

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **26 May 2020**

PRE-TRIAL CHAMBER II

Before:

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF

***THE PROSECUTOR v. ALFRED ROMBHOT YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

Defence Response to Prosecution's "Request for Leave to Appeal the "Decision on the 'Prosecution's Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges'", ICC-01/14-01/18-524

Source: Defence of Patrice-Edouard Ngaïssona

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

Ms Fatou Bensouda
 Mr James Stewart
 Mr Kweku Vanderpuye

Counsel for the Defence of Mr Ngaïssona

Mr Geert-Jan Alexander Knoops
 Ms Lauriane Vandeler

Counsel for the Defence of Mr Yekatom

Ms Mylène Dimitri
 Mr Peter Robinson

Legal Representatives of the Victims

Mr Yaré Fall
 Ms Marie Edith Douzima Lawson
 Ms Paolina Massidda
 Mr Abdou Dangabo Moussa
 Ms Elisabeth Rabesandratana
 Mr Dmytro Suprun

Legal Representatives of the Applicants**Unrepresented Victims****Unrepresented Applicants
(Participation/Reparation)****The Office of Public Counsel for Victims****The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta

States' Representatives**Amicus Curiae****REGISTRY****Registrar**

Mr Peter Lewis

Counsel Support Section**Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations
Section****Other**

I. Introduction

1. Pre-Trial Chamber II (“Chamber”) should reject the “Request for Leave to Appeal the “Decision on the ‘Prosecution’s Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges’” (“Application”).¹ The purported issues raised by the Office of the Prosecutor (“Prosecution”) amount to mere disagreements with the “Decision on the ‘Prosecution’s Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges’” (“Decision”) and do not constitute appealable issues within the meaning of article 82(1)(d) of the Rome Statute (“Statute”).² Furthermore, the Application does not meet either of the cumulative statutory requirements for granting leave to appeal.

II. Submissions

A. The Application does not set out an appealable issue

2. None of the three purported issues advanced in the Application constitutes an ‘appealable issue’ under article 82(1)(d).
3. According to established jurisprudence, an “issue” is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. An “issue” is constituted by a subject, the resolution of which is essential for the determination of matters arising in the judicial cause under examination.³ Most importantly, the “issue”

¹ ICC-01/14-01/18-524.

² ICC-01/14-01/18-403-Conf. A public redacted version was notified on 20 December 2019, ICC-01/14-01/18-403-Red.

³ Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 9

identified by the appellant must emanate from the relevant decision itself and cannot represent a hypothetical concern or abstract legal question.⁴

First purported issue

4. The first issue, “whether re-introducing factual allegations falling within the terms of the legal characterisations already accepted by the Pre-Trial Chamber in the confirmation decision amounts to an “additional charge” for the purpose of article 61(9)”, is not appealable. The first issue is a mere disagreement with the Chamber’s legal characterisation of the factual allegations relating to the alleged second instance of rape.⁵ More specifically, the Prosecution disagrees with the result of the approach taken by the Chamber that “the factual allegations at stake [do not fall] within the terms of the legal characterisations already accepted by the Pre-Trial Chamber”.⁶ The focus of the Prosecution on detecting inconsistencies between the Decision and the jurisprudence of the Court makes its mere disagreement with the Chamber’s analysis even more apparent.⁷ Contrary to the Prosecution’s submissions,⁸ the Chamber did not depart from the distinguishable jurisprudence in applying the definition of charge to the factual allegations in question and made a reasoned decision as to why this alleged second instance of rape could not qualify as a mere amendment.⁹ This is absolutely not a case where judicial certainty is endangered and which would require appellate intervention.¹⁰ As already recalled by the Chamber, the fact that a matter represents a legal question “does

⁴ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Leave to Appeal the ‘Decision Pursuant to Articles 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo’”, 18 September 2009, ICC-01/05-01/08-532, para. 17; Pre-Trial Chamber I, “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges”, 31 July 2013, ICC-02/01-01/11-464, para. 8.

⁵ Request, para. 15.

⁶ Request, para. 13. See also Decision, paras 18-20.

