

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No. ICC-01/09-01/11 OA 6

Date: 13 December 2013

THE APPEALS CHAMBER

Before:

**Judge Sang-Hyun Song, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka**

SITUATION IN THE REPUBLIC OF KENYA

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

Public Document

**Decision on the Prosecutor's 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"**

Decision 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 Fabricio Guariglia

Counsel for Mr William Samoei Ruto
Mr Karim A.A. Khan
Mr David Hooper

Legal Representatives of the Victims
Mr Wilfred Nderitu

Counsel for Mr Joshua Arap Sang
Mr Joseph Kipchumba Kigen-Katwa
Ms Caroline Buisman

REGISTRY

Registrar
Mr Herman von Hebel



The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled “Decision on the ‘Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’” of 16 August 2013 (ICC-01/09-01/11-859), and

Having before it the “Application to Participate in the Interlocutory Appeal filed by the Prosecution against the ‘Decision on the “Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’” of 26 September 2013 (ICC-01/09-01/11-991), and the “Prosecution’s request pursuant to Regulation 28(2)” of 3 October 2013 (ICC-01/09-01/11-1010),

After deliberation,

Renders by majority, Judge Anita Ušacka dissenting, the following

DECISION

1. The “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’” is dismissed as inadmissible.
2. The “Application to Participate in the Interlocutory Appeal filed by the Prosecution against the ‘Decision on the “Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’”” is rejected.
3. The “Prosecution’s request pursuant to Regulation 28(2)” is rejected.

REASONS

I. PROCEDURAL HISTORY

1. On 23 January 2012, Pre-Trial Chamber II (hereinafter: “Pre-Trial Chamber”) issued, by majority, the “Decision on the Confirmation of Charges Pursuant to Article

61(7)(a) and (b) of the Rome Statute”¹ (hereinafter: “Confirmation Decision”), confirming the charges brought by the Prosecutor against Messrs Ruto and Sang to the extent specified therein,² and committing the two accused persons to trial on the charges as confirmed.³ With regard to the temporal framework of the crimes allegedly committed in the greater Eldoret area, the Pre-Trial Chamber confirmed the charges against the two accused for crimes committed “between 1 January 2008 and 4 January 2008”.⁴

2. On 29 March 2012, the Presidency assigned the case against Messrs Ruto and Sang to Trial Chamber V.⁵

3. On 21 August 2012, the Prosecutor submitted the “Prosecution’s Updated Document Containing the Charges pursuant to the Trial Chamber’s Order (ICC-01/09-01/11-448)”⁶ (hereinafter: “Updated Document Containing the Charges”), alleging that the crimes committed in the greater Eldoret area began “on or about 30 December 2007”.⁷ On 28 November 2012, she followed the same approach in the “Prosecution’s Submissions of the Charges against William Samoei Ruto and Joshua Arap Sang”⁸ (hereinafter: “Modified Charges Section”).

4. On 28 December 2012, Trial Chamber V ordered the Prosecutor to amend both the Updated Document Containing the Charges and the Modified Charges Section in order to reflect the limited temporal scope of the charges confirmed by the Pre-Trial Chamber, *inter alia*, in respect of the crimes allegedly committed in the greater Eldoret area, namely “between 1 January 2008 and 4 January 2008”.⁹

¹ ICC-01/09-01/11-373.

² Confirmation Decision, paras 349, 367, p. 138.

³ Confirmation Decision, p. 138.

⁴ Confirmation Decision, paras 349(b), 367(b), p. 138(e), (f). Para. 22 refers to the “Prosecution’s Amended Document Containing the Charges and List of Evidence submitted pursuant to Article 61(3) and Rules 121(3), (4) and (5)” of 15 August 2011, ICC-01/09-01/11-261 and confidential annexes), in which she alleged that the suspects committed crimes against humanity in different locations, including the greater Eldoret area, “[f]rom on or about 30 December 2007 to the end of January 2008”; see ICC-01/09-01/11-261-AnxA, paras 77-82, referring to incidents between 30 December 2007 and 1st January 2008 in the Greater Eldoret area.

⁵ “Decision constituting Trial Chamber V and referring to it the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*”, ICC-01/09-01/11-406.

