



Original: English

No. ICC-01/14-01/18

Date: 19 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

Consolidated Decision on filings ICC-01/14-01/18-524-Corr and ICC-01/14-01/18-545 (Prosecutor's requests for leave to appeal the decisions pursuant to article 61(9) of the Rome Statute dated 14 May 2020 and 1 June 2020)

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

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PRE-TRIAL CHAMBER II of the International Criminal Court issues this consolidated decision on 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”’ (the ‘14 May 2020 Decision’),¹ submitted by the Prosecutor on 20 May 2020 (the ‘First Request for Leave to Appeal’ or ‘First Request’),² and the request for leave to appeal the ‘Decision on the Prosecutor’s request to amend the charges against Alfred Yekatom’ (the ‘1 June 2020 Decision’),³ submitted by the Prosecutor on 8 June 2020 (the ‘Second Request for Leave to Appeal’ or ‘Second Request’).⁴

I. PROCEDURAL HISTORY

1. On 11 December 2019, the Chamber issued the ‘Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona’ (the ‘Confirmation Decision’, ‘Yekatom’ and ‘Ngaïssona’ respectively), in which, *inter alia*, it confirmed the charges presented against Yekatom and Ngaïssona to the extent specified in the decision and committed them to trial on the charges as confirmed.⁵
2. On 2 March 2019, the Prosecutor requested the Chamber to reconsider or, in the alternative, grant leave to appeal the Confirmation Decision.⁶ On 11 March 2019, the Chamber rejected this request.⁷

¹ 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”, 14 May 2020, ICC-01/14-01/18-517.

² Corrected Version of “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””, 20 May 2020, ICC-01/14-01/18-524, 27 May 2020, ICC-01/14-01/18-524-Corr.

³ Decision on the Prosecutor’s request to amend the charges against Alfred Yekatom, 1 June 2020, ICC-01/14-01/18-538.

⁴ Request for Leave to Appeal the “Decision on the Prosecutor’s request to amend the charges against Alfred Yekatom”, ICC-01/14-01/18-545.

⁵ ICC-01/14-01/18-403-Conf (public redacted version notified on 20 December 2019, ICC-01/14-01/18-403-Red).

⁶ 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]”, ICC-01/14-01/18-437.

⁷ 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’, ICC-01/14-01/18-447.

3. On 13 March 2020, the Registry transmitted the record of the proceedings to the Presidency,⁸ which constituted Trial Chamber V and referred the case against Yekatom and Ngaïssona to it on 16 March 2020.⁹
4. On 31 March 2020, the Prosecutor requested that the Chamber, *inter alia*, ‘amend the charges of rape confirmed against’ Ngaïssona by ‘includ[ing] and confirm[ing] a second instance of rape’ (the ‘First Article 61(9) Request’).¹⁰
5. On 14 May 2020, the Chamber issued the 14 May 2020 Decision in which it, *inter alia*, rejected the Prosecutor’s request to amend the charges pursuant to article 61(9) of the Rome Statute (the ‘Statute’).
6. Also on 14 May 2020, the Prosecutor filed the ‘Prosecution Motion to Amend the Charges against Alfred YEKATOM’, seeking to amend the charges against Yekatom under article 61(9) of the Statute to ‘add charges of rape and sexual slavery as war crimes, in violation of article 8(2)(e)(vi)’ (the ‘Second Article 61(9) Request’).¹¹
7. On 20 May 2020, the Prosecutor submitted the First Request for Leave to Appeal, a corrected version of which was filed on 27 May 2020.
8. On 26 May 2020, the Common Legal Representative of the Former Child Soldiers and the Common Legal Representatives of the Victims of Other Crimes (the ‘CLR/V’) filed their joint response, supporting the First Request for Leave to

⁸ 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, ICC-01/14-01/18-449.

⁹ Decision constituting Trial Chamber V and referring to it the case of The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, ICC-01/14-01/18-451.

¹⁰ 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 Charge, ICC-01/14-01/18-468-Conf (with confidential annex; public redacted version notified on 31 March 2020, ICC-01/14-01/18-468-Red).

¹¹ ICC-01/14-01/18-518.

