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Criminal  
Court**

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Date: **2 March 2020**

**PRE-TRIAL CHAMBER II**

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

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II  
IN THE CASE OF *THE PROSECUTOR v. ALFRED YEKATOM AND  
PATRICE-EDOUARD NGAISSONA***

**Public**

**Prosecution's Request for Reconsideration of, or alternatively Leave to Appeal, the  
"Decision on the confirmation of charges against Alfred Yekatom and Patrice-  
Edouard Ngaissona"**

**Source:** Office of the Prosecutor

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

**The Office of the Prosecutor**

Ms Fatou Bensouda

Mr James Stewart

Mr Kweku Vanderpuye

**Counsel for Alfred Yekatom**

Ms Mylene Dimitri

Mr Peter Robinson

**Counsel for Patrice-Eduard Ngaissona**

Mr Geert-Jan Alexander Knoops

**Legal Representatives of Victims**

Mr Dmytro Suprun

Mr Abdou Dangabo Moussa

Ms Elisabeth Rabesandratana

Mr Yaré Fall

Ms Marie-Edith Douzima-Lawson

Ms Paolina Massidda

**Common Legal Representatives for Victims**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations Other  
Section**

## I. INTRODUCTION

1. The Prosecution requests Pre-Trial Chamber II (“Chamber”) to reconsider its 11 December 2019 Decision on the Confirmation of Charges<sup>1</sup> (“Decision”) regarding the modes of liability charged against Alfred Yekatom.<sup>2</sup> Reconsideration is necessary as the decision is affected by a clear error of reasoning, and to prevent an injustice.

2. In the alternative, the Prosecution requests the Chamber’s leave to appeal the Decision and to certify the following proposed issues, as framed, for further consideration by the Appeals Chamber:

- Whether the Pre-Trial Chamber erred in declining to confirm article 28 as a cumulative/alternative mode of liability to article 25.<sup>3</sup>
- Whether the Pre-Trial Chamber erred in failing to confirm article 25(3)(c) and (d) as alternative modes of liability to article 25(3)(a) and (b).<sup>4</sup>

3. These issues arise from the Decision and would significantly affect the fair and expeditious conduct of the proceedings as well as, potentially, the outcome of the trial. Moreover, immediate resolution of these issues by the Appeals Chamber may materially advance the proceedings, as well as clarify the practice of the Court altogether.<sup>5</sup>

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<sup>1</sup> ICC-01/14-01/18-403-Conf.

<sup>2</sup> Decision, paras. 58, 100.

<sup>3</sup> Decision, para. 58.

<sup>4</sup> Decision, para. 100.

<sup>5</sup> Given the refusal of some Trial Chambers to entertain applications for re-characterisation pursuant to regulation 55 if the confirmation decision has not been appealed, this request also safeguards any such future application: *see e.g.*, ICC-01/05-01/13-1250, paras. 10-11; ICC-01/05-01/13-1553, paras. 6-8 ; ICC-02/11-01/15-185, paras. 8, 12 (where the Trial Chamber considered that the Prosecution “appears to have bypassed other statutory remedies available before making the Request” but ultimately gave notice pursuant Regulation 55 in the special circumstances of the case).

## II. SUBMISSIONS

### A. REQUEST FOR RECONSIDERATION

#### a) General

4. Although an exceptional remedy, the Court's Pre-Trial and Trial Chambers have reconsidered their own decisions in some limited circumstances, in line with the practice of the *ad hoc* Tribunals and other international courts.<sup>6</sup> They have done so on different grounds, including when there was a "clear error" of reasoning on the part of a Chamber, or to prevent an injustice.<sup>7</sup> While most Chambers have found that these criteria need not be demonstrated cumulatively,<sup>8</sup> they happen to be so in this case. This underlines the importance which the Prosecution attaches to this request.

