



Original: English

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

Date: 30 September 2013

**THE APPEALS CHAMBER**

**Before:** Judge Sang-Hyun Song, Presiding  
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**

**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’”**

**Source: Defence for Mr. William Samoei Ruto**

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

**The Office of the Prosecutor**

Ms. Fatou Bensouda, Prosecutor  
Mr. James Stewart, Deputy Prosecutor

**Counsel for William Ruto**

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

**Counsel for Joshua Sang**

Mr. Joseph Kipchumba Kigen-Katwa  
Ms. Caroline Buisman

**Legal Representatives of the Victims**

Mr. Wilfred Nderitu

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

Ms. Paolina Massida

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

**States' Representatives**

**Amicus Curiae**

---

---

**REGISTRY**

**Registrar**

Mr. Herman von Hebel

**Counsel Support Section**

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. Introduction

1. The Rome Statute (“Statute”) enshrines the fundamental principle that an accused has, as a minimum guarantee, the right “[t]o be informed promptly and in detail of the nature, cause and content” of the charges preferred against him.<sup>1</sup>
2. Some 7 weeks before the start of trial, the Prosecutor sought permission from the Pre-Trial Chamber to extend the temporal scope of the charges against Mr. Ruto and Mr. Sang relating to the greater Eldoret area (“Amendment Request”).<sup>2</sup> The Prosecutor took this step at this late stage in proceedings despite: (i) being in possession of the information said to support the extension since last year;<sup>3</sup> (ii) receiving a clear direction from the Trial Chamber in December 2012 that the temporal limits of the charges would be strictly construed;<sup>4</sup> and (iii) approaching the issue of amendment of the charges with greater “*diligence, organisation and efficiency*”<sup>5</sup> in the *Kenyatta* case.<sup>6</sup>
3. On 16 August 2013, the Single Judge of Pre-Trial Chamber II (“Single Judge”) rejected the Amendment Request (“Decision”)<sup>7</sup> but granted leave to appeal on a limited issue on 6 September 2013.<sup>8</sup>
4. On 10 September 2013, the trial against Mr. William Samoei Ruto commenced.<sup>9</sup> The Prosecutor did not request any delay to the start of trial pending resolution of the issue of the temporal scope of the charges. Indeed, the Prosecution refused to request an adjournment at the 9 September 2013 status conference despite the

<sup>1</sup> Statute, Article 67(1)(a) (emphasis added).

<sup>2</sup> ICC-01/09-01/11-824-Conf.

<sup>3</sup> See ICC-01/09-01/11-836-Conf-AnxA.

<sup>4</sup> ICC-01/09-01/11-522, para. 29.

<sup>5</sup> ICC-01/09-01/11-859, para. 41.

<sup>6</sup> ICC-01/09-02/11-607-Conf referred to at ICC-01/09-02/11-700-Corr, fn 7.

<sup>7</sup> ICC-01/09-01/11-859.

<sup>8</sup> ICC-01/09-01/11-912.

<sup>9</sup> ICC-01/04-01/06-1084, para. 39 (“the true opening of the trial [is] when the opening statements, if any, are made prior to the calling of witnesses”).

prompting of the Presiding Judge and the difficulties the Prosecution faced regarding the first three witnesses scheduled to testify.<sup>10</sup>

5. The start of trial is a watershed moment. Consistent with the minimum guarantee of fair notice of the charges, Article 61(9) of the Statute provides, “[a]fter the commencement of trial” the only action which the Prosecutor may take in relation to the charges laid against an accused is to withdraw them.
6. Set in this legal and factual context, the defence for Mr. William Samoei Ruto (“Defence”) respectfully submits that the *Prosecution’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” (“Appeal”)*<sup>11</sup> should be dismissed. Critically, the Appeal is moot. In the alternative, the Defence submits that the Single Judge correctly exercised her discretion in the Decision and did not commit any error when she dismissed the Amendment Request.