⁷ Request, paras 20-22, 24-25.

⁸ Request, para. 22.

⁹ Decision, paras 18-20.

¹⁰ Request, para. 22.

not, however, automatically render [...] the Issues ‘appealable’ for the purposes of an interlocutory appeal”.¹¹

5. Furthermore, it is questionable whether the second part of the alleged first issue, namely whether an additional charge necessarily requires stricter scrutiny than an amended charge and the Prosecution’s underlying conclusion that the alleged exercise of such higher caution was determinative of the Chamber’s decision to reject the Prosecution’s request to amend the charges (“Request”)¹² arises out of the Decision within the meaning and for the purposes of article 82(1)(d) of the Statute.

6. The Prosecution’s analysis seems to be a misinterpretation of the Decision. The Chamber did not rule that an additional charge *necessarily* required stricter scrutiny than an amended charge nor did it suggest that this consideration was determinative, on its own, of its decision to reject the Request. The Decision was not based only on the delay that might arise from a confirmation hearing. To the contrary, after having pointed out that *both* an additional charge and an amended charge must “be approached with the utmost caution and limited to the most restrictive of circumstances”,¹³ the Chamber then fully agreed with the “precautionary and restrictive approach” adopted by pre-trial chambers in cases of *amendment* of the charges, where, by definition, the question of the holding of a new confirmation hearing had not even been considered as a factor.¹⁴ The Prosecution conflates the urgency of the need for caution and the degree of caution needed.¹⁵ The factors which the Chamber gave weight to in assessing whether the Request was justified included *inter alia* the relevance of the filtering function of the Pre-Trial Chamber, the Prosecution’s diligence¹⁶ or

¹¹ ICC-01/14-01/18-447, para. 31.

¹² Request, para. 17, 14

¹³ Decision, para. 21.

¹⁴ Decision, para. 22.

¹⁵ See Request, para. 16 referring to Decision, para. 21.

¹⁶ Decision, paras 29, 31.

the fairness of the proceedings,¹⁷ which contradicts the Prosecution's argument that the potential delay in the holding of a confirmation hearing was a determinative consideration. The prejudice generally resulting from the delay in the proceedings has of course been found relevant, but this consideration was made irrespective of whether the charge would be new or amended.¹⁸ Moreover, the Chamber's invariable reference through its Decision to both "additions and changes" when considering those factors¹⁹ suggests that the Request as originally formulated, *i.e.* as an amendment of the charges, could also have been rejected based on the same reasoning, despite the absence of risk of delay specifically linked to the holding of a confirmation hearing. Therefore, the Prosecution's allegation that "[h]ad the Chamber not misdirected itself, it would have found that the requested amendment was not an "additional" charge, and hence it could be expeditiously decided upon in written procedure" is unsubstantiated.

7. Regardless of whether this purported sub-issue arises out of the Decision, the Prosecution's arguments in this respect amount to nothing more than a mere disagreement or a difference of opinion as to the alleged approach applied by the Chamber.
8. In any event, since this purported sub-issue directly flows from the main one, *i.e.* from the Prosecution's disputing the Chamber's legal characterisation of the Request as a new charge and would thus not exist had the Prosecution not disputed this legal point in the first place,²⁰ the examination of this purported

¹⁷ Decision, paras 24, 30-31 (on the right of the accused to understand the charges against him and have time to prepare his defence), 24-26, 32 (on the prohibition for the Prosecution to obtain an unfair advantage through the abusive recourse of the 61(9) prerogative), 26-27 (impact on pre-trial custody).

¹⁸ Decision, paras 32-34.

¹⁹ Decision, paras 24, 27, 28.

²⁰ See Request, para. 14, where the Prosecution states that "[t]he Chamber's characterisation of the Prosecution's Request as a "new charge" determined its ultimate conclusion to reject it".

sub-issue is not necessary for the Chamber to reach its conclusion and should be rejected *in limine*.

9. Finally, the Prosecution's argument that the Chamber would not have given the proper consideration to the nature of the confirmation hearing which the addition of a charges would entail, is again, if the Prosecution's interpretation were to be followed, a mere disagreement with the assessment made by the Chamber and therefore does not constitute an appealable issue and is in fact not expressly listed as one.²¹
10. Therefore, this purported first issue should be rejected as non-appealable.