#### b) Reconsideration is necessary because the Decision is flawed by a clear error of reasoning

##### i) The Chamber refrained from assessing Yekatom's criminal liability under Article 28

5. The Prosecution respectfully submits that the Chamber erred by declining to "address the allegation of command responsibility" and, thus, not to "retain for the

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<sup>6</sup> See e.g., *Prosecutor v. Šešelj*, Decision on motion for reconsideration of the "Decision on the interlocutory appeal concerning jurisdiction" date 31 August 2004," IT-03-67-AR72.1, 15 June 2006, para. 9; *Prosecutor v. Strugar*, Decision on Strugar's request to reopen appeal proceedings, IT-02-42-A, 7 June 2007, paras. 22-23; *Prosecutor v. Kajelijeli*, Judgement, ICTR-98-44A-A, 23 May 2005, para. 203; *Prosecutor v. Kamuhanda*, Decision on Kamuhanda's appeal of decision on motion for appointment of amicus curiae prosecutor to investigate prosecution witness GEK, MICT-13-33-AR90/108.1, 8 December 2015, para. 16; *Prosecutor v. Ayyash et al.*, Decision dismissing the Prosecution motion for reconsideration of the Trial Chamber Decision under Rule 165 to call Mr Michael Taylor, STL-11-01/T/TC, F 3686, 12 June 2018, para. 7; *Prosecutor v. Mučić et al.*, Separate opinion of Judge Shahabuddeen, IT-96-21-Abis, 8 April 2003, paras. 5-9 (also citing case-law from certain domestic jurisdictions).

<sup>7</sup> ICC-01/04-02/06-519, para. 12; ICC-02/04-01/15-1547, para. 7; ICC-02/04-01/15-468, para. 4; ICC-01/04-02/06-1049-Red, para. 12; ICC-01/05-01/08-3343, para. 30.

<sup>8</sup> *Ibid.* After its earlier decision denying a request for reconsideration for lack of legal basis (see ICC-01/14-01/18-190, para. 11), this Chamber has entertained such request but only in limited circumstances: See ICC-01/14-01/18-206, para. 20: "[r]econsideration is allowed as an exceptional measure which should only be undertaken when the conditions upon which the decision was grounded have changed, and it is necessary to prevent an injustice." Emphasis added. See also ICC-01/12-01/18-608-Red, para. 48 and the case-law cited in fn. 94.

relevant confirmed counts the cumulative mode of liability of article 28(a).”<sup>9</sup>

6. In particular, Yekatom had been charged both cumulatively and alternatively with modes of liability under article 25 *and* under article 28 to reflect not only his responsibility for his participation in the alleged crimes but also his *additional* responsibility as a military commander for failing to discharge his duties under international humanitarian law with respect to the crimes committed by his subordinates.

7. The Chamber correctly recognised article 28 as a cumulative mode of liability, and expressly noted that article 28 is concerned with responsibility “other than the one found in article 25” —namely, failing to prevent or repress his subordinates’ crimes.<sup>10</sup> However, in the same breath, it determined that since Yekatom’s conduct “resulted in the realisation of the objective elements of the crimes, rather than only consisting in the mere failure to prevent or repress crimes committed by other persons”, it did not need to confirm his additional responsibility for the charges as a commander, nor assess the underlying evidence.<sup>11</sup> In the Prosecution’s respectful submission, this was erroneous.

8. Under the Court’s jurisprudence it is undisputed that article 28 is an independent, “additional” mode of liability to those set out in article 25. Command responsibility is not subsumed by article 25, even if the commander’s conduct also directly resulted in the commission of crimes. As stated by the Trial Chamber in *Bemba*, “[t]he plain terms of Article 28—‘[i]n addition to other grounds of criminal responsibility’—and its placement in Part 3 of the Statute indicate that Article 28 is intended to provide a distinct mode of liability from those found in Article 25.”<sup>12</sup> As a

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<sup>9</sup> Decision, para. 58.

<sup>10</sup> Decision, para. 58.

<sup>11</sup> Decision, para. 58.

