

### **Dissenting Opinion of Judge Anita Ušacka**

1. I respectfully disagree with my colleagues' decision to dismiss this appeal as inadmissible. The dismissal is based on an interpretation given to article 61 (9) of the Statute which is, to my mind, merely one of several possible ways to address the period of time during which charges may be amended. In my view, the first sentence of article 61 (9) of the Statute should be read in a way that provides a potential remedy for the Prosecutor's request, if any error is found on the merits of the appeal. Accordingly, in my opinion, the correct course of action would have been for the Appeals Chamber to first address the merits of the appeal. Only after addressing the merits could the Appeals Chamber have fully assessed the implications of dismissing the appeal.

#### **I. BACKGROUND**

2. On 16 August 2013, the Pre-Trial Chamber (Single Judge) issued the Impugned Decision, rejecting the Prosecutor's Request to Amend the Charges. In the view of the Pre-Trial Chamber, the Prosecutor's handling of the request revealed a "lack of efficiency and due diligence"<sup>1</sup>, particularly by filing the Request to Amend the Charges almost seven months after the date of issuance of Trial Chamber V's decision on the updated document containing the charges on 28 December 2012<sup>2</sup> and failing to provide any justification for this delay.<sup>3</sup>

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

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>4</sup>

4. On Tuesday, 10 September 2013, the trial against Mr Ruto and Mr Sang commenced. The Document in Support of the Appeal was filed within the time limit of ten days after the decision granting leave was rendered, i.e. on 19 September 2013.

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<sup>1</sup> Impugned Decision, para. 35.

<sup>2</sup> Impugned Decision, para. 37.

<sup>3</sup> Impugned Decision, para. 38.

<sup>4</sup> Decision on the Prosecutor's Request for Leave to Appeal, para. 67, p. 26.



5. The requested amendment seeks to include in the scope of the charges events that took place on 30 and 31 December 2007 in the greater Eldoret area.<sup>5</sup> This is based on the following:

6. On 15 August 2011, the Prosecutor requested that the Pre-Trial Chamber confirm charges for crimes allegedly committed as part of an attack that occurred in different areas of Kenya, including in the greater Eldoret area.<sup>6</sup> On 23 January 2012, the Pre-Trial Chamber confirmed charges relevant to the greater Eldoret area for crimes allegedly committed between 1 January 2008 and 4 January 2008, noting that the Prosecutor had alleged attacks in that area starting from 30 December 2007.<sup>7</sup> In addition, the Pre-Trial Chamber confirmed that the overall attack relevant to all locations in Kenya started on 30 December 2007 and ended on 16 January 2008.<sup>8</sup> The Prosecutor included both in the Updated Document Containing the Charges filed on 21 August 2012 and in the Modified Charges Section filed on 28 November 2012 before the Trial Chamber that the overall attack relevant to all of the locations in Kenya, including the greater Eldoret area, occurred between 30 December 2007 and 16 January 2008, but specified incidents occurring in the greater Eldoret area for dates occurring on or after 1 January 2008.<sup>9</sup> On 28 December 2012, Trial Chamber V ordered the Prosecutor to amend the Updated Document Containing the Charges in order to reflect the limited temporal scope of the charges confirmed by the Pre-Trial Chamber.<sup>10</sup> In this decision, Trial Chamber V also noted that the Pre-Trial Chamber had made findings limiting the temporal scope of specific charges in different areas, including the greater Eldoret area.<sup>11</sup> Thereafter, the Prosecutor submitted a newly updated document containing the charges on 7 January 2013<sup>12</sup> and submitted the Updated Pre-Trial Brief on 25 February 2013.

7. On 22 July 2013, the Prosecutor filed a request to amend the charges in relation to events that took place in the greater Eldoret area on 30 and 31 December 2007,

<sup>5</sup> Prosecutor's Request to Amend the Charges, para. 1.

<sup>6</sup> "Document Containing the Charges", ICC-01/09-01/11-261-AnxA, paras 77-86.

<sup>7</sup> Confirmation Decision, paras 253, 254, 349, 367.

<sup>8</sup> Confirmation Decision, para. 174.

<sup>9</sup> Updated Document Containing the Charges, paras 26, 30, 71-86.

<sup>10</sup> "Decision on the content of the updated document containing the charges", ICC-01/09-01/11-522.

<sup>11</sup> "Decision on the content of the updated document containing the charges", ICC-01/09-01/11-522, para. 28, footnote 47.

