

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/14-01/18**

Date: **29 September 2026**

**THE APPEALS CHAMBER**

**Before:** Judge Solomy Balungi Bossa, Presiding  
Judge Luz del Carmen Ibáñez Carranza  
Judge Gocha Lordkipanidze  
Judge Kimberly Prost  
Judge Erdenebalsuren Damdin

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II  
IN THE CASE OF *THE PROSECUTOR v.*  
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

**Public**

**Request for Hearing**

**Source:** Defence for Mr. Alfred Rombhot Yekatom

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☐ The Office of Public Counsel for  
Victims

☒ The Office of Public Counsel for the  
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☐ States' Representatives

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## **I. Introduction**

1. The Defence for Mr. Alfred Rombhot Yekatom ('Appellant') requests the Appeals Chamber to convene a hearing in these appeals once the further written submissions ordered on 25 August 2026 have been filed.<sup>1</sup> The Defence seeks to address the matters identified in this Request, including the questions and further submissions insofar as they bear on the Appellant's appeal.
2. Whilst the Decision on Hearing found that a hearing was not necessary 'at the current stage of the proceedings', it expressly reserved further submissions 'whether oral or in writing'.<sup>2</sup> The Order has since identified eleven questions concerning article 25(3)(d) which 'require further elucidation' in the Prosecution's appeal,<sup>3</sup> including the use of contextual findings to establish individual responsibility, the contribution required of an accused and the applicable mental elements. Although those questions are framed under article 25(3)(d), the answers the Chamber gives to them may well bear on the determination of Grounds 1 and 2 of the Appellant's Appeal Brief, which challenge the Trial Chamber's use of the same contextual findings and its conclusions on the Appellant's contribution, intent and knowledge under article 25(3)(a).<sup>4</sup> The exchange is nonetheless confined to the Prosecution, the Ngaïssona Defence and the Victims whilst Mr. Yekatom, whose convictions may ultimately be upheld on the strength of the answers, has been given no opportunity to address either the questions or what the other participants say in response.
3. The Defence requests to be heard on those interpretations before the Chamber decides whether to apply them to the Appellant's convictions. Additionally, the Defence seeks to be heard on three discrete matters. First, the distinction between material and subsidiary facts and the standard of proof, which goes to whether the factual basis of the Appellant's convictions was properly pleaded and proved at trial and has been further addressed only by the Ngaïssona Defence in its reply. Second, the request in the Prosecution's Response,<sup>5</sup> that the Chamber sustain the convictions through further legal conclusions or on an alternative basis under article 83(2)(a), which raises the distinct

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<sup>1</sup> ICC-01/14-01/18-2929 (A A2 A3) ('Order').

<sup>2</sup> ICC-01/14-01/18-2894 (A A2 A3) ('Decision on Hearing'), para. 8.

<sup>3</sup> Order, para. 6 and disposition 1-2 (up to 40 pages each from the Prosecution and the Victims, followed by up to 50 pages from the Ngaïssona Defence).

<sup>4</sup> ICC-01/14-01/18-2848-Corr-Red ('Appeal Brief').

<sup>5</sup> ICC-01/14-01/18-2885-Red ('Prosecution's Response' or 'Response').

question as to whether the Appeals Chamber has both the findings and the power to alter the legal basis of the convictions on appeal consistently with the Appellant's rights to notice, an effective defence and a reasoned judgment. Third, Trial Chamber VI's assessment, in its judgment of 23 September 2026 in *Said*, of the reliability of P-1339, the witness whose uncorroborated evidence forms the basis for a number of the findings which underpin the Appellant's convictions, which is a matter that post-dates the written phase altogether.<sup>6</sup>

4. A hearing is sought because the matters on which the Defence asks to be heard can only usefully be addressed once the positions of all participants are known, and because oral argument is the most economical way for the Chamber to receive them. A further written round after 14 October 2026 would require a further order fixing time limits and, in fairness with respect to P-1339 related submissions following the *Said* case, an opportunity for the other participants to answer, whereas a hearing would allow the Chamber to put its questions directly to counsel and to bring the exchange to a close in a single sitting. A decision on the Request is sought now, rather than once the exchange has closed, as the need for the Defence to be heard is already apparent from the Order and the Prosecution's Response and does not depend on the content of submissions yet to be filed. Those submissions will determine how the questions are argued, not whether they arise, which is why the hearing itself should follow them.
5. As such, the Defence proposes that a hearing take place after 14 October 2026, once all the ordered submissions have been filed and sufficient time has been allowed to consider them, so that counsel may address all relevant points arising from the written responses insofar as they implicate the Appellant's appeal, as well as any further questions the Chamber may wish to raise.

## **II. The Defence should be heard on questions which engage the Appellant's grounds of appeal**

6. The power to convene a hearing in an appeal under article 81 derives from article 83(1) of the Statute and is reflected in regulation 28(2), under which the Order was issued, and the inherent powers preserved by regulation 28(3).<sup>7</sup> Its exercise turns primarily on whether oral submissions would assist the Appeals Chamber in clarifying and resolving

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<sup>6</sup> See generally Appeal Brief, Grounds 4.1-4.6.

<sup>7</sup> Article 83(1) of the Statute; regulations 28(2) and 28(3) of the Regulations of the Court; Order, p. 3.

the issues raised in the appeal,<sup>8</sup> rather than on any prescribed requirement to convene a hearing at a particular stage.<sup>9</sup> In this regard, the Defence observes that the written default as provided for in rule 156(3) concerns appeals against other decisions and does not govern these appeals.<sup>10</sup>

7. In its Decision on Hearing, the Chamber expressly left open the possibility of further submissions as the proceedings progressed, and the Order has since called for further submissions on the relationship between contextual findings and individual responsibility, and on the requirements distinguishing the modes of liability.<sup>11</sup> Those matters are also in issue in Grounds 2.1, 2.6 and 2.7, where the Defence challenges the Trial Chamber's use of Anti-Balaka 'movement'-wide findings and disputes whether the Appellant's contribution, intent and knowledge were established under articles 25(3)(a) and 30. The fact that the questions are framed under article 25(3)(d) does not remove the need to hear the Appellant on reasoning which may be relied upon to uphold his convictions under article 25(3)(a).
8. Questions (a), (b) and (d) ask what distinguishes an 'organisational policy' from a 'common purpose' under article 25(3)(d), and whether the latter may be established from a pattern of violence or criminality.<sup>12</sup> The use of contextual findings to establish individual responsibility is central to Ground 2.1, which challenges the Trial Chamber's treatment of the Anti-Balaka as 'one movement' and its reliance on findings made under articles 7(2)(a) and 8(2)(f) to establish the Appellant's responsibility under article 25(3)(a).<sup>13</sup> It is submitted that in doing so, the Trial Chamber used findings concerning the existence and characteristics of the broader movement in place of proof of the objective and subjective elements of the applicable mode of liability. Establishing an organisational policy or an organised armed group cannot, without more, establish the

<sup>8</sup> ICC-01/04-02/12-199 (A), *Prosecutor v. Ngudjolo*, Scheduling order for a hearing before the Appeals Chamber, 18 September 2014 ('*Ngudjolo* Scheduling Order'), para. 13; Decision on Hearing, para. 7. See also ICC-01/05-01/13-2275-Red (A A2 A3 A4 A5), *Prosecutor v. Bemba et al.*, 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', 8 March 2018 ('*Bemba et al.* Appeal Judgment'), para. 47.