⁶ ICC-01/09-01/11-448-AnxA.

⁷ Updated Document Containing the Charges, para. 30.

⁸ ICC-01/09-01/11-486, ICC-01/09-01/11-486-AnxA, pp. 3 *et seq.*

⁹ “Decision on the content of the updated document containing the charges”, ICC-01/09-01/11-522, para. 29.

5. On 7 January 2013, the Prosecutor submitted the “Prosecution’s Submission of the Updated Document Containing the Charges pursuant to the Decision on the content of the updated document containing the charges (ICC-01/09-01/11-522)”,¹⁰ reflecting the temporal scope confirmed in the Confirmation Decision.

6. On 25 February 2013, in the “Prosecution’s Updated Pre-Trial Brief”¹¹ (hereinafter: “Updated Pre-Trial Brief”), the Prosecutor nevertheless stated once again that the evidence at hand establishes that Messrs Ruto and Sang “are criminally responsible, as charged, for the crimes against humanity [...] in the locations of [...] the greater Eldoret area [...] between on or about 30 December 2007 to 16 January 2008.”¹²

7. On 21 May 2013, the Presidency constituted Trial Chamber V(a) (hereinafter: “Trial Chamber”) and assigned to it the case against Messrs Ruto and Sang.¹³

8. On 3 June 2013, the Trial Chamber set the date for the start of the trial for 10 September 2013.¹⁴

9. On 22 July 2013, the Prosecutor filed before the Pre-Trial Chamber the “Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute”¹⁵ (hereinafter: “Prosecutor’s Request to Amend the Charges”).

10. On 2 August 2013, Mr Ruto filed his response to the Prosecutor’s Request to Amend the Charges¹⁶ (hereinafter: “Mr Ruto’s Response to the Prosecutor’s Request to Amend the Charges”). On 13 August 2013 Mr Sang filed his response thereto.¹⁷

¹⁰ ICC-01/09-01/11-533-AnxA and the *Corrigendum* thereto ICC-01/09-01/11-533-AnxA-Corr of 25 January 2013.

¹¹ ICC-01/09-01/11-625-Conf-AnxB.

¹² Updated Pre-Trial Brief, para. 203; *see also* paras 159, 163-191.

¹³ “Decision constituting Trial Chamber V(a) and Trial Chamber V(b) and referring to them the cases of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* and *The Prosecutor v. Uhuru Muigai Kenyatta*”, ICC-01/09-01/11-745.

¹⁴ “Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date”, ICC-01/09-01/11-762, p. 35.

¹⁵ ICC-01/09-01/11-824-Conf. Pursuant to Pre-Trial Chamber II’s “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, dated 16 August 2013, the document was reclassified as public.

¹⁶ “Defence Response to ‘Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’”, ICC-01/09-01/11-836-Conf.

11. On 16 August 2013, the Pre-Trial Chamber, its functions being exercised by the 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’”¹⁸ (hereinafter: “Impugned Decision”). Considering, *inter alia*, the timing of the Prosecutor’s Request to Amend the Charges, the Pre-Trial Chamber held that “[i]f such procedural performance were to be tolerated, this would taint the fairness and expeditiousness of the entire proceedings”.¹⁹ The Pre-Trial Chamber concluded that granting the Prosecutor’s Request to Amend the Charges

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.²⁰

12. Consequently, the Pre-Trial Chamber rejected the Prosecutor’s Request to Amend the Charges.²¹

13. On 26 August 2013, the Prosecutor applied for leave to appeal the Impugned Decision.²²

14. On 30 August 2013, Mr Ruto and Mr Sang filed their respective responses thereto.²³

15. On 6 September 2013, the Pre-Trial Chamber granted leave to appeal the Impugned Decision in relation to the following issue, namely:

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

¹⁷ “Sang Defence Response to Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute”, ICC-01/09-01/11-853-Conf.

¹⁸ ICC-01/09-01/11-859.

¹⁹ Impugned Decision, para. 41.

²⁰ Impugned Decision, para. 42.

²¹ Impugned Decision, para. 42, p. 14.

²² “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)”, ICC-01/09-01/11-880.