<sup>12</sup> ICC-01/05-01/08-3343, para. 173.

result, “a commander’s conduct may be capable of satisfying a material element of one or more modes of liability”.<sup>13</sup> Similarly, Pre-Trial Chambers I and II in *Ongwen*, *Bemba* and *Gbagbo* underscored that article 28 “reflects a different form of criminal responsibility than that found in article 25(3)(a).”<sup>14</sup>

9. Likewise, the *ad hoc* tribunals recognised that an accused may be tried and both their personal participation in crimes and their responsibility as a commander taken into account in the sentence ultimately imposed. In such cases, the finding of superior responsibility was at least given effect as a circumstance aggravating the responsibility of the accused based upon their own participation.<sup>15</sup> Consequently, failure to assess evidence and make findings in relation to command responsibility was considered an error of law.<sup>16</sup>

**ii) The Chamber refrained from assessing Yekatom’s criminal liability under article 25(3)(c) and (d)**

10. The Prosecution submits that the Chamber also erred by declining to give substantive consideration to, or indeed to confirm, the alternative charges under article 25(3)(c) and (d). This was based on its view that these alternatives were “unnecessary” given its findings that the evidence showed—to the degree required by article 61—that Yekatom had committed the crimes jointly with or through another person under article 25(3)(a) or alternatively, ordered the commission of these crimes under article 25(3)(b).<sup>17</sup>

<sup>13</sup> ICC-01/05-01/08-3343, para. 174, cited in the Decision, fn. 99.

<sup>14</sup> ICC-02/04-01/15-422, para. 42; ICC-02/11-01/11-656-Red, para. 262; ICC-01/05-01/08-424, para. 405.

<sup>15</sup> See *Prosecutor v. Nahimana et al*, Judgement, ICTR-99-52-A, 28 November 2007, para.487; *Setako v. Prosecutor*, Judgement, ICTR-04-81-A, 28 September 2011 (“*Setako* Appeal Judgement”) para.266; *Prosecutor v. Kordić & Čerkez*, Judgement, IT-95-14/2-A, 17 December 2004, para. 34.

<sup>16</sup> *Setako* Appeal Judgement, para. 268 (“[s]ince the Amended Indictment charged Setako cumulatively under Articles 6(1) and 6(3) of the Statute, the Trial Chamber was required to make a finding as to whether Setako incurred superior responsibility for the purpose of sentencing. The Trial Chamber’s failure to make such a finding constituted an error of law”).

<sup>17</sup> Decision, paras. 98-100.

11. When based on the same underlying conduct, charges of responsibility under article 25(3)(c) and (d) may lie in the alternative to 25(3)(a) and/or (b). A person may not be convicted cumulatively for all these modes with respect to the same conduct, nor may their responsibility be aggravated on this basis. However, these concerns arise only if a person is convicted following a trial before a Trial Chamber. It does not bar a Pre-Trial Chamber from confirming all viable cumulative or alternative charges. This is because confirmation proceedings are concerned solely with identifying and delineating all those charges preferred by the Prosecutor that are sufficiently supported by the evidence, and upon which a person may properly be tried.<sup>18</sup>

12. It is for that reason that this Chamber correctly rejected Yekatom's request for the non-confirmation of two charged crimes (*torture* under count 12, and *other inhumane acts* under count 11), that are based on the same underlying facts and for which no cumulative convictions could ultimately be entered at trial.<sup>19</sup> Significantly, the Chamber underscored the principle that the Trial Chamber must not be constrained by the non-confirmation of substantiated charges, even if they are 'subsumed' by others as Yekatom had argued. It held specifically that:

[a] Trial Chamber is better poised to fully assess the relevant circumstances and that, in light of regulation 55 of the Regulations, providing early notice as to the applicable legal qualifications is beneficial both for the rights of the Defence and judicial economy.<sup>20</sup>

13. The Chamber's approach equally applies to alternative modes of liability. In the Prosecution's respectful submission, it was erroneous to fail to do so.