<sup>9</sup> *Bemba et al.* Appeal Judgment, para. 47.

<sup>10</sup> *Bemba et al.* Appeal Judgment, para. 46.

<sup>11</sup> Order, paras 6-7, in particular questions (a), (b), (d), (e), (f), (h)(ii) and (j). See Appeal Brief, Grounds 2.1, 2.6 and 2.7, paras 25-49 and 223-282.

<sup>12</sup> Order, para. 7(a), (b), (d).

<sup>13</sup> Appeal Brief, Ground 2.1, paras 25-49, in particular paras 27-34, 35-47 and 48-49; see also Ground 2.2, paras 50-95. On the distinction between contextual findings and the requirements for individual criminal responsibility, see in particular paras 45-46.

agreement, contribution or control required under that mode, or the Appellant's own intent and knowledge.

9. The distinction must also be considered against the charges as confirmed, under which article 25(3)(d) was available as an alternative mode against Mr. Ngaïssona alone, whilst the charges against the Appellant were confined to articles 25(3)(a) and (b).<sup>14</sup> The Prosecution's subsequent attempts to introduce article 25(3)(d) in respect of the Appellant, through reconsideration and successive applications under regulation 55, were all unsuccessful.<sup>15</sup> Yet Ground 2.1 contends that the Trial Chamber attributed the conduct and characteristics of the wider Anti-Balaka 'movement' to the Appellant, on the basis of its supposed organisation, instead of establishing the requirements of the form of article 25(3)(a) applied in the Judgment. By contrast, in *Katanga*, Trial Chamber II did not treat the militia's status as an organisation under article 7 as establishing control over the crimes under article 25(3)(a); rather, it considered responsibility under article 25(3)(d)(ii) separately, following notice under regulation 55.<sup>16</sup>
10. Even if an organisational policy or pattern of criminality were sufficient to establish a common purpose under article 25(3)(d), it would not follow that the same findings established the common plan or other requirements of responsibility under article 25(3)(a). Ground 2.1 challenges precisely that use of movement-wide findings against the Appellant, and the Defence should be heard, once the further submissions have been filed, on both the interpretation they advance and any proposed application of that interpretation to the Appellant's convictions.
11. The Trial Chamber, for example, relied on the perception that the RFACPP was Anti-Balaka<sup>17</sup> to conclude that the 'movement' could rely on the Appellant to execute its policy of targeting Muslim civilians.<sup>18</sup> Grounds 2.1 and 2.7 dispute both that attribution

<sup>14</sup> Appeal Brief, paras 31-34, referring to ICC-01/14-01/18-403-Corr-Red2, paras 98-100, 104, 124-128, 139-143, 154-156, p. 112. On the absence of another charged nexus with the broader Anti-Balaka leadership, see Appeal Brief, paras 34, 45 and 48.

<sup>15</sup> Appeal Brief, para. 33, referring *inter alia* to ICC-01/14-01/18-437, para. 31; ICC-01/14-01/18-503-Conf, paras 56-57; ICC-01/14-01/18-1345-Conf, para. 55; ICC-01/14-01/18-1973-Conf.

<sup>16</sup> ICC-01/04-01/07-3436-tENG, *Prosecutor v. Katanga*, Judgment pursuant to article 74 of the Statute, 7 March 2014 ('*Katanga* Trial Judgment'), paras 1417-1423. See also Appeal Brief, para. 47.

<sup>17</sup> Judgment, ICC-01/14-01/18-2784-Red, 24 July 2025 ('Judgment'), para. 4011 and fn. 9673, referring to para. 63. On the CLRV's reliance on contextual findings in support of article 25(3)(d), see ICC-01/14-01/18-2884-Red ('Victims' Observations'), Section VI, paras 29 and 39-43, in particular para. 40, referring to Judgment, paras 22, 451, 1296, 1319 and 4108. See also Judgment, paras 43, 45 and 3910-3912, as discussed in Appeal Brief, paras 36-37.

<sup>18</sup> Judgment, para. 4011. See also Prosecution's Response, paras 30, 33 and 35-36; Appeal Brief, paras 38-43; ICC-01/14-01/18-2902 ('Request for Leave to Reply'), para. 12. On the timing of the alleged association, compare Prosecution's Response, para. 33, with Appeal Brief, paras 42-43.

and the evidence said to establish the Appellant's own intent, including the specific intent for persecution, and maintain that the requirements for individual responsibility were not proved beyond reasonable doubt.<sup>19</sup>

12. Questions (e) and (f) require consideration of the contribution threshold under article 25(3)(d) and its distinction from assistance under article 25(3)(c).<sup>20</sup> This issue concerns Ground 2.6 which challenges the findings on the Appellant's contribution and control under article 25(3)(a), including whether the contribution relied upon for co-perpetration gave the Appellant the power to frustrate the crimes. In particular, the Appeal Brief challenges the Trial Chamber's reliance on the Appellant's alleged leadership without determining whether the 5 December 2013 crimes would not have occurred, or would have been committed in a significantly different manner, in the absence of the Appellant's contribution. The Appeal Brief also raises the distinct complaint that, insofar as the Trial Chamber treated the life-threatening conditions in Mbaiki as part of an essential contribution, those conditions were not themselves acts of the Appellant.<sup>21</sup> To the extent that the further submissions develop an account of the relationship between the modes which may affect the assessment of contribution and control under article 25(3)(a), the Defence seeks to address that account and its implications for the findings challenged in Ground 2.6.
13. As regards the mental elements, questions (c), (g), (h), (i), (j) and (k) address the accused's awareness of the group's criminal activity, purpose and intended crimes, with question (j) expressly requiring comparison between articles 25(3)(d)(i), 25(3)(d)(ii) and the *other modes under article 25(3)*, whilst question (h)(ii) asks whether article 30 applies.<sup>22</sup> That comparison includes article 25(3)(a), under which the Appellant was

<sup>19</sup> Judgment, para. 4011 and fn. 9673, referring to para. 63; Appeal Brief, paras 38-45 and 48-49. For the further example concerning persecution, compare Judgment, para. 4024 and fn. 9678, with para. 48, as expressly challenged in Appeal Brief, para. 248. Paragraph 4024 refers to knowledge of the perceptions of RFACPP members, whereas paragraph 48 refers to knowledge of the Anti-Balaka's perceptions. The separately expressed conclusions about the Appellant's own perceptions are also challenged, both as to their derivation and their evidential basis: Appeal Brief, paras 40-43 and 248-249. See also Judgment, para. 4368 and fn. 10113, which relies on paragraph 48 alongside the alleged instructions in paragraph 114; Prosecution's Response, paras 26-28.

