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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-ÉDOUARD NGAÏSSONA***

Public Document

**Common Legal Representatives' Joint Response
to the Prosecution's Request for Reconsideration or Leave to Appeal**

Source: Common Legal Representatives of Victims

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

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I. INTRODUCTION

1. The Common Legal Representative of the Former Child Soldiers and the Common Legal Representatives of the Victims of Other Crimes (jointly the “Common Legal Representatives”) hereby file their joint response to the “Prosecution’s Request for Reconsideration of, or alternatively Leave to Appeal, the ‘Decision on the confirmation to charges against Alfred Yekatom and Patrice-Edouard Ngaïssona’” (the “Prosecution Request” or the “Request”).¹

2. Taking note of the Prosecution’s choice to seek reconsideration of the Decision confirming the charges and, only alternatively, leave to appeal said Decision on two discrete issues, the Common Legal Representatives consider that appellate review is the more appropriate procedural avenue in the circumstances.

3. In particular, the Common Legal Representatives support the Prosecution in that the Pre-Trial Chamber erred in interpreting article 61(7) of the Statute as not requiring to assess the evidence in light of all possible modes of liability (in respect of both suspects). It is averred that immediate resolution of the issues identified by the Prosecution and – more globally – the alleged error committed by the Pre-Trial Chamber of not conducting a full analysis of the evidence relating to all modes of liability charged, is necessary at this early stage of the proceedings. It is in the interest of all parties and participants that the issues are properly settled before the start of the trial phase. Indeed, confirming charges for alternative modes of liability promotes judicial efficiency and reduces the potential disruptive effect that the triggering of regulation 55 of the Regulations of the Court may entail at the trial stage.

¹ See the “Prosecution’s Request for Reconsideration of, or alternatively Leave to Appeal, the ‘Decision on the confirmation to charges against Alfred Yekatom and Patrice-Edouard Ngaïssona’”, [No. ICC-01/14-01/18-437](#), 2 March 2020 (the “Prosecution Request” or the “Request”).

II. PROCEDURAL BACKGROUND

4. From 19 to 25 September and on 11 October 2019, Pre-Trial Chamber II (the “Chamber”) held the confirmation of charges hearing.

5. On 11 December 2019, the Chamber issued the “Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona”, partly confirming the charges against the suspects and committing them for trial (the “Decision confirming the charges”).² In the ruling the Chamber indicated that the time limit for the filing of an application for leave to appeal the Decision was suspended until its translation into French by the Registry.³

6. On 21 February 2020, the Registry filed the French translation of the Decision confirming the charges.⁴

7. On 2 March 2020, the Prosecution filed its Request moving for reconsideration, or, in the alternative, leave to appeal two issues arising from the Decision confirming the charges.⁵

III. SUBMISSIONS

A. Request for Reconsideration

8. The Appeals Chamber has thus far not pronounced itself on the remedy of reconsideration⁶ which is not found in the statutory framework of the Court.⁷ Yet, the

² See the “Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona” (Pre-Trial Chamber II), [No. ICC-01/14-01/18-403-Conf](#), 11 December 2019 (the “Decision confirming the charges”). A public redacted version of the Decision was issued on 20 December 2020; see [No. ICC-01/14-01/18-403-Red](#).

³ *Idem*, p. 107.

⁴ See the “Décision relative à la confirmation des charges portées contre Alfred Yekatom et Patrice-Édouard Ngaïssona” (Pre-Trial Chamber II), [No. ICC-01/14-01/18-403-Conf-tFRA](#), 21 February 2020.

⁵ See the Prosecution Request, *supra* note 1.

⁶ See e.g., the “Decision on Mr. Ruto’s request for reconsideration of the ‘Decision on the request for suspensive effect’” (Appeals Chamber), [No. ICC-01/09-01/11-993-Red](#), 27 September 2013, para. 8. See

practice has indicated that a Chamber may reconsider its own decision to prevent an injustice or to address a clear error of reasoning.⁸

9. The Common Legal Representatives take note of the Prosecution's choice to request in the first instance, reconsideration of the Decision confirming the charges, and only alternatively leave to appeal.

