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Date: **20 May 2019**

**PRE-TRIAL CHAMBER II**

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

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II**

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

**Public**

**Request for Leave to Appeal the “Decision on the ‘Prosecution’s Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges’”**

**Source:** Office of the Prosecutor

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Ms Fatou Bensouda, Prosecutor

Mr James Stewart

Mr Kweku Vanderpuye

**Counsel for Alfred Yekatom**

Ms Mylène Dimitri

Mr Peter Robinson

**Counsel for Patrice-Edouard****Ngaïssona**

Mr Geert-Jan Alexander Knoops

**Legal Representatives of the Victims**

Mr Abdou Dangabo Moussa

Ms Elisabeth Rabesandratana

Mr Yaré Fall

Ms Marie-Edith Douzima-Lawson

Ms Paolina Massidda

**Legal Representatives of the Applicants****Unrepresented Victims****Unrepresented Applicants****The Office of Public Counsel for Victims**

Mr Dmytro Suprun

**The Office of Public Counsel for the Defence****States Representatives****Amicus Curiae****REGISTRY****Registrar**

Mr Peter Lewis

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

Mr Philipp Ambach

**Other**

## Introduction

1. The Pre-Trial Chamber has denied the Prosecution’s request to re-introduce one factual allegation—a second victim—into the charge of rape against Mr Ngaïssona.<sup>1</sup> This allegation was previously made as part of the confirmation of charges proceedings, but was not included within the confirmed charges because the supporting evidence for this incident was ruled inadequate. Yet the Prosecution’s renewed request is now based on an additional statement that was not previously available, even with the exercise of reasonable diligence.<sup>2</sup> In the Prosecution’s respectful submission, this sufficed to cure the inadequacy in the evidence of a charge and specification which was, and is, already well known to Mr Ngaïssona and his defence team, and consequently justified the prompt amendment of the charge of rape to re-introduce this allegation in advance of the trial.

2. Unlike the Prosecution, the Pre-Trial Chamber characterised the Request as seeking the entry of an *additional* charge—rather than the amendment of a confirmed charge<sup>3</sup>—and emphasised its view of the “fundamental distinction” between the two concepts,<sup>4</sup> given the necessity of a “complex incidental procedure such as a new confirmation hearing” when an additional charge is entered.<sup>5</sup> In the Pre-Trial Chamber’s view, this seemed to heighten the caution required beyond that customarily adopted in determining requests for amendment.<sup>6</sup>

3. While recognising that the Prosecution may investigate beyond the confirmation hearing in order to establish the truth, and to ensure that the Court is not deprived of significant and relevant evidence<sup>7</sup>—which is indeed consistent with article 61(8) of the Rome Statute—the Pre-Trial Chamber nonetheless concluded that the Prosecution may not seek to “correct[]” the confirmation decision, and that any attempt to do so in the manner proposed by the Request would be unduly burdensome to the Defence.<sup>8</sup> This was particularly due to the need for an additional confirmation hearing, and particularly its view of the consequential burden on Defence counsel and the potential for delay to the start of trial.<sup>9</sup>

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<sup>1</sup> See [ICC-01/14-01/18-517](#) (“Decision”).

<sup>2</sup> See [ICC-01/14-01/18-468-Red](#) (“Request”), paras. 6-8.

<sup>3</sup> See [Decision](#), paras. 18-20.

<sup>4</sup> See [Decision](#), para. 21.

<sup>5</sup> See [Decision](#), para. 21.

<sup>6</sup> See [Decision](#), paras. 21-22 (referring to “the need for such caution” becoming “all the more urgent”). See also para. 23.

<sup>7</sup> See [Decision](#), para. 25. See also para. 36.

<sup>8</sup> See [Decision](#), para. 31.

<sup>9</sup> See [Decision](#), paras. 31-35.

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

- the meaning of “charge(s)” for the purpose of article 61 of the Statute and, in particular, “additional charge” under article 61(9);
- the significance of article 61(9) as the procedural remedy recognised in article 61(8), where charges have been partly confirmed by the Pre-Trial Chamber; and
- the exercise of the Pre-Trial Chamber’s discretion under article 61(9).

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

6. Indeed, it is no exaggeration to say that denying the Prosecution’s request means that the victim of this additional crime may not realistically expect to receive justice from this Court—even though it is highly likely that their evidence will in any event be heard as part of this trial. The Decision precludes the possibility that either a conviction or acquittal might be entered in these trial proceedings in respect of this allegation of rape.<sup>10</sup>

7. As the Court has repeatedly held, confidence in the legal correctness of a decision is irrelevant for the purpose of deciding whether leave to appeal should be granted under article 82(1)(d) of the Statute. The sole question is whether the issues involved in the Decision meet the criteria set out in that provision, such that those issues merit the scrutiny of the Appeals Chamber if requested by a Party.<sup>11</sup>

### **Submissions**

8. The Prosecution agrees with the Pre-Trial Chamber that, at its heart, article 61(9) of the Statute requires an “appropriate balance” between the Prosecutor’s prerogative to request amended or additional charges—a prerogative which “cannot and should not be taken away”, in light of her obligation to search for the truth—“and the need to prevent that prerogative

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<sup>10</sup> Cf. [Decision](#), para. 36.