## II. The Appeal is Moot

7. Somewhat bizarrely, the critical question raised by the Appeal – whether it is moot – is only addressed by the Prosecution in the final paragraph of its brief.<sup>12</sup> The Defence submits that this question should be answered in the affirmative.
8. Article 61(9) of the Statute is straightforward, exhaustive and unambiguous. The Prosecution is not permitted to amend the charges once the trial has begun. Yet, this is exactly what the Prosecution seeks to do here. Indeed, what Article 61(9) does not say is what the Prosecution contends in the brief, namely, that the Prosecution has a “right to request an amendment of the charges before the commencement of the trial”.<sup>13</sup> Had this been the intention of the drafters, it would have been reflected in Article 61(9). This is not the case.

<sup>10</sup> ICC-01/09-01/11-T-26-CONF-ENG, p. 35, line 17 to p. 37, line 23.

<sup>11</sup> ICC-01/09-01/11-956.

<sup>12</sup> Appeal, para. 36.

<sup>13</sup> Appeal, para. 36 (emphasis added).

9. The Defence's approach to the interpretation of Article 61(9) is to be preferred because it is supported by reading the article's "*wording...in context and in light of its object and purpose*".<sup>14</sup> In this regard, Article 61(9) is included in Part V (Investigation and prosecution), and not Part VI (The Trial), of the Statute. Secondly, the title of the article is "Confirmation of the charges before trial". These contextual factors all indicate that the provisions of Article 61 are concerned primarily with proceedings before trial commences. While Article 61(9) does address one scenario "[a]fter commencement of the trial", this scenario is expressly limited to the withdrawal of the charges, a situation which obviously does not result in any prejudice to an accused. No other scenario is contemplated. Of further relevance, is the abovementioned right of an accused to be informed promptly and in detail of the charges he is to meet.<sup>15</sup> Clearly, this is consistent with the purpose of Article 61(9), which is to provide statutory assurance that an accused will know the full scope of the charges against him before trial commences. Finally, of note is that academic commentators on the Statute also adhere to this interpretation of Article 61(9).<sup>16</sup>
10. The Prosecution's reliance on comparative jurisprudence and the domestic *status quo ante* principle provide no solution to the fact that the appeal is moot. In respect of the *status quo ante* principle, footnote 79 of the Appeal refers to reparations and restitution in the context of wrongful acts which are attributed to a State. Not only is the asserted connection between those issues and the present case tenuous, but the Prosecution ignores that they are based on entirely different considerations and principles inapposite to an international criminal trial where the freedom of an individual is potentially at stake. Indeed, the Prosecution has

---

<sup>14</sup> ICC-01/04-168 OA 3, para. 33.

<sup>15</sup> Statute, Article 67(1)(a).

<sup>16</sup> O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, 2<sup>nd</sup> Edition (München, Oxford, Baden-Baden: C.H. Beck, Hart, Nomos, 2008), p. 1180 ("After commencement of the trial, amendment of the charges is not permitted"). See also V. Nerlich, 'The Confirmation of Charges Procedure at the International Criminal Court: Advance or Failure?' (2012) 10(5) *Journal of International Criminal Justice*, 1339 at 1349: "[Article 61(9)] suggest[s] that any addition to the charges is no longer possible once the trial has commenced."

not been able to cite a single case where any international criminal tribunal has ever considered and applied such a principle.

11. Moreover, Article 21(1)(a) of the Statute directs Judges at this Court to apply “[i]n the first place” the Statute, the Elements of Crimes and the Rules of Procedure and Evidence. Recourse to comparative jurisprudence and domestic principles is only to be made when neither the Court’s own legal texts nor international treaties and principles provide an answer to the issue at hand.<sup>17</sup> This is not the case here. There is no *lacuna* or a *non-liquet* situation; Article 61(9) governs the present issue. In any event, reliance on national law and principles<sup>18</sup> as per Article 21(1)(c) can only be sustained where they are shown to be reflective of a general principle of law derived from the major legal systems of the world. The Prosecution has manifestly failed to do this.<sup>19</sup>
12. Finally, the fact that the Prosecution finds itself in the present position is a situation of its own creation. The Defence accepts that a request for suspensive effect “*would have served no purpose as the Appeals Chamber has no authority to suspend the proceedings before another chamber*”,<sup>20</sup> but this does not mean that the Prosecution was without a remedy. Leave to appeal was granted on 6 September 2013. Trial was scheduled to start on 10 September 2013. The Prosecution could have requested a delay at the status conference held on 9 September 2013. It did not. This failure constitutes a fatal error if the Prosecution intended to pursue the present appeal.
13. The Single Judge’s observations in the Decision that the Prosecution lacks “*diligence, organization and efficiency*” are equally applicable to the Appeal.<sup>21</sup> It is