Appeal.¹² On the same day, the Defence for Ngaïssona responded, submitting that the Chamber should reject the First Request (the ‘Ngaïssona Defence Response’).¹³

9. On 28 May 2020, the Prosecutor submitted a request for leave to reply to the Defence Response (the ‘Request for Leave to Reply’).¹⁴

10. On 1 June 2020, the Defence for Ngaïssona responded to the Prosecutor’s Request for Leave to Reply, submitting that it should be rejected.¹⁵

11. Also on 1 June 2020, the Chamber issued its 1 June 2020 Decision, in which it rejected the Second Article 61(9) Request.

12. On 8 June 2020, the Prosecutor submitted the Second Request for Leave to Appeal.

13. On 12 June 2020, the Defence for Yekatom submitted its response, opposing the Second Request.¹⁶ On the same day, the CLRV submitted their response, supporting the Second Request.¹⁷

II. THE PROSECUTOR’S REQUEST FOR LEAVE TO REPLY TO THE NGAÏSSONA DEFENCE RESPONSE TO THE FIRST REQUEST

¹² Common Legal Representatives’ Joint Response to the “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-01/14-01/18-530.

¹³ 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, ICC-01/14-01/18-533.

¹⁴ Prosecution Request for Leave to Reply to “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-01/14-01/18-534.

¹⁵ Defence Response to the “Prosecution Request for Leave to Reply to “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-01/14-01/18-534), ICC-01/14-01/18-537.

¹⁶ Yekatom Defence Response to Request for Leave to Appeal the Decision on the Prosecutor’s Request to Amend the Charges against Alfred Yekatom, ICC-01/14-01/18-549-Conf (public redacted version notified on the same day, ICC-01/14-01/18-549-Red).

¹⁷ Common Legal Representatives’ Joint Response to the Prosecution’s “Request for Leave to Appeal the ‘Decision on the Prosecutor’s request to amend the charges against Alfred Yekatom’” (ICC-01/14-01/18-545), ICC-01/14-01/18-550-Conf (public redacted version notified on the same day, ICC-01/14-01/18-550-Red).

14. The Prosecutor submits that '[a] limited and focused reply' would assist the Pre-Trial Chamber in deciding on the First Request for Leave to Appeal, as the Prosecutor 'would further demonstrate that appealable issues clearly arise from the [14 May 2020] Decision, and that the intervention of the Appeals Chamber is necessary to settle them, in particular the notion of "charge"'.

15. In the view of the Prosecutor, a reply would be warranted in regard to two submissions in the Ngaïssona Defence Response to the effect that:

- (i) '[i]t 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, that rendered the re-introduction of the factual allegations in question impermissible, having also due regard to competing interests'; and
- (ii) '[a]rticle 61(8) is not applicable in the context of the present Request [because] 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. [...]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'.

16. The Defence for Ngaïssona opposes the Request for Leave to Reply, submitting that 'both issues upon which the Prosecution seeks leave to reply fall outside the permissible scope of a reply'. In its view, not only did the Prosecutor 'already reply without having waited for the Chamber's authorisation', but 'allowing further submissions on the issues [raised] would not assist the Chamber in determining whether the Prosecution should be granted leave to appeal'.

17. The Chamber recalls regulation 24(5) of the Regulations of the Court (the 'Regulations'), which provides that participants may only reply to a response with leave of the Chamber and that, unless otherwise permitted by the Chamber, a reply

must be limited to new issues raised in the response which could not have been reasonably anticipated.

18. The Chamber considers that it has sufficient information before it upon which to make a decision on the First Request, and that it would not be assisted by a reply of the Prosecutor. Furthermore, the Chamber is of the view that (i) the first issue in support of the request for leave to reply relates to matters already decided upon in the 14 May 2020 Decision and (ii) the Request for Leave to Reply already contains substantive submissions on the second issue in violation of regulation 24(5) of the Regulations.

19. Accordingly, the Chamber rejects the Request for Leave to Reply to the Ngaïssona Defence Response to the First Request.

