

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **27 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 ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

**Public with Public Annex**

**Corrected version of "Public redacted version of "Yekatom Defence Response to Motion to Amend the Charges", 26 May 2020, ICC-01/14-01/18-532-Conf", 26 May 2020, ICC-01/14-01/18-532-Red**

**Source:** Defence for Mr. Alfred Rombhot Yekatom

**Document 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 Participation and Reparations  
Section**

1. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence” and “Mr. Yekatom”, respectively) respectfully oppose the Prosecution’s *Motion to Amend the Charges Against Alfred Yekatom*.<sup>1</sup> This Chamber’s recent *Decision on the Prosecution Request to Amend Charges pursuant to Article 61(9) and for the Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges*<sup>2</sup> is directly on point. The potential disruption of the trial and to the Defence’s trial preparation far outweighs any need for the new charges. In addition, the motion lacks sufficient detail for the Defence to respond to the merits of whether this specific proposed amendment is warranted.

### **RELEVANT PROCEDURAL HISTORY**

2. On 11 November 2018, this Chamber issued its *Warrant of Arrest for Alfred Yekatom*.<sup>3</sup> Mr. Yekatom made his initial appearance before this Court on 23 November 2018. His hearing on the confirmation of charges was set for 30 April 2019.<sup>4</sup>
3. On 20 February 2019, over Mr. Yekatom’s objection,<sup>5</sup> the Chamber joined the case of Mr. Yekatom with that of Patrice-Edouard Ngaïssona, who had been recently arrested and transferred to the Court. Both Mr. Yekatom and Mr. Ngaïssona requested that the date of 30 April 2019 for the confirmation hearing be maintained.<sup>6</sup> The Prosecution, on the other hand, asked that the confirmation hearing be postponed to 18 June 2019.<sup>7</sup> The Chamber granted the Prosecution’s request.<sup>8</sup>

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<sup>1</sup> [ICC-01/14-01/18-518-Conf](#). Public redacted version: [ICC-01/14-01/18-518-Red](#).

<sup>2</sup> [ICC-01/14-01/18-517](#).

<sup>3</sup> [ICC-01/14-01/18-1-Conf-Exp](#). Public redacted version: [ICC-01/14-01/18-1-Red](#).

<sup>4</sup> [ICC-01/14-01/18-T-001-ENG](#).

<sup>5</sup> [ICC-01/14-01/18-82](#).

<sup>6</sup> [ICC-01/14-01/18-82](#), paras. 6, 22, 35, 39; [ICC-01/14-01/18-118](#), para. 8.

<sup>7</sup> [ICC-01/14-01/18-76](#), para. 11.

<sup>8</sup> [ICC-01/14-01/18-87](#). Leave to appeal this decision was denied on 21 March 2019 ([ICC-01/14-01/18-154](#)).

4. On 1 May 2019, the Prosecution requested yet another postponement of the confirmation hearing until September 2019,<sup>9</sup> over the objection of Mr. Yekatom, who contended that a postponement would result in unreasonable delay.<sup>10</sup> The Chamber again granted the Prosecution's request and postponed the hearing until 19 September 2019.<sup>11</sup>
5. The hearing began on 19 September 2019, ten months after Mr. Yekatom's arrival at the Court.<sup>12</sup> It concluded on 11 October 2019.<sup>13</sup>
6. On 11 December 2019, the Chamber issued its *Decision on the Confirmation of Charges Against Alfred Yekatom and Patrice-Edouard Ngaissona* in which it confirmed some of the charges. The Chamber suspended, *proprio motu*, the time limit for seeking leave to appeal the decision until a French translation was provided.<sup>14</sup>
7. It took more than two months for a French translation to be prepared. Then, at the very last possible moment, on 2 March 2020, the Prosecution, which works in both languages, sought reconsideration or leave to appeal the confirmation decision.<sup>15</sup> The Defence opposed reconsideration and leave to appeal.<sup>16</sup>
8. On 11 March 2020, the Pre-Trial Chamber denied reconsideration and leave to appeal and ordered that the Registry transmit the case file to the Presidency.<sup>17</sup>
9. On 16 March 2020, the Presidency assigned the case to Trial Chamber V.<sup>18</sup> Three days later the Trial Chamber scheduled a status conference and invited

<sup>9</sup> [ICC-01/14-01/18-186-Conf-Red-Corr](#), Public redacted version: [ICC-01/14-01/18-186-Red2](#).

