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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

Public Redacted Version of “Common Legal Representatives’ Joint Response to the Prosecution’s “Request for Leave to Appeal the ‘Decision on the Prosecutor’s request to amend the charges against Alfred Yekatom’” (ICC-01/14-01/18-545)”

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” or the “CLR”) hereby file their joint response to the “Request for Leave to Appeal the ‘Decision on the Prosecutor’s request to amend the charges against Alfred Yekatom’” (the “Prosecution Request” or the “Request”).¹

2. The Common Legal Representatives support the Prosecution’s Request. The four issues identified by the Prosecution arise from the Impugned Decision, significantly affect the fair and expeditious conduct of the proceedings, as well as the outcome of the trial, and the immediate resolution by the Appeals Chamber is necessary to materially advance the proceedings. The Common Legal Representatives concur with the arguments presented by the Prosecution. Therefore, they will present some additional arguments in support of the Request.

3. In particular, the Common Legal Representatives agree with the Prosecution that the Chamber failed to give due regard to the rights and interests of the Victims. The Common Legal Representatives aver that the Chamber, in not properly counterbalancing the competing interests, abused its discretion under article 61(9) of the Statute to such a significant extent as to deny the Victims concerned their right to truth and justice. As a result, [REDACTED] subjected to sexual violence have been effectively denied their right to equal and effective access to justice and their right to a remedy. Moreover, by failing to give due regard to the rights and interests of the Victims, the Chamber contravened to the very interests of justice.

¹ See the “Request for Leave to Appeal the ‘Decision on the Prosecutor’s request to amend the charges against Alfred Yekatom’”, [No. ICC-01/14-01/18-545](#), 8 June 2020 (the “Prosecution Request” or the “Request”).

II. PROCEDURAL BACKGROUND

4. On 11 December 2019, Pre-Trial Chamber II (the “Chamber”) issued the “Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona” (the “Decision confirming the charges”), partly confirming the charges against the suspects and committing them for trial.²

5. On 2 March 2020, the Prosecution filed a Request for Reconsideration of, or alternatively Leave to Appeal, the Decision confirming the charges,³ which was rejected by the Chamber on 11 March 2020.⁴

6. On 16 March 2020, the Presidency constituted Trial Chamber V and referred the present case to it.⁵

7. On 31 March 2020, the Prosecution filed its “[...] 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”.⁶

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. A public redacted version of the Decision was issued on 20 December 2020 as [No. ICC-01/14-01/18-403-Red](#). On 14 May 2020, the Chamber issued a “Corrected version of ‘Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona’”, [No. ICC-01/14-01/18-403-Conf-Corr](#).

³ See the “Prosecution’s Request for Reconsideration of, or alternatively Leave to Appeal, the ‘Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona’”, [No. ICC-01/14-01/18-437](#), 2 March 2020.

⁴ See the “Decision on the Prosecutor’s request for reconsideration or, in the alternative, leave to appeal the ‘Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona’” (Pre-Trial Chamber II), [No. ICC-01/14-01/18-447](#), 11 March 2020, p. 14.

⁵ See the “Decision constituting Trial Chamber V and referring to it the case of The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona” (Presidency), [No. ICC-01/14-01/18-451](#), 16 March 2020.

⁶ See 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”, [No. ICC-01/14-01/18-468-Conf](#), 31 March 2020. A public redacted version was filed on 31 March 2020 as [No. ICC-01/14-01/18-468-Red](#). On 16 April 2020, a corrected confidential version was filed as [No. ICC-01/14-01/18-480-Conf](#). On 17 April 2020, a public redacted version of the corrected version was filed as [No. ICC-01/14-01/18-480-Red](#).