III. CONSOLIDATING THE DECISION ON THE FIRST AND THE SECOND REQUESTS FOR LEAVE TO APPEAL AND CRITERIA GUIDING THE CHAMBER IN ADJUDICATING BOTH REQUESTS

20. The Prosecutor submits that ‘in the interest of judicial economy, the Pre-Trial Chamber could render a single consolidated decision’ on the First and the Second Requests.¹⁸ The Chamber is satisfied that the issues in the two requests are sufficiently linked so as to warrant a single decision on the matter.

21. It is well-established in the case law of the Court that an interlocutory appeal pursuant to article 82(1)(d) of the Statute can only be allowed in respect of issues arising from the decision in question, provided that they do not merely constitute a disagreement and for which resolution is essential for the determination of the matter. In addition, leave to appeal can only be granted in respect of issues which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Chamber, immediate appellate resolution may materially advance the proceedings.

22. It has also been consistently held that, for the purposes of determining a request for leave to appeal, the requirements set forth in article 82(1)(d) of the Statute are the

¹⁸ Second Request for Leave to Appeal, para. 5.

sole parameters of relevance and arguments relating to the merits or substance of the appeal are irrelevant.

23. The Chamber will address both the First and the Second Request for Leave to Appeal in light of these criteria and principles.

IV. THE PROSECUTOR'S FIRST REQUEST FOR LEAVE TO APPEAL

A. The Prosecutor's submissions

24. The Prosecutor requests leave to appeal the 14 May 2020 Decision under article 82(1)(d) of the Statute, for the following three issues:

- (i) '[w]hether 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), which necessarily requires stricter scrutiny than an "amended charge"' (the 'First Issue of the First Request');
- (ii) '[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' (the 'Second Issue of the First Request'); and
- (iii) '[w]hether the Pre-Trial Chamber properly and reasonably exercised its discretion under article 61(9) in light of the material circumstances' (the 'Third Issue of the First Request').

25. In the view of the Prosecutor, the three issues affect the fair and expeditious conduct of the proceedings, as well as the outcome of the trial, and 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'.

B. The Chamber's determination

26. As a preliminary remark, the Chamber notes that the First Request includes extensive sections devoted to submissions on the merits, with a view to demonstrating

how, in the Prosecutor's view, the Chamber erred either in law or fact;¹⁹ nevertheless, since the Prosecutor does, albeit concisely, also address the relevant statutory criteria relating to interlocutory appeals, the Chamber will nevertheless consider it.

First Issue of the First Request

27. The Prosecutor submits that, in the 14 May 2020 Decision, the Chamber 'found that the [First Article 61(9)] Request sought to add a new or additional charge of rape and thus it required stricter scrutiny and a confirmation hearing which would necessarily delay the proceedings' and that the Chamber's 'characterisation of the [First Article 61(9)] Request as a "new charge" determined its ultimate conclusion to reject it'.

28. The Chamber notes that it is accurate that the 14 May 2020 Decision re-characterised the First Article 61(9) Request from one seeking an amendment of the charges to one requesting the addition of a new charge.²⁰ However, the Prosecutor's reading of the Chamber's approach is inaccurate: while stating that caution was 'all the more urgent' where there is an addition of a new charge, the 14 May 2020 Decision also stressed that a precautionary approach must be taken in regard to both requests for amendments and requests to add new charges. Specifically, the Chamber (i) held that both forms of modification of the charges, risk causing 'undue prejudice to the Defence' and must *both* therefore 'be approached with the utmost caution and limited to the most restrictive of circumstances';²¹ and (ii) referred to requests under article 61(9) of the Statute (encompassing both amendments and additions of charges) throughout its reasoning.²² In addition, the need for a precautionary approach for both types of requests was reiterated by the Chamber in the 1 June 2020 Decision.²³

¹⁹ See e.g. First Request for Leave to Appeal, paras 19, 23, 31, 44.

²⁰ 14 May 2020 Decision, paras 18-20.

²¹ 14 May 2020 Decision, para. 21.

²² See e.g. 14 May 2020 Decision, paras 24, 27-28.

²³ 1 June 2020 Decision, para. 12 ('[t]he Chamber recalls that, to the extent that both the amendment and the addition of a new charge "consist of a request to modify the scope and subject matter of a case", these two "forms of modification share the risk of resulting, if allowed, in causing undue prejudice to the Defence": hence, "they must both be approached with the utmost caution and limited to the most restrictive of circumstances" and 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').