<sup>12</sup> "Prosecution's Submission of 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)", ICC-01/09-01/11-533-AnxA.



thereby initiating the proceedings that led to this appeal.<sup>13</sup> It should be noted that, according to the Prosecutor, the evidence supporting the crimes that were allegedly committed during this time period was collected only after the confirmation of charges and disclosed to Mr Ruto and Mr Sang in January 2013.<sup>14</sup>

## II. REASONS

8. In reaching my conclusions, I have considered the following issues:

### A. Interpretation of Article 61 (9) of the Statute

9. Article 61 (9) of the Statute reads:

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

10. The first sentence of this provision proscribes that the Prosecutor may only amend the charges in the time period “[a]fter the charges are confirmed and before the trial has begun”. Based on this provision, one could assume that, if the Prosecutor had submitted a request for amendment of the charges to the competent Chamber after the commencement of the trial, the request would have been rejected.

11. However, the present case differs from this scenario. The Prosecutor’s Request to Amend the Charges was filed on 22 July 2013, approximately seven weeks before the commencement of the trial. Although the Pre-Trial Chamber rejected the request, it nevertheless granted the Prosecutor leave to appeal the Impugned Decision (before the commencement of the trial) and thereby allowed the Appeals Chamber to review this decision.

#### *1. Interpretation of the Majority*

12. Instead of considering the Impugned Decision on the basis of the issue for which leave was granted – i.e. whether the Pre-Trial Chamber has discretion in deciding on an amendment request and, if so, how it should exercise such discretion – my colleagues ignore the issue on appeal on the basis of an issue arising from their

<sup>13</sup> Prosecutor’s Request to Amend the Charges.

<sup>14</sup> See Prosecutor’s Request to Amend the Charges, paras 11-14 (footnotes 13-33).

interpretation of the first sentence of article 61 (9) of the Statute, namely, whether an amendment to the charges can be granted *after* the commencement of the trial where the amendment request was filed *before* the commencement of the trial.

13. The Majority appear to assume that the interpretation of article 61 (9) of the Statute is a straightforward matter.<sup>15</sup> It bases its conclusion primarily on a textual interpretation of a part of that provision,<sup>16</sup> focusing on the five words “before the trial has begun” and reading the word “amend” as exclusively referring to a fully concluded amendment process. The Majority also rely on its own understanding of the purpose of this part of the provision, namely, that “at the beginning of the trial, its parameters must be clear”.<sup>17</sup> The Majority do not, however, rely on a systematic interpretation of article 61 of the Statute. It does not take into account article 61 of the Statute in its entirety, its place in Part V of the Statute (“Investigation and Prosecution”), the full content of paragraph 9 of that article, the purpose of the confirmation proceedings, or the implications on the rights of the accused if a trial were to commence while an amendment request is pending.

14. In that respect, it is recalled that the Document in Support of the Appeal was filed on 19 September 2013, i.e. nine days after the commencement of the trial. If it were clear that the amendment process needed to have been fully concluded before the commencement of the trial and that the Prosecutor’s relief could no longer be granted, the Appeals Chamber would have had to immediately dismiss the appeal *in limine* for a number of reasons, primarily for reasons of expeditiousness and judicial economy.

## 2. Interpretation of the right of the Prosecutor to “amend” the charges

15. The word “amend” in article 61 (9) of the Statute imports the notion of changing “an otherwise final text”.<sup>18</sup> The relevant “text” is the Prosecutor’s document containing the charges, as confirmed by the Pre-Trial Chamber pursuant to article

<sup>15</sup> In this context, I note that despite the fact that the application and interpretation of article 61 (9) of the Statute in relation to the applicable timeframe for seeking an amendment lies primarily within the powers of the Pre-Trial Chamber, the Majority approaches the matter without the benefit of a ruling of the Pre-Trial Chamber on the issue.

<sup>16</sup> See “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” (hereinafter: “Majority Decision”), 13 December 2013, ICC-01/09-01/11 (OA 6), para. 27.

<sup>17</sup> See Majority Decision, para. 29.

<sup>18</sup> B. A. Garner (ed.), *Black’s Law Dictionary* (West, 8<sup>th</sup> Edition, 2004), p. 89.

