

**Cour
Pénale
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**International
Criminal
Court**

Original:

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

Date: 16 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-EDOUARD
NGAISSONA***

Public Redacted

**Public Redacted Version of “Defence Response to the Prosecution’s Request to
Amend Charges pursuant to Article 61(9) (ICC-01/14-01/18-468-Conf)”, 14 April
2020**

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) requests Pre-Trial Chamber II (“Chamber”) to amend the charges against Mr Ngaïssona post confirmation to include an alleged instance of rape that the Chamber had specifically refused to confirm (“Request”).¹
2. As developed in its “Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona” (“Confirmation Decision”), the Chamber had determined that this alleged rape was not established to the relevant standard “(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 [was] indirect and too vague.”²
3. Two months after this decision, the Prosecution arranged an interview with the alleged victim, thereby attempting to correct its evidentiary lacuna, and now seeks to have this new evidence inserted into the confirmed charges without providing any valid justification as to why the statement in question could not have been collected before confirmation.
4. In principle, the Prosecution’s investigation “should largely be completed at the stage of the confirmation hearing”.³ While the Prosecution is not barred from continuing its investigations post confirmation of the charges, “the exercise of such discretion should be diligent and professional and should also not lead to abuse.”⁴ Whether the Prosecution has been acting diligently in conducting further investigative steps will be subject to the Pre-Trial Chamber’s scrutiny in the context of an amendment of the charges application.⁵ Indeed, trial chambers have made clear that the Prosecution’s flexibility at this point was very much restricted, that it did not have *carte blanche* or an automatic right to amend the charges, or the word “permission” included in article

¹ICC-01/14-01/18-468-Conf.

²ICC-01/14-01/18-403-Conf, para. 107.

³*The Prosecutor v. Callixte Mbarushimana*, Appeals Chamber, “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’”, ICC-01/04-01/10-514, 30 May 2012, para. 44.

⁴*The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the “Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute, ICC-01/09-01/11-859, 16 August 2013 (“Ruto Decision”), para. 34.

61(9) of the Statute would otherwise be meaningless.⁶

5. As will be elaborated below, the Prosecution in the present case did not demonstrate that it has acted diligently and professionally in collecting such new evidence. This is yet another example of the lack of diligence and organization of the Prosecution, not being ready for the present proceedings, despite having initiated them and having had total control over when to do so, and providing post facto excuses to obtain further delays, to the detriment of the general fairness and expeditiousness of the proceedings.
6. The Defence therefore strongly opposes the Prosecution's request for an amendment of the charges against Mr Ngaïssona at this stage of the proceedings.

II. Confidentiality

7. These submissions are filed as confidential as they respond to a request of the same classification. A public redacted version of the present response will be filed contemporaneously.

III. Procedural history

8. On 7 December 2018, the Chamber issued the "Warrant of Arrest for Patrice-Edouard Ngaïssona",⁷ who was surrendered to the Court by the authorities of the French Republic on 23 January 2019.

⁵*The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, "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'", ICC-01/04-01/06-568, 13 October 2006, para. 53.

⁶ *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the "Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute" ICC-01/09-02/11-700-Corr, 21 March 2013 ("Kenyatta Decision"), paras 19-22, 34 ; Ruto Decision, para. 31 ; *Prosecutor v. Al Hassan*, 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, ICC-01/12-01/18-608-Red, 21 February 2020 ("Al Hassan Decision"), paras 52 and seq.

⁷ICC-01/14-01/18-89-Conf-Exp. A public redacted version is also available, see ICC-01/14-01/18-89- Red.

