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**International  
Criminal  
Court**

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Date: **8 June 2020**

**PRE-TRIAL CHAMBER II**

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

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II**

**IN THE CASE OF *THE PROSECUTOR V. ALFRED YEKATOM AND  
PATRICE-EDOUARD NGAÏSSONA***

**Public**

**Request for Leave to Appeal the “Decision on the Prosecutor’s request to amend  
the charges against Alfred Yekatom”**

**Source:** Office of the Prosecutor

**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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## Introduction

1. The Pre-Trial Chamber has denied the Prosecution’s request to introduce additional charges of rape and sexual slavery against Mr Yekatom.<sup>1</sup> While these allegations were not previously made as part of the confirmation of charges proceedings, the Prosecution’s request arose from the statements of two witnesses that were not previously available, even with the exercise of reasonable diligence.<sup>2</sup> As the Pre-Trial Chamber recalled, the Prosecution submitted that the main forms of potential prejudice which must be balanced against the Request—the timely preparation of the Defence and any delay to the trial—could in the current circumstances be adequately averted or mitigated by the limited extent of the evidence supporting the additional charges, the very early stage of proceedings before the Trial Chamber, and the institution of procedural measures to expedite the additional proceedings required under article 61(9) of the Rome Statute.<sup>3</sup>

2. The Pre-Trial Chamber reached a different view. It considered that the Prosecution had not exercised reasonable diligence in investigating these allegations,<sup>4</sup> and that “in light of” this conclusion “the disruption caused to the Defence, the delay to the commencement of the trial and the prolongation of the accused’s pre-trial custody [...] would not be warranted.”<sup>5</sup> It further considered that the new allegations “cannot be regarded as necessary with a view to honouring the Court’s obligation to determine the truth”, and that article 61(9) must not be used in such a way as to transform the charges for trial “into a moving target.”<sup>6</sup>

3. In this context, the Prosecution respectfully seeks leave to appeal four issues arising from the Decision, concerning:

- the legal consequence, for the purpose of the article 61(9) assessment, of an allegation constituting an “additional charge”;
- the assessment of ‘reasonable diligence’ for the purpose of article 61(9), when it has been determined that material circumstances are unclear;

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<sup>1</sup> See [ICC-01/14-01/18-538](#) (“Decision”).

<sup>2</sup> See [ICC-01/14-01/18-518-Red](#) (“Request”), paras. 20-30.

<sup>3</sup> See [Decision](#), para. 13. See further [Request](#), paras. 31-45.

<sup>4</sup> [Decision](#), paras. 16-18.

<sup>5</sup> [Decision](#), para. 19.

<sup>6</sup> [Decision](#), para. 19.

- the assessment of reasonable diligence for the purpose of article 61(9), when based on disagreement with the Prosecutor's exercise of discretion under articles 54(1) and 61(9); and
- the exercise of the Pre-Trial Chamber's discretion under article 61(9).

4. These issues significantly affect the fair and expeditious conduct of the proceedings, and the outcome of the trial. Immediate resolution by the Appeals Chamber may materially advance the proceedings, insofar as it will ensure that the trial proceeds on the right course, with the right charges.

5. As further explained below, the proposed issues are, in part, linked to those issues arising from the Pre-Trial Chamber's previous decision under article 61(9), concerning Mr Ngaïssona, for which the Prosecution has already sought certification to appeal.<sup>7</sup> But, even where a linked issue is proposed in this submission, it does not duplicate the issue identified from the prior Ngaïssona Decision, insofar as the circumstances of the Prosecution's article 61(9) request regarding Mr Yekatom are different. In this context, and in the interest of judicial economy, the Pre-Trial Chamber could render a single consolidated decision on these two applications. This will have the advantage of ensuring that any appeals which are allowed will proceed on the same schedule, enabling the Appeals Chamber to issue a single joint judgment on the matter.

6. As previously submitted, the denial of a substantiated article 61(9) request is particularly important. It represents the last realistic opportunity for the victims concerned to receive justice from this Court,<sup>8</sup> which itself is one of 'last resort'. Because allegations which are sufficiently confined in scope may not independently meet the admissibility requirements in article 17(1) of the Statute, article 61(9) is intended to ensure an efficient mechanism by which the truth concerning the scope of an Accused's culpability can be established, even for allegations which may not have initially formed part of the confirmed charges. Indeed, this is precisely why article 61(9) exists: it is a mechanism of judicial efficiency designed to close accountability gaps, where this can practicably be reconciled with the rights of the Accused. The logical alternative — to initiate an entirely new prosecution under article 58, subject to a post-confirmation application for joinder and admissibility determination— would be

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<sup>7</sup> See [ICC-01/14-01/18-524-Corr](#) ("Ngaïssona Certification Request").

<sup>8</sup> See [Ngaïssona Certification Request](#), para. 6.

circuitous and lengthy. Article 61(9) must therefore be understood and applied in a realistic and practicable manner, consistent with the interests it was contemplated to preserve.