10. Given the importance of the matter at hand, and that a clear statutory avenue exists for challenging the Decision, the Common Legal Representatives posit that reconsideration should be an auxiliary remedy of seeking judicial intervention, rather than the main basis for challenging rulings. This holds particularly true for decision of such significance as a decision confirming the charges, which will serve as the basis for the trial proceedings.

11. Where the substance of the decision is so clearly a matter that has the potential of significantly affecting the outcome of the trial and to have implications on the fairness and expeditiousness of the proceedings, as those put before the Chamber in the present case, the Common Legal Representatives aver that article 82(1)(d) of the Statute is the more appropriate procedural avenue to follow, as it would ultimately lead to legal certainty.

12. Nevertheless, since the Common Legal Representatives share the Prosecution's view that the identified issues must be resolved prior to the commencement of the trial, they do support the Prosecution in its legal challenge of

also, the "Decision on the request for reconsideration of the decision on the request for the disqualification of the Prosecutor in the investigation against Mr David Nyekorach-Matsanga" (Appeals Chamber), [No. ICC-01/09-111](#), 22 April 2013, para. 5.

⁷ See the "Decision on Mr Ntaganda's request for reconsideration of the decision on time and page extensions", [No. ICC-01/04-02/06-2426](#) (Appeals Chamber), 1 October 2019, para. 6.

⁸ See *e.g.*, the "Decision on Defence Request to Reconsider the Date of the Closing Statements", [No. ICC-02/04-01/15-1691](#) (Trial Chamber IX), 4 December 2019, para. 6 and references contained therein. See also, the "Decision on the Sang Defence's Request for Reconsideration of Page and Time Limit" (Trial Chamber V(A)), [No. ICC-01/09-01/11-1813](#), 10 February 2015, para. 19; and the "Decision on Defence request for reconsideration of oral ruling on admission of a document for impeachment purposes" (Trial Chamber VI), [No. ICC-01/04-02/06-1473](#), 3 August 2016, para. 4.

the two issues on either basis, as said issues may indeed be interpreted as fulfilling the requirement of “constituting clear errors in reasoning”.⁹

B. Request for Leave for Appeal

13. Article 82(1)(d) of the Statute provides for the possibility for the parties to seek leave to appeal *“a decision that involves an issue that 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 Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”*.

14. The jurisprudence of the Court has clarified the various requirements of article 82(1)(d) of the Statute.¹⁰ In this regard, the Appeals Chamber ruled that *“[e]vidently, article 82 (1) (d) of the Statute has two components. The first concerns the prerequisites for the definition of an appealable issue and the second the criteria by reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber”*.¹¹ The Appeals Chamber also stated that *“[o]nly an ‘issue’ may form the subject-matter of an appealable decision”*,¹² and defined the term “issue” as *“an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”*.¹³ The Appeals Chamber also considered that *“[n]ot every issue may constitute the subject of an appeal. It must be one apt to ‘significantly affect’, i.e. in a*

⁹ Trial Chamber V(A) comprehensively set out the standard, which has later on been endorsed by other Chambers of this Court. It held: *“[T]he Chamber considers that the powers of a chamber allow it to reconsider its own decisions, prompted by one of the parties or proprio motu. Reconsideration is exceptional, and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. New facts and arguments arising since the decision was rendered may be relevant to this assessment.”* See the “Decision on the Sang Defence’s Request for Reconsideration of Page and Time Limit”, *supra* note 8. See also, the “Decision on the Sang Defence’s Request for Reconsideration of Page and Time Limit” (Trial Chamber V(A)), [No. ICC-01/09-01/11-1813](#), 10 February 2015, para. 19.

¹⁰ See the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under article 58” (Pre-Trial Chamber II), [No. ICC-02/04-01/05-20](#), 19 August 2005, para. 21. See also the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), [No. ICC-01/04-168 OA3](#), 13 July 2006, paras. 8 and 14.

¹¹ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 10, para. 8.

¹² *Idem*, para. 9.