<sup>20</sup> Order, para. 7(e)-(f) and fn. 8. See also Victims' Observations, paras 34-35, on the relative contribution thresholds and the relationship between the contribution and the commission of the crime.

<sup>21</sup> Appeal Brief, Ground 2.6, paras 223-239, in particular paras 223, 226 and 233-236. On the control and essential-contribution requirement, see Judgment, para. 3873 and fn. 9421, citing ICC-01/04-02/06-2666-Red (A A2), *Prosecutor v. Ntaganda*, Judgment on the appeals of Mr. Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', 30 March 2021 ('*Ntaganda Appeals Judgment*'), para. 1041, and ICC-01/04-01/06-3121-Red (A5), *Prosecutor v. Lubanga Dyilo*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against his conviction, 1 December 2014 ('*Lubanga Appeals Judgment*'), para. 473. See also Judgment, paras 4360-4363.

<sup>22</sup> Order, para. 7(c), (g), (h), (i), (j) and (k), in particular (h)(ii) and (j).

convicted, and in respect of which Ground 2.7 challenges the proof of intent and knowledge at the material time, including reliance on mischaracterised or *post facto* conduct and the attribution to the Appellant of perceptions ascribed to the broader Anti-Balaka or RFACPP members.<sup>23</sup> The Defence seeks to address why knowledge of a group's activity or purpose cannot, without more, establish the state of mind required under article 30 and the applicable form of article 25(3)(a), and why the inferences challenged in Ground 2.7 fail to establish the Appellant's purported *mens rea*.

14. The Defence accordingly seeks an opportunity to address the Chamber's questions and the arguments advanced by the Prosecution and CLR V in answer to them insofar as they concern the Appellant's appeal. The points at which those questions engage the Appellant's grounds are apparent from the Order and the Appeal Brief and are identified above. The reasons why the Defence asks to be heard on them once the exchange has closed, rather than now, are set out in Section IV(d) below.

### **III. The factual basis of the convictions and the scope of appellate correction warrant further submissions**

#### *a) The distinction between material and subsidiary facts*

15. In its Response, the Prosecution maintains that proof beyond reasonable doubt is required of facts indispensable to conviction, which it calls 'material facts', but not of subsidiary or 'linked' facts.<sup>24</sup> In the Decision on Replies, the Chamber permitted the Ngaïssona Defence to address whether the particular findings identified in its request had properly been characterised as subsidiary;<sup>25</sup> however it denied the Defence's request for leave to reply on the related distinction between pleaded material facts and subsidiary facts, on the basis that the existing arguments and pleading record were sufficient.<sup>26</sup> The further submissions on the use of contextual findings are likely to bear on whether facts described as subsidiary are being relied upon to establish the elements of the Appellant's responsibility, including under the alternative form of article 25(3)(a) as advanced by the Prosecution. The Defence seeks to address those submissions together with the requirements of pleading, proof and appellate review applicable to the factual basis on which the convictions would be upheld.

<sup>23</sup> Appeal Brief, Ground 2.7, paras 240-282, in particular paras 240, 247-249, 252, 256-258 and 274-282.

<sup>24</sup> Prosecution's Response, paras 411, 458, 464, 469, 471, 481 and 484.

<sup>25</sup> ICC-01/14-01/18-2917 (A A2 A3) ('Decision on Replies'), p. 3, disposition 1, and paras 23-24.

<sup>26</sup> Request for Leave to Reply, paras 2, 6 and 9; Decision on Replies, para. 27.

16. Ground 1.1 approaches the distinction from the opposite direction, challenging the Trial Chamber's reliance, after confirmation, on background or supporting matters as material facts establishing the Appellant's responsibility. As argued in the Appeal Brief, the material facts constituting the *actus reus* or *mens rea* must fall within the confirmed facts and circumstances and be proved beyond reasonable doubt. Material facts are the factual allegations underlying the elements of the crimes charged and the accused's responsibility under the applicable mode of liability, whereas subsidiary facts are those from which the material facts may be inferred or by which they may be demonstrated or supported.<sup>27</sup> The fact that the Prosecution labels a fact as subsidiary does not resolve whether the Judgment relied upon it as part of the material factual basis of the Appellant's responsibility.
17. Indeed, the Prosecution relies on the subsidiary characterisation throughout its answers to Grounds 1.1 to 1.3. It downplays the material facts set out in Ground 1.1 as 'subsidiary facts, which were functionally evidence' and argues that they therefore did not require pleading or confirmation.<sup>28</sup> In answer to Ground 1.2, it seeks to sustain an alternative conviction for indirect perpetration by relying on the alleged instructions to target 'all sectors' where Muslims were to be found,<sup>29</sup> despite these instructions being challenged as unpleaded material facts in Ground 1.1; and, separately, in Ground 2.7 because the 'all sectors' formulation is unsupported by the evidence and materially differs from the instructions as formulated elsewhere in the Judgment.<sup>30</sup> The same subsidiary versus material facts distinction is invoked in response to Ground 1.3 to deny that the Trial Chamber altered the material factual basis of the Appellant's co-perpetration liability.<sup>31</sup>
18. That the Appellant has had no opportunity to answer the distinction between subsidiary and material facts on which the Prosecution's position on these sub-grounds rests is all the more significant when viewed against the extensive pre-trial and trial litigation turning on this very matter.<sup>32</sup> In particular, the Appeals Chamber will recall having itself

<sup>27</sup> Appeal Brief, Ground 1.1, paras 5-6 and the authorities cited therein. See further articles 66(3) and 74(2) of the Statute; *Katanga* Trial Judgment, paras 1485-1489.

<sup>28</sup> Prosecution's Response, para. 8.

<sup>29</sup> Prosecution's Response, paras 16-18.

<sup>30</sup> Appeal Brief, paras 9-11 and 242-243. Compare Judgment, paras 74 and 4016. See also Prosecution's Response, paras 17 and 19, and Section III(b) below.

<sup>31</sup> Prosecution's Response, para. 20 and fn. 110. See also Appeal Brief, paras 17-22; Request for Leave to Reply, paras 9-11.

<sup>32</sup> Including in academic literature, see e.g. ICC-01/14-01/18-565-Conf, citing P. Bradfield, 'Alternative Charges and Modes of Liability in the Latest CAR Case at the ICC – Trouble Ahead?', *EJIL:Talk!*, 21 January 2020; and M. Cupido

found that the operative part of the Confirmation Decision was effectively defective, i.e. that it did not provide a complete description of the material facts constituting the charges being brought against Mr. Yekatom.<sup>33</sup> It found that the operative part required reading in conjunction with factual findings set out elsewhere in the Confirmation Decision – in other words, precisely those findings that the Prosecution now seeks to downplay as non-binding ‘subsidiary facts’, in response to Grounds 1.1-1.3.<sup>34</sup> In the same vein, at trial, the Defence expressly requested that the Trial Chamber confirm that factual allegations as regards Mr. Yekatom’s liability as a commander were not confirmed and therefore fell outside the scope of the case.<sup>35</sup> The Trial Chamber rejected this as unnecessary.<sup>36</sup> Yet, and again, it is precisely those allegations that the Trial Chamber relied on to convict Mr. Yekatom;<sup>37</sup> and that the Prosecution now seeks to characterise as ‘subsidiary’, and to rely on as such, in response to Grounds 1.1 and 1.2.<sup>38</sup>

19. The issue at the core of this concerns the use of the disputed facts to establish the material basis of the Appellant’s responsibility, which required compliance with the confirmed scope of the case and proof beyond reasonable doubt. That requires comparison of the facts and circumstances described in the charges as confirmed with the basis adopted in the Judgment. The Prosecution’s reference to the Trial Chamber’s ability to assess allegations or evidence which were either not addressed by the Pre-Trial Chamber or addressed differently,<sup>39</sup> does not, by itself, answer those complaints, which concern whether the material basis of responsibility was properly charged and proved and whether the Appellant had adequate notice and an effective opportunity to defend against it.