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<sup>18</sup> Article 61(7)(a). *See also e.g.*, ICC-01/04-01/06-3121-Red, para. 124; ICC-01/05-01/13-2275-Red, para. 196.

<sup>19</sup> Decision, paras. 120-123.

<sup>20</sup> Decision, para. 121.

**iii) The Chamber should have confirmed all supported cumulative and alternative modes of liability as the Trial Chamber is best placed to fully assess the evidence**

14. In sum, the Prosecution respectfully submits that the Chamber erred by not even giving substantive consideration whether to confirm all charged modes of liability that are properly substantiated by the evidence, as dictated by the Statute, and further confirmed by the Court's jurisprudence and the *Chambers Practice Manual*. On the basis of the evidence adduced at this preliminary stage, it should have confirmed the additional modes specified, so that they could be considered by the Trial Chamber on the merits of the testimony to be heard at trial.

15. Article 61(7)(a) requires that "[t]he Pre-Trial Chamber *shall* [...] confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges confirmed."<sup>21</sup> Charges include the crimes and the modes of liability.<sup>22</sup> Therefore the obligation to confirm a charge where evidence is sufficient concerns both the crime and the mode of liability.

16. The Court's case law supports this position. According to the Pre-Trial Chamber in *Ongwen*, "[a]rticle 61(7) of the Statute mandates the Chamber to decline to confirm charges *only* when the evidence does not provide substantial grounds to believe that the person committed the charged crime [...]. When the Prosecutor meets the applicable burden of proof, the Chamber *shall* confirm the charges as presented."<sup>23</sup> In *Gbagbo*, the Pre-Trial Chamber held that this "reduce[s] future delays at trial, and provides early notice to the defence of the different legal characterisations that may be considered by the trial judges."<sup>24</sup>

<sup>21</sup> Article 61(7)(a). Emphasis added.

<sup>22</sup> Regulation 52(c). *See also e.g.*, ICC-01/04-01/06-803-tEN, paras. 151, 317, 410.

<sup>23</sup> ICC-02/04-01/15-422-Red, para. 30. Emphasis added.

<sup>24</sup> ICC-02/11-01/11-656-Red, para. 228.



17. The approach has been consolidated in the *Chambers Practice Manual*, which advises that all pleaded cumulative or alternative modes of liability that are supported by the evidence should be confirmed, thus allowing “the Trial Chamber, on the basis of a full trial, to determine which one, if any, of the confirmed alternative is applicable to each case.”<sup>25</sup>

18. The position is also consistent with the nature and object of confirmation proceedings. Since not all evidence is adduced at this stage, the interests of justice dictate that a Pre-Trial Chamber should not lightly dismiss substantiated charges, whether brought cumulatively or in the alternative, and should not overly constrain the Trial Chamber. Indeed, the *ad hoc* Tribunals also permitted cumulative or alternative charges because “prior to the presentation of all evidence it is not possible to determine which of the charges brought against an accused will be proven,” and because “the Trial Chamber is better poised, after the parties’ presentation of the evidence, to evaluate which alternative charges may be retained based upon their sufficiency”.<sup>26</sup>

19. As the Pre-Trial Chamber itself recognised, it should adopt an approach which does not constrain but rather gives deference to the Trial Chamber – which, following a full trial, will be better placed to determine the proper mode of liability. This is exactly what this Chamber considered in dismissing Yekatom’s request regarding the counts of *other inhumane acts* and *torture*.<sup>27</sup> It did not adequately explain why this principle should not be applied consistently.

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<sup>25</sup> Chambers Practice Manual (4th ed., 2019), para. 67.

<sup>26</sup> *Prosecutor v. Naletilić & Martinović*, Judgment, IT-98-34-A, 3 May 2006, para. 103; *Prosecutor v. Mučić et al.*, Judgement, IT-96-21-A, 20 February 2001, para. 400.

<sup>27</sup> Decision, paras. 120-121.