9. On 20 February 2019, the Chamber issued the “Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters”, thereby joining the cases against Mr Yekatom and Mr Ngaïssona.⁸ The Chamber scheduled the confirmation hearing in the joint case to commence on 18 June 2019.⁹
10. On 4 April 2019, the Chamber issued the “Second Decision on Disclosure and Related Matters”, thereby, *inter alia*, ordering the Prosecution to disclose a list of evidence it intends to present at the confirmation hearing, all evidence within the meaning of article 67(2) of the Statute in its possession or control and all material referred to in rule 77 of the Rules in her possession or control by 17 May 2019.¹⁰
11. On 1 May 2019, the Prosecution filed the “Prosecution’s Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines”.¹¹
12. On 15 May 2019, the Chamber issued its “Decision on the ‘Prosecution’s Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines’”, thereby deciding that the confirmation hearing would commence on 19 September 2019 and fixing a new disclosure deadline to 19 August 2019 at the latest.¹²
13. On 11 December 2019, Pre-Trial Chamber II issued its “Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona”, partially confirming the charges against Mr Patrice-Edouard Ngaïssona.¹³
14. On 30 March 2020, the Prosecution requested the Chamber to amend the charges against Mr Ngaïssona pursuant to article 61(9) of the Rome Statute (“Statute”) and rule 128 of the Rules of Procedure and Evidence (“Rules”).¹⁴

⁸ICC-01/14-01/18-121.

⁹ICC-01/14-01/18-121, para. 18.

¹⁰ICC-01/14-01/18-163, page 16.

¹¹ICC-01/14-01/18-186-Conf-Exp. A confidential redacted version is also available, see ICC-01/14-01/18-186-Conf-Red-Corr.

¹²ICC-01/14-01/18-199.

¹³ICC-01/14-01/18-403-Conf. A public redacted version is also available, see ICC-01/14-01/18-403-Red.

¹⁴ICC-01/14-01/18-468-Conf. A public redacted version is also available, see ICC-01/14-01/18-468-Red.

IV. Submissions

A. The Request is not properly supported and justified

i. Reliance on [REDACTED] and [REDACTED]’s statements was already unjustified in light of the limited scope of the decision to postpone the confirmation of charges

15. The Prosecution presented limited and specific reasons for not being able to meet the initial 17 May 2019 disclosure deadline and for requesting to postpone the confirmation hearing to 19 September 2019 and related disclosure deadlines. None of these reasons included the Prosecution’s need to disclose additional evidence not already obtained. On the contrary, according to the Prosecution, additional time was needed, specifically, to: (i) “*complete the review of its evidence collection*” to [REDACTED]; (ii) [REDACTED] and (iii) ensure the proper implementation of unique pseudonyms.¹⁵
16. The Pre-Trial Chamber granted the requested postponement strictly “in light of the need to ensure the protection of victims and witnesses”.¹⁶ It considered that the delay was necessary in view of the reasons advanced by the Prosecution and “*that, to the extent that the delay [wa]s limited to what [wa]s strictly necessary for the purposes of allowing the Court and the Prosecutor to properly discharge their protective obligations, the need for a postponement outweigh[ed] the prejudice that the suspects may incur*” (emphasis added).¹⁷
17. Yet, the Prosecution used the additional time granted by the Pre-Trial Chamber not only to discharge its protective obligations relating to evidence already in its possession in the spirit of the Chamber’s order but to obtain new evidence. This was the case of the witness statements of [REDACTED] and [REDACTED], obtained in June 2019 and disclosed on 9 August 2019, which led to the addition of a new charge of rape in the Document Containing the Charges.¹⁸

¹⁵ICC-01/14-01/18-186-Conf-Red-Corr, paras 2, 9. *See also* ICC-01/14-01/18-186-Conf-Red-Corr, paras 7-22.

¹⁶ICC-01/14-01/18-199, page 17.

¹⁷ICC-01/14-01/18-199, para. 37.

¹⁸[REDACTED]’s statement was disclosed on 9 August 2019 (INCRIM package 33) and [REDACTED]’s on 5 August 2019 (INCRIM package 17).

18. Therefore, the belated reliance on the witness statements of [REDACTED] and [REDACTED] to justify the inclusion of a new charge of rape in the Document Containing the Charges was already contestable in light of the strict conditions in which the postponement of the confirmation of charges hearing had been granted.

ii. Reliance on [REDACTED]'s statement in support of the Request is not reasonable and justified