8. On 14 May 2020, the Chamber issued 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’”, rejecting said request (the “Decision on the Amendment of Charges against Mr Ngaïssona”).⁷

9. On the same day, the Prosecution filed its “[...] Motion to Amend the Charges against Alfred YEKATOM” (the “Prosecution’s Motion to Amend Charges against Mr Yekatom” or the “Motion”).⁸

10. On 20 May 2020, the Prosecution filed a request for leave to appeal the Decision on the Amendment of Charges against Mr Ngaïssona.⁹

11. On 26 May 2020, the Common Legal Representatives filed their “[...] Joint Response to the ‘Prosecution Motion to Amend the Charges against Alfred YEKATOM’”.¹⁰

12. On the same day, the Defence for Mr Yekatom filed its response to the Motion before Trial Chamber V. On 27 May 2020, the Defence filed a corrected version of the submission before Pre-Trial Chamber II.¹¹

13. On 1 June 2020, the Chamber issued the “Decision on the Prosecutor’s request to amend the charges against Alfred Yekatom” (the “Impugned Decision”).¹²

⁷ See 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’” (Pre-Trial Chamber II), [No. ICC-01/14-01/18-517](#), 14 May 2020 (the “Decision on the Amendment of Charges against Mr Ngaïssona”).

⁸ See the “Prosecution Motion to Amend the Charges against Alfred YEKATOM”, [No. ICC-01/14-01/18-518-Conf](#), 14 May 2020. A public redacted version was issued on 22 May 2020 as [No. ICC-01/14-01/18-518-Red](#) (the “Prosecution’s Motion to Amend Charges against Mr Yekatom” or the “Motion”).

⁹ See the Prosecution’s Request, *supra* note 1.

¹⁰ See the “Common Legal Representatives’ Joint Response to the ‘Prosecution Motion to Amend the Charges against Alfred YEKATOM’”, [No. ICC-01/14-01/18-531-Conf](#), 26 May 2020. A public redacted version was filed on the same day as [No. ICC-01/14-01/18-531-Red](#).

¹¹ See the “Corrected version of ‘Yekatom Defence Response to Motion to Amend the Charges’, 26 May 2020, ICC-01/14-01/18-532-Conf”, [No. ICC-01/14-01/18-532-Conf-Corr](#), 27 May 2020. A public redacted version was filed on the same day as [No. ICC-01/14-01/18-532-Red-Corr](#).

14. On 8 June 2020, the Prosecution filed a request for leave to appeal the Impugned Decision.¹³

III. CLASSIFICATION

15. Pursuant to regulation 23*bis*(1) and (2) of the Regulations of the Court, the present submission is classified as confidential, since it refers to the content of documents likewise classified as confidential. A public redacted version is filed simultaneously.

IV. SUBMISSIONS

16. Article 82(1)(d) of the Rome Statute (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”*.

17. The jurisprudence of the Court has clarified the requirements of article 82(1)(d) of the Statute.¹⁴ 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-*

¹² See the “Decision on the Prosecutor’s request to amend the charges against Alfred Yekatom” (Pre-Trial Chamber II), [No. ICC-01/14-01/18-538](#), 1 June 2020 (the “Impugned Decision”).

¹³ See the Prosecution’s Request, *supra* note 1.

¹⁴ 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.

Trial Chamber may state such an issue for consideration by the Appeals Chamber".¹⁵ The Appeals Chamber also stated that "[o]nly an 'issue' may form the subject-matter of an appealable decision",¹⁶ 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".¹⁷ 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 material way, either a) 'the fair and expeditious conduct of the proceedings' or b) 'the outcome of the trial'".¹⁸

18. 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*".¹⁹ 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*".²⁰

19. Finally, the Appeals Chamber indicated 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

¹⁵ 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 14, para. 8.

¹⁶ *Idem*, para. 9.

¹⁷ *Ibid.*

¹⁸ *Idem*, para. 10.

¹⁹ 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.

