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No. ICC-01/14-01/18

Date: 1 June 2020

PRE-TRIAL CHAMBER II

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *THE PROSECUTOR V. ALFRED YEKATOM AND
PATRICE-EDOUARD NGAÏSSONA***

Public

Decision on the Prosecutor's request to amend the charges against Alfred Yekatom

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

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PRE-TRIAL CHAMBER II of the International Criminal Court issues this Decision on the Prosecutor’s request to amend the charges against Alfred Yekatom.

I. PROCEDURAL HISTORY

1. On 11 December 2019, the Chamber issued the ‘Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona’ (the ‘Confirmation Decision’, ‘Yekatom’ and ‘Ngaïssona’ respectively), in which, *inter alia*, it confirmed the charges presented against Yekatom and Ngaïssona to the extent specified in the decision and committed them to trial on the charges as confirmed.¹

2. On 2 March 2019, the ‘Prosecution’s Request for Reconsideration of, or alternatively Leave to Appeal, the “Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard [Ngaïssona]”’ was filed.² On 11 March 2019, the Chamber rejected this request.³

3. On 13 March 2020, the Registry transmitted the record of the proceedings to the Presidency,⁴ which constituted Trial Chamber V and referred the case against Yekatom and Ngaïssona to it on 16 March 2020.⁵

4. On 31 March 2020, the ‘Prosecution’s Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges’ (the ‘First Article 61(9) Request’) was filed:⁶ the Prosecutor requested the Chamber, *inter alia*, to ‘amend the charges of rape

¹ Pre-Trial Chamber II, Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona, 11 December 2019, ICC-01/14-01/18-403-Conf (public redacted version notified on 20 December 2019, ICC-01/14-01/18-403-Red).

² Prosecutor, Prosecution’s Request for Reconsideration of, or alternatively Leave to Appeal, the “Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard [Ngaïssona]”, 2 March 2020, ICC-01/14-01/18-437.

³ Pre-Trial Chamber II, Decision on the Prosecutor’s request for reconsideration or, in the alternative, leave to appeal the ‘Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona’, 11 March 2020, ICC-01/14-01/18-447.

⁴ Registry, Transmission to the Presidency of the record of the proceedings, including the Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona, 13 March 2020, ICC-01/14-01/18-449.

⁵ Presidency, Decision constituting Trial Chamber V and referring to it the case of The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, 16 March 2020, ICC-01/14-01/18-451.

⁶ Prosecutor, Prosecution’s Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges, 31 March 2020, ICC-01/14-01/18-468-Conf with confidential Annex (public redacted version notified on 1 April 2020, ICC-01/14-01/18-468-Red).

confirmed against' Ngaïssona by 'includ[ing] and confirm[ing] a second instance of rape'.

5. On 14 May 2020, the Chamber issued the 'Decision on the 'Prosecution's Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges'' (the '14 May 2020 Decision'), rejecting the First Article 61(9) Request.⁷ On the same day, the 'Prosecution Motion to Amend the Charges against Alfred YEKATOM' (the 'Request') was filed:⁸ the Prosecutor seeks that the Chamber (i) 'grant permission to amend the charges' confirmed against Yekatom 'under article 61(9) [of the Statute (the 'Statute')]' to add charges of rape and sexual slavery as war crimes'; and (ii) 'issue a scheduling order for the confirmation hearing [on those charges] for as soon as practicable'.

6. On 26 May 2020, the 'Yekatom Defence Response to Motion to Amend the Charges' (the 'Yekatom Response'), opposing the Request, was filed before Trial Chamber V. On 27 May 2020, the Defence for Yekatom filed a corrected version of the filing, in which it replaced the cover page in order to reflect Pre-Trial Chamber II and its composition.⁹

7. On 26 May 2020, the Common Legal Representatives of the Former Child Soldiers and the Common Legal Representatives of the Victims of Other Crimes (the 'CLRV') filed their joint response, seeking that the Chamber grant the Request in its entirety.¹⁰

⁷ Pre-Trial Chamber II, Decision on the 'Prosecution's Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges', 14 May 2020, ICC-01/14-01/18-517.

⁸ Prosecutor, Prosecution Motion to Amend the Charges against Alfred YEKATOM, 14 May 2020, ICC-01/14-01/18-518-Conf with confidential *ex parte* Annexes A-D, only available to the Prosecutor (public redacted version notified on 22 May 2020, ICC-01/14-01/18-518-Red).

⁹ Defence for Yekatom, Corrected version of "Yekatom Defence Response to Motion to Amend the Charges", 26 May 2020, ICC-01/14-01/18-532-Conf, 27 May 2020, ICC-01/14-01/18-532-Conf-Corr with corrected confidential Annex, ICC-01/14-01/18-532-Conf-Corr-Anx (a public redacted version was notified on the same day, ICC-01/14-01/18-532-Red-Corr, with corrected public redacted Annex, ICC-01/14-01/18-532-Red-Corr-Anx).