<sup>10</sup> [ICC-01/14-01/18-194-Conf](#), paras. 28-31, Public redacted version: [ICC-01/14-01/18-194-Red](#).

<sup>11</sup> [ICC-01/14-01/18-199](#).

<sup>12</sup> [ICC-01/14-01/18-T-004-Conf](#), Public redacted version: [ICC-01/14-01/18-T-004-Red2-ENG](#). The *Chamber's Practice Manual* provides that "the typical target date for the confirmation hearing should be around four to six months from the first appearance" (p. 3).

<sup>13</sup> [ICC-01/14-01/18-T-011-CONF-ENG](#), Public redacted version: [ICC-01/14-01/18-T-011-Red-ENG](#).

<sup>14</sup> [ICC-01/14-01/18-403-Conf](#), para. 240; Public redacted version: [ICC-01/14-01/18-403-Red](#).

<sup>15</sup> [ICC-01/14-01/18-437](#).

<sup>16</sup> [ICC-01/14-01/18-443](#).

<sup>17</sup> [ICC-01/14-01/18-447](#).

<sup>18</sup> [ICC-01/14-01/18-451](#).

submissions on various issues, including the commencement date for the trial.<sup>19</sup>

10. In status conference submissions filed on 8 April 2020, the Yekatom<sup>20</sup> and Ngaïssona<sup>21</sup> Defence requested that the trial be scheduled without further delay. In its submissions filed the same day, the Prosecution claimed that its operations, particularly in the Central African Republic, were interrupted as a result of the COVID-19 pandemic and that it would not be able to even fulfill its disclosure obligations in the near future, let alone commence the trial.<sup>22</sup> The Prosecution added that it would not be in a position to file a Pre-Trial Brief until all further proceedings on amendment of charges before the Pre-Trial Chamber were concluded.<sup>23</sup>
11. On 31 March 2020, the Prosecution requested the Pre-Trial Chamber to amend the charges by adding a charge of rape against Ngaïssona and gave notice that it would seek to add rape and sexual slavery charges against Yekatom at some time in the future.<sup>24</sup> The Ngaïssona Defence opposed the proposed amendment.<sup>25</sup> The Yekatom Defence said it would file a response if and when the Prosecution sought to amend the charges against Mr. Yekatom.<sup>26</sup>
12. On 30 April 2020, the Prosecution moved the Trial Chamber to reinstate, via Regulation 55 of the Regulations of the Court, the modes of liability for which the Pre-Trial Chamber found had not been proven during the confirmation process.<sup>27</sup> The Yekatom Defence filed its opposition on 14 May 2020.<sup>28</sup> No decision has yet been issued.

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<sup>19</sup> [ICC-01/14-01/18-459](#).

<sup>20</sup> [ICC-01/14-01/18-472](#), para. 3.

<sup>21</sup> [ICC-01/14-01/18-473-Conf](#), para. 8.

<sup>22</sup> [ICC-01/14-01/18-474-Conf](#), paras. 8-11; Public redacted version: [ICC-01/14-01/18-474-Red](#).

<sup>23</sup> *Id.*, para. 13.

<sup>24</sup> [ICC-01/14-01/18-468-Conf](#), Public redacted version: [ICC-01/14-01/18-468-Red](#).

<sup>25</sup> [ICC-01/14-01/18-477-Conf](#), Public redacted version: [ICC-01/14-01/18-477-Red](#).

<sup>26</sup> [ICC-01/14-01/18-517](#), para. 5.

<sup>27</sup> [ICC-01/14-01/18-503-Conf](#), Public redacted version: [ICC-01/14-01/18-503-Red](#).

<sup>28</sup> [ICC-01/14-01/18-515](#).