7. Indeed, the decisive quality of article 61(9) decisions is such that, arguably, appropriate issues arising from such decisions should enjoy a strong presumption of certification for appeal under article 82(1)(d), if requested by a Party, to the extent that they will very often meet the requisite criteria and deserve the scrutiny of the Appeals Chamber.<sup>9</sup> The Prosecution underscores its acknowledgement that certification cannot be taken to imply any lack of confidence by a chamber in the legal correctness of its own decision; rather, it is a procedural safeguard to ensure that certain interlocutory decisions receive the confirmation of the Appeals Chamber in light of their importance to the proceedings overall.

8. Moreover, the Prosecution attaches significant importance to this application, and the similar application in respect of the decision declining to amend the charges against Mr Ngaïssona, because of their impact on the effective prosecution of sexual and gender based violence (which faces unique challenges),<sup>10</sup> and the potential consequences for the victims of these crimes. These public interests militate in favour of a cautious approach by the Pre-Trial Chamber, and consequently certification of the proposed issues to allow confirmation of its reasoning by the Appeals Chamber.

### **Submissions**

9. The Pre-Trial Chamber has acknowledged that “the Prosecutor’s ‘responsibility is to seek justice for the complete range of the crimes committed by an accused, even (as article 61(9) anticipates will occur on occasion) if the allegations came to light after the initial confirmation proceedings’.”<sup>11</sup> As it has already recalled,<sup>12</sup> the Prosecution also agrees with the Pre-Trial Chamber that article 61(9) of the Statute requires an “appropriate balance” between the Prosecutor’s prerogative to request additional charges—a prerogative which “cannot and should not be taken away”, in light of her obligation to search for the truth—“and the need to prevent that prerogative from unnecessarily becoming a disruptive factor to the detriment of the Defence”.<sup>13</sup> However, this does not mean, in the Prosecution’s respectful submission, that a request under article 61(9) can only be successful when it will have no

<sup>9</sup> See e.g. [ICC-02/04-01/05-20](#), para. 22. See also [Ngaïssona Certification Request](#), para. 7.

<sup>10</sup> See e.g. [ICC-01/04-02/06-2359](#) (“*Ntaganda Judgment*”), para. 88. See further below fn. 55.

<sup>11</sup> [Decision](#), para. 15.

<sup>12</sup> [Ngaïssona Certification Request](#), para. 8.

<sup>13</sup> [Decision](#), para. 15 (quoting [ICC-01/14-01/18-517](#) (“*Ngaïssona Decision*”), para. 36).

impact at all on “the current trial”.<sup>14</sup> This sets far too high a threshold for article 61(9) determinations, and overlooks both the requirement to balance the competing interests at stake and to take into account the possibility for other procedural measures to avert or mitigate any potential prejudice which might ensue.

10. Similarly, while accepting that the Prosecution may be required to show that it has exercised reasonable diligence in its investigation of allegations which lead to an application under article 61(9),<sup>15</sup> this may not endow the Pre-Trial Chamber with an unfettered discretion to deny such an application where it disagrees with the Prosecutor’s determination as to when the evidence suffices to proceed, or because it considers the Prosecution’s explanation of its determination inadequate.<sup>16</sup>

11. As previously submitted, clarifying the law on article 61(9) will assist the Parties in all cases before the Court, as well as victims, by giving better notice of the significance of the confirmation decision in crystallising the matters to be determined at trial.<sup>17</sup> While the reasoning of a Pre-Trial Chamber on such matters is always instructive, appellate decisions have the potential to harmonise the Court’s practice, promote certainty and predictability, and reduce the need for contentious future litigation. The important matters raised in the Decision would benefit from such treatment.

12. For these reasons, and those expressed in more detail in the following paragraphs, the Prosecution requests the Pre-Trial Chamber to certify the proposed issues in the Decision for the further consideration of the Appeals Chamber.

#### **Four issues arise from the Decision and should be certified for appeal**

13. Four issues arise from the Decision, for which the Prosecution seeks certification to appeal. As the Court has consistently required, “an appealable issue must be ‘an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion’.”<sup>18</sup> The proposed issues each satisfy this requirement.

<sup>14</sup> *Contra* [Decision](#), para. 15 (“such right ‘should only be exercised under circumstances and conditions which would not impact the current trial’”); [Ngaïssona Decision](#), para. 36.

<sup>15</sup> *See also* [Decision](#), para. 19 (text accompanying fn. 26: referring to the Prosecutor’s duty “to timely honour all relevant statutory obligations”).

<sup>16</sup> *Cf.* [Decision](#), para. 18.

<sup>17</sup> *See* [Ngaïssona Certification Request](#), para. 10.

<sup>18</sup> *See e.g.* [ICC-01/04-168 OA3](#), para. 9.

***First proposed issue: the legal consequence, for the purpose of article 61(9), of an allegation constituting an “additional charge”***

14. The first proposed issue is:

Whether a request for an “additional charge” for the purpose of article 61(9) necessarily requires stricter scrutiny than a request for an “amended charge”.

15. This issue is an identifiable subject or topic arising from the Decision, and its resolution is “essential for the determination of matters arising under the judicial cause under examination”.<sup>19</sup> Indeed, while the Pre-Trial Chamber stated that both the amendment and the addition of charges under article 61(9) “[...] must [...] be approached with the utmost caution and limited to the most restrictive of circumstances”,<sup>20</sup> it expressly added that “the need for such caution is ‘all the more urgent’ when adjudicating the addition of new charges which entails an incidental procedure such as a new confirmation hearing.”<sup>21</sup> This can only be interpreted to mean that the Pre-Trial Chamber applied a greater degree of caution still—in other words, a stricter standard—to the Request because it entailed additions to, and not merely the amendment of, the charges against Mr Yekatom. This approach permeated all the reasoning in the Decision.

