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**No. ICC-01/14-01/18**

**Date: 14 May 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 ‘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’

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

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**REGISTRY**

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation  
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**PRE-TRIAL CHAMBER II** of the International Criminal Court issues this 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 ‘Request’).<sup>1</sup>

## **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.<sup>2</sup>
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.<sup>3</sup> On 11 March 2019, the Chamber rejected this request.<sup>4</sup>
3. On 13 March 2020, the Registry transmitted the record of the proceedings to the Presidency,<sup>5</sup> which constituted Trial Chamber V and referred the case against Yekatom and Ngaïssona to it on 16 March 2020.<sup>6</sup>
4. On 31 March 2020, the Prosecutor filed the Request, thereby seeking that the Chamber (i) ‘amend the charges of rape confirmed against’ Ngaïssona by ‘includ[ing]

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<sup>1</sup> 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).

<sup>2</sup> 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).

<sup>3</sup> 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.

<sup>4</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> 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.

and confirm[ing] a second instance of rape under counts 40 and 41 of the Document Containing the Charges’ (the ‘Request for Amendment’); (ii) correct ‘the article number cited in respect of Count 40 as referred to in the Confirmation Decision to clarify that this count pertains to crimes against humanity, and not to war crimes’ (the ‘Request for Correction’); and (iii) ‘take notice of its intention to add additional charges against’ Yekatom.

5. On 14 April 2020, the Defence for Ngaïssona and the Common Legal Representatives of the Victims (the ‘CLR V’) submitted their responses (the ‘Defence Response’ and ‘CLR V Response’ respectively).<sup>7</sup> The Defence for Yekatom indicated that it would not be submitting a response.<sup>8</sup>

6. On 16 April 2020, the Prosecutor filed a request for leave to reply to the Defence Response (the ‘Request for Leave to Reply’).<sup>9</sup>

7. On 20 April 2020, the Defence for Ngaïssona responded to the Prosecutor’s Request for Leave to Reply.<sup>10</sup>

## II. THE PROSECUTOR’S REQUEST FOR CORRECTION

8. The Prosecutor submits that ‘Count 40, as referenced in the Confirmation Decision’, which ‘currently reads as “rape, pursuant to and prohibited by article 8(2)(e)(vi) of the Statute [...]”, should ‘refer instead to article 7(1)(g), rape as a crime against humanity’, consistently with ‘the preceding paragraphs referring to crimes against humanity’ and ‘the formulation of Count 40 in the’ Document Containing the Charges (the ‘DCC’). While the Defence Response does not address the matter, the

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<sup>7</sup> Defence for Ngaïssona, Defence Response to the Prosecution’s Request to Amend Charges pursuant to Article 61(9) (ICC-01/14-01/18-468-Conf), 14 April 2020, ICC-01/14-01/18-477-Conf (public redacted version notified on 16 April 2020, ICC-01/14-01/18-477-Red); CLR V, Common Legal Representatives’ Joint Response to 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 April 2020, ICC-01/14-01/18-475.

<sup>8</sup> Email from the Defence for Yekatom, 13 April 2020, at 19:20.

<sup>9</sup> Prosecutor, Prosecution’s Request for Leave to Reply to the Defence Response to the Prosecution’s Request to Amend Charges pursuant to Article 61(9) (ICC-01/14-01/18-468-Conf) (ICC-01/14-01/18-477-Conf), 16 April 2020, ICC-01/14-01/18-480-Conf (confidential and public redacted corrected versions notified on 17 April 2020, ICC-01/14-01/18-480-Conf-Corr; ICC-01/14-01/18-480-Red-Corr).

<sup>10</sup> Defence for Ngaïssona, Defence Response to the “Prosecution’s Request for Leave to Reply to the Defence Response to the Prosecution’s Request to Amend Charges pursuant to Article 61(9) (ICC-01/14-01/18-468-Conf) (ICC-01/14-01/18-477-Conf)” (ICC-01/14-01/18-480-Conf), 20 April 2020, ICC-01/14-01/18-487-Conf.

CLRV submit that they ‘support the application for correction of the Decision confirming the charges, insofar as it seeks to rectify a purely technical error’.

9. The Chamber recalls that it confirmed charges for one incident of rape both as a war crime and as a crime against humanity in the context of the attack on Bossangoa (Counts 40 and 41), as it clearly emerges from paragraph 110 of the Confirmation Decision that refers to ‘(iii) rape (articles 7(1)(g) and 8(2)(e)(vi) of the Statute)’. The Chamber notes that, however, in the operative part of the Confirmation Decision Count 40 mistakenly references article 8(2)(e)(vi) (rape as a war crime) instead of article 7(1)(g) (rape as a crime against humanity). To remedy this typographical error, *corrigenda* of both the confidential and public redacted versions of the Confirmation Decision will be filed pursuant to regulation 25 of the Regulations of the Registry.