### c) Reconsideration is necessary to prevent an injustice

20. Reconsideration is also necessary to prevent an injustice, since the only other available redress is regulation 55—but this is discretionary, not automatic.<sup>28</sup> It does not accord the Prosecution any right to such a remedy.

21. For example, in the *Bemba et al.* case, the Trial Chamber twice rejected the Prosecution’s applications for notice to be given under Regulation 55(2) regarding the modes of liability.<sup>29</sup> The Trial Chamber emphasised: “*that it is ultimately its prerogative to decide if and when to give Regulation 55 notice. The Chamber is not required to accept every Prosecution submission that a recharacterisation can be derived from the facts and circumstances described in the charges – the Chamber has discretion in deciding whether a possible re-characterisation ‘appears to [it]’.*”<sup>30</sup>

22. If, for any reason, the Trial Chamber were to deny a request to give notice of a potential re-characterisation under regulation 55, Yekatom will never be held culpable under these additional modes of responsibility, even if the evidence proves that responsibility beyond reasonable doubt.<sup>31</sup> Moreover, if the Trial Chamber were to find his personal participation under article 25(3)(a) or (b) not sufficiently supported,

<sup>28</sup> See e.g., ICC-01/04-01/06-2205 OA15 OA16, para. 84; ICC-01/04-01/07-3363 OA13, para. 87; ICC-02/11-01/15-369, paras. 25, 27 ; ICC-01/05-01/13-1553, paras. 6-8.

<sup>29</sup> ICC-01/05-01/13-1250, paras. 10-11; ICC-01/05-01/13-1553, paras. 6-8. For the Prosecution’s applications, see ICC-01/05-01/13-922 and ICC-01/05-01/13-1538.

<sup>30</sup> ICC-01/05-01/13-1553, para. 8.

<sup>31</sup> A Trial Chamber may give regulation 55 notice for the re-characterisation of the facts even before the Prosecution’s opening statement. It is not required that the prosecution must have initially appealed the confirmation decision, nor to have shown special or extraordinary circumstances: ICC-02/11-01/15-369 OA7, (“*Gbagbo* regulation 55 Appeal Decision”), paras. 32, 57, 67. Nevertheless, a Trial Chamber still enjoys wide discretion. In the *Bemba et al* case, the Trial Chamber had initially declined to re-characterise the facts, noting among others that the Prosecution had not appealed the confirmation decision that had declined to confirm article 25(3)(d). ICC-01/05-01/13-1250, paras.10-11. Following the issuance of the *Gbagbo* regulation 55 Appeal Decision, the Prosecution requested the *Bemba et al* Trial Chamber to reconsider its decision. It denied the request. It noted, among others, that regulation 55 is discretionary. Indeed, “[i]t is ultimately [the Trial Chamber’s] prerogative to decide if and when to give Regulation 55 notice. The Chamber is not required to accept every Prosecution submission that a recharacterisation can be derived from the facts and circumstances described in the charges – the Chamber has discretion in deciding whether a possible recharacterisation ‘appears to [it]’”: ICC-01/05-01/13-1553, paras. 6-8.

Yekatom will be acquitted, even if the evidence otherwise establishes his responsibility under article 25(3)(c) or (d), or article 28. As Yekatom would not be held accountable, the victims of the crimes would not see justice done.

23. That this is not a mere theoretical possibility has been shown repeatedly at the Court. In *Ngudjolo* for example, the Pre-Trial Chamber considered that his charged liability as an accessory under article 25(3)(b) was ‘rendered moot’ by confirming his charge as a principal under article 25(3)(a). As a result, it refrained from confirming any alternative mode of liability.<sup>32</sup> Subsequently, the Trial Chamber provided *proprio motu* notice of a possible re-characterisation of Katanga’s liability under 25(3)(d), pursuant to regulation 55, but not that of Ngudjolo.<sup>33</sup> Consequently, when the Trial Chamber ultimately acquitted Ngudjolo of his criminal liability under article 25(3)(a), it was not even in the position to consider any other mode of liability.<sup>34</sup>

