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No.: **ICC-01/09-01/11**
Date: **30 September 2013**

APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR v. WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG

Public

Sang Defence Response to Prosecution Appeal against the "Decision on the Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute"

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 & Procedural History

1. On 6 September 2013, just four days prior to the start of trial in this case, the Single Judge of Trial Chamber II certified the following issue for appeal:

> Whether the Single Judge erred in interpreting the term "permission" referred to in article 61(9) of the Statute so as to include factors relevant to the specificities of the case when exercising her discretion; and whether, consequently, in this particular case, the Single Judge abused her discretion.[1]

2. The Single Judge had previously rejected[2] the prosecution's request to amend the Document Containing the Charges ("DCC"),[3] on the basis that the request was belated and resulted in prejudice to the accused. The prosecution seeks to expand the temporal scope of the charges related to the greater Eldoret area by two days, to include the crimes allegedly committed therein on the 30th and 31st of December 2007. The prosecution filed its appeal on 19 September 2013, arguing that the Single Judge applied a wrong legal standard when exercising her discretion. Specifically the prosecution argues that the Single Judge erred in establishing a "presumption of unfairness due to the lateness" of the prosecution's Amendment Request, and further that the Single Judge "failed to consider other relevant factors as well as the rights and interests at stake".[4]

3. The Prosecution's Appeal must be rejected for two reasons: i) it is procedurally barred at this stage due to the constraints contained in Article 61(9); and ii) it fails to show how the Single Judge abused her discretion or incorrectly exercised her discretion based on an error of law or procedure, such that it materially affected her determination in rejecting the Amendment Request. Consequently, the decision of the Single Judge must remain in force, and the prosecution's requested amendment to the DCC should be rejected.

[1] *Prosecutor v. Ruto and Sang,* ICC-01/09-01/11-912, Decision on the Prosecutor's Request for Leave to Appeal the Decision Rejecting the Amendment of the Charges (ICC-01/09-01/11-859), 6 September 2013 ("Decision Granting Leave"), para. 67. The Prosecution's application for leave to appeal was ICC-01/09-01/11-880.
[2] *Prosecutor v. Ruto and Sang,* ICC-01/09-01/11-859, Decision on the Prosecution's Request to Amend the Document Containing the Charges Pursuant to Article 61(9) of the Statute, 16 August 2013 ("Decision Rejecting Amendment").
[3] *Prosecutor v. Ruto and Sang,* ICC-01/09-01/11-824, Prosecution's Request to Amend the Updated DCC pursuant to Article 61(9) of the Statute, 22 July 2013 ("Amendment Request").
[4] *Prosecutor v. Ruto and Sang,* ICC-01/09-01/11-956, 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", 19 September 2013, para 1 ("Appeal").

II. APPLICABLE LAW

Standard of Review

4. The Appeals Chamber has previously set out the standard of review on appeal of a discretionary decision, emphasizing that it will only interfere with a discretionary decision under limited conditions:

> [T]he Appeals Chamber's functions extend to reviewing the exercise of discretion by the Pre-Trial Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion under article 19 (1) of the Statute to determine admissibility, save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions. The jurisprudence of other international tribunals as well as that of domestic courts endorses this position. They identify the conditions justifying appellate interference to be: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion.[5]

5. Indeed, and as explained in a minority opinion,

> The Appeals Chamber reviews discretionary decisions of the Pre-Trial and Trial Chambers with some deference. It is the Appeals Chamber's jurisprudence that it is not conducting a *de novo* review and therefore cannot substitute its discretion with the discretion of the Pre-Trial or Trial Chamber. Rather, the Appeals Chamber will intervene only if the exercise of discretion amounted to an abuse of discretion.[6]

Procedure for Amending the Charges

6. Article 61(9) states: After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. […] After the commencement of

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[5] *Prosecutor v. Kony et al,* ICC-02/04-01/05-408, Judgement on the appeal of the Defence against the "Decision on the admissibility of the case under Article 19(1) of the Statute" of 10 March 2009, 16 September 2009, para. 80, as cited in *Prosecutor v. Ruto, Kosgey and Sang,* ICC-01/09-01/11-307 OA, Urgent Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 August 2011 ("Decision on Kenyan Admissibility Appeal").

