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Pénale
Internationale**



**International
Criminal
Court**

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Date: 14 April 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-ÉDOUARD NGAÏSSONA***

Public Document

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"

Source: Common Legal Representatives of Victims

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

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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 “CLRV”) hereby file their 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” (the “Prosecution’s Request” or the “Request”).¹ Although the Prosecution’s Request relates to a crime falling under ‘other crimes’, the present submission is filed jointly as it addresses the legal criteria under article 61(9) of the Rome Statute (the “Statute”), a matter of common interest for both teams.

2. The Common Legal Representatives submit that the Prosecution’s Request fulfils the requirements for the amendment of charges pursuant to article 61(9) of the Statute and should therefore be granted. In particular, the Common Legal Representatives contend that the Request is properly supported, justified and timely. Moreover, it is in the interest of the participating victims because it contributes to the search for the truth and to better understand the extent of the victimisation.

3. As regards the remainder of the Prosecution’s Request, the Common Legal Representatives support the application for correction of the Decision confirming the charges, insofar as it seeks to rectify a purely technical error. Finally, they take note of the Prosecution’s intention to further request the addition of charges against Mr Yekatom and reserve their right to make observations in due course.

¹ 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 issued on 31 March 2020; see [No. ICC-01/14-01/18-468-Red](#) (the “Prosecution’s Request” or the “Request”).

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”).²

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”).³

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”).⁴

7. On 6 March 2020, the Common Legal Representatives⁵ and the Defence⁶ filed their respective responses to the Prosecution’s Request for Reconsideration or Leave to Appeal.

² 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 issued on 18 September 2019, see [No. ICC-01/14-01/18-282-AnxB1-Red](#) (the “Document Containing the Charges” or the “DCC”).

³ 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, see [No. ICC-01/14-01/18-403-Red](#) (the “Decision confirming the charges”).

⁴ 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 (the “Prosecution’s Request for Reconsideration or Leave to Appeal”).

⁵ See the “Common Legal Representatives’ Joint Response to the Prosecution’s Request for Reconsideration or Leave to Appeal”, [No. ICC-01/14-01/18-442](#), 6 March 2020.

⁶ See the “Yekatom Defence Opposition to Prosecution’s Request for Reconsideration or Leave to Appeal Confirmation Decision”, [No. ICC-01/14-01/18-443](#), 6 March 2020.

8. On 11 March 2020, the Chamber rejected the Prosecution's Request for Reconsideration or Leave to Appeal and ordered the Registrar to transmit the Decision confirming the charges and the record of the case to the Presidency.⁷

9. On 13 March 2020, the record of the case was transmitted to the Presidency.⁸

10. On 16 March 2020, the Presidency constituted Trial Chamber V (the "Trial Chamber") and referred the present case to it.⁹ On the same day, Judge Schmitt was elected Presiding and Single Judge of the Trial Chamber.¹⁰

11. On 31 March 2020, the Prosecution filed the Request, *inter alia*, giving notice of a forthcoming application to add charges against Mr Yekatom.¹¹

12. On 1 April 2020, the Common Legal Representatives requested by e-mail authorisation to file a consolidated joint response to the Prosecution's Request and to the forthcoming application to add charges once the latter will be filed.¹²

13. On the same day, the Defence for Mr Ngaïssona asked that, should the CLRV's request be granted, the time limit for the Defence to respond to both the Prosecution's Request and the CLRV's response, start running upon reception of the latter, regardless of whether the CLRV are permitted to file a consolidated response.¹³

⁷ 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.

⁸ See the "Transmission to the Presidency of the record of the proceedings, including the Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona", [No. ICC-01/14-01/18-449](#), 13 March 2020.

⁹ 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.

¹⁰ See the "Decision notifying the election of a Presiding Judge and Single Judge" (Trial Chamber V), [No. ICC-01/14-01/18-454](#), 17 March 2020.

¹¹ See the Prosecution's Request, *supra* note 1.

¹² See the e-mail sent by the Common Legal Representatives to the Chamber on 1 April 2020 at 12:14.

¹³ See the e-mail sent by the Ngaïssona Defence to the Chamber on 1 April 2020 at 15:17; and the e-mail sent the same day at 15:59.