*b) The scope and safeguards of article 83(2)*

20. The Prosecution’s answer to Ground 1.2 maintains that the Trial Chamber applied a

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and L. Yanev, ‘A “Schrödinger’s Cat” Moment for Co-Perpetration Liability? The Yekatom and Ngaiissona Decision on the Confirmation of Charges’, *EJIL:Talk!*, 8 May 2020.

<sup>33</sup> ICC-01/14-01/18-874, paras 54-55.

<sup>34</sup> ICC-01/14-01/18-874, paras 54-57; see Prosecution’s Response, para. 8, fn. 22 (in particular, citing to ICC Chambers Practice Manual, paras 36, 62).

<sup>35</sup> ICC-01/14-01/18-1378, paras 20-44, 69, see also ICC-01/14-01/18-282-Conf-AnxB1, para. 233; and ICC-01/14-01/18-447, para. 19.

<sup>36</sup> ICC-01/14-01/18-1482, paras 5, 10.

<sup>37</sup> Judgment, paras 4010-4012 (In particular, ‘Mr. Yekatom’s instructions were understood by the elements to accept that Muslim civilians would be killed as a result of the fighting based on his elements not having been trained or instructed to apply the principle of distinction during combat and bearing strong anti-Muslim sentiment and feelings of vengeance against the Seleka.’); see also paras 2446-2447.

<sup>38</sup> Prosecution’s Response, para. 16, fn. 94; see also para. 17, relying via cross-reference to arguments on Grounds 1.1 and 1.2.

<sup>39</sup> Prosecution’s Response, para. 8.

charged form of article 25(3)(a) and that its references to direct perpetration were merely descriptive, whilst also arguing that the findings would, in any event, support co-perpetration or indirect perpetration.<sup>40</sup> In inviting the Appeals Chamber to enter further legal conclusions or sustain the convictions on an alternative basis under article 83(2)(a),<sup>41</sup> the Prosecution thus raises the further question whether the requisite findings were made and whether that alternative can be adopted consistently with the Appellant's procedural rights.

21. However, that invitation proceeds on the premise that the factual findings necessary to sustain the alternative have already been made.<sup>42</sup> In this respect, the Defence disputes both the Prosecution's account of the Judgment and the use to which it seeks to put the findings. The Response itself attributes propositions to the Trial Chamber which the Judgment does not state, restates other findings in materially different terms and treats accounts of the evidence as findings of fact. Where passages from different parts of the Judgment are assembled to support a form of responsibility which the Trial Chamber did not adopt, it is likewise necessary to distinguish the determinations actually made from the further findings or inferences which the Appeals Chamber would have to supply.
22. The classification of the facts relied upon and the powers required to sustain a different basis of conviction therefore need to be considered together, particularly in light of the further submissions on contextual findings and the requirements of the different modes.<sup>43</sup> The Defence seeks to address any resulting arguments as they affect Ground 1.2, including whether the proposed alternative rests on properly pleaded and proved facts which establish the particular form of responsibility advanced, and whether it can be adopted consistently with the Appellant's rights to notice, an effective opportunity to defend and a reasoned judgment. The Defence proposes to address the following questions in particular.
  - i. whether the findings in the Judgment satisfy the objective and subjective elements of the particular form of article 25(3)(a) now advanced, or whether maintaining the convictions would require further findings on the common plan,

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<sup>40</sup> Prosecution's Response, paras 10-19.

<sup>41</sup> Prosecution's Response, paras 8, 10-18, 20-22, in particular para. 18 and fn. 104.

<sup>42</sup> Prosecution's Response, para. 18 and fn. 104.

<sup>43</sup> Order, paras 6-7. See also Request for Leave to Reply, paras 2, 5-6 and 10-14, and Decision on Replies, paras 27-28 and 31-33, declining leave to reply on the matters raised in that request.

- the Appellant's conduct or control, or the requisite intent and knowledge;<sup>44</sup>
- ii. whether the proposed alternative could be adopted on appeal consistently with articles 67(1)(a) and (b) and the safeguards reflected in regulation 55, as construed in *Lubanga* and *Katanga*;<sup>45</sup> and
  - iii. how the duties to give a reasoned trial judgment under article 74(5) and a reasoned appellate judgment under article 83(4) apply when the convictions are to be upheld on reasoning not adopted by the Trial Chamber.<sup>46</sup>
23. Describing the proposed disposition as a correction of law does not establish that it is available on the findings in the Judgment, since the appropriate remedy depends on the error established and the determinations needed to correct it. Article 83(2) provides for reversal or amendment of the decision, or a new trial, and permits the Chamber, for those purposes, to remand a factual issue or itself call evidence to determine it. Those powers serve the corrective function of an appeal under article 81 and must be exercised within the limits of appellate review, rather than through an unrestricted re-examination of the evidence.<sup>47</sup>
24. In *Mladić*, on which the Prosecution relies,<sup>48</sup> the IRMCT Appeals Chamber explained that, where an incorrect legal standard had been applied, it could consider the trial evidence so far as necessary to apply the correct standard, but had to be satisfied beyond reasonable doubt before confirming the challenged factual finding.<sup>49</sup> The Prosecution's

<sup>44</sup> Appeal Brief, Ground 1.2, paras 12-16; Judgment, paras 4010-4013, 4025-4026; Prosecution's Response, paras 11-16. Compare the express findings concerning the PK9-Mbaiki Axis at Judgment, paras 4345-4363.

<sup>45</sup> ICC-01/04-01/06-2205 (OA 15 OA16), *Prosecutor v. Lubanga*, Judgment on the appeals of Mr. *Lubanga Dyilo* and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court', 8 December 2009, paras 85-100; ICC-01/04-01/07-3363 (OA13), *Prosecutor v. Katanga*, Judgment on the appeal of Mr. Germain *Katanga* against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons', 27 March 2013, paras 90-101.

<sup>46</sup> Articles 74(5) and 83(4) of the Statute. See *Lubanga Appeals Judgment*, paras 24, 313; *Bemba et al. Appeal Judgment*, paras 102, 105-106, 1049; ICC-01/05-01/08-3636-Anx2, *Prosecutor v. Bemba*, Separate Opinion of Judges Christine Van den Wyngaert and Howard Morrison, 8 June 2018, paras 6-7.