19. Turning now to the Prosecution's present application to amend the charges post confirmation to include the witness statement of [REDACTED], for whom vague information had been obtained during [REDACTED], it is absolutely not founded and should be rejected.
20. First, as developed above, given the Chamber's restrictive order, since it is only during [REDACTED], *i.e.* in June 2019, it is very questionable whether it would have been fair to the Defence for the Prosecution to rely on that statement assuming it would have been disclosed by the new 19 August 2019 disclosure deadline.
21. Second, while the Prosecution received information about that witness back in June 2019, *i.e.* over two months before the disclosure of its Document Containing the Charges and over three months before the commencement of the confirmation of charges hearing, it somehow took the Prosecution over nine (9) months to organise an interview with that witness, obtained between 12 and 14 February 2020, *i.e.* two (2) months after the Confirmation Decision.
22. In the *Kenyatta* case, where the Prosecution had attempted to rely on witness statements obtained after the confirmation stage, Trial Chamber V ruled that "[p]ost-confirmation investigation may be appropriate when it pertains to evidence which the Prosecution could not with reasonable diligence have discovered or obtained prior to confirmation."¹⁹ It further added that, however,

[...] the Prosecution should not continue investigating post-confirmation for the purpose of collecting evidence which it could reasonably have been expected to have collected prior to confirmation. If a Trial Chamber finds that this has occurred, it would need to determine the appropriate remedy based on the circumstances of the case. This could include the exclusion of all or part of the evidence so obtained as a remedy for the Prosecution's conduct as well as to allay any potential prejudice caused to

¹⁹*The Prosecutor v. Uhuru Muigai Kenyatta*, Trial Chamber V, "Decision on defence application pursuant to Article 64(4) and related requests", 26 April 2013, ICC-01/09-02/11-728, para. 120.

the accused.²⁰

23. Although in the aforementioned *Kenyatta* case, the new evidence, obtained after the confirmation stage, did not exceed the facts and circumstances described in the confirmed charges, and therefore did not require the Prosecution to follow the specific procedural framework under article 67(9) of the Statute, Trial Chamber V's general ruling in relation to post confirmation investigation, which applies irrespective of whether the Prosecution attempts to rely on new evidence (i) within the confirmed facts and circumstances or (ii) exceeding the facts and circumstances described in the confirmed charges, is relevant to the present case.

24. In the *Ruto and Sang* case, where like in the present case, the Prosecution had requested an amendment of the charges post confirmation without proper justification, the Single Judge rejected its request recalling

[...] her previous finding that the wording of article 61(9) of the Statute allows the Prosecutor to request permission to amend the charges up until the actual commencement of the trial, provided that a request to this effect is properly "supported and justified".²¹

25. Thus, in a scenario where new evidence collected post confirmation of charges is then used to request an amendment of the charges, the Prosecution must explain the reasons why such new pieces of evidence were not collected prior to confirmation. Pre-Trial Chamber II specified in the *Kenyatta* case that

[t]he underlying rationale is that the continued investigation should be related *only* to such essential pieces of evidence which were not known or available to the Office of the Prosecutor prior to the confirmation hearing or could not have been collected for any other reason, except at a later stage. 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. [Emphasis added.]²²

26. In the *Al Hassan* case, the Pre-Trial Chamber, having noted that in its amendment request, the Prosecution had not provided any rationale as to why new witness statements had been obtained after the notification of the amended document

²⁰*Ibid.*, para. 121.

²¹Ruto Decision, para. 31; Kenyatta Decision, para. 21.

²²Kenyatta Decision, para. 37.

containing the charges and even after the 15 day time limit before the confirmation hearing within which the Prosecution could have submitted a new amended version of that document, requested the Prosecution to provide additional observations in relation thereto.²³

27. In the present case, the Prosecution fails to substantiate why [REDACTED] would not have been available for interview before the 19 August 2019 disclosure deadline or even before 4 September 2019, *i.e.* 15 days before the confirmation hearing, and why this statement could not have been collected and disclosed by then.²⁴ The Prosecution by merely arguing that “it was necessary to make arrangements to interview the witness in [REDACTED]” fails to demonstrate the particular difficulty that the organisation of an interview in [REDACTED] would entail.²⁵ The volatile security situation in Central African Republic, which has been repeatedly used by the Prosecution, *inter alia*, to anticipate, request and obtain disclosure delays in the present proceedings, to the detriment of Mr Ngaïssona, cannot for once be invoked in the present scenario.²⁶ One could actually reasonably think that organising an interview in [REDACTED], far away from the alleged perpetrators of the charges and “the volatile security situation”, would make any interview arrangements much easier than the interviews typically organised in Central African Republic. The Defence therefore submits that [REDACTED] cannot justify a time gap of nine months between the obtention of (i) a lead in June 2019 and (ii) the witness statement in February 2020. In light of the above, this justification should be rejected.²⁷

28. The other arguments presented by the Prosecution are totally unfounded and should be disregarded as they relate to circumstances that are *subsequent* to the obtention of the witness statement, namely the assessment of [REDACTED] and the translation of the witness statement, which, took in fact less than a month after the obtention of the

23Al Hassan Decision, para. 55.