²³ “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)”, ICC-01/09-01/11-893; “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-01/09-01/11-894.

particular case, the Single Judge abused her discretion in rejecting the Amendment Request.²⁴

16. On 10 September 2013, the opening statements were heard before the Trial Chamber.²⁵

17. On 19 September 2013, the Prosecutor filed the “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’”²⁶ (hereinafter: “Document in Support of the Appeal”), requesting that the Appeals Chamber:

(i) [f]ind that the Single Judge erred in the test or procedure that she applied to reject the Prosecut[or]’s Request [To Amend the Charges], confirm the correct test and apply it to the [r]equest, and therefore, grant the Prosecut[or]’s [r]equest to amend the temporal scope of the charges to include crimes committed in the greater Eldoret area on 30 and 31 December 2007 [...]

(ii) In the alternative, to find that the Single Judge erred in the test she applied to reject the Prosecut[or]’s Request [To Amend the Charges], confirm the correct test, and to apply the test to the Prosecut[or]’s Request [To Amend the Charges] 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 Prosecut[or]’s Request [To Amend the Charges], 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.²⁷

18. The Prosecutor submits, *inter alia*, that “an amendment is still permitted until the start of the trial subject to the Chamber’s authorization”.²⁸ She contends that, although the trial in this case commenced on 10 September 2013, “this does not render this appeal moot”.²⁹

²⁴ “Decision on the Prosecutor’s Request for Leave to Appeal the Decision Rejecting the Amendment of the Charges (ICC-01/09-01/11-859)”, (hereinafter: “Decision on the Prosecutor’s Request for Leave to Appeal”), ICC-01/09-01/11-912, para. 67, p. 27. It should be noted that whereas the Prosecutor requested leave to appeal the Impugned Decision with respect to two issues, the Single Judge, acting on behalf of the Pre-Trial Chamber, found that, as pointed out by Messrs Ruto and Sang, both issues were interrelated. Therefore, the Single Judge took her decision on both submitted issues together and reformulated them in one issue, as quoted above; *see* paras 24, 36, 37, 59, 66, 67 of the Decision on the Prosecutor’s Request for Leave to Appeal.

²⁵ ICC-01/09-01/11-T-27-ENG ET WT, pp. 13 *et seq.*

²⁶ ICC-01/09-01/11-956 (OA 6).

²⁷ Document in Support of the Appeal, para. 34.

²⁸ Document in Support of the Appeal, para. 9.

²⁹ Document in Support of the Appeal, para. 36.

19. On 26 September 2013, the common legal representative for victims requested leave to participate in the present appeal³⁰ (hereinafter: “Victims’ Request for Participation”).

20. On 30 September 2013, Mr Ruto filed the “Defence response to the ‘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””³¹ (hereinafter: “Mr Ruto’s Response to the Document in Support of the Appeal”). He requests, pursuant to article 61 (9) of the Statute and considering that the trial in this case commenced on 10 September 2013, that the Appeals Chamber “declare the appeal moot”³² or, in the alternative, “(a) dismiss the appeal, and (b) confirm the [Impugned] Decision”.³³

21. On the same day, Mr Sang filed the “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””³⁴ (hereinafter: “Mr Sang’s Response to the Document in Support of the Appeal”), submitting that “the [P]rosecution’s appeal should be dismissed”, for similar reasons to those submitted by Mr Ruto.³⁵

22. On 2 October 2013, following an order from the Appeals Chamber,³⁶ the Prosecutor filed her response to the Victims’ Request for Participation, indicating that she did not object to it.³⁷ Neither Mr Ruto nor Mr Sang filed a response.

23. On 3 October 2013, the Prosecutor filed the “Prosecution’s request pursuant to Regulation 28(2)”³⁸ (hereinafter: “Regulation 28 (2) Request”). Referring to

³⁰ “Application to Participate in the Interlocutory Appeal filed by the Prosecution against the ‘Decision on the “Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute”””, ICC-01/09-01/11-991 (OA 6).

³¹ ICC-01/09-01/11-999 (OA 6).

³² Mr Ruto’s Response to the Document in Support of the Appeal, paras 4-9, 32.

³³ Mr Ruto’s Response to the Document in Support of the Appeal, para. 33.

