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**International  
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**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-ÉDOUARD NGAÏSSONA**

**Public**

**Public Redacted Version of the “Common Legal Representatives’ Joint Response to the ‘Prosecution Motion to Amend the Charges against Alfred YEKATOM’”**

**Source:** Common Legal Representatives of Victims

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

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## I. INTRODUCTION

1. The Common Legal Representative of the Former Child Soldiers and the Common Legal Representatives of the Victims of Other Crimes (jointly the “Common Legal Representatives” or the “CLR”) hereby file their joint response to the “Prosecution Motion to Amend the Charges against Alfred YEKATOM” (the “Prosecution’s Motion” or the “Motion”).<sup>1</sup> Although the Motion relates to the alleged responsibility of Mr Yekatom for crimes [REDACTED], the present submission is filed jointly as it addresses the legal criteria under article 61(9) of the Rome Statute (the “Statute”), and the victimisation related to gender-based crimes, matters of common interest to both teams of legal representatives.

2. The Common Legal Representatives submit that the Prosecution’s Motion fulfils the requirements for the addition of charges pursuant to article 61(9) of the Statute as recently interpreted by the present Chamber and should therefore be granted. In particular, the Common Legal Representatives contend that the Prosecution rightly continued investigations after the confirmation of charges, that the Motion is supported and justified and that it provides sufficient explanations in relation to the proposed new charges. They further argue that adding the new charges of rape and sexual slavery would not negatively impact the fairness and expeditiousness of the proceedings and that the Trial Chamber would be able to fully assess the extent of the victimisation suffered by the Victims.

3. The Common Legal Representatives posit that it is in the interest of the Victims they represent that the proposed charges against Mr Yekatom are added and consequently amended under article 61(9) of the Statute in order for them to have

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<sup>1</sup> See the “Prosecution Motion to Amend the Charges against Alfred YEKATOM”, [No. ICC-01/14-01/18-518-Conf](#), 14 May 2020 (the “Prosecution’s Motion” or the “Motion”). A public redacted version was filed on 22 May 2020 as [No. ICC-01/14-01/18-518-Red](#).

effectively access to justice, recognition of their victimisation and eventually the possibility to claim reparations for the harm they suffered.

## II. PROCEDURAL BACKGROUND

4. On 19 August 2019, the Prosecution filed its “Notification of Filing of the Document Containing the Charges and List of Evidence” (the “Document Containing the Charges” or the “DCC”).<sup>2</sup>

5. On 11 December 2019, Pre-Trial Chamber II (the “Chamber”) issued the “Decision on the confirmation of charges against Alfred Yekatom and Patrice-Édouard Ngaïssona” (the “Decision Confirming the Charges”).<sup>3</sup>

6. On 2 March 2020, the Prosecution filed a Request for Reconsideration of, or alternatively Leave to Appeal, the Decision Confirming the Charges (the “Prosecution’s Request for Reconsideration or Leave to Appeal”),<sup>4</sup> which was rejected by the Chamber on 11 March 2020.<sup>5</sup>

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<sup>2</sup> See the “Notification of Filing of the Document Containing the Charges and List of Evidence”, [No. ICC-01/14-01/18-282](#), 19 August 2019. A public redacted version of the Document Containing the Charges was filed on 18 September 2019 as [No. ICC-01/14-01/18-282-AnxB1-Red](#) (the “Document Containing the Charges” or the “DCC”). <sup>3</sup> See the “Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona” (Pre-Trial Chamber II), [No. ICC-01/14-01/18-403-Conf](#), 11 December 2019. A public redacted version was issued on 20 December 2019 as [No. ICC-01/14-01/18-403-Red](#) (the “Decision Confirming the Charges”).

<sup>3</sup> See the “Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona” (Pre-Trial Chamber II), [No. ICC-01/14-01/18-403-Conf](#), 11 December 2019. A public redacted version was issued on 20 December 2019 as [No. ICC-01/14-01/18-403-Red](#) (the “Decision Confirming the Charges”).