²⁰ *Idem*, para. 18.

issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence”.²¹

20. 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 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*”.²²

21. The Common Legal Representatives submit that the four issues identified by the Prosecution in its Request fulfil the requirements for leave to appeal to be granted. They arise from the Impugned Decision; they do not merely constitute conflicting opinion; and they materially affect the fairness and expeditiousness of the proceedings and the outcome of the trial. They are not simply hypothetical concerns or abstract legal questions, but have serious implications for the proceedings. Indeed, the decision to allow or reject an addition of charge(s) significantly affects the outcome of the trial *per se*. In this regard, the Impugned Decision would significantly affect the outcome of the trial as the charges of rape and sexual slavery could then not form the factual basis upon which the judgment pursuant to article 74 of the Statute will be rendered. It is therefore essential that the issues arising from the Impugned Decision be expeditiously and authoritatively resolved by the Appeals Chamber prior to the start of the trial.

²¹ 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 14, para. 13.

²² 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.

a. First Issue: The legal consequence, for the purpose of article 61(9) of the Statute, of an allegation constituting an “additional charge”

22. The Common Legal Representatives concur with the Prosecution that the Chamber erred in law by requiring stricter scrutiny of its Motion because it contemplated the addition of charges, irrespective of the limited nature of the evidence to be considered in any further confirmation hearing.²³

23. The Common Legal Representatives argue that the standard set by the Chamber is unreasonable because so high that no amendment or addition of charge(s) would be possible under article 61(9) of the Statute.

24. On the one hand, the Chamber stated that:

*“[a]ny change or addition to the case as emerging from the confirmation decision has by its nature a disruptive effect’ [...] on the proceedings and ‘hence on the fundamental rights of the accused’; (ii) ‘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’; and, (iii) since ‘the boundaries of the forthcoming trial are (and remain) set as emerging from the confirmation decision’, ‘any amendment or modification to those boundaries has the potential to adversely impact the efforts of the Defence’”.*²⁴

25. On the other hand, the Chamber held that the Prosecution’s right to amend or add charges under article 61(9) of the Statute *“should only be exercised under circumstances and conditions which would not impact the current trial”*.²⁵

26. It follows from the above reasoning that virtually no request for amendment or addition of charge(s) can ever fulfil the conditions set by the Chamber because of its inherent disruptive nature. Said reasoning leaves little to no room for the application of article 61(9) of the Statute and the narrow approach adopted by the

²³ See the Prosecution’s Request, *supra* note 1, paras. 14-18.

²⁴ See the Impugned Decision, *supra* note 12, para. 14 (emphasis added).

²⁵ *Idem*, para. 15, quoting the Decision on the Amendment of Charges against Mr Ngaïssona, *supra* note 7, para. 36.

Chamber may render purely theoretical the Prosecution's right to amend or add charge(s).

27. Considering that it is the first time in the Court's history that a request for an addition of charge(s) under article 61(9) of the Statute is entertained, the Common Legal Representatives agree with the Prosecution²⁶ that legal certainty and clarity by the Appeals Chamber are warranted on the above issue.

b. Second Issue: Assessment of reasonable diligence for the purpose of article 61(9) of the Statute, when it has been determined that material circumstances are unclear

28. The Common Legal Representatives concur with the Prosecution that the Chamber erred in law in assessing the criteria of the 'reasonable diligence' for the purposes of article 61(9) of the Statute and in reaching an adverse ruling by indicating that the Prosecution had not adequately explained which investigative activities were needed.²⁷

29. In this regard, the Common Legal Representatives recall that in the *Al Hassan* case, Pre-Trial Chamber I, noting that the Prosecution had not provided any justification as to why the witness statements underlying the request for an amendment of charges had not been collected earlier, requested additional information from the Prosecution:

*"[a]fin de statuer sur le bien-fondé de la Partie III de la Requête du Procureur et de sa demande de modification des charges, la Chambre enjoint par conséquent au Procureur de lui fournir [...] des observations supplémentaires sur les circonstances et les raisons pour lesquelles elle a recueilli ces déclarations après le dépôt de son DCC".*²⁸

²⁶ See the Prosecution's Request, *supra* note 1, para. 18.

²⁷ *Idem*, paras. 19-23.

²⁸ See the "Décision sur la procédure applicable suite au dépôt par le Procureur de sa requête pour corrections et modifications de la Décision de confirmation des charges" (Pre-Trial Chamber I), [No. ICC-01/12-01/18-608-Red](#), 21 February 2020, para. 55.