### **III. THE PROSECUTOR’S REQUEST FOR LEAVE TO REPLY**

10. The Prosecutor submits that a reply addressing the legal position advanced by the Defence would assist the Chamber in the proper determination of the issue, ‘particularly in the absence of settled jurisprudence at the Court’. In the view of the Prosecutor, a reply would be warranted in respect of the following issues: (i) ‘the scope and assessment of relevant factors which a Chamber may reasonably consider in determining article 61(9) applications’; (ii) ‘the circumstances attendant to the practicalities and feasibility of obtaining remote evidence in the course of a complex international investigation’; and (iii) ‘certain misleading and inaccurate statements by the Defence’.

11. The Defence for Ngaissona opposes the Request for Leave to Reply. In its view, ‘allowing further submissions on the issues would not assist the Chamber’, and ‘would be inconsistent with the principles of judicial economy, since the Chamber is already well placed to decide’ on the matter; some issues outlined by the Prosecutor would consist of an ‘attempt to “get a second bite of the apple” by requesting to make further submissions on points which have already been raised in its original Request’. In the view of the Defence, the Chamber can simply refer to ‘previous ICC jurisprudence’, which ‘is well settled’ on this point. Finally, the Defence submits that the Prosecutor ‘has failed to adhere to the strict requirements of regulation 24(5) by providing substantive submissions in requesting leave to reply to the second issue’.

12. The Chamber recalls regulation 24(5) of the Regulations of the Court (the 'Regulations'): participants may only reply with leave of the Chamber and, unless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated.

13. The Chamber considers that it has sufficient information before it upon which to make a decision, and that it would not be assisted by a reply of the Prosecutor. Furthermore, the Chamber notes that, by making substantive submissions in its Request for Leave to Reply, the Prosecutor has not strictly complied with regulation 24(5) of the Regulations. Accordingly, the Chamber rejects the Request for Leave to Reply.

#### **IV. THE PROSECUTOR'S REQUEST FOR AMENDMENT**

14. The Prosecutor submits that, although 'the Chamber determined that the supporting evidence did not meet the relevant threshold at confirmation' with regard to the second instance of rape charged under Counts 40 and 41 of the DCC, 'additional evidence in the form of a detailed Witness Statement from the victim [...], which meets the requisite standard' and 'provides a first-hand account of the crime' has now been obtained; accordingly, the Chamber 'should amend the charges pursuant to article 61(9) and rule 128 of the Rules'. The Prosecutor explains that the statement 'was obtained between 12 and 14 February 2020' and that relying on it 'is reasonable and justified in the circumstances'; having become aware only in June 2019 that the witness 'was a potential second victim of sexual violence, the Prosecution did not have sufficient time to interview her and to perform other necessary steps to be able to integrate her evidence into the DCC ahead of the 19 August 2019 deadline'. Additionally, in the view of the Prosecutor an amendment to the charges would 'cause no appreciable prejudice to the Defence' but rather 'provide the earliest possible notice and clarity in the scope of the charges [...] as well as advance the expediency and efficiency of the proceedings': the new witness statement would 'simply further substantiat[e] a material fact of which the Defence has had ample notice' since it was already 'pled and charged in the DCC'.

15. The Defence for Ngaïssona 'strongly opposes the Prosecution's request', since it 'is not properly supported and justified' and 'causes prejudice to Mr Ngaïssona'. The CLRV submit that the Request 'fulfils the requirements for the amendment of

charges pursuant to article 61(9) of the Statute and should therefore be granted', especially because it 'is properly supported, justified and timely' and 'it will not be prejudicial to the Defence'.

16. The Chamber notes that the Prosecutor's submissions recounting the circumstances in which the new evidence was obtained, and the reasons which would warrant granting the amendment, make it clear that the Request for Amendment is premised on the Prosecutor's view that including the rape of the second victim previously charged in the DCC would qualify as an amendment of the charges within the meaning of the first sentence of article 61(9) of the Rome Statute (the 'Statute'), as opposed to an additional charge within the meaning of the second sentence of the same provision; as such, it would not require the holding of a hearing for its confirmation.