24Pursuant to article 61(4) of the Statute, the Prosecution was at liberty, before the confirmation hearing, to continue its investigations and amend any charges.

25Request, para. 8.

26See *e.g.* ICC-01/14-01/18-110-Conf-Red, paras 1, 5; ICC-01/14-01/18-186-Conf-Red-Corr, para. 12, ICC-01/14-01/18-237-Conf-Red, para. 5.

27For an example of dismissal of a similar request before the ICTR for lack of justification, see ICTR, *Prosecutor v Muvunyi*, Decision on the Prosecutor’s Motion for Leave to Amend the Indictment, 23 February 2005, No. ICTR-2000-55A-PT, paras. 46-47.

said interview.²⁸ Therefore, they are totally irrelevant to justifying why this witness statement could not have been obtained prior to the 19 August 2019 deadline or even prior to the commencement of the confirmation hearing.

29. This is yet another example of the erratic use by the Prosecution of its protective obligations towards witnesses to attempt to discharge itself from its obligations of fairness and expeditiousness towards Mr Ngaïssona.²⁹ The Defence wonders how much longer Mr Ngaïssona will continue to pay the consequences of the lack of diligence of the Prosecution which has been apparent from the very start of these proceedings, the Prosecution having gone so far as blaming the delay in the disclosure process on “the unexpected speed at which the Suspects were arrested”.³⁰ The Defence submits that further requests for delays invoking such concerns are not reasonable.
30. In the *Kenyatta* case, the Trial Chamber elaborated on the reasons why it may be appropriate for the Prosecution to postpone investigation until after confirmation, *i.e.*, “if the Prosecution can establish that (a) it could not have taken a particular investigative step prior to confirmation without unduly endangering the security of particular individuals or (b) that it had justifiable reasons for believing that this situation would significantly change after confirmation [...]”.³¹ In the present case, the security of the witness *before* her statement was obtained was never part of the concerns of the Prosecution.³²
31. Justifications that have been considered valid and reasonable in the past, in the only ICC case in which a request for the amendment of the charges has been granted, included (i) lack of cooperation, (ii) security concerns *prior to* the interviews, (iii) incidents regarding intimidation of witnesses and (iv) the difficulty in approaching insider witnesses.³³ This Pre-Trial Chamber even specified that these had been the

28Request, para. 8. This witness statement was disclosed onto E-court on 12 March 2020.

29See *e.g.* ICC-01/14-01/18-186-Conf-Red-Corr, paras 7 and seq.; ICC-01/14-01/18-179-Conf-Red, para. 17; ICC-01/14-01/18-237-Conf-Red, para. 19; ICC-01/14-01/18-267-Conf-Red, para. 12; ICC-01/14-01/18-143-Conf, para. 23. The Defence also notes article 54(1)(c) of the Statute which provides that with respect to investigations, the Prosecution must “fully respect the rights of persons arising under this Statute”.

30ICC-01/14-01/18-186-Conf-Red-Corr, para. 10.

31ICC-01/09-02/11-728, para. 120.

32See Request, para. 8.

33Kenyatta Decision, para. 38.

core reasons weighing in favour of granting this request.³⁴ No such justifications can be found in the present case.