29. Further, as regards the Prosecutor's submission that the Chamber did not properly consider the delay that a confirmation hearing would have entailed for the additional charge in question, the Chamber notes that the risk of undue delay – and the ensuing adverse impact on the rights of the accused – was only one among several factors weighed by the Chamber in reaching its determination, alongside other elements including the diligence of the Prosecutor, the gatekeeper function of the Pre-Trial Chamber, and the requirement of the fairness of the proceedings. In the view of the Chamber, the Prosecutor's dissatisfaction with the outcome of this balancing exercise constitutes a mere disagreement with the Chamber's determination.

30. In light of the above, the Chamber considers that the First Issue of the First Request constitutes a misinterpretation of, and disagreement with, the 14 May 2020 Decision and, accordingly, does not constitute an appealable issue within the meaning of article 82(1)(d) of the Statute.

Second Issue of the First Request

31. The Prosecutor submits that (i) article 61(9) of the Statute 'does not restrict the amendment of charges to factual allegations which have not been declined by the Chamber'; (ii) 'article 61(8) of the Statute expressly regulates the Prosecution's prerogative to request re-introduction of factual allegations' that were previously declined due to insufficient evidence; and (iii) article 61(8) of the Statute 'illustrates that the non-confirmation of allegations is not meant to prejudice the Court's – and the Prosecution's – duty to establish the truth'. In the view of the Prosecutor, since 'article 61(9) follows article 61(8) and there is no other procedure to give effect to the latter, the procedure set out in article 61(9) is the proper means for the Prosecution of bringing such an application'.

32. The Second Issue of the First Request is premised on the Prosecutor's assertion that the 14 May 2020 Decision precludes the re-introduction of non-confirmed factual allegations under article 61(9) of the Statute.²⁴ The Chamber notes that it never found in the 14 May 2020 Decision that the Prosecutor 'could not have recourse to article

²⁴ First Request for Leave to Appeal, para. 28 ('the Pre-Trial Chamber found that the Prosecution could not have recourse to article 61(9) to re-introduce a factual allegation which had not been confirmed. This factor was determinative to the Chamber's decision').

61(9) to re-introduce a factual allegation which had not been confirmed'; accordingly, the statement to the effect that such 'factor was determinative to the Chamber's decision' amounts to a mischaracterisation.

33. Furthermore, the Second Issue of the First Request omits to adequately consider that the Chamber's determination was 'reached in light of the specific circumstances of these proceedings and of [that] request'.²⁵ The wording of the 14 May 2020 Decision reflects that it was only after assessing and balancing the relevant factors that the Chamber found that the specific circumstances unique to the First Article 61(9) Request were not such as to justify it. As noted by the Defence for Ngaïssona, throughout the 14 May 2020 Decision the Chamber refers to the fact that article 61(9) of the Statute provides a right to request additional charges and amendments. By the same token, the Chamber recalled that the jurisprudence of the Court provides that, in order for a request pursuant to article 61(9) of the Statute to be granted, the Prosecutor must properly explain why the additional evidence could not have been obtained using reasonable diligence prior to the confirmation, in particular since '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'.²⁶

34. Accordingly, the Chamber finds that the Second Issue of the First Request, which is premised on a misinterpretation of the 14 May 2020 Decision, does not arise from it and is hence not an appealable issue within the meaning of article 82(1)(d) of the Statute.

Third Issue of the First Request

35. The Prosecutor submits that, on the one hand, the Chamber's reasoning in the Decision 'did not take into account, or otherwise did not take sufficient account, of various other relevant factors', namely (i) 'the fact that the Defence already had notice of many of the relevant factual allegations arising from the [Article 61(9)] Request'; (ii) 'the degree to which any further confirmation hearing would be limited in its scope'; (iii) 'the significance of the Prosecutor's duty to establish the truth'; (iv) 'the

²⁵ 14 May 2020 Decision, para. 36.