30. In the present case, the Chamber listed the missing information it needed from the Prosecution, namely:

*“(i) what ‘additional details and clarifications’ were needed in respect of the second statement;
(ii) why these were necessary to ‘determine whether to seek the amendment of charges’;
(iii) whether the desired clarifications were eventually obtained; and
(iv) whether and, in the affirmative, how these clarifications were taken into account in the decision-making process underlying the Request”.*²⁹

31. However, rather than giving the Prosecution the opportunity to provide said information, the Chamber rejected the Motion. The Common Legal Representatives aver that the Chamber’s approach is not in accordance with the law and - being unreasonable - shows an abuse of discretion. Indeed, the Chamber rejected the Motion on the basis of a lack of explanation, without giving the Prosecution the opportunity to provide the Chamber with the information it deemed material to constitute ‘adequate justification’.

32. Although the procedure in the *Al Hassan* case concerned an amendment rather than an addition of charges, the Common Legal Representatives argue that a similar approach should be taken in light of the fact that the Prosecution must provide adequate justification for its investigative activities after the confirmation hearing in both instances.

33. The Common Legal Representatives contend that this situation is untenable and that based on this difference in approach alone, it is clear that harmonisation by the Appeals Chamber is warranted for consistency and legal certainty. Additionally, the Second Issue also affects the outcome of the Chamber’s conclusion because it might have come to a different decision if it had given the Prosecution the opportunity to provide the information that was lacking according to the Chamber.

²⁹ See the Impugned Decision, *supra* note 12, para. 18.

c. Third Issue: Assessment of reasonable diligence for the purpose of article 61(9) of the Statute, based on disagreement with the Prosecutor's exercise of discretion under article 61(9)

34. The Common Legal Representatives concur with the Prosecution that the Chamber erred in making an adverse ruling on the reasonable diligence in conducting investigative activities based on its disagreement with the Prosecution's exercise of discretion under article 61(9) of the Statute grounded on its appreciation of the relevant evidence.³⁰

35. In the *Al Hassan* case, the Defence raised similar arguments concerning the timing of the request for amendment of charges. Pre-Trial Chamber I held in that regard that:

"[l]a Chambre estime cependant qu'il revient au Procureur d'évaluer au moment du dépôt du DCC si elle a suffisamment d'éléments de preuve pour établir des motifs substantiels de croire qu'un acte criminel relevant de la compétence de la Cour a été commis et que la personne poursuivie en est pénalement responsable. Sauf abus, il semble raisonnable à la Chambre que le Procureur puisse ne pas présenter certains faits au moment du dépôt de son DCC eu égard au caractère limité des preuves dont elle dispose, mais de choisir de les présenter par la suite si elle obtient, de son point de vue, des éléments de preuve supplémentaires susceptibles d'établir devant la Chambre ces faits eu égard à la norme d'administration de la preuve applicable à ce stade de la procédure".³¹

36. In the present case, the Prosecution presented proper justification for the circumstances underlying its Motion. While it is clear from the Impugned Decision that the Chamber disagrees with the Prosecution's decision-making process, at no point does the Chamber denote any negligence or abuse in said decision-making process.

37. The Common Legal Representatives further observe that in the *Ruto and Sang* case, the request for amendment of charges was rejected in part due to the "the lack of

³⁰ See the Prosecution's Request, *supra* note 1, paras. 24-33.

³¹ See the "Version publique expurgée du Rectificatif de la Décision portant modification des charges confirmées le 30 septembre 2019 à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 23 avril 2020, ICC-01/12-01/18-767-Conf" (Pre-Trial Chamber I), [No. ICC-01/12-01/18-767-Corr-Red](#), 8 May 2020, para. 24 (emphasis added).

diligence, organization and efficiency on the part of the Prosecutor”³², as well as the failure “to provide the Chamber with any justification or valid reasons for [...] procedural conduct and excessive delays”.³³

38. The Common Legal Representatives argue that the finding in the *Ruto and Sang* case applies *mutatis mutandis* to requests for additional charges under article 61(9) of the Statute, considering that the procedures for the amendment and addition of charge(s) both require adequate justification of the Prosecution’s investigative activities after the confirmation hearing.