16. The Pre-Trial Chamber’s determination to apply the greatest possible caution to the Request is evident from its apparent observation that it would not permit any “impact” at all on “the current trial”.<sup>22</sup> This appears to be the same approach taken in the previous Ngaiissona Decision,<sup>23</sup> which in the Prosecution’s submission constituted an error of law even if—for the sake of argument—it was not erroneous in that context to treat the Prosecution request in respect of Mr Ngaiissona as a request to add to the charges, rather than merely to amend them.<sup>24</sup>

17. Underpinning the view in the Decision that stricter scrutiny—or ‘greater caution’—is required for potential additions to the charges is the requirement of a further confirmation

<sup>19</sup> [ICC-01/04-168 OA3](#), para. 9. See also [ICC-01/04-01/10-443](#), p.4; [ICC-01/09-02/11-275](#), para 11; [ICC-01/09-02/11-211](#), para 12; [ICC-01/04-01/10-288](#), p.6.

<sup>20</sup> [Decision](#), para. 12. See also paras. 14 (recalling that “the Chamber considered ‘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’”), 15 (“the circumstances listed by the Prosecutor as warranting the amendment or addition must be carefully scrutinised”).

<sup>21</sup> [Decision](#), para. 12 (emphasis added).

<sup>22</sup> See [Decision](#), para. 15.

<sup>23</sup> See [Ngaiissona Certification Request](#), paras. 16-18, 23.

<sup>24</sup> See [Ngaiissona Certification Request](#), paras. 15, 20-22, 24-25.

hearing, which the Pre-Trial Chamber considered would necessarily entail an unacceptable degree of delay to the commencement of the trial and the time spent by the Accused in pre-trial detention.<sup>25</sup> Indeed, so strict was the standard applied that all such hearings were treated the same: the Decision contains no concrete analysis of the nature of the hearing which would actually be required in this case, or the limited scope of the evidence underpinning the allegations in question (and which would consequently enable a limited, focused hearing).<sup>26</sup> Nor does the Decision contain any discussion of the Prosecution's proposals as to how such a hearing might be expedited.<sup>27</sup> This both illustrates that a strict standard was in fact applied, and the legal error inherent to it. Rather than deciding *a priori* that the request concerned an addition to the confirmed charges, and should thus be subject *per se* to the strictest possible scrutiny, the Pre-Trial Chamber should instead have included the procedural consequences of the requested addition (including a forecast of the complexity of the hearing required) as one of the considerations to be balanced against the factors supporting the addition. If it had done so, it would have determined that the further confirmation hearing required in this case need not have been especially burdensome to the Defence, nor resulted in any unnecessary, disproportionate or unreasonable extension to their time in pre-trial custody.

18. The proposed issue is no mere disagreement with the outcome of the Decision, but rather goes to the essence of the law governing the Pre-Trial Chamber's assessment under article 61(9) of the Statute. This question is ripe for the adjudication of the Appeals Chamber, in order to harmonise the practice of the Court between cases, and to provide greater certainty for all Parties and participants on this important matter.

***Second proposed issue: assessment of reasonable diligence for the purpose of article 61(9), when it has been determined that material circumstances are unclear***

19. The second proposed issue is:

Whether—in the context of an article 61(9) request—the Pre-Trial Chamber may make an adverse ruling on the “reasonable diligence” of the Prosecution in conducting investigative activities when it has concluded that material aspects of the Prosecution's activities, and the reasons for those activities, have not been explained to its satisfaction.

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<sup>25</sup> See [Decision](#), paras. 14, 19.

<sup>26</sup> See [Decision](#), para. 19.

<sup>27</sup> See [Request](#), paras. 39-45.

20. This Second Issue is likewise an identifiable subject or topic arising from the Decision, and its resolution was also essential for the matters presented for judicial determination.<sup>28</sup> It is unique to the Decision, and is not akin to any of the issues arising from the *Ngaïssona* Decision.

21. In assessing whether the Prosecution had exercised reasonable diligence justifying the timing of the Request, the Pre-Trial Chamber considered that the Prosecution had not “adequately explained” what “additional details and clarifications” were needed with regard to the statement of one of the two witnesses upon which the Prosecution relied.<sup>29</sup> It further considered that the Prosecution had not explained whether these clarifications were eventually obtained, or how they were taken into account by the Prosecution in its further course of action.<sup>30</sup> Yet, having decided that these questions were material to its assessment of reasonable diligence, but that it was not sufficiently apprised of them, the Pre-Trial Chamber nonetheless proceeded to make an adverse ruling.<sup>31</sup> In other words, in the absence of what it considered to be relevant information, the Decision exhibited a presumption that the Prosecution had *not* exercised reasonable diligence.