<sup>11</sup> See e.g. [ICC-02/04-01/05-20](#), para. 22.

from unnecessarily becoming a disruptive factor to the detriment of the Defence”.<sup>12</sup> It also agrees that the balance between the powers of the Pre-Trial Chamber and Trial Chamber, in transitioning from confirmation proceedings to trial proceedings, is a “delicate” one.<sup>13</sup>

9. It is in that spirit that the Prosecution respectfully brings this application. While it appreciates the necessity of protecting the rights of the Accused in deciding matters under article 61(9), the approach adopted in the Decision raises questions of general importance to the work of the Court. In particular, the reasoning of the Pre-Trial Chamber seems to suggest that it considers that the Prosecution may *never* seek to “‘remedy’ evidentiary lacunae which might affect part of an otherwise confirmed case”—for example, by amending a confirmed charge to re-introduce a factual allegation—and that this would, *per se*, occasion unfairness to the Defence.<sup>14</sup> But this would seem to be inconsistent with article 61(8) and (9) of the Statute, read in combination, and the Pre-Trial Chamber’s own recognition that the confirmation decision is not the ‘last word’ on the charges.

10. Clarifying the law on article 61(9)—and especially where it relates to factual allegations which were previously made by the Prosecution, but not accepted as part of the confirmed charges—will assist the Parties in all cases before Court, as well as victims, by giving better notice of the significance of the confirmation decision in crystallising the matters to be determined at trial.<sup>15</sup> While the reasoning of a Pre-Trial Chamber on such matters is always instructive, appellate decisions have the potential to harmonise the Court’s practice and to reduce the need for contentious future litigation. The important matters raised in the Decision would benefit from such treatment.

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

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<sup>12</sup> [Decision](#), para. 36.

<sup>13</sup> [Decision](#), para. 26.

<sup>14</sup> *See* [Decision](#), para. 31.

<sup>15</sup> *Cf.* [Decision](#), para. 31 (expressing concern about any “uncertainty and precariousness” added “to the contours of each confirmed case”, and seeming to suggest that permitting an amendment or addition to the charges which related to a factual allegation already raised during the confirmation proceedings, but not adopted as part of the confirmed charges, “would be tantamount to making the rejection of one or more charges virtually meaningless”).

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

12. The Prosecution identifies three issues arising from the Decision, for which it seeks certification to appeal. As the Court has consistently required, “an appealable issue must be ‘an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion’.”<sup>16</sup> The proposed issues each satisfy this requirement.

#### ***First proposed issue: definition of an “additional charge” for the purpose of article 61(9)***

13. The first proposed issue is:

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), which necessarily requires stricter scrutiny than an “amended charge”.

14. This issue is an identifiable subject or topic arising from the Decision, and its resolution is “essential for the determination of matters arising under the judicial cause under examination”.<sup>17</sup> Indeed, the Pre-Trial Chamber found that the Prosecution 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. The Chamber’s characterisation of the Prosecution Request as a “new charge” determined its ultimate conclusion to reject it.

#### ***The First Issue arises from the Decision***

15. The First Issue plainly arises from the Decision. *First*, the Pre-Trial Chamber found that the Prosecution Request should be characterised as a request to introduce a “new or additional charge” of rape rather than a mere amendment to the charges. The Chamber held that “[it] [wa]s not persuaded by the framing of the Request for Amendment as a mere amendment of a confirmed charge”,<sup>18</sup> and that “adding a second person as a victim to the crime of rape allegedly committed under factual circumstances entirely other than the ones relevant to the confirmed charge as regards specific time, place, alleged perpetrators [...] cannot qualify as a

<sup>16</sup> See e.g. [ICC-01/04-168 OA3](#), para. 9.

<sup>17</sup> [ICC-01/04-168 OA3](#), para. 9. See also [ICC-01/04-01/10-443](#), p.4; [ICC-01/09-02/11-275](#), para 11; [ICC-01/09-02/11-211](#), para 12; [ICC-01/04-01/10-288](#), p.6.

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

mere ‘amendment’ of the same charge of rape as initially confirmed; it must be regarded rather as a new, additional charge, as such requiring a confirmation hearing.”<sup>19</sup>

16. *Second*, the Chamber stated that a decision to allow a new charge requires more caution than a decision to amend an existing charge due to the delay resulting from the holding of another confirmation hearing. The Chamber found that “for the purposes of article 61(9), there is a fundamental distinction between an amendment of an existing charge (which would not require holding a hearing) and the addition of a new charge (which instead would) [...]. [T]hey must both be approached with the utmost caution and limited to the most restrictive of circumstances. However, the addition of a new charge also requires a complex incidental procedure such as a new confirmation hearing [...] This makes the need for such caution all the more urgent.”<sup>20</sup>

17. The higher caution required, and the purported delay resulting from a limited confirmation hearing, were determinative considerations to the Chamber’s decision to reject the Request. The Chamber held that “[t]he need to avoid delays to the trial is indeed critical to the determination of a request under article 61(9)”<sup>21</sup> and that “a procedure under article 61(9) of the Statute inevitably defers the proper commencement of the trial and accordingly prolongs *per se* the overall duration of the proceedings”.<sup>22</sup> It stated that “the Prosecutor’s right of recourse to article 61(9) [...] should only be exercised under circumstances and conditions which would not impact the current trial”.<sup>23</sup> It concluded that “none of the circumstances listed by the Prosecutor in support qualifies as a ‘proper justification’, which would warrant allowing triggering the procedure leading—via new, albeit limited, confirmation proceedings—to an extension of the facts and circumstances of the case against Mr Ngaiissona through the addition of one charge of rape to the case.”<sup>24</sup> The Chamber emphasised that “its determination has been reached in light of the specific circumstances of these proceedings and of this request”.<sup>25</sup>

18. Thus, the Chamber concluded that the proposed amendment entailed the addition of new or additional charges which required a confirmation hearing which would delay the

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<sup>19</sup> [Decision](#), para. 20.

<sup>20</sup> [Decision](#), para. 21.

<sup>21</sup> [Decision](#), para. 32.

<sup>22</sup> [Decision](#), para. 33.

<sup>23</sup> [Decision](#), para. 36.

<sup>24</sup> [Decision](#), para. 31.