17. Both the Defence for Ngaissona and the CLRV seem to adhere to this approach: the former, by focusing on the tardiness of the Prosecutor's initiatives aimed at pursuing the relevant evidentiary lead and recalling relevant precedent instances of requests for amendment of the charges; the latter, by indicating *inter alia* that the Request for Amendment 'fulfils the requirements for the amendment of charges pursuant to article 61(9) of the Statute'.

18. The Chamber is not persuaded by the framing of the Request for Amendment as a mere amendment of a confirmed charge. While it cannot be said that a definite understanding of the notion of what constitutes a charge has been reached within the jurisprudence of the Court, it seems to be beyond controversy that both the facts and their legal characterisation concur to make a charge.

19. The factual allegations underlying the two charges of rape submitted by the Prosecutor under Counts 40 and 41 of the DCC make it apparent that they respectively refer to specific, distinct incidents, differing from each other as regards the victim, the alleged perpetrator(s) and the specific places where the events occurred; they only share one element, namely that they were both allegedly committed in the context of the 5 December 2013 attack on Bossangoa. The victim of the (already confirmed) first instance of rape reports having been ambushed while fleeing her neighbourhood, found where she had taken shelter, taken to another location and there raped by a group of five Anti-Balaka. She met the victim of the

second instance of rape, and heard her story about also having been raped by the Anti-Balaka on 5 December 2013, at a safe location which she reached the following morning. The second victim, whose statement the Prosecutor has only collected following the confirmation hearing, was also allegedly raped while fleeing her home, but took shelter and was raped at different locations than those of the first victim, allegedly by a group of Anti-Balaka in a different composition; she was also rescued under different circumstances.

20. In the view of the Chamber, adding a second person as a victim to the crime of rape allegedly committed under factual circumstances entirely other than the ones relevant to the confirmed charge as regards specific time, place, alleged perpetrators ('a second instance of rape', as stated by the Prosecutor), cannot qualify as a mere 'amendment' of the same charge of rape as initially confirmed: it must be regarded rather as a new, additional charge, as such requiring a confirmation hearing. It is sufficient to note that, if the charge of rape underlying Counts 40 and 41 as confirmed were to be withdrawn, the allegations supporting the Request for Amendment would *per se* be grounds for confirmation and then for conviction, if found substantiated to the respectively relevant evidentiary threshold.<sup>11</sup>

21. The Chamber further underlines that, for the purposes of article 61(9) of the Statute, there is a fundamental distinction between an amendment of an existing charge (which would not require holding a hearing) and the addition of a new charge (which instead would). Both consist of a request to modify the scope and subject matter of a case which, having completed the confirmation stage, has already moved to trial, a phase where the guilt and innocence of the accused shall be debated and the boundaries of which should therefore be clear and determined; they also share the risk of resulting, if allowed, in causing undue prejudice to the Defence. Accordingly, they must both be approached with the utmost caution and limited to the most restrictive of

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<sup>11</sup> *See, for example*, the following ICTR cases, which indicate that one relevant factor in considering whether a proposed amended indictment contains new charges is whether the allegation could be found, in itself, to be grounds for conviction: ICTR, Trial Chamber II, *Prosecutor v. Tharcisse Muvunyi*, Decision on the Prosecutor's Motion for Leave to Amend the Indictment, 23 February 2005, No. ICTR-2000-55A-PT, para. 39; ICTR, Trial Chamber III, *Prosecutor v. Ildéphonse Nizeyimana*, Decision on Prosecutor's Request for Leave to File an Amended Indictment, 22 September 2010, No. ICTR-2001-55-PT, para. 12.



circumstances. However, the addition of a new charge also requires a complex incidental procedure such as a new confirmation hearing, which is suitable to result in significant delays to the proceedings, while the accused are in pre-trial custody. This makes the need for such caution all the more urgent.

22. Previous decisions applying article 61(9) of the Statute before the Court all addressed issues of amendments, and did not therefore result in holding a new confirmation hearing. Still, it is significant that they all appear to have been inspired by a precautionary and restrictive approach. Applications submitted by the Prosecutor as requests for amendments – and treated by the relevant Chambers as such – revolved around modifications of minor import, affecting either the territorial or temporal scope, or secondary factual details relating to the conduct underlying an *already confirmed* charge.<sup>12</sup> Even then, Chambers have been consistently careful to stress that (i) ‘continuing investigations after the charges have been confirmed cannot be the rule, but rather the exception, and should be justified on a case-by-case basis’;<sup>13</sup> (ii) as a consequence, a request under article 61(9) ‘needs to be supported and justified’;<sup>14</sup> (iii) the Pre-Trial Chamber ‘might require some explanations for the purposes of its final determination’;<sup>15</sup> and (iv) ‘a decision of whether to grant permission to amend the charges confirmed should be taken upon an assessment of all relevant circumstances surrounding the case at [the relevant] stage of the proceedings’,<sup>16</sup> including, most crucially, the fairness and expeditiousness of the proceedings and the rights of the accused and the victims.<sup>17</sup>