³⁴ ICC-01/09-01/11-1001 (OA 6).

³⁵ Mr Sang’s Response to the Document in Support of the Appeal, paras 6-10, 34.

³⁶ “Order on the filing of a response to the request by the Common Legal Representative for victims to participate in the appeal against Pre-Trial Chamber II’s decision of 16 August 2013”, 27 September 2013, ICC-01/09-01/11-996 (OA 6).

³⁷ “Prosecution Response to the Common Legal Representative’s ‘Application to Participate in the Interlocutory Appeal filed by the Prosecution against the ‘Decision on the “Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute”””, ICC-01/09-01/11-1008 (OA 6).

Mr Ruto's submission that she "jettison[ed] the Issue certified for appeal in favour of one [she] considers more convenient",³⁹ the Prosecutor "invites the Appeals Chamber to request from [her] limited clarifications within one working day in the Appeal against the [Impugned] Decision".⁴⁰

24. On 4 October 2013, Mr Ruto filed the "Defence response to the Prosecution's request pursuant to Regulation 28(2)",⁴¹ requesting that the Appeals Chamber reject the Regulation 28 (2) Request.

II. DETERMINATION BY THE APPEALS CHAMBER

25. The Appeals Chamber notes that, in this appeal, the Prosecutor seeks an amendment of the temporal scope of the charges against Mr Ruto and Mr Sang,⁴² or at least that the Pre-Trial Chamber determine once again whether or not to grant the Prosecutor's Request to Amend the Charges.⁴³ Before addressing the merits of the Prosecutor's arguments as to why the Impugned Decision was erroneous, the Appeals Chamber has to consider whether the relief sought can, at this point in time, still be granted. If it cannot, there is no reason for the Appeals Chamber to address the merits of the appeal, and it would have to be dismissed. Were the Appeals Chamber to address the merits of the appeal regardless, it would, in effect, be giving an advisory opinion, which is not the Appeals Chamber's role.⁴⁴

³⁸ ICC-01/09-01/11-1010 (OA 6).

³⁹ Mr Ruto's Response to the Document in Support of the Appeal, para. 19 (*see also* paras 18, 20, 25).

⁴⁰ Regulation 28 (2) Request, paras 4, 7-8, 10.

⁴¹ ICC-01/09-01/11-1012 (OA 6).

⁴² The Appeals Chamber takes no position on whether the modification of the temporal scope of the charges sought by the Prosecutor would be an amendment of the charges or the addition of additional charges, as this question is irrelevant for the determination of the present matter. In the analysis that follows, the modification sought is referred to as an amendment, as this is the term used by the Prosecutor.

⁴³ Document in Support of the Appeal, para. 34.

⁴⁴ *See for example Situation in Darfur, Sudan*, "Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 6 December 2007", 18 June 2008, ICC-02/05-138 (OA OA 2 OA 3), para. 18; *Situation in the Democratic Republic of Congo*, "Decision on Victims Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 24 December 2007", 30 June 2008, ICC-01/04-503 (OA 4 OA 5 OA 6), para. 30; *See also Prosecutor v. Thomas Lubanga Dyilo*, "Decision of the Appeals Chamber upon the Registrar's Requests of 5 April 2007", 27 April 2007, ICC-01/04-01/06-873 (OA 8), para. 6; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility

26. Article 61 (9) of the Statute provides as follows:

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. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After the commencement of trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges. [emphasis added]

27. The wording of this provision prescribes that an amendment of the charges is no longer possible after the trial has begun. In that regard, the Appeals Chamber notes that opening statements in the present case were made on 10 September 2013 and the first witness was heard on 17 September 2013.⁴⁵ Accordingly, irrespective of the precise moment at which the trial begins within the meaning of article 61 (9) of the Statute, in the instant case, the trial has commenced.