<sup>4</sup> See 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’”, [No. ICC-01/14-01/18-437](#), 2 March 2020.

<sup>5</sup> See the “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’” (Pre-Trial Chamber II), [No. ICC-01/14-01/18-447](#), 11 March 2020, p. 14.

7. On 16 March 2020, the Presidency constituted Trial Chamber V (the “Trial Chamber”) and referred the present case to it.<sup>6</sup>

8. On 31 March 2020, the Prosecution filed its “[...] 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 “Prosecution’s Request to Amend Charges and Notice of Intention to Add Additional Charges”).<sup>7</sup>

9. On 14 April 2020, the Common Legal Representatives filed their joint response to the Prosecution’s Request to Amend Charges and Notice of Intention to Add Additional Charges.<sup>8</sup> The Defence for Mr Ngaïssona filed its response that same day.<sup>9</sup> The Defence for Mr Yekatom had indicated that it would not be submitting a response.<sup>10</sup>

10. 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 “Decision on the Prosecution’s Request to Amend Charges”).<sup>11</sup>

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<sup>6</sup> See the “Decision constituting Trial Chamber V and referring to it the case of The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona” (Presidency), [No. ICC-01/14-01/18-451](#), 16 March 2020.

<sup>7</sup> See 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”, [No. ICC-01/14-01/18-468-Conf](#), 31 March 2020. A public redacted version was filed on 31 March 2020 as [No. ICC-01/14-01/18-468-Red](#).

<sup>8</sup> See the “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’”, [No. ICC-01/14-01/18-475](#), 14 April 2020 (the “Prosecution’s Request to Amend Charges and Notice of Intention to Add Additional Charges”).

<sup>9</sup> See the “Defence Response to the Prosecution’s Request to Amend Charges pursuant to Article 61(9) (ICC-01/14-01/18-468-Conf)”, [No. ICC-01/14-01/18-477-Conf](#), 14 April 2020. A public redacted version was filed on 16 April 2020 as [No. ICC-01/14-01/18-477-Red](#).

<sup>10</sup> See the Email correspondence from the Yekatom Defence on 13 April 2020 at 19:20.

<sup>11</sup> See 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’” (Trial Chamber V), [No. ICC-01/14-01/18-517](#), 14 May 2020 (the “Decision on the Prosecution’s Request to Amend Charges”).

11. On the same day, the Prosecution also filed its Motion.<sup>12</sup>

12. On 20 May 2020, the Prosecution filed a request for leave to appeal the Decision on the Prosecution's Request to Amend Charges.<sup>13</sup>

### III. CONFIDENTIALITY

13. Pursuant to regulation 23bis(2) of the Regulations of the Court, the present submission is classified as 'confidential' following the classification chosen by the Prosecution. A public redacted version is filed simultaneously.

### IV. SUBMISSIONS

#### A. Applicable law

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

*"After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges".*

15. As argued by the Prosecution in its Motion, a request for additional charges as such has never been granted in the Court's history.<sup>14</sup> In the Decision on the Prosecution's Request to Amend Charges, however, the Chamber considered that the Prosecution's application concerned the addition of new charges, rather than the amendment of existing ones,<sup>15</sup> and formulated a precautionary and restrictive

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<sup>12</sup> See the Prosecution's Motion, *supra* note 1.

<sup>13</sup> See the "Request for Leave to Appeal 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'", [No. ICC-01/14-01/18-524](#), 20 May 2020.

<sup>14</sup> See the Prosecution's Motion, *supra* note 1, para. 9.

<sup>15</sup> See the Decision on the Prosecution's Request for Amendment of Charges, *supra* note 11, para. 20.

approach to be adopted when dealing with such an application pursuant to article 61(9) of the Statute.<sup>16</sup> Applying the principles identified by the Chamber, the Common Legal Representatives will demonstrate that the Prosecution's Motion fulfils the relevant legal criteria and should therefore be granted.