[6] *Prosecutor v. Ruto, Kosgey and Sang,* ICC-01/09-01/11-336 OA, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", Dissenting Opinion of Judge Anita Usacka, 20 September 2011, para. 15.

trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

7. Rule 128 (Amendment of the charges) states, in relevant part:

> 1. If the Prosecutor seeks to amend charges already confirmed before the trial has begun, in accordance with article 61, the Prosecutor shall make a written request to the Pre-Trial Chamber, and that Chamber shall so notify the accused.
>
> 2. Before deciding whether to authorize the amendment, the Pre-Trial Chamber may request the accused and the Prosecutor to submit written observations on certain issues of fact or law.

8. In *Lubanga*, the Trial Chamber determined:

> By Article 61(9), after the charges have been confirmed, control over them remains with the Pre-Trial Chamber until the commencement of the trial, since post-confirmation and "before the trial has begun", the Prosecutor may, with the permission of the Pre-Trial Chamber and on notice to the accused, amend the charges.[7]

9. Indeed, the Single Judge in a previous decision, which was not challenged by the prosecution, stated, "the Chamber's permission is a *condition sine que non* for any amendment of the charges at this stage, as dictated by the Statute".[8]

III. SUBMISSIONS

<u>The Issue on Appeal is Moot because the Trial has Begun</u>

10. There is no dispute that the trial has begun in this case, as of 10 September 2013;[9] all parties have given opening statements and the evidence of the first witness, protracted though it may be, is underway. The prosecution did not seek to delay the start of trial pending the resolution of this issue; nor did it request any sort of suspensive effect from the Appeals Chamber vis-à-vis the trial proceedings. Consequently, at this stage, per the plain language of Article 61(9), the charges may no longer be amended. Thus, the Appeal is now moot.

11. Article 61(9) sets out specific stages of the proceedings at which the prosecutor may request permission to take action with respect to the charges:

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[7] *Prosecution v. Lubanga*, ICC-01/04-01/06-1084, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, para. 39.

[8] ICC-01/09-02/11-700-Corr, para. 19.

[9] Appeal, para. 36.

- At any time – the Prosecutor may seek to add additional charges or to substitute more serious charges, following a hearing to confirm those charges
- After the charges are confirmed, and <u>before the trial has begun</u> – the Prosecutor may seek to amend the charges
- After commencement of the trial – the Prosecutor may seek to withdraw the charges.

12. These time periods are delineated so as to ensure fairness to the accused and certainty to the proceedings. Indeed, the restrictions as to when the Prosecutor can seek to amend the charges gives effect to the accused's rights under Article 67(a) to be informed promptly and in detail of the nature, cause and content of the charges and Article 67(b) to have adequate time and facilities for the preparation of the defence.

13. The prosecution now tries to dance around the determinative nature of this provision, claiming that appellate jurisdiction should seek to re-instate the *status quo ante* and restore the party's situation as it was at the time when its right was affected by a lower court.[10] But there are several problems with this argument. For one, the prosecution asserts that it has the "right" to amend the charges, and that any infringement of this "right" must be given a "remedy". However, Article 61(9) confers no such right on the prosecution; rather it allows the prosecution the seek permission to amend the charges. It does not guarantee that charges will be amended up until the start of trial. It is also notable that the prosecution found no international criminal law jurisprudence to support its position.

14. Instead, the prosecution, having been in possession of the evidence it now seeks to add into the charges since at least January of this year, and having been on notice that the Trial Chamber considered the temporal jurisdiction in Eldoret to be between 1 and 4 January 2008, since December of last year, waited more than six months to raise the issue with the Pre-Trial Chamber and to seek permission to amend the charges. There is no excuse for this delay. To the contrary, one consequence of this delay is that the prosecution is now out of time. Though in

[10] Appeal, para. 36.

theory, the prosecution could request amendment of the charges up until the day trial began, in practice, this is not a feasible option. The prosecution is well-aware that the decision making process of the chambers requires sufficient time, especially when significant issues are at stake. The Trial Chamber has previously cautioned this prosecution against dilatory filings, which, though technically brought in time, have the effect of prejudicing or delaying the proceedings.[11] In this instance, the prosecution is simply asking for too much, too late.