<sup>47</sup> *Lubanga Appeals Judgment*, paras 24, 56; ICTY, IT-98-32-A, *Prosecutor v. Vasiljević*, Appeal Judgment, 25 February 2004, para. 5 ('The appeals procedure provided for under Article 25 of the Statute is corrective and does not give rise to a *de novo* review of the case'); IRMCT, MICT-16-99-A, *Prosecutor v. Šešelj*, Appeal Judgment, 11 April 2018, para. 12.

<sup>48</sup> Response, para. 18 and fn. 104 citing IRMCT, MICT-13-56-A, *Prosecutor v. Mladić*, Appeal Judgment, 8 June 2021 ('*Mladić Appeal Judgment*'), para. 17. On the different approaches to appellate review, see ICC-01/05-01/08-3636-Red (A), *Prosecutor v. Bemba*, Judgment on the appeal of Mr. Jean-Pierre *Bemba Gombo* against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute', 8 June 2018 ('*Bemba Appeals Judgment*'), paras 38-45; compare ICC-01/05-01/08-3636-Anx1-Red, Dissenting Opinion of Judges Sanji Mmasenono Monageng and Piotr Hofmański, 8 June 2018, paras 6-16.

<sup>49</sup> *Mladić Appeal Judgment*, para. 17.

reliance on that authority does not resolve whether any further findings or inferences required to sustain its alternative could lawfully be made in this appeal, or whether they would remedy the pleaded errors, both of which the Defence seeks to address before the Chamber determines the proposed disposition.

25. The exercise of appellate powers must also respect the Appellant's right to an effective opportunity to defend against the proposed basis of conviction. Under articles 81(2)(b) and (c), the Court may invite submissions on grounds for setting aside a conviction in an appeal against sentence, or for reducing a sentence in an appeal against conviction only, before determining those matters under article 83.<sup>50</sup> The provision for hearing the parties on those additional grounds before they are determined therefore supports the Defence's request to address the alternative basis of liability advanced by the Prosecution *before* the Chamber decides whether it can lawfully sustain the Appellant's convictions.
26. The European Court of Human Rights ('ECtHR') has likewise emphasised the importance of an oral hearing where an appellate court reassesses guilt or contested facts, as distinct from deciding questions of legal interpretation or applying the law to established facts.<sup>51</sup> In that context, the assessment of an accused's intent may itself require consideration of factual matters,<sup>52</sup> whilst a change in the legal characterisation of the charges requires adequate notice and an effective opportunity to defend against the new basis of responsibility.<sup>53</sup> The Prosecution's alternative basis for conviction depends on both the interpretation of article 25(3)(a) and the sufficiency of disputed findings, and therefore requires consideration of the factual and legal basis on which the convictions would be upheld, together with the safeguards necessary before the Chamber could adopt that basis.

*c) The assessment of P-1339 in the Said Trial Judgment*

27. Trial Chamber VI delivered its judgment in *Said* on 23 September 2026.<sup>54</sup> As the

<sup>50</sup> Articles 81(2)(b) and 81(2)(c) of the Statute.

<sup>51</sup> ECtHR, Application No. 16206/90, *Botten v. Norway*, Judgment, 19 February 1996 ('*Botten v. Norway*'), paras 39, 48-53; ECtHR, Application Nos 24954/94, 24971/94 and 24972/94, *Tierce and Others v. San Marino*, Judgment, 25 July 2000, paras 92-102; ECtHR, Application No. 10563/83, *Ekbatani v. Sweden*, Judgment, 26 May 1988, paras 31-33.

<sup>52</sup> ECtHR, Application No. 43151/02, *Suuripää v. Finland*, Judgment, 12 January 2010, para. 44; ECtHR, Application No. 36292/14, *Styrmir Þór Bragason v. Iceland*, Judgment, 16 July 2019, paras 67-68 and 78-79; *Botten v. Norway*, paras 49-50.

<sup>53</sup> ECtHR, Application No. 72916/10, *Gelenidze v. Georgia*, Judgment, 7 November 2019, paras 30-38; see also ECtHR, Application No. 25444/94, *Pélissier and Sassi v. France*, Judgment, 25 March 1999, paras 51-63; ECtHR, Application No. 25575/04, *Drassich v. Italy*, Judgment, 11 December 2007, paras 31-43.

<sup>54</sup> ICC-01/14-01/21-1054-Red, *Prosecutor v. Said*, Trial Judgment, 23 September 2026 ('*Said Trial Judgment*').

Chamber will be aware, the case arose from the same situation, and P-1339, a former RFACPP member on whose evidence Trial Chamber V placed significant weight, testified in it once more for the Prosecution about the very events on which he had been relied upon to secure the conviction of Mr. Yekatom, namely the formation and movements of the RFACPP in the bush, its arming and training, and the preparations for the attack of 5 December 2013.<sup>55</sup> Notably, Trial Chamber VI found P-1339 wanting on precisely those matters. In particular, it found that P-1339 ‘was not forthcoming, particularly regarding the activities of Alfred Yekatom’s group in the bush and preparations in Zongo’, that the imprecision in his account went to ‘the timeframe of the gathering and organisation of Anti-Balaka groups, the movement of Alfred Yekatom’s group in the bush and the extent of arming and training prior to the 5 December 2013 attack’, and that his ‘inability or unwillingness to provide precise information regarding these matters impacted the probative value of his evidence and the Chamber’s view of its reliability’.<sup>56</sup> Trial Chamber VI therefore treated his testimony ‘with caution’ and ‘assessed the reliability of his evidence on a case-by-case basis in light of other evidence before it’, and on the one matter for which he was the only witness, it ‘did not find his estimates of the timing of events to be reliable generally’.<sup>57</sup>

28. Trial Chamber VI’s position differs markedly from Trial Chamber V’s treatment of the same witness on the same subject matter. Indeed, Trial Chamber V found P-1339 ‘generally credible’, considered that he ‘showed a genuine disposition to answer the questions put to him truthfully’ and was ‘forthcoming about the words and actions of Mr Yekatom’, and ‘generally relied’ on his evidence,<sup>58</sup> in many instances without corroboration. P-1339 was the sole or principal source for the findings on the preparation, planning, arming and instruction of the RFACPP before 5 December 2013, on the events at the Boeing Market and the Boeing Mosque and on the identity of those who killed Djido Saleh,<sup>59</sup> and it is his account of Mr. Yekatom’s purported instructions which underlies both the findings on intent and knowledge and the alternative basis of

<sup>55</sup> *Said Trial Judgment*, paras 147, 464, 469 and 478.

<sup>56</sup> *Said Trial Judgment*, paras 150-151.

<sup>57</sup> *Said Trial Judgment*, paras 152 and 469.

<sup>58</sup> *Judgment*, paras 330-337, in particular paras 332-334 and 337.