61 (7) of the Statute. Thus, an “amendment” refers to any alteration to the document containing the charges. If the amendment request is more fundamental, i.e. if the Prosecutor seeks to add additional charges or to substitute more serious charges, the second sentence of article 61 (9) of the Statute clarifies that the Pre-Trial Chamber must hold a confirmation hearing. In the present case, the Prosecutor sought an amendment that, in her opinion, did not require a confirmation hearing, because it “is a minor adjustment to the temporal scope of some of the alleged crimes by a matter of two days”.<sup>19</sup>

16. The word “amend” is used as a verb in its active form in article 61 (9) of the Statute; it is the Prosecutor who may “with the permission of the Pre-Trial Chamber” amend the charges. However, there are at least two possible options as to the correct interpretation of the word “amend” in this context. First, it can be read as requiring a request from the Prosecutor to the Pre-Trial Chamber for permission to amend the charges. Second, it can be read as requiring the Pre-Trial Chamber to grant permission to amend the charges before the commencement of the trial. Possibly, it could even mean that the Prosecutor is required to file an amended document containing the charges before the commencement of the trial.

17. In support of the first option, it is important to note that the phrase “permission of the Pre-Trial Chamber” is connected by the word “and” with the phrase “after notice to the accused”. Evidently, the accused is notified at the time the Prosecutor seeks an amendment. Therefore, the act of seeking an amendment, as opposed to having been granted an amendment (or filing an amended document containing the charges) could be considered sufficient in order to fall within the timeframe required by article 61 (9) of the Statute.

18. In further support of the first option, I note that the first sentence of article 61 (9) of the Statute suggests that the Prosecutor has a right to amend the charges *during the entirety of this period*, i.e. up until the moment the trial begins. If the first sentence of article 61 (9) of the Statute is read as requiring the amendment process to be fully concluded, the Prosecutor would be required to foresee how long the amendment process would take, which could include, for example, the length of a

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<sup>19</sup> Prosecutor’s Request to Amend the Charges, para. 17.

confirmation hearing if a more fundamental amendment is requested, and/or of appeal proceedings, if leave to appeal a decision denying an amendment is granted.<sup>20</sup>

19. However, to require the Prosecutor to take into account the length of amendment proceedings would, in my view, be at odds with the fact that the Trial Chamber may commence the trial at any time. There is no legal provision requiring the Trial Chamber to postpone the commencement date of the trial to account for proceedings relevant to the Prosecutor's request to amend the charges. Rather, this is a matter solely within the discretion of the Trial Chamber. While the Prosecutor may seek a postponement of the trial date, such a request does not *automatically* lead to a Trial Chamber postponing the commencement of the trial.

20. In sum, if the view of the Majority was correct, at least the following scenarios would make a request to amend the charges submitted before the commencement of the trial moot: first, where the trial commences while the Pre-Trial Chamber is still in the process of considering the Prosecutor's request to amend the charges; second, as is the case in the appeal-at-hand, where leave to appeal was granted by the Pre-Trial Chamber shortly before the trial commences (thus allowing the defence to raise the argument that the appeal is moot); third, where the trial commences, for example, one day before the delivery of the appeal judgment; or fourth, where, at the time of the commencement of trial, the matter is before the Pre-Trial Chamber because it has been remanded by the Appeals Chamber for new consideration.

### 3. Considerations relevant to a purposive interpretation

21. The Majority refer, in paragraphs 29 and 30 of their decision, to the relationship between article 61 (9) of the Statute and regulation 55 of the Regulations of the Court. Regulation 55 of the Regulations of the Court was apparently adopted on the understanding that the Prosecutor could no longer *seek* an amendment of the charges after the commencement of the trial.<sup>21</sup> Therefore, the main purpose of regulation 55 of

<sup>20</sup> See regulation 65 of the Regulations of the Court.

<sup>21</sup> See Appeals Chamber, "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'" (hereinafter: "Lubanga OA 15 OA 16 Judgment"), 8 December 2009, ICC-01/04-01/06-2205 (OA 15 OA 16), para. 77.

the Regulations of the Court was to avoid impunity gaps and to promote judicial economy.<sup>22</sup>

22. In accepting this, in my view, article 61 (9) of the Statute should also be interpreted so as to allow the Prosecutor to close impunity gaps as long as she still has the right to seek an amendment of the charges. In that case, the amendment process would, at times, only conclude after the commencement of the trial. It would then be the task of the Trial Chamber to either postpone the commencement of the trial or, at the beginning of the trial, take the measures necessary to afford the defence an opportunity to prepare an effective defence in relation to the additional charges.