---

<sup>17</sup> Statute, Article 21(c). It is only “when all other sources fail, [must] the Court [...] apply general principles derived from national law[.]” See also O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*, 2<sup>nd</sup> Edition (München, Oxford, Baden-Baden: C.H. Beck, Hart, Nomos, 2008), p. 702.

<sup>18</sup> Appeal, fns 80, 82.

<sup>19</sup> The Prosecution can only point to the practice of Germany, Kosovo, Montenegro, Bosnia and Herzegovina, and the United States (Appeal, fns 80, 82), which is hardly reflective of a general principle of law.

<sup>20</sup> Appeal, fn. 81.

<sup>21</sup> Decision, para. 41.

this flawed, undisciplined approach which has resulted in the Appeal being rendered moot. The Defence respectfully submits that the Appeal must, therefore, be dismissed.

### **III. Response to the Ground of Appeal: The Single Judge did not err in rejecting the Amendment Request**

14. If, *arguendo*, the Appeals Chamber does not find the Appeal to be moot, the Defence submits that the Appeal should be dismissed because the Single Judge did not err in rejecting the Amendment Request.

#### Preliminary issue (1): The Prosecution mischaracterises the standard of review

15. Contrary to the Prosecution's assertion,<sup>22</sup> the Single Judge's rejection of the Amendment Request was a discretionary decision. As such, "*the Appeals Chamber will interfere with [it] only under limited conditions.*"<sup>23</sup> Specifically, "*the conditions justifying appellate interference [in a discretionary decision are]: (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.*"<sup>24</sup>
16. The Prosecution's attempt to re-characterise the error on appeal as "*a mixed error of law and procedure*"<sup>25</sup> is unconvincing and can be criticised as an obvious attempt to avoid the higher standard of appellate review for discretionary decisions. The Prosecution's argument is undermined, first, by its own submission that the Single Judge "*correctly*" identified the legal standard to be applied, hence there is clearly no error of law at issue.<sup>26</sup> Secondly, the Prosecution effectively argues that the Single Judge "*[gave] weight to extraneous or irrelevant considerations*",<sup>27</sup> namely

---

<sup>22</sup> Appeal, para. 12.

<sup>23</sup> ICC-02/04-01/05-408 OA3, para. 80.

<sup>24</sup> ICC-02/04-01/05-408 OA3, para. 80.

<sup>25</sup> Appeal, para. 12.

<sup>26</sup> Appeal, para. 7.

<sup>27</sup> ICC-02/04-01/05-408 OA3, para. 81 quoting *Prosecutor v. Milošević*, IT-02-54-AR 73.3, Decision on Interlocutory Appeal of Trial Chamber's Decision on the Assignment of Counsel, 1 November 2004, para. 10.

the lateness of the Amendment Request,<sup>28</sup> and also “*failed to give weight or sufficient weight to relevant considerations*”,<sup>29</sup> specifically, factors relevant to assessing the impact of the proposed amendment on the rights of the accused and “*relevant factors in favour of the proposed amendment*”.<sup>30</sup> This Court’s jurisprudence establishes that these sorts of considerations are properly engaged when reviewing discretionary decisions.<sup>31</sup>

17. The Prosecution’s submissions on the standard of review should, therefore, be rejected. As no error of law or fact is at issue, this Chamber should only interfere if it determines that the Single Judge’s decision is so unfair and unreasonable as to constitute an abuse of discretion.