16. Relying on previous decisions on the amendment of charges in the *Kenyatta*,<sup>17</sup> *Ruto and Sang*<sup>18</sup> and *Al Hassan*<sup>19</sup> cases, the Chamber formulated a number of principles underlying its interpretation of the requirements under article 61(9) of the Statute as follows:

- “(i) ‘continuing investigations after the charges [...] cannot be the rule, but rather the exception, and should be justified on a case-by-case basis’;*
- (ii) as a consequence, a request under article 61(9) ‘needs to be supported and justified’;*
- (iii) the Pre-Trial Chamber ‘might require some explanations for the purposes of its final determination’; 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’ including, most crucially, the fairness and expeditiousness of the proceedings and the rights of the accused and the victims”.*<sup>20</sup>

17. The Chamber also considered that *“the exercise of prosecutorial discretion in the amendment or addition of charges ‘should be diligent and professional and should also not lead to abuse’”*.<sup>21</sup>

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<sup>16</sup> *Idem*, para. 23.

<sup>17</sup> See the “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’” (Pre-Trial Chamber II), [No. ICC-01/09-02/11-700-Corr](#), 21 March 2013.

<sup>18</sup> See the “Decision on the ‘Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’” (Pre-Trial Chamber II), [No. ICC-01/09-01/11-859](#), 16 August 2013.

<sup>19</sup> See the “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” (Pre-Trial Chamber I), [No. ICC-01/12-01/18-608-Red](#), 21 February 2020.

<sup>20</sup> See the Decision on the Prosecution's Request for Amendment of Charges, *supra* note 11, para. 22.

<sup>21</sup> *Idem*, para. 24, quoting the “Decision on the ‘Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’”, *supra* note 18, para. 34.

*a. The Prosecution rightly continued investigations after the confirmation of charges*

18. Relying on the *Lubanga* case, the Chamber recalled that the Prosecution 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*”.<sup>22</sup>

19. In the present case, the Prosecution received the information relating to [REDACTED] in mid-July 2019.<sup>23</sup> Understandably, this did not afford the Prosecution sufficient time to interview the witnesses and integrate their evidence in the DCC before the 19 August 2019 deadline. Therefore, the Prosecution cannot be faulted for not having included in the DCC crimes for which it had not yet obtained (and scrutinise) evidence.

20. In this regard, mindful of its obligation under the Statute, the Prosecution rightly continued its investigation into the information relating to said witnesses. Had the Prosecution not done so, it would not have uncovered evidence relating to the crimes of rape and sexual slavery alleged against Mr Yekatom. The continued investigation was therefore necessary to establish the truth about said crimes, and without said evidence, the Court would have been deprived of significant and relevant evidence of grave crimes.

21. The Common Legal Representatives recall that, already in June 2019, the Prosecution indicated that it was “*continu[ing] to investigate the commission of sexual and gender based crimes [...] and may seek the confirmation of such charges, should the evidence obtained satisfy the requisite threshold*”.<sup>24</sup>

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<sup>22</sup> See the Decision on the Prosecution’s Request to Amend Charges, *supra* note 11, para. 25.

<sup>23</sup> See the Prosecution’s Motion, *supra* note 1, para. 23.

<sup>24</sup> See the “Prosecution’s Additional Observations on the ‘Registry’s First Assessment Report on Applications for Victims’ Participation in Pre-Trial Proceedings’ (ICC-01/14-01/18-198)”, [No. ICC-01/14-01/18-224-Conf](#), 14 June 2019, para. 9. A public redacted version was filed on 27 August 2019 as [No. ICC-01/14-01/18-224-Red](#).