<sup>59</sup> *Judgment*, paras 2410, 2416, 2418, 2432-2433, 2435-2444, 2446-2447, 2459-2462, 2464-2468, 2480-2481, 2529-2531, 2533, 2537, 2547, 2552, 2579, 2586, 2630-2640, 2668-2670, 3650 and 3654; *Appeal Brief*, para. 373; ICC-01/14-01/18-2910-Conf (‘Defence Response to Victims’ Observations’), paras 45-47.

liability which the Prosecution now invites the Chamber to adopt.<sup>60</sup> The reliability of that evidence, and the adequacy of the reasons given for accepting it in the face of the Defence's sustained challenges at trial, fall squarely within Grounds 4.1 to 4.3 and 4.6 and bear directly on Grounds 2.3 and 2.7.<sup>61</sup>

29. Nor is this merely a situation in which two chambers assessed two records and reasonably reached different conclusions about the same witness.<sup>62</sup> Rather, the considerations which led Trial Chamber VI to its conclusion, namely imprecision, inconsistency and an unwillingness to give clear answers about the RFACPP's activities and preparations, are intrinsic to P-1339's own account rather than of the record in which it was tested, and are of the very kind which the Defence put squarely before Trial Chamber V.<sup>63</sup> Trial Chamber VI, which set his account against the evidence of other witnesses on the formation of the Anti-Balaka, nonetheless treated it with caution and relied on it only case by case and in the light of that other evidence.<sup>64</sup> In contrast, Trial Chamber V relied on P-1339 as the sole source for a series of findings for which no such check was available and, where it did find support elsewhere, did so on a reading of the other evidence which the Appellant contests. Given that a chamber of this Court has publicly found a witness not forthcoming on the very matters for which his uncorroborated word sustains convictions in this case, there remain three key issues on which the Defence seeks to be heard: (i) whether the reasons given for accepting his evidence meet the standard required where a genuine and significant dispute surrounds a witness central to the findings;<sup>65</sup> (ii) how that assessment bears on the reasonableness of the findings under the applicable standard of review;<sup>66</sup> and (iii) what remedy is

<sup>60</sup> Judgment, paras 2444 and 4010-4012; Appeal Brief, paras 124-132; Prosecution's Response, paras 16-18.

<sup>61</sup> Appeal Brief, paras 372-386 and 396-405 (Grounds 4.1-4.3 and 4.6), 124-132 (Ground 2.3) and 240-282 (Ground 2.7).

<sup>62</sup> See, e.g., ICTY, IT-98-32/1-A, *Prosecutor v. Lukić and Lukić*, Appeal Judgment, 4 December 2012, paras 260-261 and 396 (findings on the evidence of Huso Kurspahić and on the presence of Mitar Vasiljević which departed from those of the *Vasiljević* Trial Chamber on the same events: 'two reasonable triers of facts may reach different but equally reasonable conclusions when assessing the reliability of a witness'); ICTR, ICTR-98-44-A, *Prosecutor v. Karemera and Ngirumpatse*, Appeal Judgment, 29 September 2014, paras 52-53; ICTR, ICTR-98-44-AR73.17, *Prosecutor v. Karemera et al.*, Decision on Joseph Nzirorera's Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts, 29 May 2009, paras 16-17 and 19 (another chamber's assessment of the same evidence 'is a factor that may be taken into account'). Compare ICTR, ICTR-00-56B-A, *Prosecutor v. Bizimungu*, Appeal Judgment, 30 June 2014, paras 58-67 (conviction resting on the uncorroborated evidence of an accomplice witness reversed where the Trial Chamber had not addressed the 'genuine and significant dispute' surrounding his credibility, including his differing accounts in other cases before the Tribunal). [check more]

<sup>63</sup> Judgment, para. 331, summarising Yekatom Defence Closing Brief, ICC-01/14-01/18-2737-Corr-Red, paras 106-135; Defence Response to Victims' Observations, paras 50-87.

<sup>64</sup> *Said* Trial Judgment, paras 456-479 (assessing P-1339's account alongside those of P-0884, P-0966, P-2251 and P-2269).

<sup>65</sup> Appeal Brief, para. 373 and the authorities cited at fn. 1337; *Ntaganda* Appeals Judgment, para. 655.

<sup>66</sup> *Bemba* Appeals Judgment, paras 38-45; *Lubanga* Appeals Judgment, paras 21-27.

appropriate if they cannot stand, having regard to the Chamber's powers under article 83(2) to reverse, to remand a factual issue or to call evidence itself.<sup>67</sup>

30. All three issues cannot be addressed within the written phase as it stands, noting that the *Said* Trial Judgment post-dates every submission in these appeals and the Order itself. Whilst the *Said* Trial Judgment is public, and can therefore be considered by the Chamber without any further step, the Defence seeks a fair opportunity to orally address how the judgment bears on grounds which are already fully pleaded.

#### **IV. A hearing would assist the Chamber in determining the appeals**

31. The Appellant's right to a fair determination of the appeal includes a meaningful opportunity to answer submissions capable of influencing the outcome,<sup>68</sup> and the matters addressed above concern the basis on which the convictions may be upheld. The Defence accordingly seeks a hearing at which counsel may address the arguments actually advanced and their implications for the pleaded grounds.

##### *a) The issues identified can be addressed and clarified in oral argument*

32. Oral argument would allow counsel to develop the pleaded grounds in light of the Appeal Brief, Response and further submissions, while answering the Chamber's questions and the arguments advanced by the other participants. In particular, counsel would be in a position to explain how a proposed interpretation affects the reasoning challenged in the Judgment and the findings required under the applicable mode of liability, with reference to the trial record where necessary, and respond to any questions arising from that explanation. The Chamber would thus be able to seek clarification as the argument develops and examine the consequences for the Appellant's convictions without having to direct a further written exchange.
33. Subject to further direction from the Chamber, the Defence therefore proposes to address five topics in oral submissions.
- i. the use of contextual findings to establish individual responsibility under article 25(3), including agreement, contribution or control, and the distinctions between the contribution requirements of the modes of liability,

<sup>67</sup> Article 83(2) of the Statute; *Mladić* Appeal Judgment, para. 17. See Section III(b) above.

<sup>68</sup> ECtHR, Application Nos 11170/84, 12876/87 and 13468/87, *Brandstetter v. Austria*, Judgment, 28 August 1991, paras 66-68 (adversarial criminal appeal proceedings). See also, for the general adversarial principle in civil proceedings, Application No. 18990/91, *Nideröst-Huber v. Switzerland*, Judgment, 18 February 1997, paras 24-31, in particular paras 24 and 29.

as raised in Grounds 2.1, 2.2 and 2.6 and the related scope complaints in Grounds 1.1 to 1.3, including in response to questions (a), (b), (d), (e) and (f);

- ii. proof of the Appellant's own intent and knowledge, including the application of article 30 and the comparison between articles 25(3)(d) and 25(3)(a), in relation to Ground 2.7 and questions (c), (g), (h), (i), (j) and (k);
- iii. the distinction between material and subsidiary facts in Grounds 1.1 to 1.3, including the use made of the disputed facts and the resulting requirements as to the permissible basis of conviction and the standard of proof;
- iv. the scope of article 83(2)(a) where the Prosecution seeks to sustain the convictions on an alternative basis in answer to Ground 1.2, including the findings and standard of review that would be required and the notice and reasoning safeguards discussed in Section III(b); and
- v. the implications of the *Said* Trial Judgment's assessment of P-1339 for Grounds 4.1 to 4.3 and 4.6 and for the related findings challenged in Grounds 2.3 and 2.7, including the standard of review and the remedy available under article 83(2).