²⁶ 14 May 2020 Decision, para. 22.

particular difficulty which may be encountered in obtaining evidence of sexual violence’; and (v) ‘the artificiality of constraining the Trial Chamber from making findings’ on Ngaïssona’s liability ‘in the context of evidence which it will otherwise hear’. On the other hand, it is the Prosecutor’s view that ‘some of the factors taken into account were irrelevant, or could only be assigned very limited weight’; such factors included *inter alia* (i) ‘the burden of the Defence team in litigating simultaneously before two chambers of the Court’; (ii) ‘the inability of the Pre-Trial Chamber to make determinations about interim release now a Trial Chamber is [seized] of the case’; (iii) ‘the impact on the expeditious hearing of the trial, which can be mitigated by the case management powers of the Trial Chamber, and in which respect a trial date is not yet set’; and (iv) ‘the balance between the powers of the Pre-Trial Chamber and the Trial Chamber’.

36. The Chamber notes that decisions pursuant to article 61(9) of the Statute are discretionary in nature, as evidenced by the reference to the need to obtain ‘permission of the Pre-Trial Chamber’ in the text. As clarified in the case law of the Court, this wording must be read to the effect that ‘the Prosecutor is not allowed to proceed’ with an article 61(9) modification ‘without prior approval from the Chamber’, which renders ‘the Chamber’s permission a *conditio sine qua non* for any’ modification of the charges.²⁷

37. The Chamber also notes that, to the extent that certain factors listed by the Prosecutor as having been overlooked were in fact referenced by the Chamber, the Third Issue of the First Request mischaracterises the 14 May 2020 Decision: for instance, the Chamber did expressly consider the Prosecutor’s right to investigate beyond the confirmation hearing in order to establish the truth, as well as the fact that the Defence already had notice of the factual allegations on which the First Article 61(9) Request was based.²⁸ As to the Prosecutor’s contention that certain factors

²⁷ See Pre-Trial Chamber II, *The Prosecutor v. Uhuru Muigai Kenyatta*, 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’”, 21 March 2013, ICC-01/09-02/11-700-Corr, para. 19; Pre-Trial Chamber II, *The Prosecutor vs. 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”, 16 August, 2013, ICC-01/09-01/11-859, para. 31.

²⁸ 14 May 2020 Decision, paras 25, 30.

should have been given more weight, it merely voices and reiterates the Prosecutor's disagreement with the determination of the Chamber.

38. Accordingly, the Chamber finds that the Third Issue of the First Request does not constitute an appealable issue within the meaning of article 82(1)(d) of the Statute.

39. Since none of the issues proposed in the Prosecutor's First Request for Leave to Appeal qualify as an appealable issue within the meaning of article 82(1)(d) of the Statute, it is unnecessary for the Chamber to determine whether the additional cumulative requirements of article 82(1)(d) are met.

V. THE PROSECUTOR'S SECOND REQUEST FOR LEAVE TO APPEAL

A. The Prosecutor's submissions

40. The Prosecutor requests leave to appeal the 1 June 2020 Decision under article 82(1)(d) of the Statute, for the following four issues:

- (i) '[w]hether a request for an "additional charge" for the purpose of article 61(9) necessarily requires stricter scrutiny than a request for an "amended charge"' (the 'First Issue of the Second Request');
- (ii) '[w]hether – 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' (the 'Second Issue of the Second Request');
- (iii) '[w]hether 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' (the 'Third Issue of the Second Request'); and
- (iv) '[w]hether the Pre-Trial Chamber properly and reasonably exercised its discretion under article 61(9) in light of the material circumstances' (the 'Fourth Issue of the Second Request').

41. The Prosecutor submits that each of the above issues significantly affects the fair and expeditious conduct of the proceedings, as well as the outcome of the trial, and that immediate resolution by the Appeals Chamber may materially advance the proceedings.

B. The Chamber's determination

First Issue of the Second Request

42. The Prosecutor submits that the 1 June 2020 Decision can only be interpreted to mean that the Chamber applied a 'stricter standard' to the Second Article 61(9) Request 'because it entailed additions to, and not merely the amendment of, the charges against Mr Yekatom'; in addition, the 1 June 2020 Decision would not have contained 'concrete analysis of the nature of the hearing which would actually be required' or the 'limited scope of the evidence underpinning the allegations in question'.