Second purported issue

11. The second issue, *i.e.* "[w]hether, in light of article 61(8), article 61(9) must be read to allow the Prosecutor an effective means by which she may apply to re-introduce, either as an amended or an additional charge, factual allegations which the Pre-Trial Chamber previously declined to confirm due to the insufficiency of the evidence" is not appealable.²²
12. Again, this second issue is a mere disagreement with the Chamber's findings in relation to the scope of the right to request amendments and additional charges under article 61(9) of the Statute.
13. In addition, this second issue does not arise out of the Decision as the Chamber does not conclude that "the Prosecution could not have recourse to article 61(9) to re-introduce a factual allegation which has not been confirmed" or that "it is absolutely impermissible for the Prosecution to rely on article 61(9) to re-introduce factual allegations which were previously not confirmed".²³ This is a

²¹ Request, para. 23.

²² Request, para. 27.

²³ Request, paras 28, 30. See also Request, paras 32 and seq..

misinterpretation of the Decision. The Chamber acknowledges throughout the Decision that the right to request amendments and additional charges is sanctioned by article 61(9) and is an existing prerogative of the Prosecution under the present circumstances.²⁴

14. The Decision must be read in light of the previous jurisprudence whose “precautionary and restrictive approach” the Chamber fully agrees with and which stands for the proposition that *inter alia* “continuing investigations after the charges have been confirmed cannot be the rule, but rather the exception, and should be justified on a case-by-case basis”.²⁵ The Chamber notes that “*unjustified* recourse to this prerogative”, leading to abuse, must be avoided²⁶ and that this principle has been sanctioned by the Appeals Chamber when setting out the limitations within which the Prosecution could conduct investigations beyond the confirmation of charges stage.²⁷ It is clear from the Decision that it is the absence of sound justification for the Request, which was only the result of supplemental investigations *launched after* the confirmation of charges,²⁸ that rendered the re-introduction of the factual allegations in question impermissible, having also due regard to competing interests. It is in this context that the Chamber stated that the Prosecution’s right “cannot be construed in such a way as to allow the Prosecutor to ‘remedy’ evidentiary lacunae”.²⁹

²⁴ See e.g. Decision, paras 24, 26, 31, 36.

²⁵ Decision, para. 22 referring to ICC-01/09-02/11-700-Corr (“*Kenyatta* Decision”), para. 35. The Defence notes that this part of this Decision contradicts the Prosecution’s argument that the Chamber would have departed from said consistent jurisprudence. See Request, para. 34.

²⁶ Decision, para. 24.

²⁷ Decision, para. 25 referring to *Kenyatta* Decision, para. 36 quoting Appeals Chamber, The Prosecutor v. Thomas Lubanga Dyilo, 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”, 12 October 2006, ICC-01/04-01/06-568, paras 52, 54.

²⁸ Decision, para. 31 noting that “only when this risk materialised was the decision made to proceed with additional investigative steps which would allow the gathering of better evidence”.

²⁹ Decision, para. 31.

15. The Chamber did not generally restrict the amendment or addition of charges to factual allegations which had not been declined, thereby generally precluding the Prosecution from re-introducing non-confirmed factual allegations.³⁰ Nor does the Chamber state that the *Al Hassan* Decision stands for this proposition.³¹ The Chamber's full adherence to the previous jurisprudence which addresses cases where factual allegations were re-introduced makes the misinterpretation of the Prosecution in this respect even more apparent.³²

16. Regardless, Article 61(8) is not applicable in the context of the present Request, which constitute another reason why the second issue does not arise out of the Decision. Indeed, the charges under which the relevant factual allegation was presented in the Document Containing the Charges were confirmed (counts 40-41). The Pre-Trial Chamber did not decline the charges under which the Prosecution chose to present the relevant factual allegation, it only concluded that the factual allegation of the second instance of rape was not established to the relevant standard.³³ Too little information on the alleged facts was provided by the Prosecution at the time for the Chamber to determine that it should have been the object of a separate charge. Furthermore, the Prosecution did not make the Request pursuant to article 61(8) or even pursuant to both article 61(8) and 61(9) but pursuant to article 61(9) only.