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<sup>12</sup> Pre-Trial Chamber II, *The Prosecutor v. Uhuru Muigai Kenyatta*, Corrigendum to “Decision on the ‘Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’”, 21 March 2013, ICC-01/09-02/11-700-Corr (the ‘*Kenyatta* Decision’), paras 28-29; 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 (the ‘*Ruto and Sang* Decision’), paras 30, 33; Pre-Trial Chamber I, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Version publique expurgée de la Décision sur la procédure applicable suite au dépôt par le Procureur de sa requête pour corrections et modifications de la Décision de confirmation des charges, 21 February 2020, ICC-01/12-01/18-608-Red (the ‘*Al Hassan* Decision’), para. 51.

<sup>13</sup> *Kenyatta* Decision, para. 35.

<sup>14</sup> *Kenyatta* Decision, para. 21; *Ruto and Sang* Decision, para. 31; *Al Hassan* Decision, para. 52.

<sup>15</sup> *Kenyatta* Decision, para. 35.

<sup>16</sup> *Kenyatta* Decision, para. 21.

<sup>17</sup> *Kenyatta* Decision, para. 22.

23. The Chamber fully agrees with this precautionary and restrictive approach. The fundamental function of the control exercised by the Pre-Trial Chamber through the confirmation decision is not only to filter out weak cases, but also (and, critically, every time a confirmation does occur) to set the factual boundaries of the trial by declining to confirm those charges which are not supported by ‘sufficient evidence to establish substantial grounds’ as set out in article 60(5) and (7), consistently with the ‘gatekeeper function of the Pre-Trial Chamber according to which [...] only those cases proceed to trial for which the Prosecutor has presented sufficiently compelling evidence going beyond mere theory or suspicion’.<sup>18</sup> Allowing the Prosecutor to reintroduce non-confirmed charges for which evidence was lacking pursuant to a supplemental investigation would be tantamount to depriving this second, critical aspect of the filtering function of the Pre-Trial Chamber of any meaningful content, especially if coupled with the less demanding procedure applicable when ‘only’ an amendment is at stake.

24. This filtering role of the Pre-Trial Chamber is indeed critical in ensuring the possibility for the accused to clearly understand the charges against which he or she has to prepare his or her defence at trial. Any change or addition to the case as emerging from the confirmation decision has by its nature a disruptive effect on this preparation, and hence on the fundamental rights of the accused; while 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. As stated in the *Ruto and Sang* case, the exercise of prosecutorial discretion in this matter ‘should be diligent and professional and should also not lead to abuse’.<sup>19</sup>

25. The correctness of this approach has been sanctioned by the Appeals Chamber, when addressing the issue as to whether the Prosecutor is allowed to continue investigations following the confirmation of the charges. It has been since long well-established that the Prosecutor can only investigate beyond the confirmation hearing

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<sup>18</sup> Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, 3 June 2013, ICC-02/11-01/11-432, para. 18.

<sup>19</sup> *Ruto and Sang* Decision, para. 34.

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’.<sup>20</sup> These limitations have been consistently read (including by the recent decision in the *Al Hassan* case)<sup>21</sup> as implying *inter alia* that, as a matter of ‘principle, the Prosecutor’s investigation “should largely be completed at the stage of the confirmation hearing”’,<sup>22</sup> after which ‘the Prosecutor is not granted *carte blanche*’ to continue with the investigation ‘with a view towards bringing further evidence in order to amend the charges, unless she shows that it “is necessary in order to establish the truth” or “certain circumstances” exist that justify doing so’.<sup>23</sup>

26. In the view of the Chamber, a generous reading of the prerogatives set forth in article 61(9) of the Statute might also risk ultimately altering the delicate balance between the pre-trial and the trial phase of the proceedings as intended in the Statute. It is beyond controversy that proceedings under article 61(9) of the Statute must be completed before the commencement of the trial: as stated by the Appeals Chamber, ‘at the beginning of the trial, its parameters must be clear’.<sup>24</sup> For the sake of argument, a Prosecutor not willing or comfortable to expeditiously face trial proceedings might try to stretch these prerogatives to an extent suitable not only to transform the forthcoming trial into a moving target (making it virtually impossible for the Defence to devise and implement a workable trial strategy), but also to delay and postpone the prospective opening of the trial ever further, potentially *sine die*. As stated by the International Criminal Tribunal for the Former Yugoslavia (the ‘ICTY’), in the absence of a sound justification for the amendment, the delay would provide ‘an

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<sup>20</sup> 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.