¹⁰ CLRV, Common Legal Representatives' Joint Response to the "Prosecution Motion to Amend the Charges against Alfred YEKATOM", 26 May 2020, ICC-01/14-01/18-531-Conf (a public redacted version was notified on the same day, ICC-01/14-01/18-531-Red).

II. SUBMISSIONS OF THE PARTIES AND PARTICIPANTS

Defence for Yekatom

8. As a preliminary matter, the Chamber notes that the corrected version of the Yekatom Response, addressed to Pre-Trial Chamber II, was received by the Registry on 27 May 2020, at 15:51 hours, after the time limit for responses to the Request had expired. Accordingly, the Chamber will not consider the Yekatom Response, also in light of the fact that the Defence for Yekatom did not request an extension of time prior to the expiration of the deadline.

Prosecutor

9. The Prosecutor submits that ‘credible evidence of rape and sexual slavery allegedly committed by Anti-Balaka elements subordinate to’ Yekatom, in the form of witness statements, was uncovered ‘[d]uring the course of finalising [the] investigation into the conscription, enlistment, and use of children under the age of 15 years’. Accordingly, charges of rape and sexual slavery as war crimes should be added by amending the charges confirmed against Yekatom, pursuant to article 61(9) of the Statute. In the view of the Prosecutor, these additional charges are ‘fully substantiated and more fully reflect [Yekatom’s] alleged culpability’; in light of the ‘seriousness and importance’ of these charges, the ‘proposed amendment is in the interests of justice’. The Prosecutor further explains that ‘the requested amendment is timely, justified, and entails no unfair prejudice to’ Yekatom, based on the following reasons: (i) ‘no trial date has as yet been set and [...] an actual trial is unlikely to commence soon’; (ii) the additional charges, being ‘predicated on sufficient evidence’, are ‘adequately substantiated’ and feature ‘among the Rome Statute’s most serious’, which renders them ‘important to the Court’s duty to establish the truth and to ensure the Trial Chamber’s “full consideration of the relevant issues”’; (iii) the Prosecutor ‘acted with reasonable diligence in pursuing the investigation and the [a]dditional [c]harges’, including with regard to the gathering of the relevant evidence; and (iv) the ‘amendment of charges [...] would not unfairly prejudice’ Yekatom, nor would the Prosecutor ‘gain any tactical advantage’, since the Defence would ‘have ample opportunity to prepare’ and there would be ‘no clear impact on the expeditious conduct of a prospective trial’. Should the Request be granted, the

Prosecutor also ‘requests that the Chamber schedule a date for the confirmation hearing on the [a]dditional [c]harges for as soon as practicable’.

Common Legal Representatives of the Former Child Soldiers and Common Legal Representatives of the Victims of Other Crimes (the ‘CLR V’)

10. In the view of the CLR V, the Request should be granted in its entirety, based *inter alia* on the following submissions: (i) it is in the interest of the victims that the proposed charges are added in order for them to have effective ‘access to justice, recognition of their victimisation and eventually the possibility to claim reparations’; (ii) the Prosecutor experienced significant operational challenges in gathering the relevant evidentiary material, making it impossible to include in the Document Containing the Charges (the ‘DCC’) the charges which form the subject matter of the Request and ‘it was sound for the Prosecution to conduct its investigation into the new charges with reasonable diligence, rather than [...] risk dismissal by the Pre-Trial Chamber due to a lack of substantiation’; (iii) adding new charges at this juncture ‘would not negatively impact the fairness and expeditiousness of the proceedings’, given that ‘the date of the commencement of the trial is yet to be set and that the new charges are limited’; (iv) concerns about the lack of charges related to gender-based crimes had already been expressed by the CLR V in their 9 July 2019 submissions; (v) the Chamber must assess and balance the rights of victims, as well as those of the accused; and (vi) it is not satisfactory to have a speedy trial ‘if said trial fails to uncover the truth about the responsibility of those involved’.

III. DETERMINATION OF THE CHAMBER

11. The Request relates to charges of rape and sexual slavery that were neither charged in the DCC against Yekatom, nor previously discussed during these proceedings, whether at the confirmation hearing or otherwise. Accordingly, the Chamber takes the view that the Request must be regarded and adjudicated as seeking to add new, additional charges within the meaning of the second sentence of article 61(9) of the Statute.