The Appeal Should be Dismissed because it does not Demonstrate that the Single Judge Erred in Law or Procedure or Abused her Discretion in Rejecting the Amendments to the DCC

15. The Single Judge granted leave on the issue of whether in defining and withholding her "permission" in relation to the prosecution's request to amend the charges, she had abused her discretion. The prosecution has not shown that the Single Judge either exercised her discretion based on an erroneous interpretation of law or procedure, or made a decision that was so unfair and unreasonable as to constitute an abuse of her discretion.

16. The prosecution concedes that the Pre-Trial Chamber's decision under Article 61(9) is discretionary;[12] indeed, a plain reading of the phrase "the Prosecutor may, with the permission of the Pre-Trial Chamber", could hardly be interpreted any other way. However, the prosecution then begins an analysis and constructs an argument, which departs from the issue which was certified for appeal. The prosecution does not directly address the issue of the Single Judge's discretion, but rather submits that the Single Judge erred in law and procedure in reaching her decision under Article 61(9).

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[11] See, for example, *Prosecutor v. Ruto and Sang,* ICC-01/09-01/11-718, para. 28 ("The consequence of the Prosecution's last minute filing of the Delayed Disclosure Application is that the Prosecution de facto failed to observe the 13 March 2013 deadline for disclosure. The Chamber notes that an unjustified delay in filing may be the basis for rejecting an application for extension of deadline").
[12] Appeal, para. 1; but see para. 10 where it refers to it as the "purportedly discretionary nature of the Chamber's permission" and claims that it has certain limitations.

17. The prosecution then goes on to create a list of factors, which is says are derived from a comprehensive reading of the statutory framework, and which it submits the Single Judge did not appropriately apply and balance:[13]

> 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.

18. The prosecution argues that:

> 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.[14]

19. The defence objects to the prosecution's assertion that if the Single Judge did not abide by and apply these criteria, then her handling of the prosecution's Article 61(9) request was procedurally improper and must be overturned. In designing its own procedure that it avers the Single Judge should have followed, the prosecution has paid no regard to Rule 128, which actually sets out the procedure that the Pre-Trial Chamber (or a single judge thereof) must follow when seized with an application under Article 61(9). Per Rule 128, the Single Judge's only procedural obligation was to notify the accused that the prosecution sought to amend the charges. That she did; the defence teams for the two accused responded accordingly.[15] Thereafter, the Single Judge had the option of requesting the accused and the Prosecutor to submit written observations on certain issues of fact or law. That she did not do; however, there is no procedural impropriety alleged in this regard.

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[13] Appeal, para. 1; see also para. 10.
[14] Appeal, para. 11.
[15] ICC-01/09-01/11-836-Conf; ICC-01/09-01/11-853-Conf.

20. Consequently, the Single Judge properly followed the procedure set out in the Rules. The other criteria, created by the prosecution, were not necessary for her to apply. Yet the defence notes that in several respects, the Single Judge actually did consider many of the proposed criteria in reaching her conclusion, expressly noting that "in arriving at a proper and balanced decision on the Request, the Single Judge shall take into consideration the diverse factors affecting the case *sub judice*."[16]

21. For example, the Single Judge considered one of the criteria proposed by the prosecution, namely that the prosecution has a right to continue its investigations post-confirmation and that the principal goal for the prosecution is to determine the truth. But the Single Judge indicated that such powers must be used diligently, professionally, and should not lead to abuse.[17] In her judgement, the Single Judge found that the prosecution in this case, by continuing to investigate and unilaterally determining that the dates in question (which had been rejected by the Pre-Trial Chamber in the confirmation decision), should remain part of the DCC, had "showed persistent disregard for the Court's procedural regime envisaged by its founders, more specifically, those parts of the statutory documents which determine the structure of the proceedings, the functions of the pre-trial and trial chambers as well as the role and the procedural standing of the Prosecutor".[18]