<sup>21</sup> *Al Hassan* Decision, para. 53.

<sup>22</sup> *Kenyatta* Decision, para. 36 quoting 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.

<sup>23</sup> *Kenyatta* Decision, para. 36 quoting 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.

<sup>24</sup> Appeals Chamber, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, 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”, 13 December 2013, ICC-01/09-01/11-1123, para. 29.

unfair tactical advantage’ to the Prosecutor.<sup>25</sup> The Chamber also notes that this would unduly extend 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. Other international criminal jurisdictions (such as the ICTY, with its rule 50(A)(i)(c) of the Rules of Procedure and Evidence) opted for vesting the competence to decide upon any amendment of the scope of the trial in the constituted Trial Chamber, possibly with a view to containing this danger, a solution also initially retained in the preparatory works leading to the Rome Statute.<sup>26</sup> One could indeed take the view that, once confirmation proceedings are exhausted, the Trial Chamber is better placed in performing the balancing act; whilst this may be possibly relevant only as a matter of legislative reform, it cannot be overstated that the different choice made by the drafters of the Statute inevitably results in increasing the responsibilities of the Pre-Trial Chamber addressing a request under article 61(9) of the Statute and in strengthening its duty to construe and apply the provision in such a way as to make it respectful of the rights of the Defence, at a stage where it is no longer responsible to determine whether and to what extent there is a need for the accused to remain in custody.

27. The need to consider the likely impact on the accused as central when deciding a matter of either amendment or addition to the charges as crystallised in the confirmation decision likewise emerges as *leit-motiv* throughout the preparatory works of the Statute. As early as in 1994, the International Law Commission made the Prosecutor’s request to amend the indictment conditional upon the Presidency issuing ‘any necessary orders to ensure that the accused is notified of the amendment and has adequate time to prepare a defence’.<sup>27</sup> Adequate notification to the accused, and

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<sup>25</sup> ICTR, Trial Chamber I, *Prosecutor v. Ephrem Setako*, Decision on Prosecution’s Request to Amend the Indictment, 18 September 2007, No. ICTR-04-81-I, para. 11.

<sup>26</sup> Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II (Compilation of proposals), Supplement No. 22A (A/51/22), 1996, p. 125 (containing an alternative to then draft article 27(4): ‘A. [The Prosecutor may amend an indictment, without leave, at any time before it is confirmed in the review proceedings under article X (A 27 ILC) of the Statute, but thereafter only with the leave of the Presidency [Indictment Chamber] or, if at trial, with leave of the Trial Chamber’).

<sup>27</sup> Report of the International Law Commission on the work of its forty-sixth session, Draft statute for an International Criminal Court with Commentaries, 1994, p. 48, Article 27(4).

respect for the latter's rights (most notably in assessing the time available to prepare), in all matters relating to a modification of the charges was considered critical both by the Ad Hoc Committee<sup>28</sup> and the Preparatory Committee on the Establishment of an International Criminal Court.<sup>29</sup>

28. While these specific requirements no longer explicitly appear in the text of article 61(9) of the Statute as adopted and currently in force, it would be hard to deny that it is still by this kind of parameters that the Pre-Trial Chamber should be guided in deciding whether the amendment or the addition should be allowed; 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',<sup>30</sup> it was also pointed out throughout the process that the latter should be the ultimate benchmark against which legitimacy of amendment/addition has to be assessed and that compliance with 'standards contained in relevant human rights instruments',<sup>31</sup> would be key.

29. This approach is also consistent with other international criminal jurisdictions. Both at the ICTY and at the International Criminal Tribunal for Rwanda (the 'ICTR') the need to avoid unfair prejudice to the accused is paramount when deciding whether to grant leave to amend an indictment. In considering these matters, the ICTY<sup>32</sup> has examined: (i) whether the accused is given an adequate opportunity to prepare an effective defence; (ii) whether granting the amendment will result in undue delay,<sup>33</sup>

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<sup>28</sup> Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, Supplement No. 22 (A/50/22), 1995, paras 132, 144.