<sup>25</sup> [Decision](#), para. 36.

proceedings. Had 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. Moreover, even if the proposed amendment constituted an additional charge, the Chamber could expeditiously hold a confirmation hearing.

*The Appeals Chamber must resolve the First Issue*

19. The Pre-Trial Chamber erred in law in characterising the Prosecution Request as a request to add additional or new charges. It also erred in fact in assuming that the confirmation of the factual allegation of a rape involving one victim within a charged incident would require a “complex” procedure that would be inherently prejudicial to the Defence because it would delay the trial. The First Issue requires an immediate resolution by the Appeals Chamber for the following reasons.

20. *First*, the Decision departs from consistent ICC jurisprudence. ICC chambers have consistently treated similar applications by the Prosecution as requests to amend existing charges which did not involve new or more serious charges and thus did not require a confirmation hearing.<sup>26</sup> Like in the Request, in those applications the Prosecution sought to expand the factual scope of the charges and to include new criminal acts (involving different victims, locations and perpetrators) within the existing charges. For example:

- In *Kenyatta*, the Prosecution sought to add the factual allegation that “victims were also killed by gunshots in Naivasha” between 27 and 29 January 2008.<sup>27</sup> This factual allegation related to incidents of murder<sup>28</sup> different from those described in the existing charge of murder.<sup>29</sup> The Pre-Trial Chamber noted the distinction between an amendment of the charges “where the Prosecutor seeks to add additional charge(s) or to substitute certain charges already confirmed with more serious ones” (which require a hearing) and “any other amendment to a charge” (where hearing is not

<sup>26</sup> *Contra* [Decision](#), para. 22 (“Applications submitted by the Prosecutor as requests for amendments—and treated by the relevant Chambers as such—revolves around modifications of minor import, affecting either the territorial or temporal scope, or secondary factual details relating to the conduct underlying an *already confirmed* charge”).

<sup>27</sup> [ICC-01/09-02/11-700-Corr](#) (“*Kenyatta* Amendment Decision”), para. 26; *see also* [ICC-01/09-02/11-607-Red](#) (“*Kenyatta* Prosecution Request”), para. 10.

<sup>28</sup> [Kenya Prosecution Request](#), para. 7.

<sup>29</sup> *See* [ICC-01/09-02/11-732-AnxA-Corr-Red](#) (“*Kenyatta* Second UDCC”), pp. 30-31 (count 1: Murder constituting a crime against humanity). *See further* [ICC-01/09-02/11-591-Conf-AnxA](#) (“*Kenyatta* UDCC”), pp. 35-36 (count 1: Murder constituting a crime against humanity).



required).<sup>30</sup> However, it considered that “the nature of the requested amendment does not aim at adding an additional charge or substituting an existing charge with a more serious one. Rather, it is a re-insertion, on the basis of the new evidence presented, of an already known specific factual allegation for an existing charge of murder in Naivasha – a location that has already been referred to in the Confirmation of Charges Decision. It follows that the Single Judge does not need to hold a hearing for the purpose of deciding on the Prosecutor’s Request”.<sup>31</sup>

- In *Ruto*, the Prosecution sought to extend the temporal scope of the charges of murder, deportation or forcible transfer, and persecution in the greater Eldoret area (in particular, in Kimumu, Langas, Yamumbi and Huruma) by two days, from “1 January to 4 January 2008” to “30 December 2007 to 4 January 2008.”<sup>32</sup> Consequently, the Prosecution sought to add new criminal acts (involving victims, perpetrators and incidents) different from those charged.<sup>33</sup> Yet the proposed amendment was not considered involving new or additional charges, since it did not affect the legal characterisation of the underlying facts for the three crimes already charged.<sup>34</sup> Although the request became moot because the trial started before the Appeals Chamber decided on the Prosecution’s appeal,<sup>35</sup> the Pre-Trial Chamber did not consider the proposed amendment as involving new charges.<sup>36</sup> Instead, it rejected the request because it involved twelve new witness statements which had been in the Prosecution’s possession for a long time.<sup>37</sup>

<sup>30</sup> [Kenya Amendment Decision](#), para. 24.

<sup>31</sup> [Kenya Amendment Decision](#), para. 29. See also para. 41 (“its re-insertion has no effect on the legal characterization of the facts”).

<sup>32</sup> [ICC-01/09-01/11-824](#) (“Prosecution *Ruto* Request”), paras. 1, 10, 17.

<sup>33</sup> See [Prosecution \*Ruto\* Request](#), paras. 11-14. See further [ICC-01/09-02/11-591-Conf-AnxA](#) (“*Ruto* Updated DCC”), pp. 42-54.

<sup>34</sup> [Prosecution \*Ruto\* Request](#), para. 17.

<sup>35</sup> [ICC-01/09-01/11-1123 OA6](#) (“*Ruto* Amendment AD”), paras. 1, 32. The Prosecution did not seek to suspend the start of the trial.

<sup>36</sup> See [ICC-01/09-01/11-859](#) (“*Ruto* Refusal Amendment Decision”); see also W. Schabas et al., ‘Article 61,’ in K. Ambos and O. Triffterer (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3<sup>rd</sup> Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016) (“Schabas et al.”), p. 1545 (mn. 152: “although PTC II did not rule on the nature of the requested amendment it was clear that the nature of the request to add two days to the existing charges still falls within the first category which does not require a hearing”).

<sup>37</sup> [Ruto Refusal Amendment Decision](#), paras. 37-38. See also para. 42 (the Chamber found that authorising the amendment would result in an unfair burden for the Defence in these circumstances, and in the absence of any justification as to the belated nature of the Prosecutor’s request). In addition, Trial Chamber V(a) had set the date for the start of the trial for 10 September 2013. The Prosecution’s request for amendment was filed on 22 July 2013.

