consideration ‘[the] diverse factors affecting the case *sub judice*’”.⁶⁵ However, this is not what the Single Judge did in her Decision, which is based solely on the “belated nature of the Prosecutor’s Request” and the Prosecution’s lack of justification on this tardiness.⁶⁶ In fact, the Single Judge did not ponder any legitimate factors in favour of granting the requested amendment of the charges and concluded that the mere lateness of the Request warrants its rejection because it “unduly compromise[s] the rights of the

⁶³ ICC-01/11-01/11-344, para.125.

⁶⁴ ICC-01/04-01/07-475OA, para.73.

⁶⁵ Decision, para.32. ICC-01/04-01/06-568 OA3, para.36.

⁶⁶ Decision, paras.42,38. In contrast, in her decision in another Kenya case the Single Judge did consider and balance other criteria : ICC-01/09-02/11-700-Corr, para.32.

accused”.⁶⁷ As articulated by Chambers of the ICTY, when deciding on a request to amend the charges, a Chamber must also examine the “benefit that would result from amending the [charges]”.⁶⁸ Similarly, in deciding on requests for non-disclosure, the ICC Chambers need to determine the need for each redaction.⁶⁹ The Appeals Chamber has found that “fail[ure] to give weight or sufficient weight to relevant considerations” can be an appealable error.⁷⁰

30. In this case, the right of the victims of these crimes to participate in the proceedings,⁷¹ the Prosecution’s duty to establish the truth pursuant to Article 54(1) and right to continue its investigation after Confirmation to that purpose⁷² are among the factors that the Single Judge should have considered when ruling on the Request.
31. Similarly, the UN *ad hoc* Tribunals have ruled that the Chamber should consider whether the amendment is sought to ensure that “the real issues in the case will be determined”⁷³ and must be supported by evidence meeting the legal threshold.⁷⁴ In her Decision, the Single Judge did not assess the nature of the proposed amendment and whether the Prosecution had provided supporting evidence to meet the threshold under Article 61(7).
32. Further, the aim to “close accountability gaps, a purpose that is fully consistent with the Statute”⁷⁵ should also have informed the Single Judge’s Decision. The Prosecution submits that the crimes committed in the greater Eldoret area on 30 and 31 December 2007 form part of the same conduct for which the accused

⁶⁷ Decision, para.42.

⁶⁸ *Halilović* Decision, para.24; *Mladić* Decision, para.40.

⁶⁹ ICC-01/04-01/07-475OA, para.71.

⁷⁰ ICC-02/04-01/05-408OA3, para.81.

⁷¹ ICC-01/09-02/11-700-Corr, para.32.

⁷² ICC-01/04-01/06-568OA3, para.52.

⁷³ *Mladić* Decision, para.20; *Halilović* Decision, para.22; *Muhimana* Decision, para.4.

⁷⁴ *Mladić* Decision, para.20.

⁷⁵ ICC-01/04-01/06-2205OA15OA16, para.77; ICC-01/04-01/07-3363OA13, para.104.

stand charged before the Court. If they are not added to the charges, there will be impunity for these crimes.⁷⁶

33. Finally, and bearing in mind the history of witness interference and intimidation that prominently features in this case, the Single Judge should have considered the impact that the Request, which is based on the evidence of 12 crime-base witnesses, has on the Prosecution's ability to present its case. If, as a result of the withdrawal of witnesses, the Prosecution was not able to establish beyond reasonable doubt that crimes were committed between 1 and 4 January 2007, then the proposed amendment of the temporal scope of the charges would provide the Prosecution with a fair opportunity to nonetheless establish the truth about the individual criminal responsibility of the accused.

Relief Sought

34. For the above reasons, the Prosecution requests the Appeals Chamber to grant the appeal and to:
- (i) Find that the Single Judge erred in the test or procedure that she applied to reject the Prosecution's Request, confirm the correct test and apply it to the Request, and therefore, grant the Prosecution's Request to amend the temporal scope of the charges to include crimes committed in the greater Eldoret area on 30 and 31 December 2007. The Appeals Chamber has the authority pursuant to Article 83(2) and Rule 158(1) to substitute a discretionary decision of another Chamber with its own⁷⁷ and has all the relevant information before it.⁷⁸ It is therefore in a position to proceed accordingly.

⁷⁶ These crimes could not be prosecuted in a separate trial before the ICC, as they would most likely be covered by the principle of *ne bis in idem*. See ICC-01/11-01/11-344-Red, paras.83 and 133.