22. No legal basis for a presumption of lack of prosecutorial diligence was articulated in the Decision—indeed, the Pre-Trial Chamber expressly recalled the established law that investigations *may* in certain circumstances properly continue after the confirmation decision<sup>32</sup>—nor is it apparently consistent with articles 42 and 54 of the Statute, which provide that it is for the Prosecutor independently to carry out investigations, and stipulate that this is a matter in which she will be “highly competent” and have “extensive practical

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<sup>28</sup> See *above* fn. 19.

<sup>29</sup> [Decision](#), para. 18 (“the Prosecution has not adequately explained (i) what ‘additional details and clarifications’ were needed in respect of the second statement; (ii) why these were necessary to ‘determine whether to seek the amendment of charges’”).

<sup>30</sup> [Decision](#), para. 18 (“the Prosecutor has not adequately explained [...] (iii) whether the desired clarifications were eventually obtained; and (iv) whether and, in the affirmative, how these clarifications were taken into account in the decision-making process underlying the Request”). Likewise, with regard to the other relevant witness, the Pre-Trial Chamber again seems to have relied on a perceived ambiguity in the Request as the basis for its adverse ruling: [Decision](#), para. 18 (“it does not mention specific obstacles with respect to the witness who was interviewed as early as September 2019 [...] it is unclear why”).

<sup>31</sup> [Decision](#), paras. 18 (“The Chamber is not persuaded that the circumstances illustrated by the Prosecutor constitute adequate justification for not having finalised the collection of the evidence supporting the Request (or at least part of it) in a more efficient manner, in particular [...] the Prosecutor has not adequately explained [...]”), 19 (prefixing the reasoning concerning the balancing test required by article 61(9) with the words “In light of the above”).

<sup>32</sup> See [Decision](#), para. 19 (recalling that, while “the Prosecutor’s investigation ‘should largely be completed at the stage of the confirmation of charges hearing’”, the Appeals Chamber has confirmed that the Prosecution may continue to investigate beyond this point “to the extent ‘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’”).

experience”.<sup>33</sup> While it is wholly accepted that the Prosecution may well be obliged to explain its conduct to the Pre-Trial Chamber, where the Court’s legal texts require, it is nonetheless impermissible to make an adverse ruling solely on the basis that the Pre-Trial Chamber considers its submissions to be unclear on particulars which the Pre-Trial Chamber considers relevant. Rather, in such circumstances, the Pre-Trial Chamber should exercise its power—which other Pre-Trial Chambers seised of article 61(9) requests have even described as a duty<sup>34</sup>—to request further submissions from the Prosecution, if necessary on an *ex parte* basis. This is particularly the case where the Prosecution has been obliged to address matters which would normally be confidential (pertaining to its internal decision-making on investigative matters, and its evaluation of the evidence) in an *inter partes* forum. Indeed, in support of the Request, the Prosecution had in any event already filed materials relevant to the Pre-Trial Chamber’s desired clarifications, on an *ex parte* basis.<sup>35</sup>

23. This Second Issue necessarily affects the ultimate conclusion of the Pre-Trial Chamber in the Decision since, if the Pre-Trial Chamber had determined that the Prosecution *had* been reasonably diligent, this would have affected the balancing exercise undertaken for the purpose of article 61(9).

***Third proposed issue: assessment of reasonable diligence for the purpose of article 61(9), based on disagreement with the Prosecutor’s exercise of discretion under article 61(9)***

24. The third proposed issue is:

Whether the Pre-Trial Chamber may make an adverse ruling on the “reasonable diligence” of the Prosecution in conducting investigative activities based on the Pre-Trial Chamber’s disagreement with the Prosecutor’s exercise of discretion under article 61(9) based on her appreciation of the relevant evidence.

25. Again, this Third Issue is an identifiable subject or topic arising from the Decision, and its resolution was essential for the matters presented for judicial determination.<sup>36</sup> Like the Second Issue, it is unique to the Decision, and is not akin to any of the issues arising from the Ngaïssona Decision.

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<sup>33</sup> See e.g. [Statute](#), art. 42(3).

<sup>34</sup> See [ICC-01/09-02/11-700-Corr](#) (“Kenya Amendment Decision”), para. 21.

<sup>35</sup> For reference to the confidential and *ex parte* annexes A-D, see [Request](#), paras. 7, 18 (fn. 20), 24 (fns. 26, 28), 25 (fns. 29-30).

<sup>36</sup> See above fn. 19.

26. In assessing whether the Prosecution had exercised reasonable diligence justifying the time at which the Request was submitted, the Pre-Trial Chamber also examined the investigation into the evidence of a second witness. In this regard, it reasoned:

Furthermore, and critically, while the Prosecutor does submit having faced difficulties contacting one of the relevant witnesses (the one who was interviewed at a later stage [and who primarily forms the subject-matter of the Second Issue, above]), it does not mention specific obstacles with respect to the witness who was interviewed as early as September 2019. As the evidence in relation to the crimes committed against this witness was secured in September 2019, *it is unclear why the Prosecutor did not file a request under article 61(9) at an earlier stage.*<sup>37</sup>

27. On this basis too, the Pre-Trial Chamber proceeded to rule that the Prosecution had not exercised reasonable diligence justifying the timing of the Request.<sup>38</sup>

28. Even if the Pre-Trial Chamber was entitled to make an adverse ruling simply on the basis that it considered the Prosecution had not sufficiently anticipated the Pre-Trial Chamber's concerns in its Request (addressed in the Second Issue, above), it was still erroneous for the Pre-Trial Chamber to take into account the Prosecutor's exercise of discretion under articles 54(1) and 61(9) as an aspect of her diligence—specifically, her discretion as to *when* she considered (based on her own internal analysis) that the evidence which had been gathered was sufficient to justify bringing the Request.