34. The Defence has identified the proposed topics by reference to the submissions presently before the Chamber, whilst recognising that the further submissions on any of the eleven questions may raise points relevant to the Appellant's appeal which cannot yet be anticipated. Should such points arise, the Defence would seek an opportunity to address them, subject to any directions the Chamber may give concerning the scope of the hearing. A hearing would also allow the Defence to address any other matters or questions on which the Chamber considers that oral submissions would assist its determination.

*b) The reasons for which hearings have been convened equally apply to these appeals*

35. The Court has held oral hearings in the completed conviction appeals in *Lubanga*, *Bemba*, *Ntaganda* and *Ongwen*,<sup>69</sup> as well as in the appeals against acquittal in *Ngudjolo*

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<sup>69</sup> ICC-01/04-01/06-3067, *Prosecutor v. Lubanga*, Scheduling order for a hearing before the Appeals Chamber, 21 March 2014; ICC-01/05-01/08-3568 (A A2 A3), *Prosecutor v. Bemba*, Scheduling order for a hearing before the Appeals Chamber, 7 November 2017 ('*Bemba* Scheduling Order'); ICC-01/04-02/06-2486 (A A2), *Prosecutor v. Ntaganda*, Scheduling order for a hearing before the Appeals Chamber, 9 March 2020; ICC-02/04-01/15-1909 (A A2), *Prosecutor v. Ongwen*, Order scheduling a hearing before the Appeals Chamber, 17 November 2021 ('*Ongwen* Scheduling Order') and

and *Gbagbo and Blé Goudé*.<sup>70</sup> In scheduling the *Ongwen* hearing, the Chamber referred to the novelty and complexity of certain issues, the number of grounds and the approaching judicial recess,<sup>71</sup> the first two of which are equally relevant to these appeals concerning a single Judgment against two accused across numerous counts and several modes of liability. The eleven questions now posed also make the course adopted in *Bemba* particularly relevant, since the Chamber there directed the parties to address its legal questions, including the standard of appellate review, and drew on their oral submissions in determining its questions.<sup>72</sup>

36. In *Ngudjolo*, the Prosecution requested a hearing long after the written submissions had closed,<sup>73</sup> and the Chamber granted the request on the basis that oral argument would assist its determination of the appeal.<sup>74</sup> The present Request should likewise be considered by reference to the questions which remain for determination and the assistance the Defence could provide in addressing them.
37. In *Ntaganda*, the Chamber permitted the Defence to reply at the hearing, subject to a prohibition on repetition, in order to streamline the proceedings,<sup>75</sup> thereby providing a further opportunity to be heard without an additional written round. A hearing would serve that purpose here, so that the Defence's submissions and any questions from the Chamber can be addressed with the benefit of the completed written exchange.
38. The ICC jurisprudence also tracks the practice before the *ad hoc* tribunals whereby oral argument was the ordinary course in appeals from judgment, with the Appeals Chamber fixing a hearing date after the time limits for filing briefs had expired.<sup>76</sup> Such practice demonstrates the very real value of receiving oral submissions alongside the written briefs when reviewing a substantial trial record, and that an opportunity to develop and clarify the arguments is compatible with, if not necessary for, the efficient conduct of complex appeals.

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ICC-02/04-01/15-1968 (A A2), Directions on the conduct of the hearing, 28 January 2022.

<sup>70</sup> *Ngudjolo* Scheduling Order; ICC-02/11-01/15-1318 (A), *Prosecutor v. Gbagbo and Blé Goudé*, Order scheduling a hearing before the Appeals Chamber and setting a time limit for any request for leave to reply, 20 March 2020.

<sup>71</sup> *Ongwen* Scheduling Order, para. 6.

<sup>72</sup> ICC-01/05-01/08-3579, *Prosecutor v. Bemba*, Order in relation to the conduct of the hearing before the Appeals Chamber, 27 November 2017; *Bemba* Appeals Judgment and citations to the transcripts of hearings of 9 to 11 January 2018.

<sup>73</sup> ICC-01/04-02/12-193-Red, *Prosecutor v. Ngudjolo*, Public redacted version of 'Prosecution's Request to Schedule the Appeal Hearing', 29 August 2014.

<sup>74</sup> *Ngudjolo* Scheduling Order, para. 13.

<sup>75</sup> ICC-01/04-02/06-2488 (A A2), *Prosecutor v. Ntaganda*, Decision on request for leave to reply, paras 7-8.

<sup>76</sup> Rule 114 of the ICTY Rules of Procedure and Evidence; rule 114 of the ICTR Rules of Procedure and Evidence; rule 141 of the Rules of Procedure and Evidence of the IRMCT.

39. The importance of that opportunity was also recognised in Judge Ibáñez Carranza's partly dissenting opinion in the *Ntaganda* reparations appeal, which addressed the public hearing as a safeguard of due process where a potentially final appellate determination involves complex issues and contested facts, as distinct from narrow legal or technical questions.<sup>77</sup> Those concerns are of direct relevance here, noting that the application of the requirements of responsibility cannot be separated from the disputed findings or from the basis on which the Prosecution proposes that the convictions should be upheld.
40. By contrast, the refusal of a hearing in *Bemba et al.* was based on the Chamber's assessment, made in its judgment on the article 70 appeals,<sup>78</sup> that the appellants' detailed written arguments and the Prosecution's response were sufficient and that further oral submissions would not be useful in those circumstances.<sup>79</sup> The present Request instead concerns the assistance a hearing would provide following the further exchange now ordered on questions relevant to the Appellant's grounds, rather than the sufficiency of the original briefs when the Decision on Hearing was issued.
- c) The determination of conviction and sentence in a single Judgment reinforces the need for a hearing*
41. The combined determination of conviction and sentence required the Defence to address both in the same 200 page Appeal Brief,<sup>80</sup> an allowance which was materially below the total available for the separate conviction and sentencing appeals in comparable cases.<sup>81</sup> An oral hearing would provide an opportunity to develop the submissions already made with the benefit of the further exchange, and to answer the Chamber's questions directly, complementing the written argument on the pleaded grounds.
42. This complementary role was recognised by the Prosecution in *Bemba*, where it opposed an extension of the page limit on the ground that the ordinary allowance would not prevent the Defence from assisting the Chamber adequately, given the possibility of a

<sup>77</sup> ICC-01/04-02/06-2708-Anx (A4 A5), *Prosecutor v. Ntaganda*, Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza to the 'Decision on various procedural issues', 10 September 2021 ('Ibáñez Carranza Partly Dissenting Opinion'), paras 2-4, 12-21.

<sup>78</sup> *Bemba et al.* Appeal Judgment, paras 46-49.

<sup>79</sup> *Bemba et al.* Appeal Judgment, para. 48.