⁷⁷ ICC-01/04-169, para.91; ICC-01/04-169, Dissenting Opinion Judge Pikis, para.46. The ICTY Appeals Chamber, having concluded that a Trial Chamber had adopted the wrong legal standard with respect to the relevant mode of liability, applied "the correct legal framework to the factual conclusions of the Trial Chamber" and found the accused guilty under another mode of liability. *Stakic* Appeals Judgement, paras.62-63,85,98. See *Jelusic* Appeals Judgement where the Appeals Chamber found that the Trial Chamber had applied the wrong

- (ii) In the alternative, to find that the Single Judge erred in the test that she applied to reject the Prosecution's Request, confirm the correct test, and to apply the test to the Prosecution's Request 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 Prosecution's Request, 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.
35. The Prosecution further requests that the Appeals Chamber should decide this appeal on an expedited basis. If the Appeals Chamber grants any of the remedies under (i) and (ii) above, then it may issue the dispositive without delay and provide its reasons in support of the decision at a later stage.
36. The trial in this case has commenced on 10 September 2013. However, this does not render this appeal moot. Appellate jurisdiction, if intervening correctively, or instructing a lower chamber to make a new determination, will seek to re-instate the *status quo ante*⁷⁹ and restore the party's situation as it was at the time when its right was affected by the lower Court.⁸⁰ In this case, the Prosecution exercised its

legal standard when assessing the evidence to establish the special intent for genocide at the Rule 89bis stage and substituted the Trial Chamber's finding, ruling that a re-trial was not "in the interests of justice (paras.39,56,77).

⁷⁸ See ICC-01/09-01/11-824 and reproduced above in para.6.

⁷⁹ The *status quo ante* principle is derived from the notion 'no right without a remedy.' Restoring the parties' original positions in line with this notion "is a principle of international law, and even a general conception of law, that any breach of engagement involves an obligation to make reparation." *Factory at Chorzow (Germ. v. Pol.)*, 1928 P.C.I.J. (ser.A) No.17 (Sept.13), para.73. See also Article 35, Draft Articles on State Responsibility with commentaries, Yearbook of the International Law Commission, 2001, vol.II, Part Two.

⁸⁰ Criminal Codes in several jurisdictions recognize the validity of restoring the parties to their original position. See, for example, the German Code of Criminal Procedure, sections 42-47,235,315,342,391, the Provisional Criminal Procedure Code of Kosovo, articles 60,63,96,97,98,479, the Criminal Procedure Code for the Federation of BiH, articles 54,57,85,86,87, the Criminal Procedure Code for Republic of Montenegro, articles 57,60,190-192 and the Law on Criminal Procedure of the Brcko District of Bosnia and Herzegovina, articles 49-51. In other national jurisdictions Appellate Courts have ordered the re-instatement of a plea agreement in a criminal case, justifying its holding by stating "...the objective is case specific and remedial. A court's essential function is to provide a remedy in the context of an individual case, and a restoration of the parties to their original position is a remedy well established in other contexts." (*State of Arizona, Respondent, v. Victor Gene Donald, Petitioner*, Court of Appeals of Arizona, Division 1, Department E. September 26, 2000, 198Ariz.406, ¶ 40,10 P.3d at 1204, para.42. *State v. Jackson*, 209Ariz.13, 97P.3d113, Ariz.App.Div.2,2004, September 22 2004, para.8.).

right to request an amendment of the charges before the commencement of trial and thus within the terms of Article 61(9). If the Appeals Chamber finds that the Single Judge erred in her Decision issued on 16 August 2013, any subsequent decision on the amendment of charges will have an effect of changing the Single Judge's Decision.⁸¹ It will then be for the Trial Chamber to take measures to mitigate the possible impact that the retroactive amendment of the charges may have on the fair conduct of the proceedings. A contrary interpretation would deprive judicial intervention of actual meaning in most instances due to intervening circumstances.⁸²



Fatou Bensouda, Prosecutor

Dated this 19th day of September 2013

At The Hague, the Netherlands

⁸¹ A request for suspensive effect of the Decision before the Appeals Chamber would have served no purpose as the Appeals Chamber has no authority to suspend the proceedings before another chamber. ICC-01/04-01/06-844 OA8, para.3 4.

⁸² Intervening circumstances do not necessarily render appeals moot. See for example, *State v. King*, 121 P.3d 488, 2005 WL 2715651, Unpublished Disposition, Kan.App., October 21, 2005 (NO.92,262) ("As a preliminary matter, the State argues that King's release from community corrections renders King's appeal moot. This is incorrect. Kansas courts will not dismiss an appeal as moot "if by leaving the judgment unreversed vital rights of the parties would thereby be affected." *Pollard v. United States*, 352 U.S. 354, 358, 1 L.Ed.2d 393, 77S.Ct. 481 (1957) (an appeal against a criminal conviction does not become moot because the defendant is no longer serving a sentence if it may have adverse legal consequences in the years). Further, national jurisdictions have held that "the...test for mootness on appeal is...whether it is still possible to 'fashion some form of meaningful relief' to the appellant in the event he prevails on the merits." *Flynn v. Sandahl*, 58 F.3d 283, 287 (7th Cir.1995), quoting *Church of Scientology v. United States*, 113 S.Ct.447,450 (1992) (emphasis in original). See also *Stone v. Board of Election Commissioners for the City of Chicago*, 643 F.3d 543 (7th Cir.2011); *In re Turner*, 156F.3d 713,716 (7th Cir.1998)."