¹³ *Ibid.*

material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”.¹⁴

15. According to the established jurisprudence, in analysing whether an appealable issue would “significantly affect” the fair and expeditious conduct of the proceedings under article 82(1)(d) of the Statute, the notion of “fairness” must be understood as referring to situations “when a party is provided with the genuine opportunity to present its case - under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent - and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision”.¹⁵ In turn, “expeditiousness” must be read as “closely linked to the concept of proceedings ‘within a reasonable time’, namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned”.¹⁶

16. Finally, the Appeals Chamber stated that in order to determine whether an issue would significantly affect the “outcome of the trial” under article 82(1)(d) of the Statute, “[t]he Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence”.¹⁷

17. Consequently, it must first be determined whether the purported “issue” identified in the Request is an “appealable issue” within the meaning of article 82(1)(d) of the Statute, as interpreted by the jurisprudence of the Court. Indeed, “while an application for leave to appeal should not contain in detail the arguments which the party intends to raise before the Appeals Chamber, it must still identify clearly the appealable issue, including by way of indicating a specific factual and/or legal error. Only in this case can the

¹⁴ *Idem*, para. 10.

¹⁵ See e.g., the “Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure” (Pre-Trial Chamber III, Single Judge), [No. ICC-01/05-01/08-75](#), 25 August 2008, para. 14.

¹⁶ *Idem*, para. 18.

¹⁷ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 10, para. 13.

*Chamber assess whether the issue, provided it was wrongly decided, may have implications on the fairness and expeditiousness of the proceedings or outcome of the trial”.*¹⁸

18. The Common Legal Representatives submit that the two issues identified by the Prosecution in its Request squarely fall within the abovementioned definition. They arise from the decision; they do not merely constitute conflicting opinion; and they materially affect the fairness and expeditiousness of the proceedings or the outcome of the trial. They are not simply hypothetical concerns or abstract legal questions, but have serious implications for the proceedings arising from the confirmation of charges. Indeed, as recalled by the Appeals Chamber, *“it is the decision on the confirmation of charges under article 61(7) of the Statute [...] which constitutes the authoritative statement of the charges [...] it is the confirmation decision that serves as a basis for the trial”*.¹⁹ It is therefore essential that any issue arising from the Decision confirming the charges in this case be expeditiously and authoritatively resolved by the Appeals Chamber prior to the commencement of the trial.

a. First Issue

19. The Common Legal Representatives support the Prosecution’s request to appeal the Chamber’s decision in the part declining to confirm Mr Yekatom’s liability under article 28 of the Statute, as an alternative or cumulative mode of liability in addition to that under article 25 of the Statute.

¹⁸ See the “Decision on three applications for leave to appeal” (Pre-Trial Chamber I), [No. ICC-02/11-01/11-307](#), 21 October 2015, para. 70.

¹⁹ See the “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled ‘Judgment pursuant to Article 74 of the Statute’”, [No. ICC-01/05-01/13-2275-Red](#), 8 March 2018, para. 196

20. Chambers of this Court have constantly held that the Prosecution may generally charge in the alternative.²⁰ At this stage of the proceedings the Chamber is not called upon to engage in a full-fledged trial. Rather, the mandate of the Pre-Trial Chamber is to determine which cases should proceed to trial. The Chamber may be presented with facts, supported by the evidence, which may satisfy different modes of liability. Therefore, at this stage of the proceedings, the Chamber should consider the facts in light of the evidence presented under the different modes of liability, particularly when it finds that one specific mode of liability does not fit with the facts and the evidence presented.

21. Consequently, the Chamber erred in not addressing alternative modes of liability. Instead, basing its decision on *“its own understanding of the relevant facts at this stage [...]”*, it concluded that it *“shall not address the allegation of command responsibility nor, thus retain for the relevant confirmed counts the cumulative mode of liability of article 28(a) of the Statute”*.²¹ In particular, it is averred that it is not for the Pre-Trial Chamber to prefer one possible interpretation of the evidence before it over another. Where the Prosecution places before the Chamber evidence capable of establishing substantial grounds to believe that a person committed a crime pursuant to different possible modes of liability, article 61(7) of the Statute requires it to assess the evidence in relation to all of said modes of liability.