22. Rape and other forms of gender-based crimes are specifically proscribed in the Statute, which seeks to criminalise particularly despicable forms of conduct used as a weapon of war against the most vulnerable victims. The efforts by the Prosecution to bring charges of gender-based crimes satisfies said purpose and is in line with its intent to ‘prioritise’ said crimes in its investigations and prosecutions.<sup>25</sup> It indeed pledged that it *“will bring charges for sexual and gender-based crimes explicitly as crimes per se, in addition to charging such acts as forms of other violence”*,<sup>26</sup> recognising that *“sexual and gender-based crimes are amongst the gravest under the Statute”*.<sup>27</sup>

***b. The Motion is supported and justified***

23. In the *Kenyatta* case, Pre-Trial Chamber II held that a request for an amendment of charges after the confirmation hearing and prior to the commencement of the trial must be supported and justified.<sup>28</sup> Indeed, before authorising the amendment of the charges, the Pre-Trial Chamber has to be able to assess *“all relevant circumstances surrounding the case at [that] stage of the proceedings”*, which entails *“consideration of the Prosecutor’s Request and an evaluation of other relevant information which the Pre-Trial Chamber could seek if necessary for the purposes of its final decision”*.<sup>29</sup>

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<sup>25</sup> See the [Policy Paper on Sexual and Gender-Based Crimes](#), June 2014, pp. 5, 10: *“Recognising the challenges of, and obstacles to, the effective investigation and prosecution of sexual and gender-based crimes, the Office elevated this issue to one of its key strategic goals in its Strategic Plan 2012-2015. [...] [A]dopting a victim-responsive approach in its work [...] It will increasingly seek opportunities for effective and appropriate consultation with victims’ groups and their representatives to take into account the interests of victims”*; *“The Prosecutor has, on various occasions since her election in December 2011, expressed her commitment to paying particular attention to the investigation and prosecution of sexual and gender-based crimes, and to enhancing access to justice for victims of these crimes through the ICC”*. See also the [Office of the Prosecutor’s Strategic Plan 2016-2018](#), in which the implementation of the Prosecution’s policies in relation to sexual and gender-based crimes constituted *“Strategic Goal 2”*.

<sup>26</sup> *Idem*, p. 6 (emphasis added).

<sup>27</sup> *Ibid.* See also the *“Sentencing judgment”* (Trial Chamber VI), [No. ICC-01/04-02/06-2442](#), 7 November 2019, para. 96: *“rape is one of the worst sufferings a human being can inflict upon another”*.

<sup>28</sup> See the *“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’, supra note 17, para. 21.*

<sup>29</sup> *Ibid.*

24. In the present case, the Prosecution has properly explained the reasons allowing for the request to add charges only at this juncture of the proceedings, having finally received evidence from two witnesses relating to rape and sexual slavery as war crimes. Considering the practical and logistical constraints encountered in obtaining said evidence,<sup>30</sup> the Common Legal Representatives aver that the Motion is justified.

25. In fact, the Prosecution has provided a sufficient and transparent explanation for the strategy adopted with respect to the witnesses concerned and the reasons why it was not possible to collect their testimony earlier.

*c. Explanations for the purposes of a final determination*

26. In the *Kenyatta* case, Pre-Trial Chamber II also held that an amendment of charges should be justified on a case-by-case basis, and “*should not be construed to mean that the Prosecutor must obtain prior permission from the relevant Pre-Trial Chamber to continue her investigation post confirmation of charges. Rather, when applying for an amendment of one or more of the charges [...] the relevant Pre-Trial Chamber might require some explanations for the purposes of its final determination*”.<sup>31</sup>

27. The Pre-Trial Chamber in that case further held that: “[...] *the continued investigation should be related only to such essential pieces of evidence which were not known or available to the Office of the Prosecutor prior to the confirmation hearing or could not have been collected for any other reason, except at a later stage*”.<sup>32</sup> Moreover, the Prosecution is expected to provide “*a proper justification to that effect in order for the Chamber to arrive at a fair and sound judgment regarding any request for amendment put before it*”.<sup>33</sup>

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<sup>30</sup> See the Prosecution’s Motion, *supra* note 1, paras. 24-28.

<sup>31</sup> See the “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’”, *supra* note 17, para. 35.

<sup>32</sup> *Idem*, paras. 37-38.