28. The Appeals Chamber notes that the Prosecutor submits that despite the wording of article 61 (9) of the Statute, her appeal is not moot. In support of this submission, the Prosecutor argues (i) that she asked for an amendment of the charges before the opening of the trial,⁴⁶ and (ii) that “[a]ppellate jurisdiction, if intervening correctively, or instructing a lower chamber to make a new determination, will seek to re-instate the *status quo ante* and restore the party’s situation as it was at the time when the right was affected by the lower Court”,⁴⁷ relying primarily on domestic cases from the United States and the legislation of other States.⁴⁸

29. As to the Prosecutor’s first argument, the Appeals Chamber notes that the Prosecutor’s Request to Amend the Charges was filed before the Pre-Trial Chamber on 22 July 2013, i.e. before the commencement of the trial. Nevertheless, the Appeals Chamber finds that the wording of article 61 (9) of the Statute (“the Prosecutor may,

of the Case”, 25 September 2009, ICC-01/04-01/07-1497, (OA 8), para. 38; *Prosecutor v. Joseph Kony et al.*, “Judgment on the appeals of the Defence against the decisions entitled ‘Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06’ of Pre-Trial Chamber II”, 23 February 2009, ICC-02/04 (OA), para. 9. See also *Prosecutor v. Callixte Mbarushimana*, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled ‘Decision on the confirmation of charges’”, 30 May 2012, ICC-01/04-01/10-514 (OA 4), para. 68.

⁴⁵ ICC-01/09-01/11-T-29-Red2-ENG WT, pp. 8 *et seq.*

⁴⁶ Document in Support of the Appeal, para. 36.

⁴⁷ Document in Support of the Appeal, para. 36 (footnotes omitted).

⁴⁸ Document in Support of the Appeal, para. 36.

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with the permission of the Pre-Trial Chamber [...] amend the charges”) indicates that not only the request to amend the charges has to be filed before the commencement of the trial, but also that the entire process of amending the charges must be completed by that time, including the granting of permission for the amendment by the Pre-Trial Chamber. The purpose of this is obvious: at the beginning of the trial, its parameters must be clear. The only modification possible under the Court’s legal framework thereafter is a change to the legal characterisation of the facts pursuant to regulation 55 of the Regulations of the Court, as already clarified by the Appeals Chamber in its “Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled ‘Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’”.⁴⁹

30. Concerning the relationship between article 61 (9) of the Statute and regulation 55 of the Regulations of the Court, the Appeals Chamber has held:

[T]he Appeals Chamber recalls that article 61 (9) addresses primarily the powers of the Prosecutor to seek an amendment, addition or substitution of the charges, at his or her own initiative and prior to the commencement of the trial; the terms of the provision do not exclude the possibility that a Trial Chamber modifies the legal characterisation of the facts on its own motion once the trial has commenced. Regulation 55 fits within the procedural framework because at the confirmation hearing, the Prosecutor needs only to “support each charge with sufficient evidence to establish substantial grounds to believe”, whereas during trial, the onus is on the Prosecutor to prove “guilt beyond reasonable doubt”. Thus, in the Appeals Chamber’s view, article 61 (9) of the Statute and Regulation 55 address different powers of different entities at different stages of the procedure, and the two provisions are therefore not inherently incompatible.⁵⁰

The Appeals Chamber recalls that regulation 55 of the Regulations of the Court was introduced precisely to mitigate the fact that after the commencement of the trial the charges cannot be amended (including by the addition of more serious charges).⁵¹

31. Therefore, the Appeals Chamber finds that, once the trial has commenced, it is no longer possible to amend or to add to the charges, irrespective of when the Prosecutor filed her request to amend the charges. The Appeals Chamber does not

⁴⁹ 8 December 2009, ICC-01/04-01/06-2205 (OA 15 OA 16).

⁵⁰ *Lubanga OA 15 OA 16 Judgment*, para. 77.

⁵¹ *Lubanga OA 15 OA 16 Judgment*, para. 77.

consider that this unduly prejudices the Prosecutor: if she identifies a need to seek an amendment of the charges shortly before the scheduled start of a trial, she may ask for a postponement of the trial until the amendment process, including any potential appeal in that regard, is concluded. The Appeals Chamber notes that, despite having modified her document containing the charges filed with the Trial Chamber in August 2012 to include the 30 and 31 of December 2007⁵² and having included the same temporal scope in the Prosecution's Updated Pre-Trial Brief in February 2013,⁵³ the Prosecutor filed the Prosecutor's Request to Amend the Charges on 22 July 2013, i.e. seven weeks before the scheduled commencement of the trial. She did not, however, seek a postponement of the trial at that point in time. Nor did she seek a postponement of the trial when the Pre-Trial Chamber, on 6 September 2013, granted her leave to appeal the Impugned Decision, even though it was clear that the appeal could not be decided before the start of the trial. In that regard, the Appeals Chamber notes that, on 9 September 2013, a status conference was held before the Trial Chamber where a postponement of the trial was discussed. However, once again, the Prosecutor did not request a postponement of the trial.⁵⁴