32. The Defence submits that this new evidence would have been available at the confirmation stage had the Prosecution exercised reasonable diligence. In the present case, this new evidence was all the more expected to have been collected prior to confirmation, given the allegation relating to the alleged rape of [REDACTED] was specifically included in the Document Containing the Charges.³⁵ This lead reached the Prosecution reasonably long before the confirmation hearing. It decided to rely on that lead in the Document Containing the Charges, despite not having completed its full investigation in respect of that allegation. As Trial Chamber V recalled, “[t]he Prosecutor should not seek to have the charges against a suspect confirmed before having conducted a full and thorough investigation in order to have a sufficient overview of the evidence available and the theory of the case.”³⁶

33. This shows at the least a lack of diligence prejudicial to Mr Ngaïssona. This Request appears to be nothing else but an attempt by the Prosecution to correct its evidentiary weaknesses after the Pre-Trial Chamber has already determined that this instance of alleged rape did not meet the evidentiary threshold required to include it within the confirmed charge. It is noteworthy that the Prosecution did not present any supporting documentation ascertaining that contact had been made and interview arrangements had been attempted with the witness before the confirmation hearing.

B. The Request causes prejudice to Mr Ngaïssona

i. This request for amendment causes prejudice to Mr Ngaïssona

34. In the *Ruto and Sang* case, it was recalled that “[p]arties and participants in a case are expected to prepare on the basis of the charges as confirmed which shape the subject-matter of the case, and thus, to take into consideration the evidence that is only relevant to the charges confirmed.”³⁷ Thus, the Prosecution’s argument that the

³⁴*Ibid.*

³⁵ICC-01/14-01/18-282-Conf-AnxB1, para. 386.

³⁶ICC-01/09-02/11-728, para. 119.

³⁷Ruto Decision, para. 40.

Defence was on notice of this second instance of confirmed rape charge, and the suggestion that it would have therefore been in a fair position to prepare its case on these aspects, cannot be sustained. The Pre-Trial Chamber made it indeed clear that this factual allegation was not established to the relevant standard and should be excluded from the facts and circumstances of the relevant charge.³⁸

35. Authorising an amendment of the charges in the absence of any valid justification as to the belated nature of the amendment would result in an unfair burden for the Defence, which cannot be confronted to ever shifting charges, and would compromise the rights of Mr Ngaïssona as provided in articles 67(1)(a) to (c) of the Statute.
36. Moreover, if the Chamber were to tolerate such procedural performance, absent any reasonable justification from the Prosecution that it acted diligently, it would give credit to its attempt to obtain an unfair advantage over the Defence and would taint the fairness of the disclosure process, which is a guarantee of fair proceedings, thereby undermining the confirmation process.
37. The Defence submits that in considering Mr Ngaïssona's prejudice, the Chamber should take into consideration the cumulative impact that the various anticipated or requested disclosure delays has had on it, the latest "Prosecution's Observations on the Agenda of the First Status Conference" dated 8 April 2020 being noteworthy in this respect.

ii. The request for the addition of new charges against Mr Yekatom causes further prejudice

38. As a final remark, the Defence is very concerned of the procedural consequences for Mr Ngaïssona of the Prosecution's intent to introduce new charges against Mr Yekatom, which will equate to a new confirmation process. In accordance with article 61(9) of the Statute, this will lead to a further appearance by Mr Yekatom, the preparation of lengthy filings and the likelihood of the postponement of the trial to allow Mr Yekatom adequate time to prepare his defence. In light of the joinder, this will create additional prejudice to Mr Ngaïssona's right to be tried without undue delay and will further prolong Mr Ngaïssona's pre-trial detention. The Defence is all

³⁸ICC-01/14-01/18-403-Conf, para. 107.

the more concerned than the Prosecution already announced that it would not be able to file a comprehensive Pre-Trial Brief until a decision is issued on both requests while admitting not knowing when such new request would be possible given the Covid-19 situation.³⁹

39. This uncertainty in the case against Mr Yekatom has a direct negative impact on Mr Ngaïssona's right to a fair and expeditious trial and causes him additional prejudice.

40. This potential delay of the proceedings pertaining to the mentioned announcement of the Prosecution in Mr Yekatom's case should give cause to reflect on the justification of the joinder of the two cases.

RELIEF SOUGHT

The Defence respectfully requests the Chamber to:

- **DENY** the Prosecution permission to amend the charges at this stage of the proceedings.

Respectfully submitted,



Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 16 April 2020,
At The Hague, the Netherlands.

³⁹ICC-01/14-01/18-474-Conf, para. 13.