<sup>33</sup> *Ibid.*

28. This reasoning was recently relied upon by Pre-Trial Chamber I in the *Al Hassan* case for granting a Prosecution's request to amend charges.<sup>34</sup>

29. In the present case, the Common Legal Representatives contend that the Prosecution has provided ample justification for the additional charges in its Motion. Similarly to the *Kenyatta* case, the Prosecution was faced with difficulties in approaching the witnesses, obtaining [REDACTED], and securing the presence of a psychosocial expert.<sup>35</sup> All these circumstances militate for the impossibility for the Prosecution to include the new charges (and evidence) in the DCC. However, the Motion has been filed as soon as feasible, after a thorough investigation of the allegations and a diligent assessment of the evidence; the reasons adduced weight in favour of granting the Motion.

30. Therefore, it can be concluded that the Prosecution "*managed to furnish the Chamber not only with evidence supporting the existence of the factual allegation, but also with a reasonable justification for the continuation of [its] investigation subsequent to the confirmation hearing*".<sup>36</sup>

31. Finally, considering the fact that the addition of charges under article 61(9) of the Statute requires the holding of a new confirmation hearing,<sup>37</sup> the Chamber may request additional explanations during said hearing if it deems it necessary to supplement the information in its possession which is, in any case, sufficient to grant the Motion.

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<sup>34</sup> See the "Version publique expurgée du Rectificatif de la Décision portant modification des charges confirmées le 30 septembre 2019 à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 23 avril 2020, ICC-01/12-01/18-767-Conf" (Pre-Trial Chamber I), [No. ICC-01/12-01/18-767-Corr-Red](#), 8 May 2020, para. 19.

<sup>35</sup> See the Prosecution's Motion, *supra* note 1, para. 26.

<sup>36</sup> See the "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'", *supra* note 17, para. 38.

<sup>37</sup> See article 61(9) of the Statute.

*d. Fairness and expeditiousness of the proceedings and the rights of the accused and the Victims*

32. In agreeing with the reasoning of Pre-Trial Chamber II in the *Kenyatta* case, the Chamber has held that “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’, including, most crucially, the fairness and expeditiousness of the proceedings and the rights of the accused and the victims”.<sup>38</sup>

33. In its discussion, the Chamber placed a great emphasis on the rights of the Accused, but did not discuss those of the Victims in the context of additional charges, despite the fact that under the Rome Statute the rights and interests of the Victims shall be taken into consideration at any stage of the proceedings before the Court. The Common Legal Representatives argue that, at the present juncture, adding new charges of rape and sexual slavery would not negatively impact the fairness and expeditiousness of the proceedings – being said addition limited - and would allow the Trial Chamber to fully assess the extent of the victimisation.

34. In assessing the requirement that the addition of charges must not cause an unfair prejudice to the Accused, the international *ad hoc* tribunals jurisprudence may be relevant. In this regard, it was held in the *Brđanin and Talić* case that:

*“The fundamental issue in relation to granting leave to amend an indictment is whether the amendment will prejudice the accused unfairly. The word “unfairly” is used in order to emphasise that an amendment will not be refused merely because it assists the prosecution quite fairly to obtain a conviction. To be relevant, the prejudice caused to an accused would ordinarily need to relate to the fairness of the trial. Where an amendment is sought in order to ensure that the real issues in the case will be determined, the Trial Chamber will normally exercise its discretion to permit the amendment, provided that the amendment does not cause any injustice to the accused, or does not otherwise prejudice the accused unfairly in the conduct of his defence. There should be no injustice caused to the accused if he is given an adequate opportunity to prepare an effective defence to the amended case”.*<sup>39</sup>

<sup>38</sup> See the Decision on the Prosecution’s Request to Amend Charges, *supra* note 13, para. 22.

<sup>39</sup> See ICTY, *Brđanin and Talić*, Case No. IT-99-36, [Decision on Form of Further Amended Indictment and Prosecution Application to Amend](#), 26 June 2001, para. 50 (emphasis added).