17. The *Al Hassan* Decision clearly distinguishes between the right of the Prosecution to go back to the Pre-Trial Chamber (i) in case of non-confirmation of certain *charges* pursuant to article 61(8) and in case of (ii) amendment of already confirmed charges, which may take the form of an addition of *new charges* or substitution of charges pursuant to article 61(9).³⁴ The Chamber

³⁰ Request, para. 32.

³¹ Request, para. 35 referring to ICC-01/12-01/18-608-Red ("*Al Hassan* Decision"), para. 44.

³² See Request, para. 34.

³³ Confirmation Decision, para. 107, pages 104, 109, 111.

³⁴ *Al Hassan* Decision, para. 44.

confirmed that the request to include the alleged rape of the second victim should not be framed as a mere amendment of a confirmed charge under the first sentence of article 61(9) but as an additional charge under the second sentence of the same article. Therefore, the case at hand is not one which falls within article 61(8).

18. Furthermore, in light of the above, the Chamber's reference to the *Al Hassan* ruling on the scope of the Prosecution's prerogative in case of amendment of an *already confirmed* charge under article 61(9) cannot be interpreted as meaning that the Chamber precluded in any circumstances the Prosecution from going back to the Pre-Trial Chamber should there be new evidence to put forward in respect of factual allegations which *were not* confirmed.³⁵

19. However, the Prosecution's prerogative to introduce or re-introduce factual allegations not confirmed in the Confirmation Decision as an amended or additional charge is not absolute. As recalled by the Pre-Trial Chamber in the *Ruto and Sang* Decision:

"[...] 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."³⁶

20. The Prosecution's right needs to be entertained within the limits of the procedure provided for under article 61(9), namely "with the permission of the Pre-Trial Chamber", which in accordance with the jurisprudence of this Court should not be granted unless the Prosecution properly explains why it could

³⁵ The Defence notes that the citation into bracket in the last sentence of paragraph 35 of the Request as well as the reference to paragraph 31 in the corresponding footnote suggest that the excerpt into bracket comes from the Decision which is in fact not the case.

³⁶ ICC-01/09-01/11-859 ("*Ruto and Sang* Decision"), para. 31.

not with reasonable diligence have obtained such additional evidence prior to confirmation. In the present case, the Chamber ruled that “none of the circumstances listed by the Prosecutor in support qualifies as a ‘proper justification’”.³⁷

21. In light of the above, the second issue is not an appealable issue and should be dismissed.

Third purported issue

22. The third issue, *i.e.* “[w]hether the Pre-Trial Chamber properly and reasonably exercised its discretion under article 61(9) in light of the material circumstances” is not appealable.³⁸

23. This amounts to a mere disagreement with the Chamber’s exercise of its discretion. The Prosecution seems to take issue with the weight or the lack thereof that the Chamber allegedly gave to certain factors - considered relevant to the Prosecution - and therefore with the Chamber’s assessment of the relevant factors as argued by the Prosecution.³⁹ The Prosecution’s argument is unconvincing. The Decision specified that it was “reached in light of the specific circumstances of these proceedings and of this request”.⁴⁰ The Decision had also due regard to a previous ruling that such a decision “should be taken upon an assessment of all relevant circumstances surrounding the case at [the relevant] stage of the proceedings”.⁴¹

24. A decision under article 61(9) is discretionary in nature. It directly follows from the wording of this article, with the use of the word “permission”. The

³⁷ Decision, para. 31.

³⁸ Request, para. 38.

³⁹ Request, para. 40-41.

⁴⁰ Decision, para. 36.

⁴¹ Decision, para. 22 referring to *Kenyatta* Decision, para. 21.

Prosecution is therefore challenging the discretionary powers provided by virtue of article 61(9).