- Likewise, in *Al Hassan*, Pre-Trial Chamber I recently authorised the Prosecution’s application to amend the charges by adding new criminal acts involving 12 new victims (out of the 17 requested) falling within the existing 13 counts.<sup>38</sup> In an earlier decision setting out the procedure to decide on the Prosecution application, Pre-Trial Chamber I agreed that the proposed amendments did not incorporate new or additional charges. It held that “[a]ccording to the Court’s previous rulings, and as the Prosecutor submits, the introduction of new criminal acts in support of charges already confirmed is akin to an ‘amendment’ of the charges rather than an ‘addition of additional charges’ or a ‘substitution of charges[already confirmed]with more serious charges’. In her Request, the Chamber notes that the Prosecutor seeks to add 17 new victims or new ‘cases’ to charges 1 to 13, which have all already been confirmed. No new charge is presented and no request is made to substitute more serious charges for those already confirmed”.<sup>39</sup>

21. Further, in deciding on other issues related to charges, other ICC chambers have adopted the same approach as the Pre-Trial Chambers above. In *Katanga*, Trial Chamber II distinguished between investigations by the Prosecution after the confirmation hearing with respect to “additional charges (additional facts and circumstances and new legal characterisations) which were not confirmed by the Pre-Trial Chamber” from those involving “new facts and circumstances which could fall within the terms of the legal characterisations already accepted by the Pre-Trial Chamber in its Confirmation Decision”. While the former would require a confirmation hearing, the Pre-Trial Chamber could authorise the latter without holding a hearing.<sup>40</sup> Similarly, the Appeals Chamber in *Bemba* held that “adding any additional criminal acts of murder, rape and pillage would have required an amendment to the charges [...] this was the only course of action that would have allowed additional criminal acts to enter the scope of the trial”.<sup>41</sup>

22. In conclusion, ICC chambers have consistently found that amendment of charges involving new criminal acts falling within existing legal characterisations are not new or

<sup>38</sup> [ICC-01/12-01/18-767-Corr-Red](#) (“*Al Hassan* Amendment Decision”), para. 197; see also [ICC-01/12-01/18-608-Red](#) (“*Al Hassan* Procedure Decision”), para. 51. In its Decision, the Pre-Trial Chamber does not refer to the *Al Hassan* Amendment Decision, and it only refers to the *Al Hassan* Procedure Decision.

<sup>39</sup> [Al Hassan Procedure Decision](#), para. 51.

<sup>40</sup> See [ICC-01/04-01/07-1547-tENG](#) (“*Katanga* Summary Charges Decision”), para. 27 (2) and (3). This was cited in: [Al Hassan Procedure Decision](#), para. 51, fn. 97. See also [Schabas et al.](#), p. 1545, mn. 153.

<sup>41</sup> [ICC-01/05-01/08-3636 A](#) (“*Bemba* AJ”), para. 115. This was cited in [Al Hassan Procedure Decision](#), para. 51 (fn. 97).

additional charges under article 61(9) of the Statute. Had the Chamber followed the above jurisprudence, it would have not characterised the Request as an application to add a new or additional charge of rape that requires a hearing and—according to the Chamber—delays the proceedings. Yet the Chamber did not engage with the jurisprudence nor did it provide ‘convincing reasons’ to depart from it.<sup>42</sup> Considering the need for judicial certainty in international criminal proceedings and most notably in matters involving the definition of the charges, the Prosecution’s investigative powers and the Court’s duty to establish the truth, the Appeals Chamber should intervene and resolve this question.

23. *Second*, even if assuming *arguendo* that the Pre-Trial Chamber was correct in treating the factual allegation which the Prosecution sought to reintroduce as an “additional charge”, it erred by failing to give significant consideration to the nature of the confirmation hearing which it would be entailed. While the Chamber conceded that this hearing would be “limited” in scope,<sup>43</sup> it nonetheless assumed that a “complex” procedure of this kind would be inherently prejudicial to the Defence because it would delay the trial.<sup>44</sup> The Prosecution submits that a hearing involving one witness regarding a confined incident already charged (the 5 December attack in Bossangoa) can be expeditiously held before the start of the trial, which has not been set yet.<sup>45</sup> Significantly, in *Al Hassan*, Pre-Trial Chamber I decided (by written procedure) on the Prosecution request to amend the charges with respect to 17 new victim incidents spanning a wider temporal scope and different locations within less than three months, even though the Prosecution filed its request shortly after the Trial Chamber set the start of the trial by 14 July 2020.<sup>46</sup>

<sup>42</sup> Although pursuant to article 21(2) the Appeals Chamber is not bound by its prior decisions, it has indicated that it does not change its jurisprudence lightly and would not depart from it “absent convincing reasons”. See [ICC-02/11-01/15-172 OA6](#), para. 14. This approach has been adopted in all international tribunals due to the need for predictability and legal certainty, among other reasons. See e.g. [Prosecutor v. Aleksovski, IT-95-14/1-A, Judgment, 24 March 2000](#), paras. 107-109; [Prosecutor v. Karadžić, MICT-13-55-A, Judgment, 20 March 2019](#), para. 13; [Prosecutor v. Šešelji, MICT-16-99-A, Judgment, 11 April 2018](#), para. 11; [Rutaganda v. the Prosecutor, ICTR-96-3-A, Judgment, 26 May 2003](#), para. 26; [Case against Akhbar Beirut S.A.L. and Ali al Amin, STL-14-06/PT/AP/AR126.1, Decision on Interlocutory Appeal concerning Personal Jurisdiction in Contempt Proceedings, 23 January 2015](#), para. 71.

<sup>43</sup> [Decision](#), para. 31.

<sup>44</sup> [Decision](#), paras. 21, 32-33, 36.