35. The Common Legal Representatives posit that, given the fact that the date of the commencement of the trial is yet to be set and that the new charges are limited, the Defence will have sufficient time to prepare its case.

36. In this regard, in the *Ruto and Sang* case, Pre-Trial Chamber II also recognised that, because a decision on the amendment of charges was taken in due course by the relevant Chamber and much in advance of the date scheduled for the commencement of the trial, “*the fairness of the proceedings, their expeditiousness and respect for the rights of the accused to receive a proper trial*” were ensured.<sup>40</sup>

37. The Common Legal Representatives submit that, as in the *Ruto and Sang* case, the fairness and expeditiousness of the proceedings, as well as the rights of the Accused, can be ensured in the present case if the Chamber proceeds expeditiously in granting the Motion and entertaining the additional charges.

38. The procedure for addition of charges necessarily entails that proceedings are prolonged because of the need to hold a new confirmation hearing and the Defence must be accorded sufficient time to adequately prepare. Said extension, however, does not necessarily lead to an undue and excessive delay in violation of the defendant’s rights. In this regard, in the *Kovačević* case, for example, it was held that “*the extension of the proceedings, even by a period of seven months, would not constitute undue delay and would afford the accused a fair trial*”.<sup>41</sup>

39. In the present instance, the sought addition is – as already stated – limited and therefore the confirmation of charges hearing will be streamlined and can be held expeditiously. Moreover, including the additional charges to the case will ensure that

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<sup>40</sup> See the “Decision on the ‘Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’”, *supra* note 18, para. 36.

<sup>41</sup> See ICTY, *Kovačević*, Case No. IT-97-24-PT, [Decision Stating Reasons for Appeals Chamber’s Order of 29 May 1998](#), 2 July 1998, para. 31.

all the real and relevant issues will be fully considered before the Trial Chamber and it will be in the interest of justice and of the Victims.<sup>42</sup>

*e. The exercise of prosecutorial discretion was diligent, professional and did not lead to abuse*

40. In the present case, unlike in the *Ruto and Sang* case, in which Pre-Trial Chamber II considered that the Prosecution did not act diligently in requesting additional charges seven months after the confirmation hearing, without adequate justification,<sup>43</sup> the Prosecution has acted diligently in thoroughly investigating and then assessing the evidence supporting the proposed additional charges.

41. Moreover, it was sound for the Prosecution to conduct its investigation into the new charges with reasonable diligence, rather than rushing to include them in the DCC and risk dismissal by the Pre-Trial Chamber due to a lack of substantiation. In this regard, Pre-Trial Chamber I in the *Al Hassan* case has remarked that “[s]auf abus, il semble raisonnable à la Chambre que le Procureur puisse ne pas présenter certains faits au moment du dépôt de son DCC eu égard au caractère limité des preuves dont elle dispose, mais de choisir de les présenter par la suite si elle obtient, de son point de vue, des éléments de preuve supplémentaires susceptibles d’établir devant la Chambre ces faits eu égard à la norme d’administration de la preuve applicable à ce stade de la procédure”.<sup>44</sup>

42. Therefore, in evaluating the Motion in light of the Chamber’s approach as set out in its recent decision rejecting the Prosecution’s Request to Amend Charges and Notice of Intention to Add Additional Charges, the Common Legal Representatives contend that, even when taking into account the precautionary and restrictive

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<sup>42</sup> See ICTY, *Boškoski and Tarčulovski*, Case No. IT-04-82-PT, [Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Amended Indictment](#), 1 November 2005, para. 7.

<sup>43</sup> See the “Decision on the ‘Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’”, *supra* note 18, paras. 37-38.

<sup>44</sup> See the “Version publique expurgée du Rectificatif de la Décision portant modification des charges confirmées le 30 septembre 2019 à l’encontre d’Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 23 avril 2020, ICC-01/12-01/18-767-Conf”, *supra* note 34, para. 24.

approach advanced, the Motion satisfies the required criteria and should therefore be granted.