39. In this regard, in the present case, not only did the Prosecution provide justification and valid reasons for its procedural conduct, but the Chamber did not find any lack of diligence, organization and efficiency on the part of the Prosecution.

40. Furthermore, the Common Legal Representatives aver that the Third Issue goes beyond the specifics of the present case and touches upon the Prosecution’s investigative discretion after the confirmation hearing; a matter which necessitates authoritative guidance from the Appeals Chamber.

d. Fourth Issue: Exercise of the Pre-Trial Chamber’s discretion under article 61(9) of the Statute

41. The Common Legal Representatives concur with the Prosecution that the Chamber erred in exercising its discretion under article 61(9) of the Statute.³⁴ After considering the circumstances under which the Prosecution had collected the evidence supporting the Motion, the Chamber held that:

“[i]n light of the above, and after careful consideration of the need to assess and balance the rights of both the accused and the victims, the Chamber believes that the disruption caused to the Defence, the delay to the commencement of the trial and the prolongation of

³² See the “Decision on the ‘Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’” (Pre-Trial Chamber II), [No. ICC-01/09-01/11-859](#), 16 August 2013, para. 41.

³³ *Idem*, para. 38.

³⁴ See the Prosecution’s Request, *supra* note 1, paras. 34-42.

*the accused's pre-trial custody inherent to the addition of the charges underlying the Request would not be warranted".*³⁵

42. The above statement is the only reference to the rights of the Victims in the Impugned Decision. While mentioning the need to assess and balance the rights of both the accused and the victims, the Chamber, however, failed to elaborate *which* rights of the Victims were taken into account, *what* weight was given thereto, and *what* alternative remedy was eventually available to the Victims to enable them to effectively pursue their right to truth and justice. The Common Legal Representatives therefore contend that the Chamber failed in properly counter-balancing the competing interests, and, given the lack of due consideration to the Victims' rights and interests, it abused its discretion under article 61(9) of the Statute. As a result, [REDACTED] subjected to sexual violence have been effectively denied their rights to equal and effective access to justice and to a remedy.

43. *First*, the Common Legal Representatives recall that the Statute mandates that the rights and interests of Victims must be taken into account at all stages of the proceedings.³⁶ The Chamber is also specifically under the obligation to take the rights of the Victims into account before making a determination under article 61(9) of the Statute.³⁷

44. Noting that the Chamber focused its evaluation solely on the rights of the Accused while referring to the rights of the Victims *en passant*, the Common Legal Representatives deem necessary to recall that the ICC is first and foremost a "*victim-centered Court*"³⁸ and its application and interpretation of Victims' rights "*must be consistent with internationally recognized human rights*".³⁹

³⁵ See the Impugned Decision, *supra* note 12, para. 19.

³⁶ See article 68(3) of the Statute.

³⁷ See the "Corrigendum to "Decision on the 'Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute'" (Pre-Trial Chamber II), [No. ICC-01/09-02/11-700-Corr](#), 21 March 2013, para. 21.

³⁸ See the "Concurring and Separate Opinion of Judge Kesia-Mbe Mindua", [No. ICC-02/17-33-Anx-Corr](#), 31 May 2019, para. 50.

³⁹ See article 21(3) of the Statute.

45. Therefore, the Common Legal Representatives contend that the Chamber should have substantially addressed the rights and interests of the Victims. Indeed, besides the right to reparations,⁴⁰ the core interest of victims in the proceedings is to effectively exercise their rights to truth and justice. These rights have been generally recognised by international human rights law,⁴¹ doctrine⁴² and the constant jurisprudence of the Court as essential for the persons directly affected by the crimes committed.⁴³

46. Furthermore, given the unique features of the legal framework of the Court, the “fair trial” guarantees shall apply throughout the proceedings and in respect to all the parties and participants, including the Victims.⁴⁴ In the same vein, the

⁴⁰ In this sense, see AMBOS (K.), “El Marco Jurídico de la Justicia de Transición”, Tenus, Bogota, 2008, notes 107-112. See also the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the General Assembly of the United Nations in its resolution No. 60/147 in the 64th plenary meeting, [UN Doc. A/RES/60/147](#), 16 December 2005, para. 21.