<sup>45</sup> Ngaïssona did not challenge the charge of rape during the confirmation process: see ICC-01/14-01/18-T-008-Conf, 78:2-122:8; ICC-01/14-01/18-T-009-Conf, 4:20-81:16; ICC-01/14-01/18-T-011-Conf, 58:4-85:21; ICC-01/14-01/18-382-Conf-Corr. Nor, in his Response did he assert that reintroducing the charge would in any way prejudice his prior position concerning it.

<sup>46</sup> See [ICC-01/12-01/18-568-Red](#) (“*Al Hassan* Prosecution Amendment Request”), filed on 31 January 2020. See [ICC-01/12-01/18-548](#) (issued on 6 January 2020 and setting the start of the trial by 14 July 2020); [Al Hassan Amendment Decision](#) (originally issued on 23 April 2020; public corrected version dated 8 May 2020).

24. Further, the Prosecution notes that the two ICTR Trial Chamber decisions cited by the Chamber do not support its conclusion that the requested amendment in this case constitutes a new or additional charge.<sup>47</sup> They stand for the proposition that “[w]hether the allegation could be found, in itself, to be grounds for conviction” was one factor—among many—that ICTR chambers could consider to determine whether the proposed amendment constituted a new charge within the terms of rule 50(B) of the ICTR Rules. In fact, in *Muvunyi*, the Appeals Chamber found that the Trial Chamber had erred in characterising most of the proposed amendments as “new charges”.<sup>48</sup> For example, with respect to the allegation regarding the accused’s participation in additional abductions (involving other victims and locations) than the one abduction originally charged, the Appeals Chamber held:

The proposed amendment, while not a new charge, does expand the scope of the allegations against the Accused from an initial pleading of ordering soldiers of the Ngoma Camp to go to the Beneberika Convent and kidnap the refugees at the Convent *to include other locations*. In the indictment, the Prosecution relies on these other incidents as supporting one charge of genocide, or alternatively complicity in genocide, and as such, *the additional incidents* are supplementary material facts in support of an existing charge. They do not constitute new charges.<sup>49</sup>

25. *Finally*, the Chamber disregards that—consistent with international practice—multiple instances of an offence can be charged within a count.<sup>50</sup>

26. In conclusion, the First Issue arises from the Decision and its resolution by the Appeals Chamber is essential to the Prosecution request to amend the charges of rape during the attack on Bossangoa on 5 December 2013—which was the question posed for judicial determination.

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<sup>47</sup> *Contra* [Decision](#), para. 2, fn. 11 (citing [Prosecutor v. Muvunyi, ICTR-2000-55A-PT, Decision on the Prosecutor’s Motion for Leave to Amend the Indictment, 23 February 2005](#), para. 39; [Prosecutor v. Nizeyimana, ICTR-2001-55-PT, Decision on Prosecutor’s Request for Leave to File an Amended Indictment, 22 September 2010](#), para. 12).

<sup>48</sup> See [Prosecutor v. Muvunyi, ICTR-00-55A-AR73, Decision on Prosecution Interlocutory Appeal against Trial Chamber II Decision of 23 February 2005, 12 May 2005](#) (“*Muvunyi* Amendment AD”), paras. 24-31, 36-38. The Appeals Chamber confirmed the Trial Chamber’s characterization of two proposed amendments as new charges: paras. 32-35 and its reasonable exercise of discretion in rejecting the requested amendments: para. 56.

<sup>49</sup> [Muvunyi Amendment AD](#), para. 31.

<sup>50</sup> [Brima AJ](#), para. 214, citing *inter alia*, [Stankovic Form of the Indictment Decision](#) (“Within the limits of the rules governing indictments, the Prosecution may choose between putting forth multiple detailed counts, or fewer counts combining specific allegations”); see also [ICC Chambers Practice Manual](#), para. 38 (“the decision on what to charge, as well as on how the charges shall be formulated, is fully within the responsibility of the Prosecutor”).

***Second proposed issue: significance of article 61(9) as the procedural remedy recognised in article 61(8), where charges have partly been confirmed by the Pre-Trial Chamber***

27. The second proposed issue is:

Whether, 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.

28. This Second Issue is likewise an identifiable subject or topic arising from the Decision, and its resolution is also essential for issues posed for judicial determination.<sup>51</sup> As explained below, 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 to reject the Prosecution Request.

*The Second Issue arises from the Decision*

29. The Second Issue plainly arises from the Decision. The Chamber held that “the right to request amendments and additional charges, whilst sanctioned by article 61(9) of the Statute, cannot be construed in such a way as to allow the Prosecutor to ‘remedy’ evidentiary lacunae which might affect part of an otherwise confirmed case: besides the uncertainty and precariousness which this would add to the contours of each confirmed case, this would be tantamount to making the rejection of one or more charges virtually meaningless.”<sup>52</sup> The Chamber considered that since “[t]he fundamental function of the control exercised by the Pre-Trial Chamber through the confirmation decision is [...] to set the factual boundaries of the trial by declining to confirm those charges which are not supported by ‘sufficient evidence’[,] [...] [a]llowing the Prosecutor to reintroduce non-confirmed charges for which evidence was lacking pursuant to a supplemental investigation would be tantamount to depriving this second, critical aspect [...] of any meaningful content, especially if coupled with the less demanding procedure applicable when ‘only’ an amendment is at stake.”<sup>53</sup>

30. By these passages, the Chamber appears to have concluded either that it is absolutely impermissible for the Prosecution to rely on article 61(9) to re-introduce factual allegations

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<sup>51</sup> See above fn. 17.

<sup>52</sup> [Decision](#), para. 31.

<sup>53</sup> [Decision](#), para. 23.

which were previously not confirmed, or that such an application must be subject to the most stringent restrictions which were not satisfied in this case. If the Chamber had not misdirected itself in this way, this would have altered the framework in which it conducted its balancing exercise, and led to a different decision.