25. Certainly, the Chamber's discretion is not unlimited. Nevertheless, the Chamber still has the discretion in making its final assessment as to the sort of factors it intends to disregard or rely upon, in other words as to the sort of factors it considers relevant in the course of its determination under article 61(9) of the Statute.
26. The ruling made in the *Kenyatta* case, and cited by the Prosecution, that granting permission must be taken upon an assessment of "all *relevant* circumstances surrounding the case at this stage of the proceedings" entailing consideration of the Prosecution's request and "other relevant information which the Pre-Trial Chamber *could* seek if necessary" (emphasis added), does not, contrary to the Prosecution's submissions, suggest otherwise.⁴² This ruling actually suggests, when read in combination with the following paragraph of the same decision, that the consideration of "diverse factors affecting the case *sub judice* including its fairness, expeditiousness, the rights of the accused as well as those of the victims" is there to *assist* the relevant chamber in deciding in its discretion to grant permission or not, and not to impose on the relevant chamber any specific mandatory factors to consider as relevant.⁴³
27. Second, assuming for the sake of the argument that the Pre-Trial Chamber ought to consider as relevant the factors listed in paragraph 41 of the Request, obligation for which the Prosecution does not advance any argument, the Defence submits that the Decision indicates that they were indeed considered.⁴⁴

⁴² *Kenyatta* Decision, para. 21, also cited in the Decision, para. 22.

⁴³ *Kenyatta* Decision, para. 22. *See also* for a similar interpretation Triffterer, page 1543, mn 147.

⁴⁴ *See* Decision, paras 14, 29 (on the fact that the Defence already had notice of part of the factual allegations); para. 31 (on whether any confirmation hearing would be limited in scope); paras 25, 28, 36 (on the Prosecution's duty to establish the truth); paras 24, 25, 31 (on the diligence of the Prosecution in obtaining the evidence). The alleged artificiality of constraining the Trial Chamber from making findings relevant to Mr Ngaïssona's liability

In any event, it does not necessarily follow that when, for instance, the Pre-Trial Chamber does not expressly address one factor, it did not consider or give adequate weight to that factor.

28. It appears from the substance of the Prosecution's submissions that it takes issue with the Chamber's exercise of its discretion as a result of which it rejected the Request, after having struck "the appropriate balance between a prerogative that exists, and cannot and should not be taken away" and other competing interests.⁴⁵ Therefore, this sort of disagreement does not constitute an appealable issue within the meaning of article 82(1)(d) of the Statute.

B. The Request does not meet the cumulative conditions of article 82(1)(d) of the Statute

29. Assuming *arguendo* that the Request articulates an appealable issue, it fails to meet the cumulative requirements of article 82(1)(d). None of the three issues significantly affects the fair or expeditious conduct of the proceedings, or the outcome of the case. Nor is the Appeals Chamber's immediate intervention required to materially advance the proceedings.

30. The Prosecution will be able to present its case alleging all the counts against Mr Ngaissona for all locations as originally delineated by the Chamber at confirmation. The Prosecution, which has not requested an addition of a charge will have the opportunity to prove Mr Ngaissona's alleged criminal responsibility in relation to the exact same charges as originally confirmed.

in the context of evidence it will otherwise hear could not have been considered since it is only known to the Prosecution which has not raised it in the Request. This factor would in any event have been irrelevant for the purpose of the Request since first, it is speculative at this stage that this person will indeed testify and more importantly taking this factor into account would make the filtering function of pre-trial chambers, which role is precisely to set out the factual boundaries of the case and ensure judicial economy, meaningless.

⁴⁵ Decision, para. 36. *See above* para. 10.