13. Also, on 14 May 2020, the Pre-Trial Chamber rejected the Prosecution's motion to amend the charges as to Mr. Ngaiisona.<sup>29</sup> On the same day, the Prosecution filed its motion to amend the charges against Mr. Yekatom.<sup>30</sup>

### **RELEVANT PROVISIONS**

14. Article 61(9) of the Statute:

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. Rule 128 of the Rules of Procedure and Evidence:

1. If the Prosecutor seeks to amend charges already confirmed before the trial has begun, in accordance with article 61, the Prosecutor shall make a written request to the Pre-Trial Chamber, and that Chamber shall so notify the accused.
2. Before deciding whether to authorize the amendment, the Pre-Trial Chamber may request the accused and the Prosecutor to submit written observations on certain issues of fact or law.
3. If the Pre-Trial Chamber determines that the amendments proposed by the Prosecutor constitute additional or more serious charges, it shall proceed, as appropriate, in accordance with rules 121 and 122 or rules 123 to 126.

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<sup>29</sup> [ICC-01/14-01/18-517](#), para. 5.

<sup>30</sup> [ICC-01/14-01/18-518-Conf](#), Public redacted version: [ICC-01/14-01/18-518-Red](#).

## ARGUMENT

### A. The Chamber's Decision on the Proposed Amendment as to Ngaissona Warrants a Rejection of the Motion as to Yekatom

16. The same considerations that led this Chamber to reject the proposed amendment as to Mr. Ngaissona apply with equal, if not greater, force to the proposed amendment as to Mr. Yekatom.
17. As the Chamber observed, requests to amend the charges after the confirmation hearing, when trial preparation is underway, may cause undue prejudice to the Defence, and must therefore "be approached with the utmost caution and limited to the most restrictive of circumstances," particularly where the accused are in custody.<sup>31</sup>
18. The Chamber emphasised that the Prosecutor's prerogative to request an amendment to the charges must be "construed narrowly" so as to avoid delay of the trial to the detriment of the accused without good reason.<sup>32</sup>
19. The Chamber recognised that a crucial requirement for trial 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 counter-productive.<sup>33</sup>
20. That is precisely the problem faced by the Defence in this case. Unlike the proposed Ngaissona amendment, which relied on an incident that had previously been charged, the proposed Yekatom amendment introduces

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<sup>31</sup> [ICC-01/14-01/18-517](#), para. 21.

<sup>32</sup> *Id.*, para, 32.

<sup>33</sup> *Id.*, para, 30.

completely new facts which have never been part of the case. In addition, while Ngaïssona was charged with other crimes of sexual violence, Yekatom has never faced such charges. Therefore, the Defence team would have to start from the beginning in both its factual and legal preparation.

21. The disruptive effect of this amendment on the Defence's trial preparation will be significant. The Defence has been fully occupied preparing to defend Mr. Yekatom on the existing charges. This involves ongoing review of almost 9000 documents, and statements of more than 150 prospective Prosecution witnesses, as well as collecting the Defence's own documentary evidence, investigating the Prosecution witnesses' versions in the field, and identifying potential defence witnesses.
22. Adding completely new factual allegations, completely new offenses, and what appears to be a completely new mode of liability would be a serious blow to the Defence's ability to prepare for an expeditious trial. To add new charges, requiring a detailed investigation, not only of the incidents, but Mr. Yekatom's relationship to the alleged perpetrators and his knowledge of the crimes, and then preparing for and participating in a full-blown confirmation hearing, makes the proposed amendment a major burden on the Defence.
23. The Prosecution has recently advised the Trial Chamber that [REDACTED] and that there are an additional [REDACTED].<sup>34</sup> The disclosure of this large volume of material once the Trial Chamber sets a disclosure deadline will further inundate the Defence and cause significant additional work to review and investigate the new material and witnesses. To add completely new charges to be defended at parallel proceedings, before a different Chamber,

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<sup>34</sup> [ICC-01/14-01/18-474-Conf](#), paras. 23,28; Public redacted version: [ICC-01/14-01/18-474-Red](#).



will throw the Defence team's trial preparation into chaos, to the significant detriment of the accused's right to both a fair and expeditious trial.

24. When one adds the effect of the COVID-19 pandemic to this equation, the ability of the Defence to timely investigate and prepare to defend the new charges at the confirmation hearing will be an even greater challenge. The Prosecution has gone to great lengths to inform the Trial Chamber of the significant impact of the pandemic on its ability to commence the trial, or even comply with its disclosure obligations.<sup>35</sup> Yet in its motion before the Pre-Trial Chamber, it contends that the confirmation hearing should be held as soon as possible.<sup>36</sup> This ignores the right of the Defence to prepare for that hearing, including investigating the prosecution's evidence and presenting its own evidence.