29. The Prosecutor's determination *when* it is appropriate to bring an article 61(9) request (based on her internal appreciation of the material evidence, and other relevant considerations) is not itself reviewable by the Pre-Trial Chamber, provided it is clear that she has been reasonably diligent in gathering the information she eventually decides to rely upon, and in taking other associated decisions. Such matters reflect the Prosecutor's own discretion in “conducting investigations and prosecutions before the Court”,<sup>39</sup> and are essentially a question of judgement and professional opinion. They are not a matter of constancy in

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<sup>37</sup> [Decision](#), para. 18 (emphasis added).

<sup>38</sup> *See above* fn. 31.

<sup>39</sup> [Statute](#), art. 42(1).

application, perseverance in endeavour, assiduity, or industry, which are the hallmarks of ‘diligence’.<sup>40</sup>

30. To put it another way, the Prosecution cannot properly be said not to be reasonably diligent if it has waited to obtain two witnesses on a given issue, and done so diligently, and not proceeded solely on the basis of one. Not only would such an approach be wrong in principle but it would, indeed, be counter-productive since it would encourage the Prosecution to file a string of article 61(9) applications as each new piece of relevant evidence was obtained, to the detriment of judicial economy for all Parties and participants concerned.

31. Moreover, even on matters which properly fall within the realm of diligence at all, the qualification that the Pre-Trial Chamber may only assess whether the Prosecution has been *reasonably* diligent underlines that the Prosecution is entitled to a margin of appreciation. It is not for the Pre-Trial Chamber to make an adverse ruling merely because it might have come to a different decision, but only if it considers that the Prosecution’s decision was an *unreasonable* one.

32. The Decision simply presents no reasoning on these issues. Nor did it address persuasive authority on this point, set out in the Request, which affirms both that:

- “[r]easonable diligence must be understood with regard to the realities facing the parties, not measured by what a party with infinite time and limitless investigative resources might have discovered or understood”, and this obligation should not “impose an unreasonable burden on the parties; one that would require virtual investigative perfection in spite of the circumstances”;<sup>41</sup> and that,
- “[u]nder some circumstances, the Prosecution might justifiably wait to file an amendment while it continues its investigation so as to determine whether further evidence either strengthens its case or weakens it.”<sup>42</sup>

<sup>40</sup> See e.g. *Oxford English Dictionary*, “diligent, *adj.* and *adv.*” (“A. *adj.* 1. Of persons: ‘Constant in application, persevering in endeavour, assiduous’, industrious; ‘not idle, not negligent, not lazy’ (Johnson). 2. Of actions, etc: Constantly or steadily applied; prosecuted with activity and perseverance; assiduous. [...]”).

<sup>41</sup> Request, para. 21 (quoting ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Motion to Reopen the Prosecution Case, 9 May 2008, para. 31).

<sup>42</sup> Request, para. 22 (quoting ICTR, *Prosecutor v. Muvunyi*, ICTR-55A-AR73, Decision on Prosecution Interlocutory Appeal against Trial Chamber II Decision of 23 February 2005, 12 May 2005, para. 51).

33. This Third Issue necessarily affects the ultimate conclusion of the Pre-Trial Chamber in the Decision since, if the Pre-Trial Chamber had determined that the Prosecution *had* been reasonably diligent, this would have affected the balancing exercise undertaken for the purpose of article 61(9).

***Fourth proposed issue: exercise of the Pre-Trial Chamber’s discretion under article 61(9)***

34. The fourth proposed issue is:

Whether the Pre-Trial Chamber properly and reasonably exercised its discretion under article 61(9) in light of the material circumstances.

35. This Fourth Issue is an identifiable subject or topic arising from the Decision, and its resolution was essential for the matters presented for judicial determination.<sup>43</sup> In its legal framework, it is substantially similar to the Third Issue arising from the *Ngaïssona Decision*,<sup>44</sup> and it shares some of the same approach, but it is fact-sensitive and it is applied to different circumstances.

36. The Fourth Issue arises from the reasoning in the Decision, which expressly recognised that the “the circumstances listed by the Prosecutor as warranting the [...] addition must be carefully scrutinised”,<sup>45</sup> and concluded that “the circumstances illustrated by the Prosecutor [did not] constitute adequate justification for not having finalised the collection of the evidence supporting the Request (or at least part of it) in a more efficient manner”,<sup>46</sup> and that:

[In this] light [...], and after careful consideration of the need to assess and balance the rights of both the accused and the victims, the Chamber believes that the disruption caused to the Defence, the delay to the commencement of the trial and the prolongation of the accused’s pre-trial custody inherent to the addition of the charges underlying the Request would not be warranted.<sup>47</sup>

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<sup>43</sup> See above fn. 19.

<sup>44</sup> See [Ngaïssona Certification Request](#), paras. 38-43.