43. The Chamber notes that the First Issue of the Second Request is premised on and centred around the submission that the Chamber would have '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' Yekatom. As such, it is similar and closely linked to the First Issue of the First Request. The Prosecutor's reading of the 1 June 2020 Decision in the Second Article 61(9) Request is as inaccurate as the reading of the 14 May 2020 Decision in the First Article 61(9) Request: while stating that caution was 'all the more urgent' where there is an addition of a new charge, the Chamber reiterated that the risk of causing undue prejudice to the Defence is inherent to both the addition and the amendment of a charge and that, accordingly, both modifications must be 'approached with the utmost caution and limited to the most restrictive of circumstances';²⁹ furthermore, in the 1 June 2020 as in the 14 May 2020 Decision, the Chamber referred to requests pursuant to article 61(9) (including both amendments and additions) throughout its reasoning.³⁰

²⁹ 1 June 2020 Decision, para. 12.

³⁰ See *e.g.* 1 June 2020 Decision, paras 12, 14, 15.

44. In light of the above, the Chamber considers that the First Issue of the Second Request constitutes a misinterpretation of, and disagreement with, the 1 June 2020 Decision and, accordingly, does not constitute an appealable issue within the meaning of article 82(1)(d) of the Statute.

Second Issue of the Second Request

45. The Prosecutor submits that the Chamber, having found that the Prosecutor had not adequately explained what clarification and additional details were required in regard to the statement of one witness, should have requested further submissions from the Prosecutor before making an adverse ruling.

46. Both the wording of the Second Issue of the Second Request and its supporting reasoning reveal the Prosecutor's dissatisfaction with the outcome of the exercise of the Chamber's discretion. Article 61(9) of the Statute does not make it compulsory for the Chamber to seek further submissions in case it considers that the Prosecutor's request is not adequately substantiated: while the Chamber *may* seek further submissions when deciding on an article 61(9) request, it will do so only when deemed necessary. Nor does the decision pursuant to article 61(9) of the Statute in the *Kenyatta* case (referred to by the Prosecutor) consider this step to be a duty in absolute terms: this decision states that, in making its decision based on 'all relevant circumstances', a Chamber may also rely on 'an evaluation of *other* relevant information which [it] *could* seek if necessary for the purposes of its final decision' (emphasis added).³¹

47. The Chamber notes that it is the responsibility and burden of the Prosecutor to properly support and justify a request to add or amend the charges: where the Prosecutor fails to do so, the Chamber is not under an obligation to remedy the flaws of a request by providing the Prosecutor with a second chance to strengthen it.

48. Accordingly, the Chamber finds that the Second Issue of the Second Request does not constitute an appealable issue within the meaning of article 82(1)(d) of the Statute.

³¹ Pre-Trial Chamber II, *The Prosecutor v. Uhuru Muigai Kenyatta*, 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'", 21 March 2013, ICC-01/09-02/11-700-Corr, para. 21.

Third Issue of the Second Request

49. The Prosecutor submits that it cannot be said that the Office was not ‘reasonably diligent’ for waiting to obtain two witnesses on a given issue instead of proceeding ‘solely on the basis of one’, and that such an approach would also 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’. Further, in the Prosecutor’s view, 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’ and the determination as to when to bring an article 61(9) request ‘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’ (emphasis added).

50. In the view of the Chamber, the Third Issue of the Second Request relies to a great extent on a mischaracterisation of the 1 June 2020 Decision. First, the 1 June 2020 Decision did not limit itself to considering the timeline of the various steps preceding the filing of the Second Article 61(9) Request, but also specifically noted that it was ‘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 as regards the decision to proceed to a second interview of one witness’;³² it also identified those aspects where it found that the information submitted in the Prosecutor’s request was not adequate to demonstrate that the timeline was the consequence of circumstances beyond the Prosecutor’s control. Second, the Chamber never intended to encourage the Prosecutor ‘to file a string of article 61(9) applications as each new piece of relevant evidence was obtained’. In submitting that the Office’s determination of the timing of an article 61(9) request ‘is not itself reviewable by the Pre-Trial Chamber’ and that it is ‘clear that she has been reasonably diligent in gathering the information’, the Prosecutor reveals that at the heart of the

³² 1 June 2020 Decision, para. 18.