25. The Appeals Chamber in *Mbarushimana* has said:

“The Appeals Chamber attaches considerable significance to the fact that article 61 (6) of the Statute enshrines the rights of the person charged to challenge the evidence presented by the Prosecutor and to present his/her own evidence. If these rights are availed of, the evidence inevitably will be contested.”<sup>37</sup>

26. It is unclear how the Defence could be expected to prepare to challenge the Prosecution's evidence and present its own evidence at a confirmation hearing under the same circumstances that prevents the Prosecution from preparing for the trial.

27. When it balanced the necessity for the amendment against the disruption to be caused to the Defence, and the human rights implications on the rights of the

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<sup>35</sup> [ICC-01/14-01/18-474-Conf](#), paras. 8-11, 22-25; Public redacted version: [ICC-01/14-01/18-474-Red](#).

<sup>36</sup> [ICC-01/14-01/18-518-Conf](#), paras. 39-45, Public redacted version: [ICC-01/14-01/18-518-Red](#).

<sup>37</sup> *Prosecutor v. 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. 40.

accused, this Chamber rejected the proposed amendment for Ngaïssona.<sup>38</sup> The Chamber went on to say, in reference to the Prosecution's notice of its intent to seek an amendment for Yekatom:

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.<sup>39</sup>

28. Mr. Yekatom greatly appreciates the Chamber's emphasis on the protection of the rights of the accused. He needs that protection. For the very reasons set forth in its decision on the proposed amendment for Ngaïssona, the proposed amendment for Mr. Yekatom should likewise be rejected.

#### B. The Prosecution's Motion Provides Inadequate Information

29. Rule 128 provides for meaningful participation by the accused in the Chamber's decision whether to amend the charges after the confirmation hearing. But the Prosecution's motion makes such participation impossible.
30. The Prosecution has proposed an amendment for additional charges without providing the Defence with the text of that amendment. The location where the offenses occurred, the identity of the victims, the identity of the alleged perpetrators, and even the mode of liability are completely unknown to the Defence.<sup>40</sup>

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<sup>38</sup> [ICC-01/14-01/18-517](#), para. 36.

<sup>39</sup> *Id.*, para. 38.

<sup>40</sup> The objective of the common plan alleged in the Document Containing the Charges was "to violently target the Muslim civilian population of western CAR", [ICC-01/14-01/18-403-Conf](#) para. 186, Public redacted version: [ICC-01/14-01/18-403-Red](#).

31. In the *Kenyatta* case, the proposed amendment was to add the phrase “the victims were also killed by gunshot in Naivasha”.<sup>41</sup> In the *Ruto* case, the proposed amendment was to change the beginning date of the offenses by two days, substituting the words “30 December 2007” for “1 January 2008”.<sup>42</sup> The Defence is unaware of any case at this court, or at any of the *ad hoc* Tribunals, where the text of a proposed amendment was not made available to the Defence.
32. In the *Kenyatta* case, the Single Judge held that, when proposing an amendment after the confirmation hearing had concluded, the Prosecutor was required to provide a proper justification for continuing its investigation after the hearing. A focus of that inquiry were facts showing that the evidence giving rise to the amendment “was 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>43</sup> In that case, lack of cooperation from the State and intimidation of witnesses were major factors leading to the approval of the modest amendment.<sup>44</sup>
33. In the *Ruto* case, the same Single Judge rejected the proposed amendment on the grounds that there was a “lack of efficiency and due diligence” on the part of the Prosecution in seeking the amendment and that the amendment would result in an unfair burden on the Defence.<sup>45</sup>

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<sup>41</sup> *Prosecutor v. Kenyatta*, [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, para. 26.

<sup>42</sup> *Prosecutor v. Ruto & 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. 13.

<sup>43</sup> *Prosecutor v. Kenyatta*, [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, para. 26.