22. In the *Ntaganda* case, for instance, the Pre-Trial Chamber considered several modes of liability and retained both article 25(3)(a) liability - indirect co-perpetration of the suspect acting pursuant to a common plan - and article 28(a) liability.²² It was only after hearing all the evidence presented at trial that the Trial Chamber “[did] *not find it appropriate or necessary, having found [the accused] principal liability to have been*

²⁰ See the “Decision on confirmation of charges against Dominic Ongwen” (Pre-Trial Chamber II), [No. ICC-02/04-01/15-422-Red](#), 23 March 2016, paras-147-149. See also, the [Pre-Trial Chamber Practice Manual](#) (2015), p. 18.

²¹ See the Decision confirming the charges, *supra* note 2, para. 58.

²² See the “Decision on the Confirmation of Charges” (Pre-Trial Chamber II), [No. ICC-01/04-02/06-309](#), 9 June 2014, paras. 101 *et seq.*, 164-175.

*established for each of the counts [sic] charges, to reach any further finding on the remaining liability alternatives”.*²³

23. The *Ntaganda* confirmation decision is, in fact, a prime example of the duty of the Pre-Trial Chamber, at this stage of the proceedings, to confirm those charges in relation to which it has determined that there is sufficient evidence to prove all elements thereof, even where these may be significantly overlapping.²⁴ A Pre-Trial Chamber may only “[d]ecline to confirm those charges in relation to which it has determined that there is insufficient evidence”.²⁵ In the present case, the Chamber has not determined that there is insufficient evidence to establish substantial grounds to believe that Mr Yekatom could alternatively and cumulatively be charged with command responsibility pursuant to article 28(a) of the Statute. Rather, it came to the conclusion that

*“the narrative of the relevant events as emerging from the available evidence is such that Yekatom’s conduct resulted in the realisation of the objective elements of the crimes, rather than only consisting in the mere failure to prevent or repress crimes committed by other persons”.*²⁶

24. In the view of the Common Legal Representatives, the above constitutes an error of law. Indeed, under article 61(7) of the Statute, the Chamber was required to determine for each charge – including each mode of liability pled in relation to each factual allegation of the crime allegedly committed – whether the Prosecution had substantiated its charges to the requisite threshold of establishing “substantial grounds to believe”.

25. This legal error mars the Decision confirming the charges and significantly affects the conduct of the proceedings and its immediate resolution by the Appeals Chamber is necessary. As rightly put by the Prosecution in its Request: “[D]eclining

²³ See the “Judgment” (Trial Chamber VI), [No. ICC-01/04-02/06-2359](#), 8 July 2018, para. 1200.

²⁴ Mr Ntaganda was alternatively charged under articles 25(3)(a), 25(3)(b), 25(3)(d), 25(3)(f), and 28(3)(a) of the Statute.

²⁵ See article 61(7)(b) of the Statute.

²⁶ See the Decision confirming the charges, *supra* note 2, para. 58.

*even to consider whether cumulative or alternative modes are adequately supported by the evidence not only unnecessarily jeopardizes the Prosecution's case against Yekatom, but equally places the victims of Yekatom's crimes in an unjust, unfair, and unconscionable position".*²⁷

26. Moreover, the Common Legal Representatives note that the Chamber chose to rely on various dissenting opinions in earlier cases before the Court, instead of applying the statutory requirement of considering the adequacy of the evidence in relation to every allegation, including the mode of liability pled.²⁸

27. Although the Chamber correctly pointed out that it had to "*address the issue of the individual criminal responsibility of the suspects by looking at their alleged contributions in respect of the charged incidents and at the evidence cited in support of those allegations*"; a close scrutiny of the opinion of Judge Tarfusser,²⁹ relied upon to dismiss article 28 liability without conducting any reasoned assessment of the evidence underlying the corresponding charges, reveals that the Chamber failed to do so.

28. In fact, Judge Tarfusser in his opinion discussed the particular quality of the evidence in relation to the specific charges against Mr Abu Garda at the time and concluded that, generally speaking, it is essential for a Chamber not to confirm charges not sufficiently supported by the evidence to the required evidentiary threshold. The specific interpretation Judge Tarfusser espouses in the paragraphs³⁰ of his opinion the Chamber relied upon, does not distract from the fact that the Statute

²⁷ See the Prosecution Request, *supra* note 1, para. 26.