22. The Single Judge also considered the degree of potential prejudice that may be caused to the prosecution's case if the amendment was not granted. In her evaluation, the Single Judge found that if the prejudice were really that great, the Prosecutor would have brought her Request in a timelier manner, and not only a few weeks before its commencement.[19]

23. The prosecution argues at paragraphs 13-15 that the Single Judge made an erroneous presumption that that lateness of the prosecution's request to amend the charges in itself was unfair, and at paragraphs 16-19 that the Single Judge

[16] Decision, para. 32.
[17] Decision, para. 33.
[18] Decision, para. 26.
[19] Decision, para. 38.

made an erroneous assessment of the prejudice of the amendment to the rights of the accused.

24. To start, the defence disagrees that the Single Judge made such a presumption. The Single Judge determined that as the prosecutor's request had been made before trial had actually begun, she was competent to entertain the request on the merits.[20] Had she made the presumption that the prosecution says she did, the Single Judge could have dismissed the request for an amendment at that level of analysis. Instead, she continued to evaluate whether granting such permission would have a negative effect on other competing interests, such as the fairness and expeditiousness of the proceedings, which would result in causing prejudice to the rights of the accused.[21]

25. In gauging the prejudice to the accused, the Single Judge found that the fact that the defence was *arguably* on notice of the prosecution's intention to rely on crimes committed in the greater Eldoret area on the 30th and 31st of December 2007, since the start of the case, was insufficient to mitigate any prejudice to the accused. Critically, the Single Judge appreciated the position of the defence, who had argued that accepting the amendment at this late stage would cause prejudice, because the defence had conducted its investigations on the basis of what was contained in the DCC and what the Pre-Trial Chamber had confirmed in the Confirmation Decision. Significantly, the defence had argued that expanding the temporal scope of the charges by two days would mean introducing new factual allegations from twelve different witnesses, occurring in four different locations within the greater Eldoret area, and which amounted to over 32 separate incidents which would need to be analysed and investigated prior to trial.[22] The Sang defence further explained that because it is on legal aid and has limited resources, it had not focused its investigations on allegations which were not part of the case against the accused as defined by the judges.[23]

26. On the basis of these submissions, and submissions made on the record by the Ruto defence as to prejudice, the Single Judge correctly determined:

[20] Decision, para. 29.
[21] Decision, para. 31.
[22] *Prosecutor v. Ruto and Sang,* ICC-01/09-01/11-853-Conf, 13 August 2013 ("Sang Response"), para. 9.
[23] Sang Response, para. 10.

> "[O]ne 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. Parties and participants in a case are expected to prepare on the basis of the charges as confirmed which shape the subject matter of the case, and thus, to take into consideration the evidence that is only relevant to the charges confirmed".[24]

27. Given these submissions by the defence, which were before the Single Judge for consideration, her determination does not amount to an erroneous assessment of prejudice, as the prosecution claims. Rather it seems the prosecution simply disagrees with the exercise of the Single Judge's discretion and final judgement.[25] The prosecution submits that the Single Judge should have evaluated the extent of the impact or degree of prejudice, depending on the type of the amendment and the circumstances of the case, as well as on the availability of remedies that could minimise the prejudice.[26] However, appellate jurisprudence is clear that it is not for the Appeals Chamber to determine what the Single Judge *might have done*, or *might have otherwise considered and decided,* but to decide whether the Single Judge *erred in what she did*.[27] The defence submits there was no error.