#### 4. Conclusion

23. These considerations reveal that the issue of when the Prosecutor may seek an amendment and whether the amendment process must be finalised before the commencement of the trial are not easily answered and have many implications. Imposing a requirement that the amendment proceedings must be concluded before the commencement of the trial, in my view, limits considerably the scope of application of the Prosecutor's right to amend the charges and appears to be contrary to the overall purpose of article 61 (9) of the Statute.

### B. Mootness

24. Mr Ruto and Mr Sang as well as the Prosecutor raise arguments relevant to the "mootness" of the appeal. In addressing these arguments, the Majority refer, in paragraphs 28 and 32 of their decision, to the concept of mootness.<sup>23</sup>

25. The concept of mootness has not yet been comprehensively addressed by the Chambers of the Court. There are examples from the jurisprudence of the Appeals Chamber where arguments have been dismissed as moot and mootness, as such, has been discussed and was rejected as being applicable to certain appeals.<sup>24</sup> In addition,

<sup>22</sup> See e.g. Lubanga OA 15 OA 16 Judgment, para. 77.

<sup>23</sup> The doctrine of mootness has existed for a long time and is well-developed in, *inter alia*, the United States, Canada and South Africa. In these jurisdictions, courts consider a request moot if it is not based on a live issue in a case or controversy (see Canada, Supreme Court, *Borowski v. Canada (Attorney General)*, 9 March 1989, [1989] 1 SCR 342; United States, Supreme Court, *DeFunis v. Odegaard*, 23 April 1974, 416 U.S. 312 (1974)). However, there are some important exceptions. When adjudicating such cases, the courts in these countries address mootness as an issue of justiciability. However, if one of the exceptions is applicable, they nevertheless decide the disputed issue.

<sup>24</sup> Appeals Chamber, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Decision on the request for suspensive effect and related issues", 18 July 2013, ICC-01/11-01/11-387 (OA 4), para. 17;

the Appeals Chamber dismissed requests as moot, although arguably, at least one of them was not admissible in any case.<sup>25</sup>

26. It appears that the Majority are well aware of the doctrine of mootness and the scope of its application. They apply elements of this doctrine, albeit without mentioning 'mootness' explicitly, to the appeal-at-hand. In my opinion, it would have been in the interests of the further development of the Court's jurisprudence to more comprehensively address the concept of "mootness", including possible exceptions if the mootness doctrine was found to be applicable to the Court.

### C. Effective remedy

27. The Majority's view in this appeal is that the Prosecutor's appeal can be decided without considering its merits, focusing on the request of Mr Ruto and Mr Sang. However, only when addressing the merits can the question of whether the Pre-Trial Chamber erred be answered. Further, only if the Appeals Chamber found an error, would it be in the position to fully appreciate the consequences of such an error and to decide on an effective remedy for the prejudice, if any, suffered by the Prosecutor in the proceedings-at-hand. In that case, the main questions to be asked would be: what remedy would be available to the Prosecutor for the erroneous rejection of her amendment request? How would the Prosecutor be able to avoid an impunity gap (if any) with respect to these events? And how could the Prosecutor/ Court protect the interests of witnesses and victims?

### D. Conclusion

28. For the aforementioned reasons, I disagree with how the Majority interprets article 61 (9) of the Statute. I consider that the appeal is justiciable and therefore find

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Trial Chamber II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled 'Decision on the Motion of the defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings'", 12 July 2010, ICC-01/04-01/07-2259 (OA 10), para. 66, and Dissenting Opinion by Judges Kourula and Trendafilova, para. 97; Appeals Chamber, *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled 'Decision on Applications for Provisional Release'", 19 August 2011, ICC-01/05-01/08-2151-Red (OA 7), para. 20; Appeals Chamber, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment on the appeal of the Prosecutor against the 'Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules' of Pre-Trial Chamber I", Dissenting Opinion of Judges Pikis and Ntanda Nsereko, 26 November 2008, ICC-01/04-01/07-776 (OA 7), para. 4.

<sup>25</sup> See *Situation in the Republic of Kenya*, "Decision on the Request for Disqualification of the Prosecutor in the Investigation against Mr David Nyekorach-Matsanga", 11 July 2012, ICC-01/09-96-Red (OA 2), paras 19-20.



that the Appeals Chamber should have addressed the merits of the appeal. Therefore, I cannot agree with my colleagues' decision to dismiss the appeal as inadmissible.

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



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**Judge Anita Ušacka**

Dated this 13th day of December 2013

At The Hague, The Netherlands