Preliminary issue (2): Failure to link the issue certified for appeal with the appeal arguments

18. Another preliminary criticism is that the arguments advanced by the Prosecution in the Appeal are completely divorced from the issue certified for appeal by the Single Judge. The issue certified (“Issue”) is as follows:

*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 in rejecting the Amendment Request.*<sup>32</sup>

19. At no point in the Appeal does the Prosecution expressly identify the Issue actually certified for appeal or focus its arguments on the same. It is not for the Defence to decipher the Prosecution’s appeal brief. Nor is it competent for the Prosecution to jettison the Issue certified for appeal in favour of one it considers more convenient. Such an approach would be to denude the Single Judge of the authority invested in her by the Statute. The Defence submits that a strict

<sup>28</sup> See, e.g., Appeal, para. 11(a).

<sup>29</sup> ICC-02/04-01/05-408 OA3, para. 81 quoting *Prosecutor v. Milošević*, IT-02-54-AR 73.3, Decision on Interlocutory Appeal of Trial Chamber’s Decision on the Assignment of Counsel, 1 November 2004, para. 10.

<sup>30</sup> See, e.g., Appeal, paras. 11(b) and 11(c).

<sup>31</sup> This Chamber has observed that it could review “whether the Trial Chamber has correctly exercised its discretion in reaching that decision” on the basis of whether the Trial Chamber “[gave] weight to extraneous or irrelevant considerations, [or] failed to give weight or sufficient weight to relevant considerations” (see ICC-02/04-01/05-408 OA3, para. 81 quoting *Prosecutor v. Milošević*, IT-02-54-AR 73.3, Decision on Interlocutory Appeal of Trial Chamber’s Decision on the Assignment of Counsel, 1 November 2004, para. 10).

<sup>32</sup> ICC-01/09-01/11-912, para. 67.



approach should be taken by the Appeals Chamber to this matter and any arguments which fall outside the scope of the Issue certified and, thus, the scope of the appeal, should be summarily dismissed.<sup>33</sup>

A: The Single Judge did not establish a presumption as to the timing of a request to amend the charges

20. As stated above, there is no clear link between the arguments advanced by the Prosecution under this head of the Appeal and the Issue certified.<sup>34</sup> On this basis alone the arguments advanced by the Prosecution should be dismissed. Notwithstanding this flaw, the Defence addresses the Prosecution's arguments out of an abundance of caution.

21. A plain reading of the Decision shows that the Single Judge did not establish a presumption that a request to amend the charges made shortly prior to the commencement of trial is automatically unfair and should be rejected.<sup>35</sup> Rather, the Single Judge determined that, in the particular circumstances of this case, the timing of the request was prejudicial. The Prosecution's position is shown to be incorrect by the Single Judge's reasoning that "*the Prosecutor is not barred...from continuing her investigation post confirmation of charges when needed for her case and for the principal goal of determining the truth.*"<sup>36</sup> This establishes that the Single Judge was cognisant that a request to amend the charges might be made as a result of such investigations at any time after confirmation but before commencement of the trial. The Single Judge made no statement about the timing of any request made during that window save that it should be made without undue delay or any delay sufficiently justified.<sup>37</sup>

22. The Prosecution's criticism of the Single Judge for purportedly creating a presumption did not, unfortunately, deter the Prosecution from advancing its

---

<sup>33</sup> The Defence observes that the Appeals Chamber has taken a strict approach in the past and has refused to address matters which were not properly the subject of the appeal. See ICC-01/04-01/06-2582 OA 18, para. 45.

<sup>34</sup> Appeal, paras. 13-15.

<sup>35</sup> Appeal, para. 13.

<sup>36</sup> Decision, para. 34.

<sup>37</sup> Decision, paras. 38 and 42.

own presumption regarding the interpretation of Article 61(9). The Prosecution asserts that Article 61(9) “*effectively creates a presumption that amendments of the charges are permissible up until the trial has begun.*”<sup>38</sup> This assertion is without foundation. First, this presumption is not compatible with the approach which the Prosecution itself acknowledges a few paragraphs earlier in the Appeal to be correct, 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’*”.<sup>39</sup> There is no mention at this point of any presumption. Secondly, no fair reading of the article lends itself to the Prosecution’s interpretation. Article 61(9) simply sets out a framework regarding when and in what manner charges may be amended or withdrawn post confirmation and identifies which *fora* are competent to hear the relevant request. Given that Article 61(9) does not create any presumption, there is nothing to rebut and the Prosecution’s arguments in paragraph 15 of the Appeal should be dismissed.