⁴¹ See IACHR, *La Cantuta v. Peru*, [Judgment of 29 November 2006](#), Series C, No. 162, para. 222; *Vargas-Areco v. Paraguay*, [Judgment of 26 September 2006](#), Series C, No. 155, paras. 153; *Almohacid-Arellano and al v. Chile*, [Judgment of 26 September 2006](#), Series C, No. 154, para. 148; *Comunidad Monviana v. Suriname*, [Judgment of 15 June 2005](#), Series C, No. 124, para. 204; and *Velasquez-Rodriguez v. Honduras*, [Judgment of 29 July 1988](#), Series C, No. 7, paras. 162-166 and 174. See also ECtHR, *Hugh Jordan v. UK*, App. No. 24746/94, [Judgment](#), 4 May 2001, paras. 16, 23, 157 and 160; *Selmouni v. France*, App. No. 25803/94, [Judgment](#), 28 July 1999, para. 79; *Kurt v. Turkey*, App. No. 24276/94, [Judgment](#), 25 May 1998, para. 140; *Selcuk and Asker v. Turkey*, App. No. 23184/94, [Judgment](#), 24 April 1998, para. 96; *Aydin v. Turkey*, App. No. 23178/94, [Judgment](#), 25 September 1997, para. 103; and *Aksoy v. Turkey*, App. No. 21987/93, [Judgment](#), 18 December 1996, para. 98.

⁴² See DONAT-CATTIN (D.), “Article 68”, in TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article*, Nomos, 1999, pp. 876-877; NAQVI (Y.), “The Right to the Truth in International Law Fact or Fiction 9”, in (2006) *ICRC International Review*, No. 88, pp. 267-268; MENDEZ (J.), “The Right to Truth”, in JOYNER (Ch.) (ed.), *Reigning in Impunity for International Crimes and Serious Violations of Fundamental Human Rights’ Proceedings of the Siracuse Conference*, 17-21 September 1998, Eres, Toulouse, 1998, pp. 257; and AMBOS (K.), “El Marco Jurídico de la Justicia de Transición”, *op. cit. supra* note 40, pp. 42-44.

⁴³ See the “Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case” (Pre-Trial Chamber II), [No. ICC-01/04-01/07-474](#), 13 May 2008, paras. 31-44.

⁴⁴ In this regard, the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power adopted by the UN General Assembly on 29 November 1985 calls for enabling victims to access to justice and to obtain redress and for providing them with fair treatment in this regard. See the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power adopted by the UN General Assembly on its 96th plenary meeting, [UN Doc. A/RES/40/34](#), 29 November 1985, Principles 4 to 7 (the “Basic Principles”).

requirements of the integrity of the proceedings shall apply to all the parties and the participants in the proceedings, and not only to the Accused.⁴⁵

47. Moreover, “[i]n the light of the core content of the right to be heard set out in article 68(3) of the Statute, [...] [said provision] imposes an obligation on the Court vis-à-vis victims. The use of the present tense in the French version of the text (“la Cour permet”) makes it quite clear that the victims’ guaranteed right of access to the Court entails a positive obligation for the Court to enable them to exercise that right concretely and effectively. It follows that the Chamber has a dual obligation: on the one hand, to allow victims to present their views and concerns, and, on the other, to examine them”.⁴⁶

48. The Common Legal Representatives therefore submit that by failing to give due consideration to the rights and interests of the Victims, the Chamber not only abused its discretion when making its counter-balancing exercise, but effectively denied [REDACTED] subjected to sexual violence - their right to truth and justice to the fullest extent and in particular their right to have their victimisation considered, recognised and addressed.