<sup>29</sup> Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee during March-April and August 1996), Supplement No. 22 (A/51/22), 1996, para. 238.

<sup>30</sup> Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, Supplement No. 22 (A/50/22), 1995, para. 132.

<sup>31</sup> Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, Supplement No. 22 (A/50/22), 1995, para. 132; Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee during March-April and August 1996), Supplement No. 22 (A/51/22), 1996, para. 238.

<sup>32</sup> See rule 50 of the ICTY Rules of Procedure and Evidence.

<sup>33</sup> ICTY, Trial Chamber II, *Prosecutor v. Ljube Boškoski & Johan Tar ulovski*, Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Amended Indictment, 1 November 2005, No. IT-04-82-PT, para. 7. See also ICTY, Trial Chamber, *Prosecutor v. Rasim Deli*, Decision on Defence Motion Alleging Defects in the Form of the Indictment and Order on Prosecution Motion to Amend the Indictment, 13 December 2005, No. IT-04-83-PT, para. 62.

and (iii) whether the Prosecutor has been diligent in seeking an amendment or new charge.<sup>34</sup> At the ICTR, leave for an amendment to the indictment is made conditional upon a twofold requirement: (i) the Prosecutor must establish that the amendment is in the interest of justice, which includes consideration of the rights of the accused to be fully informed of the charges against him, have adequate time and resources for the preparation of his defence, and to be tried without undue delay;<sup>35</sup> and (ii) the Chamber or Judge must be satisfied that the request for amendment is not the result of a lack of diligence on the part of the Prosecutor.<sup>36</sup> Conversely, both the ICTY and the ICTR have consistently allowed amendments to the extent that they could be regarded as beneficially impacting the defence of the accused: amendments which would simply clarify existing charges,<sup>37</sup> streamline the charges and identify them with greater precision,<sup>38</sup> or provide a more detailed and comprehensive account of the criminal acts alleged<sup>39</sup> were considered as benefitting, as opposed to prejudicing, the accused and therefore allowed. Furthermore, the fact that the accused was already familiar with the circumstances of this new charge, based on disclosures previously made to the accused, was found as *per se* inadequate to neutralise the prejudice entailed in the

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<sup>34</sup> ICTY, Trial Chamber III, *Prosecutor v. Milan Luki & Sredoje Luki*, Decision on Prosecution Motion Seeking Leave to Amend the Second Amended Indictment and on Prosecution Motion to Include UN Security Council Resolution 1820 (2008) as Additional Supporting Material to Proposed Third Amended Indictment as well as on Milan Luki's Request for Reconsideration or Certification of the Pre-Trial Judge's Order of 19 June 2008, 8 July 2008, No. IT-98-32/1-PT, paras 52-54.

<sup>35</sup> ICTR, Trial Chamber II, *Prosecutor v. Tharcisse Muvunyi*, Decision on the Prosecutor's Motion for Leave to Amend the Indictment, 23 February 2005, No. ICTR-2000-55A-PT, paras 26-27.

<sup>36</sup> ICTR, Appeals Chamber, *Prosecutor v. Édouard Karemera et al.*, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, No. ICTR-98-44-AR73, para. 20; ICTR, Trial Chamber III, *Prosecutor v. Édouard Karemera et al.*, Decision on the Prosecutor's Motion for Leave to Amend the Indictment, 13 February 2004, No. ICTR-98-44-T, paras 24-26; ICTR, Trial Chamber II, *Prosecutor v. Tharcisse Muvunyi*, Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, 23 February 2005, No. ICTR-2000-55A-PT, paras 46-47; ICTR, Trial Chamber I, *Prosecutor v. Jean Mpambara*, Decision on the Prosecution's Request for Leave to File an Amended Indictment, 4 March 2005, No. ICTR-2001-65-I, para. 15; ICTR, Appeals Chamber, *Prosecutor v. Tharcisse Muvunyi*, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005, 12 May 2005, No. ICTR-2000-55A-AR73, para. 51.

<sup>37</sup> ICTY, Trial Chamber III, *Prosecutor v. Vojislav Šešelj*, Decision on Prosecution's Motion for Leave to File an Amended Indictment, 14 September 2007, No. IT-03-67-PT, paras 23-38.

<sup>38</sup> ICTR, Trial Chamber III, *Prosecutor v. Édouard Karemera et al.*, Decision on the Prosecutor's Motion for Leave to Amend the Indictment, 13 February 2004, No. ICTR-98-44-T, para. 46.