23. Accordingly, the Defence submits that the Single Judge did not abuse her discretion by establishing any presumption that a late request to amend the charges in and of itself is unfair. The Prosecution’s arguments should, therefore, be dismissed.

*B: The Single Judge did not err in concluding that the rights of the accused would be unduly prejudiced*

24. At the outset, the Defence observes that the basic tenor of the Prosecution’s arguments under this head of the Appeal is that the Single Judge ought to have carried out a case specific assessment of the impact of the proposed amendment to the charges.<sup>40</sup> Applying this conclusion to the first limb of the Issue on appeal, it appears that the Prosecution’s answer to the question “[w]hether the Single Judge erred in interpreting the term “permission” referred to in article 61(9) of the Statute so as

---

<sup>38</sup> Appeal, para. 14.

<sup>39</sup> Appeal, para. 7.

<sup>40</sup> See, e.g., Appeal, paras. 17, 18, 25.

to include factors relevant to the specificities of the case when exercising her discretion”<sup>41</sup> is in the negative and, thus, that the Single Judge committed no error. Consequently, if the Single Judge did not err in this regard, the answer to the second limb of the Issue must also be in the negative and “the Single Judge [did not] abuse[...] her discretion in rejecting the Amendment Request”.<sup>42</sup>

25. Notwithstanding the foregoing, the Prosecution’s approach is apparently to ignore the specific terms of the Issue certified in favour of improperly creating its own appeal issue, namely whether the Single Judge “*incorrectly evaluated the impact that the proposed amendment has on the rights of the accused in this case*”.<sup>43</sup> The Defence submits that this issue is outside the scope of the appeal and should be dismissed. Nevertheless, the Defence addresses the arguments advanced by the Prosecution in the event that the Appeals Chamber decides to consider same, notwithstanding Defence submissions to the contrary.

26. The Prosecution’s argument that the Single Judge erroneously assessed the prejudice of the proposed amendment on the rights of the accused in this case is without merit. Contrary to the Prosecution’s submission, the Single Judge did not conclude that the amendment would unduly prejudice the rights of the accused “*in the abstract*”.<sup>44</sup> As the Prosecution concedes, the starting point must be that an amendment to the charges post-confirmation will engage an accused’s Article 67 rights.<sup>45</sup> Additionally, both the defence for Mr. Sang and the defence for Mr. Ruto submitted that they would suffer prejudice if the Amendment Request was granted.<sup>46</sup> These factors combined with the timing of the request mean that it was proper and reasonable for the Single Judge to conclude that the Amendment Request would unduly prejudice the rights of the accused.

---

<sup>41</sup> ICC-01/09-01/11-912, para. 67 (emphasis added).

<sup>42</sup> ICC-01/09-01/11-912, para. 67.

<sup>43</sup> Appeal, para. 11(b).

<sup>44</sup> Appeal, para. 17.

<sup>45</sup> Appeal, para. 18.

<sup>46</sup> See ICC-01/09-01/11-836-Conf, paras. 4, 15, 18, 19, 20, 21, 23, 24, 25, 26; ICC-01/09-01/11-853-Conf, paras. 9-10.