24. Likewise, in *Bemba*, the Pre-Trial Chamber only confirmed the charge of criminal responsibility under article 28(a), and not under articles 25(3)(a) or 28(b).<sup>35</sup> Subsequently, the Trial Chamber *proprio motu* gave notice of a possible limited re-characterization to the alternative form of knowledge under article 28(a)(i), *i.e.* that the accused “should have known” about the commission of crimes.<sup>36</sup> In its judgment, the Trial Chamber convicted Bemba as originally charged,<sup>37</sup> and considered that re-characterisation was not in fact warranted.<sup>38</sup> The Appeals Chamber finally acquitted Bemba for not having met the requirements of article 28(a),<sup>39</sup> and while this did not turn on Bemba’s knowledge the question whether the Appeals Chamber could even

<sup>32</sup> ICC-01/04-01/07-717, paras. 470-471.

<sup>33</sup> ICC-01/04-01/07-3319-tENG, *especially* paras. 14, 59.

<sup>34</sup> ICC-01/04-02/12-3-tENG, *especially* paras. 7-14, 110-112.

<sup>35</sup> ICC-01/05- 01/08-424, paras. 344, 406.

<sup>36</sup> ICC-01/05-01/08-2324, para. 5.

<sup>37</sup> ICC-01/05-01/08-3343, para. 742.

<sup>38</sup> ICC-01/05-01/08-3343, paras. 717-718.

<sup>39</sup> ICC-01/05-01/08-3636-Red, paras. 196-241.

avail itself of the regulation 55 notice which had been given was at least raised in oral argument.

25. Similarly, in the *CAR Article 70* case, one of the accused (Babala) was originally charged under article 25(3)(a) as a direct and indirect co-perpetrator, and under article 25(3)(c) and (d).<sup>40</sup> The Pre-Trial Chamber only confirmed his liability as an accessory under article 25(3)(c).<sup>41</sup> The Trial Chamber, limited to this mode, subsequently acquitted Babala of the large majority of charges against him, convicting him of merely two instances of corruptly influencing witnesses with whom Babala had a direct link.<sup>42</sup>

26. In sum, declining even to consider whether cumulative or alternative modes are adequately supported by the evidence not only unnecessarily jeopardizes the Prosecution's case against Yekatom, but equally places the victims of Yekatom's crimes in an unjust, unfair, and unconscionable position. Indeed, notwithstanding the Chamber's view that it was not necessary to engage with all the underlying evidence detailed in paragraphs 196-241 of the Document Containing the Charges,<sup>43</sup> some of its existing findings already show that there are substantial grounds to believe that Yekatom is additionally culpable under article 25(3)(c) and (d) and under article 28. In particular:

- the evidence considered by the Chamber as supporting charges under article 25(3)(a) or (b)—including that Yekatom was involved in planning, leading, ordering and/or directly perpetrating the crimes<sup>44</sup>— would necessarily substantiate his criminal responsibility under article 25(3)(c) and (d);

<sup>40</sup> ICC-01/05-01/13-526-AnxB1-Red2, paras. 127-129, 142-146.

<sup>41</sup> ICC-01/05-01/13-749, para. 85. *See also* p. 54, point (b)(ii).

<sup>42</sup> ICC-01/05-01/13-1989-Red, paras. 456-457.

<sup>43</sup> ICC-01/14-01/18-282-Conf-AnxB1.

<sup>44</sup> Decision, *e.g.*, paras. 98-99, 124-125, 139-140, 154-155.

- likewise, the Chamber’s references to Yekatom’s superior position—for example, referring to his “group”, his “fighters”, his “elements”, or his “subordinates”<sup>45</sup>; and to the fact that Yekatom ordered his men to carry out crimes, which they did<sup>46</sup>—demonstrates that he knew they were committing the crimes, and that he failed to take all necessary and reasonable measures to prevent or repress their commission, and this would necessarily substantiate his criminal responsibility under article 28.<sup>47</sup>

27. Accordingly, in the respectful submission of the Prosecution, the Chamber not only erred but raised the spectre of future injustice in failing to give substantive consideration to, and not confirming, Yekatom’s responsibility under all cumulative and alternative modes of liability, as it was obliged under article 61.