²⁸ In relation to the Separate Opinion of Judge Fulford, it is unclear on what part of said opinion the Chamber based its reasoning, given that the reference is not specified. See the Decision confirming the charges, *supra* note 2, footnote 106.

²⁹ See the "Decision on the Confirmation of Charges", [No. ICC-02/05-02/09-243-Red](#), 8 February 2010 (the "Separate Opinion of Judge Tarfusser"), p. 99, para. 4 (cited in the Decision confirming the charges at para. 57, footnote 98).

³⁰ *Idem*, para. 5: "*In other words, to establish at first the occurrence of the historical events as well as a proper link between such events and the suspect as perpetrator (imputatio facti) is propaedeutic to any legal reasoning. Therefore, failure to demonstrate it makes it unnecessary to proceed to the legal characterisation of the historical event as a crime as well as to the determination of whether the link between such event and the suspect grounds his or her criminal responsibility (imputatio iuris)*".

requires the Pre-Trial Chamber to engage with *all* charges put before it and make its determination on all matters that must be proven by the Prosecution. Notably, at this stage of the proceedings, “substantial grounds to believe” is the only required threshold to be met;³¹ and article 61(7) of the Statute does not require the Chamber to engage in a critical assessment of the Prosecution’s case theory in isolation.

29. Therefore, the Common Legal Representatives conclude that the Chamber mistakenly relied on said opinion³² and consequently erroneously did not confirm the mode of liability under article 28 of the Statute. While it would have been legitimate for the Chamber to reach the conclusion that “it *“was not persuaded that the narrative of the facts, as established by the evidence, point to [...] criminal responsibility based on [...] mere failure to prevent or repress the crimes committed by others pursuant to article 28 of the Statute”*”,³³ it was not open to the Chamber to decline this assessment of the evidence altogether.

b. Second Issue

30. The second issue identified by the Prosecution³⁴ concerns the fact that the Chamber prematurely concluded its analysis of the different, alternative modes of liability and merely focussed its review on article 25(3)(a) and (b) of the Statute. By not considering, and thus not confirming alternative modes of liability under article 25(3)(c) and (d), the Chamber fell short of its statutory obligation under article 61(7) of the Statute and therefore committed an error.

31. In assessing Mr Yekatom’s liability, the Chamber seems to have been guided by the understanding that it only needed to ascertain whether the evidence presented was sufficient to the necessary threshold to confirm the suspect’s criminal responsibility under article 25(a) and/or (b) of the Statute. In essence, it again cut its

³¹ See article 61(7) of the Statute.

³² See the Decision confirming the charges, *supra* note 2, para. 57.

³³ See the “Decision on the confirmation of charges against Laurent Gbagbo”, [No. ICC-02/11-01/11-656-Red](#), 12 June 2014, para. 263.

³⁴ See the Prosecution Request, *supra* note 1, para. 2.

analysis short, ostensibly believing that confirming two modes of liability was sufficient.³⁵

32. The Common Legal Representatives concur with the Prosecution that the Chamber failed to give substantive consideration to the alternative modes of liability pled in the document containing the charges.³⁶ Indeed, substantive consideration for different modes of liability eventually also extends to the assessment and appreciation of the supporting facts, since, what may be insufficient – in isolation – to prove or link a person to a common plan as a principal may very well be sufficient to establish other forms of contribution to the common plan and/or the crimes. In this regard, the wording of article 61(7)(c) of the Statute underlines the importance of the Chamber’s full analysis of the material submitted by the Prosecution.

33. In this regard, the Common Legal Representative submit that the choice of the Chamber to not address the possible other modes of liability had an impact on its understanding of the evidence particularly in relation to the ones presented in support of the continuous crimes of forcible transfer and deportation, imprisonment and other forms of severe deprivation of liberty, as well as recruitment of child soldiers. Said choice also impacted on the full appreciation of – and resulted in the misinterpretation by - the Chamber of certain facts/evidence such as the extent of Mr Ngaïssona knowledge and his *post facto* contributions.