## V. VIEWS AND CONCERNS OF THE VICTIMS

43. The Common Legal Representatives recall that they had already raised the issue of the lack of charges related to gender-based crimes in their submissions dated 9 July 2019. In said observations, they submitted that *“the Prosecution should investigate sexual and gender-based crimes and include related charges in the Document Containing the Charges, namely rape and sexual violence”*<sup>45</sup> and that *“from the account of their clients it appears that rape was a systematic practice allegedly committed by Anti-Balaka during the period referred to in the Warrants of Arrest. Moreover, said crimes were also committed [REDACTED]”*.<sup>46</sup>

44. Shortly after said submissions, the Prosecution received information regarding evidence [REDACTED]. Although the Victims deplore the omission of the crimes of rape and sexual slavery in the original DCC, they welcome the Motion to add these charges to the present case.

45. [REDACTED].<sup>47</sup>

46. The Common Legal Representatives cannot stress enough the gravity of gender-based crimes and its devastating consequences for the Victims, especially [REDACTED]. According to the [REDACTED].<sup>48</sup>

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<sup>45</sup> See the “Victims’ Views and Concerns arising from the Prosecution’s Additional Observations on the Registry’s First Assessment Report on Applications for Victims’ Participation in Pre-Trial Proceedings, [No. ICC-01/14-01/18-239-Conf](#), 9 July 2019, para. 5 ; reclassified as public by Pre-Trial Chamber II’s decision dated 26 May 2020.

<sup>46</sup> *Idem*, para. 9.

<sup>47</sup> [REDACTED].

<sup>48</sup> [REDACTED]

47. The Common Legal Representatives aver that if the additional charges are not retained, the Victims of these crimes will effectively be denied access to justice. The full extent of the victimisation of the Victims concerned will not be acknowledged and they will not be eventually able to claim reparations for the harm suffered. Therefore, the Victims' rights to participation - and eventually reparation - would be unjustifiably jeopardised.

48. As also recalled *supra*, entertaining the Motion is required in the interest of justice, and in particular in the interest of the Victims. The Chamber should not place undue weight on the need to protect the rights of the Accused as opposed to the need to establish the truth; and the rights of the Victims should also be properly assessed and balanced when determining whether to grant the Motion.<sup>49</sup>

49. The Victims are strong proponents of expeditious proceedings, as it is also in their interest that justice is not delayed. However, the expeditiousness of the proceedings should never outweigh the duty to establish the truth. It is not satisfactory for the Victims to have a speedy trial if said trial fails to uncover the truth about the responsibility of those involved and the extent of their victimisation.

50. Now that the Prosecution has filed the Motion, it would be unthinkable for the Chamber to adjudicate the present case with blinders on, knowing fully well that rape and sexual slavery [REDACTED] was a well-known and systematic phenomenon during the period covered by the charges already confirmed.

51. It is beyond controversy that crimes as grave as rape and sexual slavery cannot go unpunished. This would go against the Court's mission to put an end to impunity for the perpetrators of international crimes. If the proposed charges are not considered at this juncture, Victims will not have the opportunity to see justice done for the real events they have suffered from and for the consequences said crimes

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<sup>49</sup> See the "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'", *supra* note 17, para. 21.



have had and continue to have on their daily life. Indeed, the alternative of eventually having a further proceeding started against Mr Yekatom would not only be contrary to the principles of judicial economy, proper administration of justice and integrity of proceedings, but would also be a waste of the Court's resources and time.

## VI. CONCLUSION

52. For the reasons set out above, the Common Legal Representatives respectfully request the Pre-Trial Chamber to grant the Prosecution's Motion in its entirety.



Dmytro Suprun  
Common Legal Representative of the  
Former Child Soldiers



Paolina Massidda  
For the team of Common Legal  
Representatives of the Victims of Other  
Crimes

Dated this 26<sup>th</sup> day of May 2020

At The Hague (The Netherlands), Bangui (Central African Republic), La Rochelle (France) and Saint Louis (Senegal)