<sup>80</sup> Appeal Brief, pp. 3-202, paras 437-438 and fn. 1677.

<sup>81</sup> Appeal Brief, para. 437, fn. 1677 (combined conviction and sentencing allocations: *Ongwen*, 250 + 100 pages; *Bemba*, 200 + 100; *Al Hassan*, 180 + 100; *Ntaganda*, 150 + 100; *Lubanga*, 120 + 100; *Bemba et al.*, 115 + 100). The *Al Hassan* appeals were later discontinued see ICC-01/12-01/18-2743, 23 July 2025, para. 3.

hearing to address matters requiring further submissions.<sup>82</sup> The Appeal Brief also recorded the Defence's readiness to provide further elaboration,<sup>83</sup> and a hearing would allow the Defence to develop the pleaded grounds in response to the Chamber's subsequent questions and the Prosecution's proposed alternative, taking account of the arguments advanced in the further submissions.

43. The public character of the proceedings is yet a further reason for a hearing as guaranteed under the statutory framework.<sup>84</sup> Those provisions reflect the value which the Statute attaches to publicity in the determination of the charges, and although an appeal confined to narrow questions of law might be decided on the papers, this appeal concerns the factual basis on which the convictions rest and the basis on which the Prosecution asks that they be upheld. The same value informs Judge Ibáñez Carranza's partly dissenting opinion,<sup>85</sup> which treated the public hearing as a safeguard of due process, and it is reflected in the ECtHR's explanation that the public character of proceedings protects litigants against the administration of justice in secret with no public scrutiny and is one of the means whereby confidence in the courts can be maintained.<sup>86</sup> The Judgment was delivered in open court and its outcome was widely reported. In this respect, the Appellant's challenges to the Judgment have so far been conducted entirely in writing, in filings drafted in the English language, partly redacted and, for the public and in particular for the affected communities in the Central African Republic, no realistic means of following the case made on Mr. Yekatom's behalf. In contrast, an oral hearing which is broadcast to relevant communities would allow the basis on which Mr. Yekatom contests his convictions to be stated publicly, in his presence, and to be answered publicly, so that the public which saw the convictions entered can also see them tested.

*d) The Request is timely and the hearing will not cause undue delay*

44. The Defence proposes that the hearing take place after 14 October 2026, once all the

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<sup>82</sup> ICC-01/05-01/08-3401 (A), *Prosecutor v. Bemba*, Response to request for an extension of the page limit, 1 July 2016, para. 9, citing the *Ngudjolo* Scheduling Order, para. 13, and regulation 28(1) of the Regulations of the Court.

<sup>83</sup> Appeal Brief, para. 3. See also paras 437 and 457.

<sup>84</sup> Article 67(1) entitles the accused to a public hearing in the determination of any charge against him, article 64(7) requires the trial to be held in public and article 83(4) requires the judgment of the Appeals Chamber to be delivered in open court, whilst regulation 20(1) provides that all hearings shall be held in public unless otherwise provided or ordered.

<sup>85</sup> Judge Ibáñez Carranza Partly Dissenting Opinion, paras 12-21.

<sup>86</sup> ECtHR, Application No. 7984/77, *Pretto and Others v. Italy*, Judgment, 8 December 1983, para. 21; ECtHR, Application No. 8273/78, *Axen v. Germany*, Judgment, 8 December 1983, para. 25; ECtHR, Application No. 35115/97, *Riepan v. Austria*, Judgment, 14 November 2000, para. 27.

submissions required by the Order have been filed. The matters identified in this Request could be addressed in a single sitting day, allowing time for counsel's submissions and for questions from the Chamber on the completed exchange and its implications for the Appellant's appeal.

45. Nor would a hearing shortly after completion of the ordered exchange materially delay the appeal, since the Chamber will in any event be considering the submissions due by 14 October 2026 and could receive the Defence's arguments orally as part of that consideration.<sup>87</sup> It is also the more economical course noting that a further written round after that date would require an order fixing page and time limits thereby extending the written phase by at least two further filings, whereas at a hearing the Chamber can put its questions to counsel directly and test the propositions advanced against the record, as it did in *Bemba* and *Ntaganda* (Section IV(b) above).
46. The Request is made before the exchange closes for the same reason. The Chamber's practice has been to fix the dates of a hearing by scheduling order and to identify the issues to be addressed in subsequent directions, once the written record is complete.<sup>88</sup> A decision now would allow the sought hearing to be fixed to follow the filing of the last of the ordered submissions directly. Were the Defence instead to apply once the exchange has closed, the Chamber would first have to receive the request and any responses to it and rule upon them, and only then could a hearing be scheduled, so that the hearing itself, and the Chamber's deliberations, would be put back by several weeks for no corresponding advantage. The finding in the Decision on Hearing that a hearing was not necessary 'at the current stage of the proceedings' left the question open for a later stage,<sup>89</sup> and the Order, by posing eleven questions on matters which overlap with the Appellant's grounds, has brought that stage about. The *Said* Trial Judgment, delivered a month later, provides yet a further reason, given that it concerns the reliability of a witness central to several of the Appellant's grounds and remains, to date, unaddressed in any written submission.
47. Nor does the Request invite the Chamber to rule in the abstract. As set out above, Sections II and III have identified the points at which the eleven questions and the

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<sup>87</sup> ICC-01/04-02/06-2488 (A A2), *Prosecutor v. Ntaganda*, Decision on request for leave to reply, paras 7-8. See Section IV(b) above.

<sup>88</sup> *Bemba* Scheduling Order, followed by ICC-01/05-01/08-3579, Order in relation to the conduct of the hearing before the Appeals Chamber, 27 November 2017; *Ongwen* Scheduling Order, followed by ICC-02/04-01/15-1968 (A A2), Directions on the conduct of the hearing, 28 January 2022.

<sup>89</sup> Decision on Hearing, paras 7-8.

Prosecution's alternative basis of conviction bear on the Appellant's grounds, and those points do not depend on what the further submissions may say about them, since the submissions will determine how the points are argued rather than whether they arise. The fact that the submissions will shape the argument is the reason the Defence asks for the hearing to follow the exchange, so that counsel answer the arguments actually made rather than those anticipated, and the Defence respectfully submits that it does not warrant deferring the decision whether a hearing should be held as per the prior practice of the Appeals Chamber..

#### **V. Relief sought**

48. For the foregoing reasons, the Defence respectfully seeks the following relief.

- a) **CONVENE** a hearing in these appeals, to be held after 14 October 2026 once all the ordered submissions have been filed, at which the Appellant may make oral submissions on the matters identified in Section IV(a), including the questions and further submissions insofar as they bear on Mr. Yekatom's appeal; and
- b) **ISSUE** such directions on the conduct and scope of the hearing as the Chamber considers appropriate.

**RESPECTFULLY SUBMITTED ON THIS 29<sup>th</sup> DAY OF SEPTEMBER 2026**




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Me Mylène Dimitri  
Lead Counsel for Mr. Yekatom

Dated 29 September 2026

At The Hague, the Netherlands