<sup>45</sup> [Decision](#), para. 15.

<sup>46</sup> [Decision](#), para. 18.

<sup>47</sup> [Decision](#), para. 19. In the Decision, the Pre-Trial Chamber did not elaborate on these factors in the same detail that it did in its previous decision under article 61(9), but it is understood that this same reasoning in relevant part is incorporated implicit: see further [Ngaïssona Decision](#), paras. 31-35 (referring to the “burden for the defence team, forced to remain simultaneously engaged both before the Pre-Trial Chamber” for the purpose of article 61(9) proceedings “and the Trial Chamber”; the “need to avoid delays to the trial”, particularly in light of “the right of the accused to be tried expeditiously”; and the fact that the Pre-Trial Chamber “is no longer responsible for deciding custody matters” and consequently is not itself in a position “to consider provisional

37. In addition to these factors, the Decision also expressly took into account:

- “the ‘marginal’ nature of the requested addition”, which the Pre-Trial Chamber considered to “strengthen[] the conclusion that granting the Request cannot be regarded as necessary with a view to honouring the Court’s obligation to determine the truth”;<sup>48</sup>
- the duty of the Prosecution “to timely honour all relevant statutory obligations”; and
- the “critical function” of the confirmation decision “in determining the boundaries of the trial”, and the need to prevent the Prosecutor’s prerogative under article 61(9) from “transform[ing] the trial to be opened on the confirmed charges into a moving target.”<sup>49</sup>

38. As previously submitted, it is settled law that the discretion vested in the Pre-Trial Chamber under article 61(9) is not unfettered, and must take account of “all relevant circumstances surrounding the case at this stage of the proceedings”, based not only on the “Prosecutor’s Request” but also any “other relevant information which the Pre-Trial Chamber could seek if necessary”.<sup>50</sup> While it is necessary and correct for the Pre-Trial Chamber to take into account the rights of the accused, this must not be speculative and must also take into account the potential countervailing measures which might be taken to avert any potential prejudice, as well as the interests which might militate in favour of adding to the charges.<sup>51</sup>

39. The Prosecution respectfully submits that, in its balancing exercise, the Pre-Trial Chamber misappreciated two factors, specifically:

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release as a counterweight to the detrimental impact” that article 61(9) proceedings may have “*per se* on the Defence strategy and resources”). Since these considerations were not expressly set out in the Decision, they will not be addressed further in this application, *but see* [Ngaißsona Certification Request](#), para. 42 (in relevant part).

<sup>48</sup> [Decision](#), para. 19.

<sup>49</sup> [Decision](#), para. 19.

<sup>50</sup> See [Kenya Amendment Decision](#), para. 21.

<sup>51</sup> See further e.g. [Prosecutor v. Nizeyimana, ICTR-2001-55-PT, Decision on Prosecutor’s Request for Leave to File an Amended Indictment, 22 September 2010](#); [Prosecutor v. Tolimir, IT-05-88/2-PT, Written Reasons for Decisions on Prosecution Motion to Amend the Second Amended Indictment, 16 December 2009](#); [Prosecutor v. Setako, ICTR-04-08-I, Decision on the Prosecution’s Request to Amend the Indictment, 18 September 2007](#); [Prosecutor v. Rukundo, ICTR-2001-70-PT, Decision on the Prosecutor’s Request for Leave to File an Amended Indictment, 28 September 2006](#); [Prosecutor v. Bošković and Tarčulovski, IT-04-82-PT, Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions challenging the Form of the Proposed Indictment, 1 November 2005](#); [Prosecutor v. Renzaho, ICTR-97-31-I, Decision on the Prosecutor’s Motion for Leave to Amend the Indictment, 18 March 2005](#); [Prosecutor v. Simba, ICTR-2001-76-I, Decision on motion to Amend Indictment, 26 January 2004](#); [Prosecutor v. Brđanin and Talić, IT-99-36, Decision on Filings of Replies \(TC\), 7 June 2001](#), para. 3.

- the exercise of reasonable diligence by the Prosecution, which should have been established even on the information presented in the Request, bearing in mind the extensive nature of the other charges, and the difficulties of the investigation in light of the Court’s cooperation framework and the particular circumstances of this situation, which were not apparently considered in the Decision; and
- the importance of the new allegations, whose significance in establishing the truth was not “marginal”, and cannot properly be equated with their discrete nature and the relatively limited extent of the underlying evidence.<sup>52</sup> Indeed, such an approach not only contradicts the principle that even the evidence of a single witness may suffice for conviction,<sup>53</sup> but also overlooks the fact that these allegations would establish a basis to try Mr Yekatom for an entirely different form of criminality (sexual violence) than that with which he is charged, and which is moreover a form of criminality to which the Statute urges particular attention.<sup>54</sup>

40. The Prosecution further submits that the Pre-Trial Chamber’s reasoning (as laid out in the Decision) did not take into account, or otherwise did not take sufficient account, of various other relevant factors. These included:

- the degree to which any further confirmation hearing would be limited in its scope, given the limited nature of the additional evidence on which the Prosecution proposed to rely;
- the significance of the Prosecutor’s duty to establish the truth for its further investigations, including after the confirmation decision in certain circumstances;

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<sup>52</sup> Compare [Decision](#), para. 19 (“The Prosecutor explicitly acknowledges that the inclusion of the additional charges ‘would have only a minimal impact on the size and duration of the Prosecution’s case’, which ‘would be marginal, at most’. In the view of the Chamber, the ‘marginal’ nature of the requested addition strengthens the conclusion that granting the Request cannot be regarded as necessary with a view to honouring the Court’s obligation to determine the truth”), with [Request](#), para. 15 (“The Additional Charges are important to the Court’s duty to establish the truth”).