49. *Second*, the Common Legal Representatives aver that the entailing effects of the Impugned Decision are fatal not only for the two victims on which evidence the Prosecution seeks to rely, but for all [REDACTED] subjected to sexual violence during [REDACTED]. In this regard, the Chamber also abused its discretion by failing to give due regard to material circumstances, in particular the notorious large

⁴⁵ See the “Decision on the admission of material from the ‘bar table’” (Trial Chamber I), [No. ICC-01/04-01/06-1981](#), 24 June 2009, para. 42. See also in the same sense TRAPP (K.), *Excluding Evidence: The Timing of a Remedy*, non-published manuscript (1998), Faculty of Law, McGill University, Canada, p. 21; quoted in TRIFFTERER (O.), *Commentary on the Rome Statute of the International Criminal Court – Observer’s Notes, Article by Article*, Verlag C.H Beck, Munich, 2008, p. 1335, footnote 139. See also the “DECISION ON THE PROSECUTION’S APPLICATION FOR LEAVE TO APPEAL THE CHAMBER’S DECISION OF 17 JANUARY 2006 ON THE APPLICATIONS FOR PARTICIPATION IN THE PROCEEDINGS OF VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 AND VPRS 6” (Pre-Trial Chamber I), [No. ICC-01/04-135-tEN](#), 20 April 2006 (dated 31 March 2006), para. 38.

⁴⁶ See the “DECISION ON THE PROSECUTION’S APPLICATION FOR LEAVE TO APPEAL THE CHAMBER’S DECISION OF 17 JANUARY 2006 ON THE APPLICATIONS FOR PARTICIPATION IN THE PROCEEDINGS OF VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 AND VPRS 6”, *supra* note 45, para. 71.

extent of the phenomenon of sexual violence [REDACTED].⁴⁷ Such abuse of the Chamber's discretion is so significant to contravene the Court's core mandate of fighting against impunity for the most serious crimes, which is its very *raison d'être*.⁴⁸

50. *Third*, by failing to properly exercise its discretion, the Chamber denied [REDACTED] subjected to sexual violence any eventual remedy for the harm they suffered from.

51. Indeed, the fundamental right to a remedy for victims of serious violations of international human rights law and international humanitarian law is enshrined in the 2006 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the "Basic Principles"),⁴⁹ as well as in international human rights instruments including the Universal Declaration of Human Rights,⁵⁰ the International Covenant on Civil and Political Rights⁵¹ and the International Convention on the Elimination of All Forms of Racial Discrimination.⁵² The drafters of the Basic Principles deliberately refrained from specifying, within the relevant provisions, the entity or entities owing the duty to provide a remedy.⁵³

⁴⁷ [REDACTED]

⁴⁸ See the Preamble of the Rome Statute, the States Parties affirming that "*the most serious crimes of concern to the international community as a whole must not go unpunished*" and determined "*to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes*". See also 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" (Pre-Trial Chamber I), [No. ICC-01/13-73](#), 18 January 2019, para. 51; and BENEDETTI (F.), BONNEAU (K.) and WASHBURN (J.L.), *Negotiating the International Criminal Court*, Martinus Nijhoff Publishers, 2014, p. 44.

⁴⁹ See the Basic Principles, *supra* note 44.

⁵⁰ See Article 8 of the Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on 10 December 1948, [General Assembly resolution 217 \(III\)](#).

⁵¹ See Article 2(3) of the International Covenant on Civil and Political Rights, adopted by [General Assembly resolution 2200A \(XXI\)](#) of 16 December 1966.

⁵² See Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, adopted by [General Assembly resolution 2106 \(XX\)](#) of 21 December 1965.

⁵³ See APTEL (C.), "Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the Impunity Gap", *Journal of International Criminal Justice*, Vol. 10, 2012, p. 1369, citing ZWANENBURG (M.), "The Van Boven/Bassiouni Principles: An Appraisal", *Netherlands Quarterly of Human Rights*, Vol. 24, 2006, p. 652; and Van BOVEN (T.), [The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International and Human Rights Law and Serious Violations of International Humanitarian Law: Introductory Note](#), UN Audiovisual Library, 2010, p. 3.