<sup>44</sup> *Id.*, paras. 38,42

<sup>45</sup> *Prosecutor v. Ruto & 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. 42

34. This Chamber, when considering the proposed amendment as to Ngaissona, held that:

As a matter of principle, the Prosecutor's investigation should largely be completed at the stage of the confirmation hearing 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>46</sup>

35. At the *ad hoc* Tribunals, the Prosecution was also required to establish that it had been diligent when seeking an amendment.<sup>47</sup>
36. It is impossible for the Defence to provide the Chamber information on whether the Prosecution was diligent in the factual vacuum presented by its motion. For example, the charges seem to relate [REDACTED],<sup>48</sup> [REDACTED].<sup>49</sup>
37. From the incomplete disclosure provided in the case so far, it appears that as early as 2016, the Prosecution was informed that there were [REDACTED].<sup>50</sup> The Prosecution was also informed in 2017 that [REDACTED].<sup>51</sup>
38. In 2018, it obtained additional information from a witness [REDACTED].<sup>52</sup> The witness even provided a list of names and contact details [REDACTED].<sup>53</sup> The Prosecution received additional details of alleged sexual slavery from another witness in May 2019.<sup>54</sup>

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<sup>46</sup> [ICC-01/14-01/18-517](#).

<sup>47</sup> See, i.e. *Prosecutor v. Lukić & Lukić*, [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 Lukić'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>48</sup> [ICC-01/14-01/18-518-Conf](#), paras. 5, 15.

<sup>49</sup> [ICC-01/14-01/18-518-Conf](#), paras. 18-19.

<sup>50</sup> CAR-OTP-2041-0741, paras. 40, 56.

<sup>51</sup> CAR-OTP-2072-0644, pp. 0527, 0660-0665-0670.

<sup>52</sup> CAR-OTP-2071-0259, paras. 45, 105-106.

<sup>53</sup> CAR-OTP-2071-0259, para. 58.

<sup>54</sup> CAR-OTP-2110-0556, paras. 71-73.

39. Absent information as to the identities of the victims and perpetrators, the Defence is unable to make submissions on whether the Prosecution exercised diligence when failing to include the allegations in its Document Containing the Charges or in not bringing the proposed amendment earlier.
40. The Prosecution sought and obtained two delays of the confirmation hearing, over the strong objections of the Defence, resulting in the hearing being held some 10 months after Mr. Yekatom's initial appearance. Given that crimes of sexual violence have been a top priority for the Prosecutor since the CAR investigation began,<sup>55</sup> it is difficult to understand why the Prosecution did not follow up on the allegations of rape and sexual slavery in the more than ample time it had to investigate the case and prepare for the confirmation hearing.
41. Absent information as to the identity of the victims and perpetrators, the Defence is unable to address the issue of whether the Prosecution was in possession of information concerning these individuals that should have led it to investigate sooner.
42. The Defence rejects the Prosecution's suggestion that the identities of the victims be provided to Defence counsel on the condition that it not be shared with their client.<sup>56</sup> Such a procedure would drive a wedge in the attorney/client relationship and undermine the trust that counsel has built up with their client. In addition, Mr. Yekatom would be an essential source of information for the Defence to investigate the means by which the Prosecution could have come upon these allegations earlier had it been diligent.
43. Similarly, the Prosecution's suggestion that an anonymous summary would be adequate for the Defence to respond to the issue of whether the proposed

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<sup>55</sup> See [Statement of the Prosecutor](#), 7 March 2014.

<sup>56</sup> [ICC-01/14-01/18-518-Conf](#), para. 42 ; Public redacted version: [ICC-01/14-01/18-518-Red](#).

amendment should be allowed,<sup>57</sup> should be rejected by the Chamber. Absent the identities of the victims and alleged perpetrators, the Defence could not make adequate submissions on the Prosecution's diligence.

44. For all of these reasons, should the Chamber not dismiss the Prosecution's motion as unwarranted in light of its decision on the proposed amendment for Ngaiissona, it should dismiss the motion on the grounds that to consider an unspecified proposed amendment without adequate disclosure to the Defence would be unfair.

### **CONFIDENTIALITY**

45. Pursuant to Regulation 23*bis* of the Regulation of the Court, this Response is filed on a confidential basis since it refers to documents classified as confidential. A public redacted version is filed simultaneously.

### **CONCLUSION**

46. It is respectfully requested that the Prosecution's motion to amend the charges be denied.

**RESPECTFULLY SUBMITTED ON THIS 27th DAY OF MAY 2020**



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<sup>57</sup> *Id.*, para. 43.