<sup>53</sup> See e.g. [ICC-01/04-01/06-3121 A5](#), para. 218; ICTY, [Prosecutor v. Delalić et al., IT-96-21-A, Judgment, 20 February 2001](#), para. 506 (“there is no legal requirement that the testimony of a single witness on a material fact [must] be corroborated before it can be accepted as evidence. What matters is the reliability and credibility accorded to the testimony”).

<sup>54</sup> See [Statute](#), art. 54(1)(b).

- the particular difficulty which may be encountered in obtaining prompt evidence of sexual violence,<sup>55</sup> the emphasis given in the Statute to addressing such allegations where the Prosecutor considers them to be well-founded, and the potential chilling effect on the future cooperation of victims of similar allegations where the Court is apparently unwilling to proceed in this regard;<sup>56</sup>
- the interests of the victims which, with the exception of a description of their submissions and one passing reference in the Pre-Trial Chamber’s reasoning, are not substantively addressed, in particular with regard to the interests of the victims directly affected by the Decision;<sup>57</sup> and
- the *cumulative* effect of the requests (in the Pre-Trial Chamber’s understanding) to add to the charges for both Mr Yekatom *and* Mr Ngaïssona, which meant that neither defendant was put to the burden of a delay to the trial which was not necessary in light of the charges which they might individually face.

41. Finally, it is also submitted that some of the factors taken into account were irrelevant, or could only be assigned very limited weight. These included:

- the impact on the expeditious hearing of the trial, which can be mitigated by the case management powers of the Trial Chamber (and which should not be pre-empted by the Pre-Trial Chamber ), and in which respect a trial date is not yet set; and
- the impact on the pre-trial custody of the accused, and particularly their internationally recognised right to liberty, insofar as—contrary to the apparent view in the Decision<sup>58</sup>—a limited and proportionate period of additional pre-trial detention may properly be regarded as “necessary” and “reasonable” and thus lawful.<sup>59</sup>

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<sup>55</sup> See e.g. [Ntaganda Judgment](#), para. 88 (finding that “cultural or communal stigmatisation, shame and fear, as well as the general lack of trust in authorities, [are] factors which can explain the difficulties faced in coming forward [as victims of alleged rape or sexual slavery], especially in a conflict or post-conflict area”, and characterising “delayed reporting of instances of rape, including after conversations with a counsellor or therapist, to be an understandable consequence of the victims’ alleged experience”).

<sup>56</sup> See [Statute](#), art. 54(1)(b).

<sup>57</sup> See [Decision](#), paras. 10, 19.

<sup>58</sup> See [Decision](#), paras. 13-14, 19.

<sup>59</sup> See further e.g. [ICC-01/05-01/13-969 OA5 OA6 OA7 OA8 OA9](#), para. 45 (“the duration of time in detention pending trial is a factor that needs to be considered along with the risks that are being reviewed under article 60 [] of the Statute [...] In the context of the legal framework of the Court, such a determination requires balancing the risks under article 58(1)(b) of the Statute that were found to still exist against the duration of detention, taking into account relevant factors that may have delayed the proceedings and the circumstances of the case as

42. The Fourth Issue is plainly an identifiable subject or topic requiring a decision for its resolution, and not a mere disagreement with the Decision itself. In particular, it raises the question for the Appeals Chamber's adjudication as to the types of factors which may properly be taken into account in deciding article 61(9) applications, and the basis upon which the Pre-Trial Chamber may reach its conclusions.

***All four proposed issues should be certified for appeal***

43. It is necessary to certify for appeal *all four* of the proposed issues, in light of their different scope, and their interlocking impact on the outcome of the Decision. The First Issue asks whether it was indeed necessary to require stricter scrutiny of the Request because it contemplated the addition of charges, irrespective of the limited nature of the evidence to be considered in any further confirmation hearing. The Second Issue and the Third Issue consider different aspects of the law relating to the Pre-Trial Chamber's assessment of whether the Prosecution had acted with reasonable diligence, which was a significant factor in its balancing exercise under article 61(9) of the Statute. And the Fourth Issue inquires into the factors which a Pre-Trial Chamber can properly consider in this analysis, as well as to whether the Pre-Trial Chamber in this particular situation erred in its appreciation of those factors it actually took into account.

44. Only by considering all four of these issues can the Appeals Chamber engage with the full reasoning of the Pre-Trial Chamber in the Decision.