12. The Chamber recalls that, to the extent that both the amendment and the addition of a new charge ‘consist of a request to modify the scope and subject matter of a case’, these two ‘forms of modification share the risk of resulting, if allowed, in causing undue prejudice to the Defence’: hence, ‘they must both be approached with

the utmost caution and limited to the most restrictive of circumstances’ and the need for such caution is ‘all the more urgent’ when adjudicating the addition of new charges which entails an incidental procedure such as a new confirmation hearing.¹¹

13. The Prosecutor, partially echoing the reasoning of the 14 May 2020 Decision, points out that ‘the two main issues touching on potential prejudice [caused by an article 61(9) request] involve the timely preparation of the defence to address the additional charges and the undue delay of the proceedings’ and that, ‘[i]n the event of a potential delay due to the adjudication of [an article 61(9) request], the Chamber should balance the substantial interests involved’.¹² In the 14 May 2020 Decision the Chamber did indeed consider that both ‘[a]dequate notification to the accused’ of the charges brought against him or her and ‘respect for the latter’s rights (most notably in assessing the time available to prepare [a defence])’ were critical ‘in all matters relating to a modification of the charges’; however, the Chamber likewise underlined that such a modification also risks unduly extending ‘the duration of pre-trial custody, contrary to the well-established principle of international human rights law that detention prior to conviction is exceptional in nature and must be strictly limited to what is necessary’.¹³

14. Furthermore, and critically, the Chamber also held that (i) ‘[a]ny change or addition to the case as emerging from the confirmation decision has *by its nature* a disruptive effect’ (emphasis added) on the proceedings and ‘hence on the fundamental rights of the accused’;¹⁴ (ii) ‘a procedure under article 61(9) of the Statute inevitably defers the proper commencement of the trial and accordingly prolongs *per se* the overall duration of the proceedings’; and, (iii) since ‘the boundaries of the forthcoming trial are (and remain) set as emerging from the confirmation decision’, ‘any amendment or modification to those boundaries has the potential to adversely impact the efforts of the Defence’.¹⁵ For these reasons, the Chamber considered ‘the likely impact on the accused as central when deciding a matter of either amendment

¹¹ 14 May 2020 Decision, para. 21.

¹² Request, paras 32, 37.

¹³ 14 May 2020 Decision, paras 26-27.

¹⁴ 14 May 2020 Decision, para. 24.

¹⁵ 14 May 2020 Decision, paras 30, 33.

or addition to the charges as crystallised in the confirmation decision’, in particular with regard to the duration of pre-trial detention, and added that, ‘while any issue of modification of the charges is a matter of “proper balance between two concerns, namely effectiveness of the prosecution and respect for the rights of the suspect or the accused”’, it is the latter that ‘should be the ultimate benchmark against which legitimacy of amendment/addition has to be assessed’ and that compliance with international human rights is key.¹⁶ Therefore, ‘[w]hile both the statutory framework and its interpretation by the Court’s case law clearly make an allowance for changes and additions to occur, it must be avoided that unjustified recourse to this prerogative by the Prosecutor turns into abuse’;¹⁷ thus, ‘only if construed narrowly will the Prosecutor’s prerogative to request amendments or additions to the confirmed charges not turn into a delaying factor detrimental to the accused without good reason’.¹⁸

15. The Chamber is cognisant of the fact that the Prosecutor’s ‘responsibility is to seek justice for the complete range of the crimes committed by an accused, even (as article 61(9) anticipates will occur on occasion) if the allegations came to light after the initial confirmation proceedings’.¹⁹ However, the Chamber reiterates that ‘the Prosecutor should not benefit from an unfettered right to resort to article 61(9) of the Statute at her ease’;²⁰ such right ‘should only be exercised under circumstances and conditions which would not impact the current trial’. The Chamber’s adjudication of an article 61(9) request ‘is a matter of striking the appropriate balance between a prerogative which exists, and cannot and should not be taken away, on the one hand, and the need to prevent that prerogative from unnecessarily becoming a disruptive factor to the detriment of the Defence, such as to make it questionable under a human rights perspective, on the other hand’;²¹ accordingly, the circumstances listed by the Prosecutor as warranting the amendment or addition must be carefully scrutinised.

¹⁶ 14 May 2020 Decision, paras 27-28.

¹⁷ 14 May 2020 Decision, para. 24.

¹⁸ 14 May 2020 Decision, para. 32.

¹⁹ Request, para. 15.

²⁰ 14 May 2020 Decision, para. 32 referring to Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the “Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute”, 16 August 2013, ICC-01/09-01/11-859, para. 31.

²¹ 14 May 2020 Decision, para. 36.