28. The jurisprudence from the *ad hoc* tribunals relied on by the prosecution at paragraphs 19 and 20 is of little assistance, due to the different procedural regimes in play. Judges at the ICC have consistently noted that the criminal procedure at the ICC, particularly with the introduction of the confirmation of charges process, is markedly different from the procedure at the *ad hoc* Tribunals.[28] As such, the Appeals Chamber should not give weight to the principles relied upon in the *ad hocs* for determining whether an indictment should be amended. The Single Judge, fully aware of the content and scope of the requested amendments, and having already determined that prejudice to the defence would arise, did not have to explicitly and separately consider the type of

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[24] Decision, para. 40.
[25] ICC-01/09-01/11-983, para. 25 (stating that an alleged failure by a Chamber to assess the request along a proposed framework is nothing more than mere disagreement with the Chamber's exercise of its discretion).
[26] Appeal, para. 18.
[27] Decision on Kenyan Admissibility Appeal, para. 98 ("Nevertheless, the question that the Appeals Chamber has to resolve is not what the Pre-Trial Chamber could have done, but whether the Pre-Trial Chamber erred in what it did").
[28] For example, *Prosecutor v. Katanga and Ngudjolo,* ICC-01/04-01/07-648, Decision on the Three Defences' Requests Regarding the Prosecution's Amended Charging Document, 25 June 2008, paras. 7-10.

amendment requested,[29] the impact on the rights of the accused in light of the facts of the case,[30] and other remedies that could mitigate prejudice to the accused.[31]

29. Again, the question before the Appeals Chamber is not whether the Single Judge could have done something differently or evaluated something additionally, but whether she arrived at her decision in a way that amounted to an abuse of discretion.[32] The Single Judge was not required, as the prosecution suggests, to "ponder any legitimate factors in favour of granting the requested amendment of the charges".[33]

30. One such "legitimate factor" put forward by the prosecution, which it submits the Single Judge was to have considered, was the need to "close accountability gaps, a purpose which is fully consistent with the Statute".[34] The prosecution goes on to bring in allegations of witness interference and intimidation, and to raise alarm that if the amendment is not granted, the prosecution may not be able to present its case. The prosecution complains that the withdrawal of several prosecution witnesses may make it difficult to establish beyond a reasonable doubt that crimes were committed between 1 and 4 January 2008, and therefore, the temporal scope of the charges should be expanded to include evidence of different incidents on different dates instead.[35] This submission is wholly and highly improper and should be rejected outright for several reasons.

31. Firstly, these submissions regarding witness interference and the need to close accountability gaps, were not put before the Single Judge at first instance. How can the prosecution expect the Single Judge to take into account arguments, of which she has not been seized? Secondly, the prosecution makes prejudicial statements about witness interference and intimidation but provides no basis for

[29] See Appeal, paras. 22-24.
[30] See Appeal, paras. 25-27.
[31] See Appeal, para. 28.
[32] Decision on Kenyan Admissibility Appeal, para. 110 ("The Pre-Trial Chamber's decision not to convene an oral hearing was thus an exercise of its discretion. As with the filing of additional reports addressed in the preceding section, the question for the Appeals Chamber to resolve is therefore not whether the Pre-Trial Chamber could have held an oral hearing, but whether the decision not to do so amounted to an abuse of discretion.").
[33] See Appeal, para. 29.
[34] See Appeal, para. 32.
[35] See Appeal, para. 33.

its allegations. Thirdly, the submissions betray the prosecution's mind-set, which is apparently to achieve a conviction at all costs, irrespective of court procedure and fairness to the accused. As such, these considerations do not belong before the Appeals Chamber in relation to the issue on appeal.

IV. CONCLUSION

32. Trial in this case has already begun, and thus the issue on Appeal, ie the prosecution's request to amend the charges, is now moot.

33. The Appeal is also deficient on the merits. In the circumstances, it is not correct for the Appeals Chamber to conduct a *de novo* review of the prosecution's request to amend the charges and add an extra two days to the temporal scope of the crimes allegedly committed in the greater Eldoret area. Nor is it proper to find that the Single Judge erred in the test that she applied, and to remand the issue.

34. Rather, the Appeals Chamber should give deference to the Single Judge's exercise of her discretion, in the absence of a clear abuse of such power. Accordingly, and as no clear legal or procedural error can be discerned, the prosecution's appeal should be dismissed.

Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua arap Sang
Dated this 30th day of September 2013
In Nairobi, Kenya