**The proposed issues each significantly affect the fair and expeditious conduct of the proceedings**

45. Each of the proposed issues significantly affects the fair and expeditious conduct of the proceedings.

46. The proposed issues significantly affect the fair conduct of the proceedings because they directly relate to the Prosecution's ability in this case to exercise the powers and to fulfil the duties set out in article 54(1) of the Statute. This has previously been confirmed as a core procedural right which is essential to the fairness of the adversarial proceedings of this

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a whole [...] Interim release and the issue of the reasonableness of the period of detention are fact intensive and case specific [...] [T]he circumstances of the specific case as a whole will always be the guiding factor").

Court,<sup>60</sup> particularly when “the treatment of particular individuals”, including “victims”, is at stake.<sup>61</sup>

47. Notably, the Decision conclusively determines the extent to which the trial will be able to make an objective assessment of the truth of the factual allegation which the Prosecution seeks to introduce, and which the Prosecution respectfully submits constitutes a “fact[] and evidence relevant to an assessment of whether there is criminal responsibility under this Statute”.<sup>62</sup> For this reason, the Prosecution considers itself obliged to have made the Request, and this present application, in pursuance of its duty to “[t]ake appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so respect the interests [...] of victims” and to “take into account the nature of the crime, in particular where it involves sexual violence [or] gender violence”.<sup>63</sup> While the Prosecution agrees that its duty to “[f]ully respect the rights of persons arising under this Statute” encompasses not only the rights of victims, but also accused persons,<sup>64</sup> it respectfully submits that the Request is not inconsistent with the right to an adequate defence. Yet in any event, any such questions which may arise are precisely why the proposed issues satisfy the requirement of article 82(1)(d), and should be certified for appeal.

48. It is a consequence of the Decision that, as it stands, the victims of the allegations in question will in all probability have no other way to obtain justice at this Court, or indeed will Mr Yekatom have an opportunity to clear his name in these respects.

49. In addition, the proposed issues significantly affect the expeditious conduct of the proceedings because they relate to the duration of the pre-trial and trial proceedings. Indeed, the Pre-Trial Chamber’s view of the impact of the Request on the speed of the proceedings was one of the chief reasons for its decision.<sup>65</sup>

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<sup>60</sup> See [ICC-01/04-135-tEN](#), paras. 38-39 (“The term ‘fairness’ [...] means equilibrium, or balance. [...] Equity of the proceedings entails equilibrium between the two parties, which assumes both respect for the principle of quality and the principle of adversarial proceedings. In the view of the Chamber, fairness of the proceedings includes respect for the procedural rights of the Prosecutor, the Defence, and the Victims [...] The Chamber also holds that within the context of the Statute, respect for the fairness of the proceedings with regard to the Prosecutor, at the investigation phase of a situation, means that the Prosecutor must be able to exercise the powers and fulfil the duties listed in article 54”).

<sup>61</sup> See [ICC-01/04-01/06-2463](#), para. 30.

<sup>62</sup> See [Statute](#), art. 54(1)(a).

<sup>63</sup> See [Statute](#), art. 54(1)(b).

<sup>64</sup> See [Statute](#), art. 54(1)(c).

<sup>65</sup> See e.g. [Decision](#), para. 19 (referring to “the delay to the commencement of the trial”).

**The proposed issues significantly affect the outcome of any trial**

50. The proposed issues significantly and necessarily affect the outcome of the trial.<sup>66</sup> Quite simply, because of the Decision, the Trial Chamber will not be able to rule in its final judgment on the factual allegations which the Prosecution seeks to introduce, either to convict Mr Yekatom of responsibility for these incidents or to acquit him.

**Immediate resolution of the proposed issues by the Appeals Chamber may materially advance the proceedings**

51. For similar reasons, immediate resolution by the Appeals Chamber of the proposed issues not only may but *will* materially advance the proceedings, in the sense that it would confirm whether the factual allegations which the Prosecution has sought to introduce should properly be included in the scope of the trial,<sup>67</sup> which has not yet started. No trial date has yet been set, and any interlocutory appeal can be expeditiously decided.

52. While interlocutory appeal proceedings will necessarily take some period of time, this will not prejudice the outcome of any further assessment which may be required by the Pre-Trial Chamber under article 61(9) of the Statute. The Trial Chamber is competent to take measures to avoid any prejudice to the Defence arising from any future amendment or addition to the charges, including by making directions as to the order in which the Prosecution will be permitted to present its case.<sup>68</sup>

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<sup>66</sup> See [ICC-01/09-01/11-912](#) (“*Ruto and Sang Charges ALA Decision*”), para. 65 (accepting that, “in the circumstances of the present case, the [proposed issue] would significantly affect the outcome of the trial as additional crimes allegedly committed [...] will not form the factual basis upon which the judgment pursuant to article 74 of the Statute will be rendered”).

<sup>67</sup> See also [Ruto and Sang Charges ALA Decision](#), para. 66.

<sup>68</sup> This is not to say that article 61(9) proceedings may continue after the start of trial, but only that any potential prejudice resulting from the completion of such proceedings relatively close to the trial date may be averted by the exercise of the Trial Chamber’s case management powers.

### Conclusion

53. For the reasons above, the Pre-Trial Chamber is respectfully requested to certify the proposed issues for appeal.<sup>69</sup>



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Fatou Bensouda, Prosecutor

Dated this 8<sup>th</sup> day of June 2020

At The Hague, The Netherlands

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<sup>69</sup> See above para. 5.