14. On 2 April 2020, the Defence for Mr Yekatom also requested the Chamber to vary the deadline in order to be in a position to file a consolidated response to the Prosecution's Request and the CLRV's response.¹⁴

15. On 3 April 2020, the Chamber by e-mail rejected the CLRV's request and instructed the parties and participants to file their responses to the Prosecution's Request within the ordinarily applicable time limit.¹⁵

III. SUBMISSIONS

A. The Request for the amendment of the charge complies with the requirements of article 61(9) of the Statute

(1) The request is properly supported and justified

16. In the Decision confirming the charges, the Chamber declined to confirm the charge related to a second rape finding that the factual allegation was not established to the relevant standard, and holding in particular that: "[a]bsent any information as to the identity of the victim and/or the perpetrators, and in light of the fact that the evidence regarding the second rape is indirect and too vague, the Chamber finds that the factual allegation of the Prosecutor is not established to the relevant standard".¹⁶

17. As indicated in the Request, between 12 and 14 February 2020, the Prosecution obtained a statement from the concerned victim, which provides a first-hand account of the crime.¹⁷ Consequently, the Prosecution asks the Chamber to amend the charges pursuant to article 61(9) of the Statute and rule 128 of the Rules of Procedure and Evidence (the "Rules") to include the crime of rape of said victim.¹⁸

18. According to the Pre-Trial Chambers in the *Kenyatta* and *Ruto and Sang* cases, article 61(9) of the Statute allows the Prosecution to request permission to amend the

¹⁴ See the e-mail sent by the Yekatom Defence on 2 April 2020 at 10:45.

¹⁵ See the e-mail sent by the Legal Officer of the Chamber on 3 April 2020 at 08:42.

¹⁶ See the Decision confirming the charges, *supra* note 3, para. 107.

¹⁷ See the Prosecution's Request, *supra* note 1, para. 6.

¹⁸ See the Document Containing the Charges, *supra* note 2, para. 386, and p. 147.

charges up until the commencement of the trial, provided that an application to this effect is properly supported and justified.¹⁹

19. After the confirmation of the charges, *“the Chamber’s permission is a conditio sine qua non for any amendment of the charges [...], as dictated by the Statute. This statutory requirement suggests that the Prosecutor should not benefit from an unfettered right to resort to article 61(9) of the Statute at her ease, particularly, if such permission will negatively affect other competing interests, such as the fairness and expeditiousness of the proceedings, which would result in causing prejudice to the rights of the accused”*.²⁰

20. In this regard, the practice of the Court has clarified that article 61(9) of the Statute provides for the possibility to ask the Pre-Trial Chamber to amend the charges already confirmed in relation to their factual scope, in order to delimit the charges as precisely as possible.²¹

21. Indeed, in the *Kenyatta* case, the Pre-Trial Chamber, after having rejected in the decision confirming the charges the allegation that weapons had been used in Naivasha due to a lack of evidence, re-included said charge following the Prosecution’s subsequent request for amendment after the collection of new evidence substantiating said allegation. In particular, the Pre-Trial Chamber held that *“it is apparent that the nature of the requested amendment does not aim at adding an additional charge or substituting an existing charge with a more serious one. Rather, it is a re-insertion, on the basis of the new evidence presented, of an already known specific factual allegation for*

¹⁹ 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, para. 21. See also 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, par. 31; and 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, para. 53.

²⁰ 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 19, para. 31.

²¹ 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”, *supra* note 19, para. 44.

an existing charge of murder in Naivasha - a location that has already been referred to in the Confirmation of Charges Decision. It follows that the Single Judge does not need to hold a hearing for the purpose of deciding on the Prosecutor's Request".²²

22. Therefore, the Common Legal Representatives submit that the Prosecution's Request fulfils the legal criteria under article 61(9) of the Statute as developed by the jurisprudence of the Court, as it concerns a modification of a charge already confirmed. Indeed, the facts and circumstances concerning the second instance of rape were originally charged and the Prosecution is merely providing further evidence which it was not able to collect prior to the confirmation of charges hearing.

23. In this regard, the practice of the Court requires the Prosecution to provide reasons why such evidence could not be collected prior to the confirmation of charges hearing.²³ In particular, the Prosecution must show that the amendment is "*necessary in order to establish the truth*" or that "*certain circumstances*" exist that justify doing so.²⁴ As explained by the Pre-Trial Chamber in the *Kenyatta* case: "*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. In these circumstances, the Prosecutor 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*".²⁵

24. In the present case, the Prosecution indicates that it only became aware in June 2019 of a potential second victim of sexual violence and that it did not have sufficient time to interview her and to perform other necessary steps to be able to integrate her evidence into the Document containing the charges before the

²² 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 19, para. 29.

²³ 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", *supra* note 19, para. 53.

²⁴ 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 19, para. 36.

²⁵ *Idem*, para. 37.

established deadline of 19 August 2019, also considering the need to translate the witness' statement into French, in order to be able to rely upon it in the DCC.²⁶

25. The Common Legal Representatives consider that the Prosecution has presented proper and sufficient justification, as well as clear explanation, as to why the evidence could not have been collected prior to the confirmation of charges hearing.

26. Furthermore, the Common Legal Representatives recall that, pursuant to article 54(1)(a) of the Statute, the Prosecution has a duty to establish the truth. According to the Appeals Chamber, this duty extends beyond the confirmation hearing and the Prosecution may therefore continue the investigation after said hearing, if this is necessary in order to establish the truth.²⁷ The Common Legal Representatives, therefore, posit that the suggested amendment of charge is necessary to establish the truth.