Therefore, the right to a remedy under international human rights law pertains not only to domestic proceedings, but also to judicial proceedings before international and internationalised courts.⁵⁴

52. The Common Legal Representatives submit that by denying [REDACTED] subjected to sexual violence their right to have their victimisation considered, recognised and addressed in the proceedings before the Court, the Chamber also failed to offer the Victims of the alleged crimes any alternative in terms of eventual remedy. This is an egregious error on the Chamber's part, especially given the fact that the Court is one of last resort for the Victims concerned.

53. Finally, the Common Legal Representatives contend that by not giving due regard to the rights and interests of the Victims, the Chamber contravened to the very interests of justice. Indeed, according to the consistent jurisprudence of the Court, the interests of justice are indissolubly linked to, and often overlap with, the interests of victims and their internationally recognised rights to truth, to justice and to reparations.⁵⁵ As it stands, there exists now the real risk that the most serious

⁵⁴ See e.g. UN Commission on Human Rights, Report of the Independent Expert to update the Set of Principles to Combat Impunity, Diane Orentlicher, 61st session, [UN Doc. E/CN.4/2005/102](#), 18 February 2005, para. 38; the "Decision establishing the principles and procedures to be applied to reparations" (Trial Chamber I), [No. ICC-01/04-01/06-2904](#), 7 August 2012, para. 185; and the "Separate Opinion of Judge Luz del Carmen Ibáñez Carranza", [No. ICC-01/04-01/06-3466-AnxII A7 A8](#), 16 September 2019, paras. 60-61.

⁵⁵ See the "Separate opinion of Judge Sang-Hyun Song" appended to the "Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007" (Appeals Chamber), [No. ICC-01/04-01/06-925](#), 13 June 2007, para. 16: "*victims of serious crimes have a special interest that perpetrators responsible for their suffering be brought to justice, and this interest is protected by human rights norms*". See also the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victims at the Pre-Trial Stage of the Case" (Pre-Trial Chamber I, Single Judge), [No. ICC-01/04-01/07-474](#), 13 May 2008, stating that "*the latest empirical studies conducted amongst victims of serious violations of human rights [...] show that the main reason why victims decide to resort to those judicial mechanisms which are available to them against those who victimised them is to have a declaration of the truth by the competent body*" (para. 31) and acknowledged that "*when this right is to be satisfied through criminal proceedings, victims have a central interest in [...] the outcome of such proceedings*" (para. 34). See also "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008" (Appeals Chamber), [No. ICC-01/04-01/06-1432 OA9 OA10](#), 11 July 2008, para. 97; the "Decision on victims' representation and participation" (Trial Chamber V), [No. ICC-01/09-01/11-460](#), 3 October 2012, para. 10; the "Decision on victims'

international crimes committed against [REDACTED] the Victims will remain forever unaddressed and unpunished.

54. The Common Legal Representatives cannot stress enough that undue weight should not be placed on the need to either protect the rights of the Accused or ensure the expeditiousness of the proceedings, as opposed, and with prejudice, to the need to establish the truth in the very interests of justice. In any case, the Victims shall not be penalised because of the alleged failure by the Prosecution to exercise ‘reasonable diligence’ in bringing the matters before the Chamber.

55. For all above reasons, the Fourth Issue significantly affects the fair and expeditious conduct of the proceedings and the outcome of the trial, and the intervention of the Appeals Chamber is necessary to materially advance the proceedings.

representation and participation” (Trial Chamber V), [No. ICC-01/09-02/11-498](#), 3 October 2012, para. 9; the “Decision on common legal representation of victims for the purpose of trial” (Trial Chamber III), [No. ICC-01/05-01/08-1005](#), 10 November 2010, para. 9(a).

V. CONCLUSION

56. For the reasons set out above, the Common Legal Representatives respectfully request the Chamber to grant the Prosecution's Request and certify the four issues for appeal.



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Dated this 12th day of June 2020

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