

# The ICC's Troubled Track Record on Sexual and Gender-Based Crimes Continues: The Yekatom & Ngaïssona Case (Part 1)

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Recent months have seen an important shift in practice at the International Criminal Court (ICC): in several cases, the Prosecutor has requested leave to amend the charges in the period between the confirmation of charges decision and the first day of trial, in order to include additional incidents of sexual violence.

This shift is likely a response to the *Bemba* appeals judgment, which held that an accused person can only be convicted of acts that were specified in the charges that the Pre-Trial Chamber (PTC) confirmed. For instance, if the PTC confirmed a charge of rape based on

evidence that ten victims experienced this crime, there is no chance of convicting the accused of an eleventh incident unless the Prosecutor sought and obtained leave from the PTC to include that incident in the charges.

The mechanism for such amendments is Art. 61(9) of the Rome Statute, which states:

After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held.

Back in April, in *Prosecutor v. Al Hassan*, the PTC agreed to modify the existing charges of sexual slavery, rape, persecution, outrages on personal dignity and other inhumane acts (including forced marriage) in order to include additional facts. The PTC indicated that these additions were not so significant that they would delay the start of the trial, and although they would impact on the way the defence organised its work in preparing for trial, this relatively small impact was outweighed by the necessary search for the truth by the Prosecutor.

However, in *Prosecutor v. Yekatom & Ngaïssona*, PTC II was not so accommodating.

### **Attempts to introduce new evidence of sexual violence in the *Yekatom & Ngaïssona* case**

The case stems from the ICC Prosecutor's second investigation in the Central African Republic (CAR), which concerns the armed conflict in that State since 2012. Key parties to this conflict include the Seleka, a coalition of armed groups whose members are mostly Muslim, and the Anti-Balaka, a movement whose members are predominantly Christian.

The Prosecutor opened this investigation in 2014, resulting in arrest warrants against Alfred Rombhot Yekatom and Patrice-Edouard Ngaïssona, as alleged leaders of certain groups within the Anti-Balaka movement, who have been in ICC custody since late 2018.

The two cases were joined in February 2019, and the Prosecutor's Document Containing the Charges (DCC) was filed in August 2019. In the DCC, the Prosecutor charged Ngaïssona with rape as a crime against humanity and a war crime, and the crime against humanity of persecution, related to many counts of sexual violence, including in the capital, Bangui, and several other towns.

Most of those counts were not confirmed by the PTC in December 2019 because Ngaïssona's knowledge and criminal responsibility had not been established. He was, however, charged with rape (and attempted rape) as a war crime and crime against humanity. These charges were based on evidence that anti-Balaka elements raped one victim during their attack on Bossangoa village. In the DCC, the Prosecutor had also alleged

that a second victim was raped in this attack. However, the Chamber held that there was insufficient evidence to establish that allegation: the evidence was ‘indirect and too vague’, and neither the victim nor the perpetrator had been identified.

The Prosecutor did not include rape charges against Yekatom, and consequently, the Chamber did not charge him with that crime.

The outcome of the Confirmation of Charges hearing contributed to a disturbing trend within the ICC of sexual violence charges being among those most vulnerable to dismissal at the pre-trial and trial stages.

In March, the Prosecutor sought to amend the charges against Ngaïssona under Art. 61(9), to include the second instance of rape in Bossangoa, explaining that the Office of the Prosecutor had obtained a first-hand account of that rape. The Prosecutor also indicated that she anticipated expanding Yekatom’s charges to include rape and sexual slavery, once certain security measures had been taken to protect two victims.

In May, PTCII denied the request to amend the charges against Ngaïssona. It reasoned that re-introducing evidence of a charge that had already been considered and dismissed did not serve the purpose of the confirmation decision, namely, to set the factual boundaries of the trial so that the accused could prepare a defence. PTCII was concerned that allowing the amendment would require a second Confirmation of Charges hearing, asserting that it would result in ‘significant delays’ in the proceedings, even while acknowledging the limited nature of the proposed amendment.

It reiterated a ‘precautionary and restrictive approach’ to art. 61(9) amendments, so as to avoid ‘unjustified recourse to this prerogative by the Prosecutor turn[ing] into abuse’ and admonished the Prosecutor for continuing to investigate after the Confirmation of Charges hearing. The PTC indicated 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’.

With respect to the Prosecutor’s ‘heads up’ that she planned also to amend the charges against Yekatom, PTCII expressed ‘concern’ and warned that it would continue to exercise vigilance to uphold the accused’s fair trial rights.

That same day, the Prosecutor filed a request to amend Yekatom’s charges to include the war crimes of rape and sexual slavery, based on evidence from two female victims in the CAR. The request indicated that, while finalising its investigation into the ‘child soldier’ charges, the Prosecution uncovered credible evidence of rape and sexual slavery committed by Anti-Balaka elements subordinate to Yekatom.

In explaining the delay in obtaining this evidence, the request pointed (among other things) to severe budget constraints during October-December 2019, which meant that only one investigative team could be sent into the CAR at a critical time. It further indicates that the initial interview with the first witness had to be pushed back so that she would have access to a qualified psychosocial expert, which was necessary because she was a potential victim of sexual violence. Quoting extensively from its own *Ngaiissona* amendment decision, and without referring to the *Al-Hassan* amendment decision, the PTC denied this request on 1 June 2020.