27. A decision on whether to grant permission to amend the charges should be taken upon assessment of all relevant circumstances surrounding the case,²⁸ *"taking into consideration diverse factors affecting (...) including its fairness, expeditiousness, the rights of the accused as well as those of the victims"*.²⁹

28. In this specific instance, while the participating victims are eager for the trial to start as soon as possible and for the Accused to finally face justice without undue delay, the determination of the truth to the fullest extent nevertheless remains one of their main concerns. Consequently, also in light of the limited charges confirmed,

²⁶ See the Prosecution's Request, *supra* note 1, para. 8.

²⁷ See the "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence'" (Appeals Chamber), [No. ICC-01/04-01/06-568 OA3](#), 13 October 2006, para. 52.

²⁸ 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 19, para. 21.

²⁹ *Idem*, para. 22.

they support the proposed amendment of the charge against Mr Ngaïssona, which will better reflect the broader extent of the victims' suffering and allow them to express their views and concerns.

29. In this regard, in order to ensure that the trial can start without undue delay, the Common Legal Representatives respectfully request the Chamber to deal with the matter as expeditiously as possible.

(2) The Request is timely

30. In accordance with article 61(9) of the Statute, a request to amend the charges must be brought "*before the trial has begun*". The Appeals Chamber in the *Ruto and Sang* case has clarified that the wording of article 61(9) of the Statute prescribes that an amendment of charges is no longer possible after the trial has begun, and that said requirement corresponds to the time of the opening statements.³⁰

31. The Appeals Chamber further held that not only must the request to amend the charges be filed before the commencement of the trial, but also that the entire process of amending the charges must be completed by that time, to ensure clarity in the parameters of the case.³¹

32. In the present instance, the Trial Chamber has just been constituted and the start date of the trial is yet to be determined. Consequently, the request for the amendment of charges was brought well "*before the trial has begun*".

33. In the *Ruto and Sang* case, the request for amendment of charges was rejected, *inter alia*, because the Prosecution had the necessary evidence in their possession for

³⁰ See the "Decision on the Prosecutor's appeal against the 'Decision on the Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute'" (Appeals Chamber), [No. ICC-01/09-01/11-1123 OA6](#), 13 December 2013, para. 27.

³¹ *Idem*, paras. 29 and 31.

almost seven months before the request was filed.³² The Common Legal Representatives posit that *a contrario* in the present instance, the Prosecution filed the Request in a timely manner and with due diligence, just eight weeks after holding the interviews with the victim in question. Consequently, this factor should weight in favour of granting the Request.

(iii) *The Defence will not be prejudiced by the discrete amendment*

34. The Common Legal Representatives submit that the proposed discrete amendment will not be prejudicial to the Defence as the second instance of rape is not a new charge but was already included in the Document Containing the Charges. Considering the fact that the start date of the trial has not yet been decided, the Defence will still have sufficient time to analyse the new evidence supporting the charge and prepare for trial.

35. The Common Legal Representatives submit that the Prosecution is in fact seeking to re-insert a specific factual allegation that was already known to the Defence and addressed in the Decision confirming the charges. This re-insertion, however, will have no effect on the legal characterization of the facts.

36. As stated above, the discrete amendment requested does not constitute an additional or more serious charge. Therefore, no additional hearing is necessary pursuant to rule 128(3) of the Rules in order to decide on the Request.³³

37. Considering the above reasons, authorising the amendment against Mr Ngaïssona will not unduly compromise his right to be promptly informed of the nature, cause and content of the charges, to have adequate time and facilities for the preparation of his defence and to be tried without undue delay, as provided in articles 67(l)(a) to (c) of the Statute.

³² 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 19, para. 37.

³³ See *supra* paras. 20-21 and note 22.

38. The Common Legal Representatives further contend that the amendment requested by the Prosecution at this stage of the proceedings is in the interests of clarity and judicial economy. It is indeed in the interests of clarity, efficiency and expediency that the charges are factually accurate and that they are made available to the Defence and the Trial Chamber before the trial starts.

B. Correction to the Decision confirming the charges

39. In addition, the Prosecution asks for the correction of Count 40, as referenced in the Decision confirming the charges to refer to the crime of rape as prohibited by article 7(1)(g), as a crime against humanity and not to article 8(2)(e)(vi) of the Statute.³⁴

40. The Common Legal Representatives support the request insofar as the correction is sought to rectify a purely technical error.

C. Notice of intention to request for the addition of charges

41. The Common Legal Representatives take note of the Prosecution's intention to subsequently request the addition of charges against Mr Yekatom and reserve their right to make observations in due course.

³⁴ See the Prosecutor's Request, *supra* note 1, para. 11.

IV. CONCLUSION

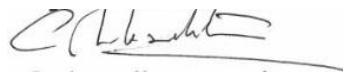
42. For the reasons set out above, the Common Legal Representatives respectfully request the Chamber to grant the Prosecution's Request in its entirety.



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Dated this 14th day of April 2020

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