*The Appeals Chamber must resolve the Second Issue*

31. The Pre-Trial Chamber erred in law in determining that the procedure under article 61(9), whether characterised as a mere amendment or as an additional charge, cannot be used to re-include factual allegations which the Chamber had previously declined to confirm due to insufficiency of evidence. The Second Issue requires an immediate resolution by the Appeals Chamber for the following reasons.

32. *First*, the Decision disregards the plain text of the Statute. Article 61(9) does not restrict the amendment of charges to factual allegations which have not been declined by the Chamber. In fact, article 61(8) of the Statute expressly regulates the Prosecution's prerogative to request re-introduction of factual allegations that the Pre-Trial Chamber has previously declined to confirm due to insufficiency of evidence:

Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.

33. The application of article 61(8) to single charges, as opposed to the document containing the charges as a whole, is demonstrated by the express reference to "a charge".<sup>54</sup> This provision illustrates that the non-confirmation of allegations is not meant to prejudice the Court's—and the Prosecution's—duty to establish the truth. Rather, such a request must be entertained under the procedure in article 61(9). 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. The alternative procedure would be bringing separate confirmation proceedings, potentially leading to

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<sup>54</sup> See also *Schabas et al.*, p. 1542 (mn. 143: "If the PTC declines to confirm one more charge(s), the Prosecutor is not precluded from subsequently requesting its confirmation. The provision was added to article 61 at the Rome Conference on a proposal from Austria. The Prosecutor can continue the investigation, and in case he/she obtains additional evidence to support the confirmation of the charge(s) concerned, he/she can request the PTC to confirm the charge(s) again").

multiple trials with the same accused for different charges, before different Trial Chambers.<sup>55</sup> The latter interpretation does not seem an efficient use of the Court's resources and risks re-traumatising victims and witnesses.

34. *Second*, the Decision departs from consistent jurisprudence. The Prosecution has been permitted to seek to re-introduce factual allegations which were not confirmed. In *Kenyatta* the Prosecution sought (and was granted) the re-introduction of the factual allegation that civilians were killed by gunshots in Naivasha, after the Pre-Trial Chamber explicitly rejected this allegation in the Confirmation Decision.<sup>56</sup> In *Ruto*, the Prosecution sought (and was rejected by the Pre-Trial Chamber) the re-introduction of the larger temporal scope that the Pre-Trial Chamber explicitly rejected in the Confirmation Decision.<sup>57</sup>

35. *Third*, the *Al Hassan* Procedure Decision cited by the Chamber does not stand for the proposition that the Prosecution is precluded from re-introducing non-confirmed factual allegations.<sup>58</sup> The *Al Hassan* Pre-Trial Chamber held that it would not entertain the Prosecution request to reconsider or correct its assessment of the *evidence already considered* in the Confirmation Decision.<sup>59</sup> It did not rule that the Prosecutor could not “go back to the Pre-Trial Chamber should there be new evidence to put forward in respect of charges which were not confirmed”.<sup>60</sup>

36. *Finally*, allowing the Prosecution to reintroduce non-confirmed charges under article 61(9) for which new evidence has been obtained is fully consistent with the function of confirmation proceedings and of the Confirmation Decision.<sup>61</sup> Indeed, by determining that the re-introduced factual allegations satisfy the standard under article 61(5), the Chamber would ensure that the charge is not weak. Moreover, since any amendment must be completed

<sup>55</sup> In fact, since the two rapes occurred in the course of the same attack the two trials could even be joined under article 64(5), had the charges relate to two different accused: see [Gbagbo & Blé Goudé Joinder Decision](#), paras. 49, 63-68.

<sup>56</sup> [Kenya Amendment Decision](#), paras. 22-29.

<sup>57</sup> [Ruto Refusal Amendment Decision](#), paras. 13-15, 26. See also [ICC-01/09-01/11-522](#), paras. 28-29 (referring to [ICC-01/09-01/11-373](#), paras. 225, 228, 241, 249, 254, 264, 271).

<sup>58</sup> *Contra* [Decision](#), para. 31 (fn. 43: citing [Al Hassan Procedure Decision](#), para. 44).

<sup>59</sup> [Al Hassan Procedure Decision](#), para. 44 (“the Chamber does not consider that article 61(9) of the Statute gives it the task of revisiting the facts as found or the assessment of evidence previously presented and included in its Confirmation Decision and of making “corrections” thereto, and it matters not that such corrections concern errors attributable to the Prosecutor (Part I of the Request) or to the Chamber (Part II of the Request). In this instance, the Chamber considers that the corrections requested by the Prosecutor in Parts I and II of her Request do not concern an amendment of the factual scope of the charges already confirmed within the meaning of article 61(9) of the Statute”). See also [Al Hassan Amendment Decision](#), para. 6.

<sup>60</sup> *Contra* [Decision](#), para. 31.

<sup>61</sup> *Contra* [Decision](#), para. 23.

before the trial starts, the accused would undoubtedly be aware of the parameters of the case against him before opening statements are delivered.<sup>62</sup>

37. In conclusion, the Second Issue arises from the Decision and its resolution by the Appeals Chamber is essential to the Prosecution request to amend the charges—which was the question posed for judicial determination.