In its request, the Prosecutor argued that – based on previous indictment amendment cases in international criminal tribunals – there are three factors that should be considered in Art. 61(9) amendment cases: (1) the importance and seriousness of the allegations to a complete understanding of the Prosecution’s case; (2) the reasonable diligence of the Prosecution in laying the additional charges; and (3) whether the adjudication of the additional charges causes unfair prejudice to the accused.

In this first post on the case, we consider the first and second factors in detail. In our next post, we discuss the third factor, as well as the silence on gender-based persecution in the *Yekatom & Ngaiissona* case.

## **1. Importance and seriousness of the allegations**

The Prosecutor argued that the new charges were sufficiently important and serious to warrant addition to the charges against Yekatom. Referring to previous ICC decisions, she pointed to ‘the grave nature and consequences of crimes of sexual violence’. Relying on *Ntaganda*, she argued that such charges strike ‘at the very core of human dignity and physical integrity’. She also put forward her Office’s duty to ‘to seek justice for the complete range of the crimes committed by an accused’.

The PTC failed to engage on the issue of the importance and seriousness of the charges, finding that, ‘In the view of the Chamber, the ‘marginal’ nature of the requested addition strengthens the conclusion that granting the Request cannot be regarded as necessary with a view to honouring the Court’s obligation to determine the truth’.

However, the Prosecutor’s use of the term ‘marginal’ was in reference to the impact on the size and duration of the case. The purpose was not to show that the charges themselves were marginal – indeed, the Prosecutor argued the opposite, that they were very serious – but rather that the impact on the size and length of the case was small. PTCII’s reasoning elides two distinct issues: the importance and seriousness of the allegations, and the degree of detriment to the accused that the proposed amendment to the charges would cause.

Additionally, the PTC did not discuss that the importance of the charges is linked, in part, to the fact that at least one of the victims appears to be a female captured by the Anti-Balaka, perhaps as a child soldier (see paras. 15 and 18, reading into the redactions). The rape and

sexual slavery charges appear to be tied to the child soldiering charges. As the Prosecutor's Policy Paper on Children notes, various provisions of the Rome Statute 'highlight the importance of the effective investigation and prosecution of crimes against or affecting children, as well as the protection of children's rights and interests'. If the child soldier charges and the sexual violence charges are connected, the additional charges relate to a particularly vulnerable witness, making the charges all the more serious.

## **2. The reasonable diligence of the Prosecution in laying the additional charges**

The Prosecutor argued that her Office was reasonably diligent in laying the additional charges, though PTCII disagreed.

The Prosecutor gave notice in June 2019 that her office was 'continu[ing] to investigate the commission of sexual and gender based crimes [...] and may seek the confirmation of such charges, should the evidence obtained satisfy the requisite threshold' (this is discussed in the Victims' Brief). In July 2019, prosecutors uncovered 'lead' but not solid evidence of rape and sexual slavery, a month before the deadline for submission of the DCC. Given that the Prosecutor had already sought and obtained a delay in the Confirmation of Charges hearing, it was not feasible to request a further delay or to include this evidence at the Confirmation of Charges stage.

The Prosecutor interviewed two witnesses in relation to the additional charges: one in September 2019 and one in November 2019 and January 2020. The Prosecutor listed issues relating to both witnesses that contributed to delays, namely difficulties contacting one witness, investigation travel, translating their statements, and assessing their risk. Once the statements were obtained, the Prosecutor verified the information by conducting 'an extensive internal evidence review'. The Prosecutor also indicated that there were numerous challenges in securing the presence of qualified psychosocial experts to support these witnesses.

The PTC was concerned with the amount of time between the discovery of the information in July 2019 and the request to amend the charges in March 2020. The PTC criticized the Prosecutor for not explaining why a request to amend the charges was not undertaken in September 2019 after the first witness was interviewed. This is despite the fact that the Prosecutor seemed to indicate that the evidence obtained from the two victims was linked.

The PTC also was concerned that the Prosecutor had not clearly explained what additional details were needed with respect to the subsequent interview of the second witness, why they were needed, whether they were obtained, or how they were taken into account. The PTC was justified in questioning why a second interview was needed, however the other aspects are not particularly relevant to the timeline of the investigation. (They would likely be more pertinent to the proposed confirmation hearing on the additional charges.)

The PTC did not specifically address the reasons put forward by the Prosecutor, only stating without explanation that the circumstances were not 'adequate justification' for the inefficiency. This lack of analysis is regrettable. At the same time, the prosecution could have provided clearer explanations of its diligence, particularly regarding the actual effects of the budget constraints and the time period between collecting the evidence and subjecting it to analysis by senior prosecution staff officials.

Additionally, there are particular challenges (such as underreporting) and responsibilities that arise in sexual violence cases that often require more time than other types of investigation: if this occurred in this case, it is crucial for the Prosecutor to fully explain so that the Chamber understands.