27. Equally without merit is the Prosecution's assertion that the Single Judge failed to take account of various factors in the Decision. That the Single Judge failed to take account of the specified factors is purely speculative. It is well established in the jurisprudence of this Court that a decision maker need only indicate "*with sufficient clarity the basis of the decision. Such reasoning [does] not necessarily require reciting each and every factor that was before the respective [decision maker] to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion.*"<sup>47</sup>
28. In the Decision, the Single Judge complied with the above statement of the Appeals Chamber. The Single Judge correctly identified that a request to amend the charges must be "*properly 'supported and justified'*"<sup>48</sup> and the legal standard to be applied when considering the request; specifically, that the learned Judge must consider "*[the] diverse factors affecting the case sub judice.*"<sup>49</sup> The Single Judge also properly identified "*which of the relevant facts and legal arguments that were before [her] were found to be persuasive for the determination [she] reached.*"<sup>50</sup> In this regard, the Single Judge pointed to the "*lack of efficiency and due diligence on the part of the Prosecutor in handling the [Amendment] Request*",<sup>51</sup> noted the Prosecutor's failure "*to provide the Chamber with any justification or valid reasons for such procedural conduct and excessive delays*"<sup>52</sup> and found that these factors were a "*compelling reason...not to accept the Prosecutor's argument that rejecting the requested amendment would cause a 'monumental' prejudice to her case.*"<sup>53</sup> Additionally, the Single Judge found that the amendment to the charges would "*unduly compromise the rights of the accused persons to be informed promptly of the nature, cause and content*

<sup>47</sup> ICC-01/04-01/06-773 OA5, para. 20. See also ICC-01/04-01/06-774 OA6, para. 30.

<sup>48</sup> Decision, para. 31 quoting ICC-01/09-02/11-700-Corr, para. 21.

<sup>49</sup> Decision, para. 32 quoting ICC-01/09-02/11-700-Corr, para. 22. See also Decision, para. 31 ("the Prosecutor should not benefit from an unfettered right to resort to article 61(9) of the Statute at her ease, particularly, if such permission will negatively affect other competing interests, such as the fairness and expeditiousness of the proceedings, which would result in causing prejudice to the rights of the accused").

<sup>50</sup> ICC-01/04-01/06-774 OA6, para. 33.

<sup>51</sup> Decision, para. 35.

<sup>52</sup> Decision, para. 38.

<sup>53</sup> Decision, para. 38.

*of the charges, to have adequate time and facilities for the preparation of their defence and to be tried without undue delay.”<sup>54</sup>*

29. The Defence also observes in passing that the Prosecution cites to various decisions of the ICTY at paragraph 20 of the Appeal to support its contention that the Single Judge ought to have articulated and considered all competing factors. However, none of the cases referred to state that a decision maker must explicitly and exhaustively address all factors it considered in reaching its decision.
30. Given that the Single Judge applied the correct legal standard and properly reasoned the Decision, the Prosecution’s extensive arguments regarding the various factors which it alleges the Single Judge failed to consider should be dismissed as irrelevant and without basis.<sup>55</sup> Additionally, the Single Judge’s reasoning is fair and reasonable in the circumstances of this case, does not constitute an abuse of discretion and, thus, does not warrant appellate intervention.

*C: The Single Judge properly considered the relevant factors in assessing the Request*

31. The Prosecution’s arguments under this final head of the Appeal can be swiftly dealt with. In short, the Prosecution criticises the Single Judge for failing to take into consideration “*relevant factors in favour of the proposed amendment*”.<sup>56</sup> This argument amounts to a repetition of those made under the previous head and can be dismissed on the same basis. As argued in more detail above, a fact finder need not articulate every step of its reasoning for a particular finding.<sup>57</sup> Instead, a fact finder is required to indicate with sufficient clarity the basis of the decision.<sup>58</sup> As already argued, the Single Judge complied with this requirement. In addition, the basis of the decision was fair and reasonable in this case and does not amount to an abuse of discretion. Accordingly, the Decision should be affirmed.

---

<sup>54</sup> Decision, para. 42.

<sup>55</sup> Appeal, paras. 19-28.

<sup>56</sup> Appeal, para. 11(c). See also Appeal, paras. 29-33.

<sup>57</sup> *Supra*, paras. 27-29.

<sup>58</sup> ICC-01/04-01/06-773 OA5, para. 20.

#### **IV. Relief Requested**

32. For the reasons argued more fully above, the Defence requests the Appeals Chamber to declare the Appeal moot.

33. In the alternative, the Defence requests the Appeals Chamber to:

- (a) dismiss the Appeal; and
- (b) confirm the Decision.

Respectfully submitted,



---

**Karim A.A. Khan QC**  
Lead Counsel for Mr. William Samoei Ruto

Dated this 30<sup>th</sup> Day of September 2013  
At The Hague, The Netherlands