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

38. The third proposed issue is:

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

39. This issue arises from the reasoning in the Decision, which expressly recognised that the outcome was “reached in light of the specific circumstances of these proceedings and of this request.”<sup>63</sup> It determined that “none of the circumstances” identified by the Prosecution “qualifies as a ‘proper justification’, which would warrant” entering an additional charge under article 61(9).<sup>64</sup> The Pre-Trial Chamber did not express itself as to whether, in its view, these circumstances would suffice to justify amending a charge. Specifically, the Decision took into account:

- the “risk” taken by the Prosecution in presenting a charge during the confirmation proceedings “relating to facts for which [it] could only rely on indirect evidence”, and asserted that “only when this risk materialised was the decision made to proceed with additional investigative steps which would allow the gathering of better evidence”;<sup>65</sup>
- the Pre-Trial Chamber’s view that the Prosecution may not “‘remedy’ evidentiary lacunae which might affect part of an otherwise confirmed case”;<sup>66</sup>

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<sup>62</sup> [Ruto Amendment AD](#), para. 29 (“the Prosecutor’s Request to Amend the Charges was filed before the Pre-Trial Chamber on 22 July 2013, *i.e.* before the commencement of the trial. Nevertheless, the Appeals Chamber finds that the wording of article 61 (9) of the Statute [...] indicates that not only the request to amend the charges has to be filed before the commencement of the trial, but also that the entire process of amending the charges must be completed by that time, including the granting of permission for the amendment by the Pre-Trial Chamber”).

<sup>63</sup> [Decision](#), para. 36.

<sup>64</sup> [Decision](#), para. 31.

<sup>65</sup> [Decision](#), para. 31.

<sup>66</sup> [Decision](#), para. 31.



- the “burden for the defence team, forced to remain simultaneously engaged both before the Pre-Trial Chamber” for the purpose of article 61(9) proceedings “and the Trial Chamber”;<sup>67</sup>
- the “need to avoid delays to the trial”,<sup>68</sup> particularly in light of “the right of the accused to be tried expeditiously”;<sup>69</sup> and
- the fact the Pre-Trial Chamber “is no longer responsible for deciding custody matters” and consequently is not itself in a position “to consider provisional release as a counterweight to the detrimental impact” that article 61(9) proceedings may have “*per se* on the Defence strategy and resources”.<sup>70</sup>

40. It is settled law that the discretion vested in the Pre-Trial Chamber under article 61(9) is not unfettered, and must take account of “all relevant circumstances surrounding the case at this stage of the proceedings”, based not only on the “Prosecutor’s Request” but also any “other relevant information which the Pre-Trial Chamber could seek if necessary”.<sup>71</sup> While it is of course necessary and correct for the Pre-Trial Chamber to take into account the rights of the accused, this must not be speculative and must also take into account the potential countervailing measures which might be taken to avert any potential prejudice, as well as the interests which might militate in favour of amending or adding to the charges.<sup>72</sup>

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

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<sup>67</sup> [Decision](#), para. 31.

<sup>68</sup> [Decision](#), para. 32.

<sup>69</sup> [Decision](#), paras. 33-34.

<sup>70</sup> [Decision](#), para. 35.

<sup>71</sup> See [Kenya Amendment Decision](#), para. 21.

<sup>72</sup> See further e.g. [Prosecutor v. Nizeyimana](#), ICTR-2001-55-PT, [Decision on Prosecutor’s Request for Leave to File an Amended Indictment](#), 22 September 2010; [Prosecutor v. Tolimir](#), IT-05-88/2-PT, [Written Reasons for Decisions on Prosecution Motion to Amend the Second Amended Indictment](#), 16 December 2009; [Prosecutor v. Setako](#), ICTR-04-08-I, [Decision on the Prosecution’s Request to Amend the Indictment](#), 18 September 2007; [Prosecutor v. Rukundo](#), ICTR-2001-70-PT, [Decision on the Prosecutor’s Request for Leave to File an Amended Indictment](#), 28 September 2006; [Prosecutor v. Boškoski and Tarčulovski](#), IT-04-82-PT, [Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions challenging the Form of the Proposed Indictment](#), 1 November 2005; [Prosecutor v. Renzaho](#), ICTR-97-31-I, [Decision on the Prosecutor’s Motion for Leave to Amend the Indictment](#), 18 March 2005; [Prosecutor v. Simba](#), ICTR-2001-76-I, [Decision on motion to Amend Indictment](#), 26 January 2004; [Prosecutor v. Brđanin and Talić](#), IT-99-36, [Decision on Filings of Replies \(TC\)](#), 7 June 2001, para. 3.

- the fact that the Defence already had notice of many of the relevant factual allegations arising from the Request, and their context, since these were litigated in the confirmation proceedings;
- the degree to which any further confirmation hearing would be limited in its scope, given the limited nature of the additional evidence on which the Prosecution proposed to rely;
- the significance of the Prosecutor's duty to establish the truth for its further investigations, including after the confirmation decision in certain circumstances; and
- the particular difficulty which may be encountered in obtaining evidence of sexual violence; and the reasonable diligence exercised by the Prosecution in attempting to obtain such evidence; and
- the artificiality of constraining the Trial Chamber from making findings relevant to Mr Ngaïssona's liability (concerning the alleged rape material to the Decision, for the purpose of the charged count of rape) in the context of evidence which it will otherwise hear.

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

- the burden on the Defence team in litigating simultaneously before two chambers of the Court—a requirement that commonly arises, for example, during interlocutory appeal proceedings, and which can be mitigated by measures within the case management discretion of any of the relevant chambers;
- the inability of the Pre-Trial Chamber to make determinations about interim release now a Trial Chamber is seised of the case (and which must be expected to make the proper decisions according to the circumstances);
- 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
- the balance between the powers of the Pre-Trial Chamber and the Trial Chamber.

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

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

44. The Prosecution submits that it is necessary to certify for appeal *all three* of the proposed issues, in light of their different scope. The first issue asks whether it was indeed necessary to characterise the Request as seeking an additional charge, and whether this necessarily required stricter scrutiny. The second issue considers whether it would be consistent with article 61(8) for the Pre-Trial Chamber to effectively exclude the possibility that a request for either an amended or an additional charge may serve to re-introduce a factual allegation that was not adopted in confirmation proceedings. And the third issue inquires into the factors which a Pre-Trial Chamber can properly consider to be relevant to this analysis, as well as to whether the Pre-Trial Chamber in this particular situation erred in its appreciation of those factors it took into account.