34. Furthermore, in declining to consider the remaining alleged modes of liability under article 25 of the Statute, the Chamber again relied upon individual separate and dissenting opinions of judges in preceding cases. In fact, a close scrutiny of said opinions reveals that they criticise decisions not confirming alternative modes of liability. In his separate opinion to the *Lubanga* judgment, for example, Judge Fulford set forth that “*in [his] judgment the plain language of Article 25(3) demonstrates that possible modes of commission under Article 25(3)(a)-(d) of the Statute were not intended to be*

³⁵ See the Decision confirming the charges, *supra* note 2, paras. 99-100.

³⁶ See the Prosecution Request, *supra* note 1, para. 27.

mutually exclusive".³⁷ Similarly, Judge Van den Wyngaert, on whose dissenting opinion the Chamber also relied upon,³⁸ criticised the late reclassification of the charges, *i.e.* the mode of liability, in the *Katanga* case. She stated that, if the Defence in that case had reasonably been able to foreshadow that the qualification of the charges against their client could be modified to fit with the requirements of article 25(3)(d), it would likely have adopted a different strategy as opposed to defending against indirect co-perpetration pursuant to a common plan under article 25(3)(a) of the Statute.³⁹ Both judges clearly stated that, because of the narrow application of article 25 in *only* confirming indirect co-perpetration pursuant to a common plan, the Defence would have been, or indeed was – in the *Katanga* scenario – prejudiced by a late re-characterisation of the facts during or even at the end of a full trial when it became clear that the facts pointed to another form of liability.⁴⁰

35. The confirmation of all possible relevant modes of liability is also a way of ensuring the efficiency of the proceedings. In its Request, the Prosecution already indicates its intention to eventually trigger regulation 55 of the Regulations of the Court, and raises some concerns in relation to the detrimental effect of such remedy.⁴¹ While the Common Legal Representatives do share said concerns, they wish to point

³⁷ See the "Judgment pursuant to Article 74 of the Statute" (Trial Chamber I), [No. ICC-01/04-01/06-2842](#) (the "Separate Opinion of Judge Adrian Fulford"), 14 March 2012, paras. 7 and 8. In fact, Judge Fulford opined that "*Some have suggested that Article 25(3) establishes a hierarchy of seriousness as regards the various forms of participation in a crime, with Article 25(3)(a) constituting the gravest example and Article 25(3)(d) the least serious. I am unable to adopt this approach. In my judgment, there is no proper basis for concluding that ordering, soliciting or inducing a crime (Article 25(3)(b)) is less a serious form of commission than committing it 'through another person' (Article 25(3)(a)), and these two concepts self-evidently overlap. Similarly, I am unable to accept that the criminality of accessories (Article 25(3)(c)) is greater than those who participate within a group (Article 25(3)(d)), particularly since many of history's most serious crimes occurred as the result of the coordinated action of groups of individuals, who jointly pursued a common goal.*"

³⁸ See the Decision confirming the charges, *supra* note 2, para. 58, footnote 106.

³⁹ See the "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons", [No. ICC-01/04-01/07-3319-tENG/FRA](#), 17 November 2012, para 39: "*Si la Défense de Germain Katanga avait pu raisonnablement prévoir que la qualification des charges puisse être modifiée pour concorder avec l'article 25-3-d, elle aurait probablement adopté une stratégie de défense différente.*"

⁴⁰ *Idem.* See also, the Separate Opinion of Judge Adrian Fulford, *supra* note 37, para. 2: "[...] as a matter of fairness it would be wrong at this late stage to modify the legal framework of the case. In short, it would be unjust to the present accused to apply a different, arguably lesser, test".

⁴¹ See the Prosecution Request, *supra* note 1, para. 20 *et seq.*

out that effective justice for victims demands expeditious proceedings. In this regard, the caution expressed by Judges Van den Wyngaert and Fulford should be heeded and the alleged errors in the Decision confirming the charges remedied at this early and determinative stage to avoid serious implications and/or delays in the trial proceedings that will undoubtedly arise if no appellate review is allowed.