<sup>39</sup> ICTR, Trial Chamber I, *Prosecutor v. Mikaeli Muhimana*, Decision on Motion to Amend Indictment, 21 January 2004, No. ICTR-95-1B-I, para. 7.

fact of having the contours of the trial redesigned and to have to accordingly adjust and modify the defence strategy on the eve of the commencement of the trial.<sup>40</sup>

30. Caution appears all the more necessary in light of the critical juncture reached by these proceedings, i.e. the stage following the confirmation decision and the handing over of the case to the Trial Chamber duly constituted by the Presidency and preceding the opening statements of the trial, commonly referred to as the ‘preparation of the trial’. A crucial requirement for this preparation to be meaningful is that 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, whether by requiring the taking of additional steps or by making steps already envisaged or taken, for which time and resources have been invested, redundant or even counterproductive. In the ICTY *Deli* case, the Chamber noted that the ‘closer to trial the Prosecution makes its motion seeking leave to amend, the more likely it is that the Trial Chamber will deny the motion on the ground that to grant leave to amend would cause unfair prejudice to the accused by, for example, depriving him of an adequate opportunity to prepare an effective defence’.<sup>41</sup> As noted by Pre-Trial Chamber II in the *Ruto and Sang* case (when denying the request for an amendment of the temporal scope of the charges), ‘[p]arties and participants in a case are expected to prepare on the basis of the charges as confirmed which shape the subject-matter of the case, and thus, to take into consideration the evidence that is only relevant to the charges confirmed’;<sup>42</sup> accordingly, the circumstance that the factual element on which the request for amendment is based was already mentioned in the DCC does not make the required additional effort any fairer to the Defence.

31. Having considered the Request for Amendment in light of the above, the Chamber finds that none of the circumstances listed by the Prosecutor in support

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<sup>40</sup> ICTR, Appeals Chamber, *Prosecutor v. Tharcisse Muvunyi*, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005, 12 May 2005, No. ICTR-2000-55A-AR73, para. 22.

<sup>41</sup> ICTY, Trial Chamber, *Prosecutor v. Rasim Deli*, Decision on Defence Motion Alleging Defects in the Form of the Indictment and Order on Prosecution Motion to Amend the Indictment, 13 December 2005, No. IT-04-83-PT, para. 62.

<sup>42</sup> *Ruto and Sang* Decision, para. 40.

qualifies as a ‘proper justification’, which would warrant allowing triggering the procedure leading – *via* new, albeit limited, confirmation proceedings – to an extension of the facts and circumstances of the case against Ngaïssona through the addition of one charge of rape to the case. The Office of the Prosecutor, in the exercise of the full discretion vested in it up to the confirmation hearing, decided to include a charge relating to facts for which the Office could only rely on indirect evidence; in so doing, it took the risk that this evidence would be found inadequate to meet the relevant standard by the Pre-Trial Chamber; only when this risk materialised was the decision made to proceed with additional investigative steps which would allow the gathering of better evidence. In the view of the Chamber, the right to request amendments and additional charges, whilst sanctioned by article 61(9) of the Statute, cannot be construed in such a way as to allow the Prosecutor to ‘remedy’ evidentiary lacunae which might affect part of an otherwise confirmed case: besides the uncertainty and precariousness which this would add to the contours of each confirmed case, this would be tantamount to making the rejection of one or more charges virtually meaningless. Furthermore, it creates an additional burden for the defence team, forced to remain simultaneously engaged both before the Pre-Trial Chamber and the Trial Chamber. As stated by the recent *Al Hassan* Decision, a procedure under article 61(9) of the Statute must be limited to the amendment of the factual basis of an already confirmed charge, whenever the amendment appears necessary with a view to enhancing the specificity of the charges against which the accused must defend himself or herself and cannot amount to a correction to the confirmation decision.<sup>43</sup>

32. The need to avoid delays to the trial is indeed critical to the determination of a request under article 61(9) of the Statute: 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. The prerogatives enshrined in article 61(9) of the Statute must remain consistent with international human rights pursuant to article 21(3) of the Statute: as stated by Pre-Trial Chamber II in the *Ruto and Sang* Decision, ‘the Prosecutor should not benefit

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<sup>43</sup> *Al Hassan* Decision, para. 44.



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'.<sup>44</sup>

33. The first, and most relevant, of these competing interests is to be found in the right of the accused to be tried expeditiously: 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. The statutory framework has been formulated in such a way so as that the trial must commence soon after the charges are confirmed. Conducting further investigations after that inevitably delays the start of the trial, with detrimental effects on the expeditiousness of the proceedings and the rights of the accused.