32. The Appeals Chamber is not persuaded by the Prosecutor's second argument. The Prosecutor does not refer to any provision in the Court's legal framework that would support her position and would lead the Appeals Chamber to conclude that, despite article 61 (9) of the Statute, the charges may still be amended at this point in time. The applicability of the legislation and case law relied upon by the Prosecutor⁵⁵ is doubtful in light of the clear wording of article 21 (1) of the Statute.⁵⁶ In addition, not all of the sources cited by the Prosecutor appear to support her submissions. For

⁵² See *supra*, para. 3.

⁵³ See *supra*, para. 6.

⁵⁴ ICC-01/09-01/11-T-26-CONF-ENG, p. 35 lines 21-24; p. 37, lines 2, 20-23; p. 58, lines 3-6.

⁵⁵ Document in Support of the Appeal, para. 36 and related footnotes.

⁵⁶ Article 21 (1) of the Statute provides that the Court must apply first the Statute, Rules of Procedure and Evidence and Elements of Crimes, second applicable treaties and the principles and rules of international law and third "[f]ailing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards" (emphasis added). Concerning the hierarchy of sources established by article 21 (1) of the Statute, see *Situation in the Democratic Republic of Congo*, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2013, ICC-01/04-168 (OA 3), paras 23 *et seq.*; see also, *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006", 14 December 2006, ICC-01/04-01/06-772 (OA 4), para. 34.

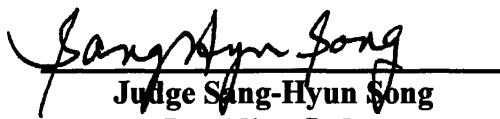
example, in one of the cases referred to by the Prosecutor, the United States Court of Appeals for the 7th Circuit held that “[i]f an event occurs during appeal that eliminates the court’s power to provide relief, the appeal is moot”.⁵⁷ In light of article 61 (9) of the Statute, this is precisely the situation the Prosecutor faces now: the charges cannot be amended after the trial has begun, eliminating the Appeals Chamber’s power to grant her the relief sought. For the above reasons, the relief sought by the Prosecutor – namely the amendment of the charges either by the Appeals Chamber or by the Pre-Trial Chamber, or a reversal of the Impugned Decision and an instruction to the Pre-Trial Chamber to decide anew on the Prosecutor’s request⁵⁸ – cannot be granted in the present circumstances. Therefore, the Prosecutor’s appeal is inadmissible and must be dismissed.

III. VICTIMS’ REQUEST FOR PARTICIPATION AND THE REGULATION 28 (2) REQUEST

33. The Appeals Chamber recalls that, on 26 September 2013, the Victims’ Request for Participation was filed and that, on 3 October 2013, the Prosecutor filed her Regulation 28 (2) Request. As the Appeals Chamber has decided that the Prosecutor’s appeal must be dismissed, the Appeals Chamber considers that both the Victims’ Request for Participation and the Regulation 28 (2) Request must be rejected as well, as granting the two requests would serve no purpose in the present proceedings.

Judge Anita Ušacka appends a dissenting opinion to the present decision.

Done in both English and French, the English version being authoritative.


Judge Sang-Hyun Song
Presiding Judge

⁵⁷ United States Court of Appeals, Seventh Circuit, *Jay Stone, et al., Plaintiffs-Appellants, v. BOARD OF ELECTION COMMISSIONERS FOR the CITY OF CHICAGO, Defendant-Appellee*, 4 May 2011, No. 11-1085, p. 2.

⁵⁸ Document in Support of the Appeal, para. 34 (i) to (iii).

Dated this 13th day of December 2013

At The Hague, The Netherlands

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