16. The Chamber notes that the Prosecutor indicates that ‘lead information’ relevant to the additional charges was uncovered ‘in mid-July 2019’. One witness was screened in late August 2019, and was subsequently interviewed in September 2019, during the confirmation hearing.²² Another witness was first interviewed in late November 2019, as the Prosecutor ‘faced considerable difficulties in initially contacting’ the witness.²³ A second interview was held in mid-January 2020, in order ‘to obtain additional details and clarifications in order to determine whether to seek the amendment of charges’, given ‘the potential impact of the information’ provided by the witness.²⁴

17. The Chamber notes that the timeline emerging from the Prosecutor’s narrative reveals that ten months elapsed between the reception of the lead information and the filing of the Request; more specifically, it took the Prosecutor four additional months following the collection of the second witness statement before submitting the Request.

18. The Chamber is not persuaded that the circumstances illustrated by the Prosecutor constitute adequate justification for not having finalised the collection of the evidence supporting the Request (or at least part of it) in a more efficient manner, in particular as regards the decision to proceed to a second interview of one witness: besides the considerable time already elapsed between the moment where the leads were initially received and the gathering of the statements, the Prosecutor has not adequately explained (i) what ‘additional details and clarifications’ were needed in respect of the second statement; (ii) why these were necessary to ‘determine whether to seek the amendment of charges’; (iii) whether the desired clarifications were eventually obtained; and (iv) whether and, in the affirmative, how these clarifications were taken into account in the decision-making process underlying the Request. Furthermore, and critically, while the Prosecutor does submit having faced difficulties

²² 14 May 2020 Decision, para. 25 referring to Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”, 12 October 2006, ICC-01/04-01/06-568, paras 52, 54.

²³ Request, para. 26.

²⁴ Request, para. 27.

contacting one of the relevant witnesses (the one who was interviewed at a later stage), it does not mention specific obstacles with respect to the witness who was interviewed as early as September 2019. As the evidence in relation to the crimes committed against this witness was secured in September 2019, it is unclear why the Prosecutor did not file a request under article 61(9) at an earlier stage.

19. In light of the above, and after careful consideration of the need to assess and balance the rights of both the accused and the victims, the Chamber believes that the disruption caused to the Defence, the delay to the commencement of the trial and the prolongation of the accused's pre-trial custody inherent to the addition of the charges underlying the Request would not be warranted. The Prosecutor explicitly acknowledges that the inclusion of the additional charges 'would have only a minimal impact on the size and duration of the Prosecution's case', which 'would be marginal, at most'.²⁵ In the view of the Chamber, the 'marginal' nature of the requested addition strengthens the conclusion that granting the Request cannot be regarded as necessary with a view to honouring the Court's obligation to determine the truth. The Chamber reiterates that the Prosecutor is duty-bound to timely honour all relevant statutory obligations²⁶ and recalls that the Prosecutor's investigation 'should largely be completed at the stage of the confirmation of charges hearing',²⁷ as well as the Appeals Chamber's determination to the effect that the Prosecutor can only investigate beyond the confirmation hearing to the extent that 'this is necessary in order to establish the truth' and when failing to do so might result in 'depriv[ing] the Court of significant and relevant evidence'.²⁸ The Chamber also reiterates that the confirmation decision has a critical function in determining the boundaries of the trial and that the prerogative vested in the Prosecutor by article 61(9) of the Statute must

²⁵ Request, paras 5, 34.

²⁶ Pre-Trial Chamber II, Decision on the 'Prosecution's Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines', 15 May 2019, ICC-01/14-01/18-199, para. 32.

²⁷ Second Decision on Disclosure and Related Matters, 4 April 2019, ICC-01/14-01/18-163, para. 28, referencing the Appeals Chamber, *The 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, para. 44.

²⁸ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 12 October 2006, ICC-01/04-01/06-568, paras 52, 54.

not be exercised and granted in such a way as to prevent the case from taking a definite shape and to transform the trial to be opened on the confirmed charges into a moving target.

20. Having considered the Request in light of the above, the Chamber finds that the Prosecutor has not submitted a proper justification which would warrant granting an extension of the facts and circumstances of the case against Yekatom through the addition of new charges of rape and sexual slavery.

FOR THESE REASONS, THE CHAMBER HEREBY

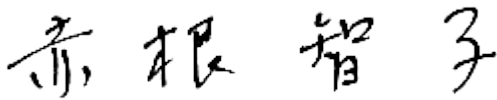
REJECTS the Request.

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

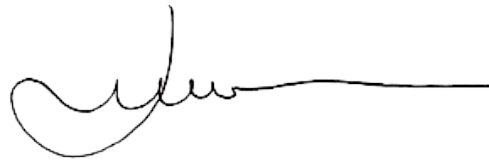


Judge Antoine Kesia-Mbe Mindua

Presiding Judge



Judge Tomoko Akane



Judge Rosario Salvatore Aitala

Dated this Monday, 1 June 2020

At The Hague, The Netherlands