34. The right to be expeditiously tried appears in all its critical importance when looked at through the prism of the fact that the accused are detained, as in the present case: the impact of the Chamber's determination on the duration of pre-trial detention is a critical element to consider when proceeding to the balancing act required by a request under article 61(9) of the Statute. Article 5(3) of the European Convention on Human Rights provides that '[e]veryone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial'. A glance at both the case law interpreting this provision and at other relevant international instruments confirms that this is a general principle of international (human rights) law of paramount importance; one way to ensure compliance with it, notwithstanding the delaying and disruptive effect inherent to any amendment or addition to the charges as originally confirmed, would be to provisionally release the accused pending trial.<sup>45</sup> As stated by the United Nations Human Rights Committee, '[w]hen delays become necessary, the judge must reconsider alternatives to pre-trial detention'.<sup>46</sup> This appears all the more

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<sup>44</sup> *Ruto and Sang* Decision, para. 31.

<sup>45</sup> *See, along the same lines*, European Court of Human Rights, Second Section, *Gábor Nagy v. Hungary*, Judgment, Application no. 33529/11, 11 February 2014, paras 19-20; Grand Chamber, *Buzadji v. The Republic of Moldova*, Judgment, Application no. 23755/07, 5 July 2016, paras 84-91; Fourth Section, *Lisovskij v. Lithuania*, Judgment, Application no. 36249/14, 2 August 2017, para. 68.

<sup>46</sup> United Nations Human Rights Committee, General comment No. 35 – Article 9 (Liberty and security of person), 23 October 2014, CCPR/C/GC/35, para. 37.

crucial and significant in a system such as the one established by the Rome Statute, where no time limits are provided for pre-trial detention. The Chamber further recalls its duty to ensure that the application and interpretation of the statutory framework remains ‘consistent with internationally recognised human rights’ pursuant to article 21 (3) of the Statute.

35. This case has now reached a stage where, confirmation proceedings having been concluded, this Chamber is no longer responsible for deciding custody matters; accordingly, it is not possible to consider provisional release as a counterweight to the detrimental impact that any amendment (or even the request for it, as we are seeing in these proceedings and as rightly pointed out by the Defence for Ngaïssona) has *per se* on the Defence strategy and resources.

36. The Chamber wishes to clarify that its determination has been reached in light of the specific circumstances of these proceedings and of this request. As such, it is without prejudice to the Prosecutor’s right of recourse to article 61(9) of the Statute with a view to honouring the obligation to search for the truth; however, this right should only be exercised under circumstances and conditions which would not impact the current trial. It 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. The Chamber is not satisfied that the circumstances of the Request for Amendment are such as to justify the disruption.

#### **V. THE PROSECUTOR’S NOTICE OF INTENTION TO ADD ADDITIONAL CHARGES**

37. Finally, the Chamber has read with concern the Prosecutor’s (unusual) submissions ‘anticipating’ that new charges will be brought against Yekatom ‘once all necessary security measures are implemented in accordance with article 68 (1)’.

38. Further to what is noted above, the Chamber believes that, in light of the note of uncertainty, this kind of announcement is bound to reverberate both on the Defence and to the preparation of the trial as a whole; all the more so for a trial where there is a co-accused, as such likely to be affected, albeit indirectly, by the move and both accused are in detention. The Chamber stresses that it will continue to exercise the

utmost vigilance to avoid that the Prosecutor's statutory prerogatives are exercised in such a way as to unduly detrimentally affect the fundamental rights of the Defence, or to making it more burdensome to exercise those rights effectively.

**FOR THESE REASONS, THE CHAMBER HEREBY**

**GRANTS** the Prosecutor's Request for Correction;

**REJECTS** the Prosecutor's Request for Leave to Reply; and

**REJECTS** the Prosecutor's Request for Amendment.

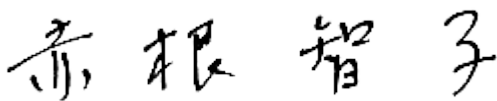
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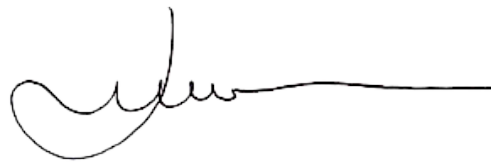
**Judge Antoine Kesia-Mbe Mindua**

**Presiding Judge**



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**Judge Tomoko Akane**



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**Judge Rosario Salvatore Aitala**

Dated this Thursday, 14 May 2020

At The Hague, The Netherlands