31. The filtering role of the Pre-Trial Chamber consists precisely in “conclusively determin[ing] 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 or] re-introduce”.⁴⁶ This cannot be in itself a justification to allow an interlocutory appeal that “can only be appealed in exceptional circumstances”,⁴⁷ as, if it were, then all requests seeking to appeal a non-confirmed charge should be authorized. Therefore, the proposed issues cannot be deemed to significantly affect the outcome of the trial.⁴⁸
32. The Prosecution’s argument concerning fairness is also unavailing. According to the Court’s established jurisprudence, the rights and interests of the victims are secondary to and must not result in prejudice to the fair trial rights of an accused.⁴⁹ The likelihood that this alleged one victim will in any event be testifying on other matters is first speculative and second is not relevant to showing that the fairness of the *proceedings* has been significantly affected.⁵⁰ The fairness and expeditiousness of the proceedings can to the contrary only be preserved if the scope of the charges as fixed by the Pre-Trial Chamber is respected and if witnesses are precluded from testifying on topics that are outside of that scope. It is in fact to be hoped that the alleged victim, assuming this person testifies, will not be the only one refrained from addressing certain matters considered as outside of the charges in light of the considerably reduced scope of the charges as a result of the Confirmation Decision. If attempts are made in this regard, it will be part of the gate-keeper function of the Trial Chamber to stop them.⁵¹

⁴⁶ See Request, para. 48. See also Request, para. 51.

⁴⁷ ICC-01/04-01/06-915, para. 28.

⁴⁸ Request, para. 51.

⁴⁹ See, e.g., Statute, Article 68(1); ICC-02/05-02/09-121, para. 5; ICC-01/05-01/08-320, para. 96.

⁵⁰ Request, para. 49.

⁵¹ See recent order from the Trial Chamber V ordering the Prosecution to file its Preliminary Witness List indicating the witnesses that it is certain not to call to testify, “including but not limited to those excluded by virtue of the reduced scope of the charges following the confirmation of charges”. ICC-01/14-01/18-528, para. 4(ii).

33. As elaborated above, the Decision is rooted in the need to avoid unfair prejudice to the accused, and therefore the overall proceedings. The Chamber has concluded that the Prosecution's prerogative should be prevented "from unnecessarily becoming a disruptive factor to the detriment of the Defence, such as to make it questionable under a human rights perspective".⁵² Therefore, it is the granting of the Prosecution's leave to appeal which could risk to significantly affect the fair conduct of the proceedings.

34. Appellate intervention would not advance the proceedings or promote their expeditiousness, but would instead delay them unnecessarily and create an additional burden on the Defence by taking away from it some precious time which would otherwise have been allocated to the preparation of Mr Ngaïssona's defence. The Prosecution's argument that the impact of the Request on the speed of the proceedings was a chief reason for the Decision and that it would demonstrate the fulfilment of the criterion of article 82(1)(d) is unconvincing.⁵³ Even if this argument is to be followed, it does not show that the purported three issues raised would affect in an adverse way the expeditious conduct of the proceedings. It shows to the contrary that the Decision aims at protecting the expeditious conduct of these proceedings.

35. Moreover, the Prosecution fails to substantiate how the request pending against Mr Yekatom would "be determined more expeditiously with the benefit of an appellate ruling on the matter".⁵⁴ As rightly pointed out by the Prosecution,⁵⁵ the determination of this other request would indeed in all likelihood be stayed, until an appellate ruling is made in relation to the Request, which would delay the overall proceedings even further, on matters which did

⁵² Decision, para. 36.

⁵³ Request, para. 50.

⁵⁴ Request, para. 50.

⁵⁵ Request, paras 50, 52.

not arise out of the Decision or that were already, directly and expeditiously, handled by the Pre-Trial Chamber. Therefore, the alleged expeditiousness of further potential litigation on the matter in relation to the request under article 61(9) in respect of Mr Yekatom can never compensate the unnecessary delay caused by interlocutory appellate proceedings.⁵⁶

36. Further, and in any event, the primary purpose of the final limb of the Article 82(1)(d) test is to guard against decisions which might later “unravel the judicial process”.⁵⁷ There is no reasoned basis on which to conclude that the Decision – which did not permit the addition of one alleged instance of rape risks such a destructive effect on the conduct of proceedings.⁵⁸

RELIEF SOUGHT

37. In light of the foregoing, the Defence respectfully requests the Chamber to **DISMISS** the Application.

Respectfully submitted,



Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 26 May 2020,
At The Hague, the Netherlands

⁵⁶ Request, para. 52.

⁵⁷ ICC-01/04-168 OA3, para. 16.

⁵⁸ See *also* para. 17 above.