Third Issue of the Second Request is a disagreement with the Chamber's assessment of the circumstances underlying the Prosecutor's Second Article 61(9) Request.

51. Accordingly, the Chamber finds that the Third Issue of the Second Request constitutes a misrepresentation of the 1 June 2020 Decision and, thus, does not constitute an appealable issue pursuant to article 82(1)(d) of the Statute.

Fourth Issue of the Second Request

52. The Prosecutor acknowledges that the Fourth Issue of the Second Request 'is substantially similar to the Third Issue' of the First Request. In the view of the Prosecutor, the Chamber (i) misappreciated two factors, namely the exercise of reasonable diligence by the Prosecutor and the 'importance of the new allegations'; (ii) failed to take into account, or to take into sufficient account, a number of factors, namely the limited scope of any further confirmation hearing; the significance of the Prosecutor's duty to establish the truth and its impact on the right to conduct further investigations after the confirmation; the difficulty associated to the obtaining of evidence of sexual violence and the statutory emphasis on sexual offences; the potential chilling effect on the future cooperation of victims of similar allegations; the interests of the victims, in particular those directly affected by the 1 June 2020 Decision, 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'; and (iii) took into account factors which, in the Prosecutor's view, 'were irrelevant, or could only be assigned very limited weight', namely the impact on the expeditious hearing of the trial and on the overall duration of the pre-trial custody of the accused.

53. The Chamber reiterates that decisions pursuant to article 61(9) of the Statute are discretionary in nature, as evidenced both by the wording of the relevant statutory texts³³ and the case law of the Court.³⁴ In providing extensive lists and submissions as to the factors which the Chamber should or should not have considered, and in

³³ Article 61(9) of the Statute refers to the need to obtain 'permission of the Pre-Trial Chamber'.

³⁴ See Pre-Trial Chamber II, *The Prosecutor v. Uhuru Muigai Kenyatta*, 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'", 21 March 2013, ICC-01/09-02/11-700-Corr, para. 19; Pre-Trial Chamber II, *The Prosecutor vs. 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", 16 August, 2013, ICC-01/09-01/11-859, para. 31.

discussing at length the extent to which they should be considered, the Prosecutor reveals that the Fourth Issue of the Second Request also revolves around a disagreement with the way in which the Chamber assessed the relevant circumstances. Furthermore, the Chamber notes that the Prosecutor also mischaracterises the 1 June 2020 Decision: the Chamber did actually consider and reference certain factors that the Prosecutor alleges as overlooked: suffice it to mention the Prosecutor's duty to establish the truth.³⁵

54. Accordingly, the Chamber finds that, similarly to the Third Issue of the First Request, the Fourth Issue of the Second Request merely voices and reiterates the Prosecutor's disagreement with the determination of the Chamber and does not constitute an appealable issue within the meaning of article 82(1)(d) of the Statute.

55. The fact that, in light of the above, none of the issues proposed in the Prosecutor's Second Request for Leave to Appeal qualifies as an appealable issue within the meaning of article 82(1)(d) of the Statute makes it unnecessary for the Chamber to determine whether the additional cumulative requirements of article 82(1)(d) are met.

³⁵ 1 June 2020 Decision, para. 19.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Prosecutor's Request for Leave to Reply to the Ngaïssona Defence Response to the First Request;

REJECTS the Prosecutor's First Request for Leave to Appeal; and

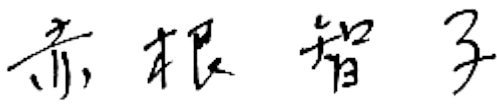
REJECTS the Prosecutor's Second Request for Leave to Appeal.

Done in both English and French, the English version being authoritative.

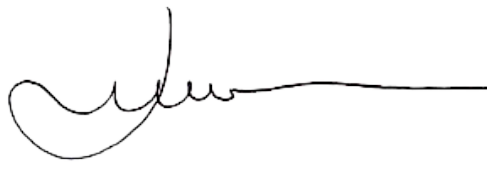


Judge Antoine Kesia-Mbe Mindua

Presiding Judge



Judge Tomoko Akane



Judge Rosario Salvatore Aitala

Dated this Friday, 19 June 2020

At The Hague, The Netherlands