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

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

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

47. The proposed issues significantly affect the fair conduct of the proceedings because they relate to the Prosecution’s ability in this case to exercise the powers and to fulfil the duties set out in article 54(1) of the Statute. This has previously been confirmed as a core procedural right which is essential to the fairness of the adversarial proceedings of this Court,<sup>73</sup> particularly when “the treatment of particular individuals”, including “victims”, is at stake.<sup>74</sup>

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<sup>73</sup> See [ICC-01/04-135-tEN](#), paras. 38-39 (“The term ‘fairness’ [...] means equilibrium, or balance. [...] Equity of the proceedings entails equilibrium between the two parties, which assumes both respect for the principle of quality and the principle of adversarial proceedings. In the view of the Chamber, fairness of the proceedings includes respect for the procedural rights of the Prosecutor, the Defence, and the Victims [...] The Chamber also

48. Notably, the Decision conclusively determines the extent to which the trial will be able to make an objective assessment of the truth of the factual allegation which the Prosecution seeks to re-introduce, and which the Prosecution respectfully submits constitutes a “fact[] and evidence relevant to an assessment of whether there is criminal responsibility under this Statute”.<sup>75</sup> For this reason, the Prosecution considers itself obliged to have made the Request, and this present application, in pursuance of its duty to “[t]ake appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so respect the interests [...] of victims” and to “take into account the nature of the crime, in particular where it involves sexual violence [or] gender violence”.<sup>76</sup> While the Prosecution agrees that its duty to “[f]ully respect the rights of persons arising under this Statute” encompasses not only the rights of victims, but also accused persons,<sup>77</sup> it respectfully submits that the Request is not inconsistent with the right to an adequate defence. Yet in any event, any such questions which may arise are precisely why the proposed issues satisfy the requirement of article 82(1)(d), and should be certified for appeal.

49. It is a consequence of the Decision that, as it stands, the victim of the rape in question will in all probability have no other way to obtain justice at this Court, or indeed will Mr Ngaïssona have an opportunity to clear his name in this respect. It is likely that, irrespective of the Decision, the witness will testify on related matters in support of the charges already confirmed in this case.

50. In addition, the proposed issues significantly affect the expeditious conduct of the proceedings because they relate to the duration of the pre-trial and trial proceedings. Indeed, the Pre-Trial Chamber’s view of the impact of the Request on the speed of the proceedings was a chief reason for its decision.<sup>78</sup> They also remain pertinent to another Prosecution request.<sup>79</sup> This further request may be determined more expeditiously with the benefit of an appellate ruling on the matter, and may indeed be stayed until that ruling is made.

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holds that within the context of the Statute, respect for the fairness of the proceedings with regard to the Prosecutor, at the investigation phase of a situation, means that the Prosecutor must be able to exercise the powers and fulfil the duties listed in article 54”).

<sup>74</sup> See [ICC-01/04-01/06-2463](#), para. 30.

<sup>75</sup> See [Statute](#), art. 54(1)(a).

<sup>76</sup> See [Statute](#), art. 54(1)(b).

<sup>77</sup> See [Statute](#), art. 54(1)(c).

<sup>78</sup> See e.g. [Decision](#), paras. 31-34.

<sup>79</sup> See [ICC-01/14-01/18-518-Conf.](#)

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

51. The proposed issues significantly and necessarily affect the outcome of the trial.<sup>80</sup> Quite simply, because of the Decision, the Trial Chamber will not be able to rule in its final judgment on the factual allegation which the Prosecution seeks to re-introduce, either to convict Mr Ngaïssona of responsibility for this incident or to acquit him.

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

52. For similar reasons, immediate resolution by the Appeals Chamber of the proposed issues not only may but *will* materially advance the proceedings, in the sense that it would confirm whether the factual allegation which the Prosecution has sought to re-introduce should properly be included in the scope of the trial,<sup>81</sup> which has not yet started. No trial date has yet been set, and any interlocutory appeal can be expeditiously decided. Indeed, insofar as the Prosecution's pending application under article 61(9) in respect of Mr Yekatom might be stayed pending the Appeals Chamber's judgment, an interlocutory appeal will also expedite further litigation or decision-making on this issue, as it will determine conclusively whether the approach in the Decision was indeed correct.

53. While interlocutory appeal proceedings will necessarily take some period of time, this will not prejudice the outcome of any further assessment which may be required by the Pre-Trial Chamber under article 61(9) of the Statute. The Trial Chamber is competent to take measures to avoid any prejudice to the Defence arising from any future amendment or addition to the charges, including by making directions as to the order in which the Prosecution will be permitted to present its case.<sup>82</sup>

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<sup>80</sup> See [ICC-01/09-01/11-912](#) (“*Ruto and Sang Charges ALA Decision*”), para. 65 (accepting that, “in the circumstances of the present case, the [proposed issue] would significantly affect the outcome of the trial as additional crimes allegedly committed [...] will not form the factual basis upon which the judgment pursuant to article 74 of the Statute will be rendered”).

<sup>81</sup> See also [Ruto and Sang Charges ALA Decision](#), para. 66.

<sup>82</sup> This is not to say that article 61(9) proceedings may continue after the start of trial, but only that any potential prejudice resulting from the completion of such proceedings relatively close to the trial date may be averted by the exercise of the Trial Chamber's case management powers.

### Conclusion

54. For the reasons above, the Pre-Trial Chamber is respectfully requested to certify the proposed issues for appeal.



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Fatou Bensouda, Prosecutor

Dated this 20<sup>th</sup> day of May 2020

At The Hague, The Netherlands