36. Finally, the Common Legal Representatives express the victims' concern in relation to the fact that the reasoning underpinning the Request appears to be equally applicable to findings related to the liability of Mr Ngaïssona, given that the Chamber employed the same method when reviewing the evidence against the charges. The victims therefore do not understand the reasons justifying the Prosecution's choice to only address the mode of liability in relation to Mr Yekatom. The Common Legal Representatives wish also to convey the serious concern of the victims in relation to the fact that the non-confirmation of charges related to crimes committed in several localities in Central African Republic has resulted in a significant number of victims being excluded from the parameters of the case.

37. In this regard, the Common Legal Representatives recall that the Chamber may use its inherent power to eventually reformulate issues certified for appeal.⁴² Indeed, the Chamber has the power to "*consider [...] arguments [...] outside the scope of the appeal if they [are] 'intrinsically linked' to the issue on appeal*".⁴³ Further, the Appeals

⁴² See the "Decision on the Prosecutor's request for leave to appeal the 'Decision on the Application for Judicial Review by the Government of the Union of the Comoros'", [No. ICC-01/13-73](#), 18 January 2019, para. 39. See also, the "Request for an alternative mechanism to facilitate disclosure or, in the alternative, request for leave to appeal the decision concerning in-depth analysis charts" (Pre-Trial Chamber I), [No. ICC-01/12-01/18-130- tENG](#), 18 September 2018, para. 30; the "Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled 'Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court'" (Appeals Chamber), [No. ICC-02/11-01/15-369](#), 18 December 2015, para. 18; and the "Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled 'Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)'" (Appeals Chamber), [No. ICC-02/11-01/15-744](#), 1 November 2016, para. 13.

⁴³ See the "Judgment on Mr Bosco Ntaganda's appeal against the decision reviewing restrictions on contacts of 7 September 2016" (Appeals Chamber), [No. ICC-01/04-02/06-1817-Red OA04](#), 8 March 2017, para. 85. See also, the "Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled 'Decision on the Prosecutor's

Chamber may clarify or amend issues as certified for appeal by the relevant Chamber *a quo*,⁴⁴ and has held that “*participating victims may make observations as to alleged errors [...] even if these alleged errors were not specifically raised by the Prosecutor, as long as they affect the victims’ personal interests and remain within the ambit of the Prosecutor’s grounds of appeal*”.⁴⁵

38. Therefore, the Chamber, in light of its substantive departure from previous jurisprudence of the Court and of the importance and novelty of the identified issues, may consider to certify a broadened issue resulting from the Decision confirming the charges and related to “whether the Chamber erred in interpreting article 61(7) of the Statute as not requiring the evaluation of the evidence presented by the Prosecution in light of all possible modes of liability (in respect of both suspects)”.

application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)” (Appeals Chamber), [No. ICC-02/11-01/15-744 OA08](#), 1 November 2016, paras. 13 and 19.

⁴⁴ See *e.g.*, the “Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’” (Appeals Chamber), [No. ICC-01/04-01/07-476 OA02](#), 13 May 2008, para. 46; and the “Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled ‘Decision on the Modalities of Victim Participation at Trial’” (Appeals Chamber), [No. ICC-01/04-01/07-2288 OA11](#), 16 July 2010, paras. 56-57 and 88-90.

⁴⁵ See the “Decision on the Participation of Victims in the Appeal against Trial Chamber II’s ‘*Jugement Rendu en Application de l’Article 74 du Statut*’” (Appeals Chamber), [No. ICC-01/04-02/12-30 A](#), 6 March 2013, para. 41. This ruling is in line with article 68(3) of the Statute requiring the Court to permit the views and concerns of the victims to be heard when their personal interests are affected.

IV. CONCLUSION

For the reasons set out above, the Common Legal Representatives respectfully request the Chamber to grant the Prosecution's Request preferably certifying the two issues or one reformulated issue for appeal.



Dmytro Suprun

Common Legal Representative of the
Former Child Soldiers



Abdou Dangabo Moussa



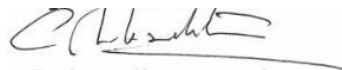
Marie Édith Douzima Lawson



Yaré Fall



Paolina Massidda



Elizabeth Rabesandratana

Common Legal Representatives of the
Victims of other crimes

Dated this 6th day of March 2020

At The Hague (The Netherlands), Bangui (Central African Republic) and Saint Louis
(Senegal)