## **B. REQUEST FOR LEAVE TO APPEAL**

28. In the alternative, the Prosecution requests that the Chamber certifies the following issue(s) for appeal under article 82(1)(d) of the Statute:

- Whether the Pre-Trial Chamber erred in declining to confirm article 28 as a cumulative/alternative mode of liability to article 25.
- Whether the Pre-Trial Chamber erred in failing to confirm article 25 (3)(c) and (d) as alternative modes of liability to article 25(3)(a) and (b).

<sup>45</sup> Decision, *e.g.*, paras. 86, 88, and 115.

<sup>46</sup> Decision, *e.g.*, paras. 98-99.

<sup>47</sup> See *e.g.*, *Prosecutor v. Karemera & Ngirumpatse*, Judgement and Sentence, ICTR-98-44-T, 2 February 2012, para. 1539; *Prosecutor v. Bagosora et al*, Judgement and Sentence, ICTR98-41-T, 18 December 2008, paras. 2040, 2067, 2083.

**a) The issues are appealable and arise from the Decision**

29. An appealable issue must be an integral part of the decision,<sup>48</sup> and comprise “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.”<sup>49</sup> The proposed issues satisfy these requirements.

30. *First*, the proposed issues arise directly from the Decision. Although the Prosecution charged Yekatom with responsibility under article 25(3)(a) to (d), and 28 in respect of Counts 1 to 8, 11 to 17, and 24 to 29, the Chamber only confirmed his responsibility under article 25(3)(a) and (b).<sup>50</sup> It specifically declined to confirm his charged responsibility under article 28—or even to evaluate the evidence supporting it—because, as noted above,<sup>51</sup> Yekatom’s conduct also resulted in the realisation of the objective elements of the crimes under article 25.<sup>52</sup> Similarly, the Pre-Trial Chamber only confirmed the charges under article 25(3)(a) or (b), and deemed it unnecessary to address and to confirm Yekatom’s alternative criminal liability under article 25(3)(c) and (d).<sup>53</sup>

31. *Second*, the proposed issues comprise identifiable subjects whose resolution by the Appeals Chamber is essential, and are not merely questions over which there is disagreement or conflicting opinion.<sup>54</sup> As mentioned, the confirmation decision delineates the scope of the charges with which a suspect will be tried by a Trial Chamber.<sup>55</sup> The Decision specifically left out article 28 and article 25(3)(c) and (d) from the scope of the charges. Yekatom cannot be tried on this basis, unless the Trial

<sup>48</sup> See e.g. ICC-01/04-168 OA3, para. 9; ICC-02/04-01/05-371 OA2, para. 8; ICC-01/05-01/08-75, para. 11.

<sup>49</sup> ICC-01/04-168 OA3, para. 9.

<sup>50</sup> Decision, para. 58.

<sup>51</sup> See above para. 7.

<sup>52</sup> Decision, para. 58.

<sup>53</sup> Decision, para. 100.

<sup>54</sup> ICC-01/04-168 OA3, para. 9.

<sup>55</sup> See above para. 11.

Chamber re-characterises the facts and circumstances under regulation 55 which, as highlighted above, is—at best—a matter for its discretion.

32. Moreover, the Chamber's reason for not confirming cumulative or alternative charges under article 28—namely, because the underlying conduct satisfies article 25—has never been endorsed by the Appeals Chamber. To the contrary, this position appears to contradict the ordinary terms of articles 28 and 61(7)(a) of the Statute.<sup>56</sup> The Appeals Chamber has also not yet expressed itself on whether charges may be alternatively confirmed under different article 25(3) modes if based on the same evidence. Accordingly, the decision not to confirm cumulative or alternative modes of liability appears inconsistent with widely established practice at the Court, and with the *Chambers Practice Manual*, which favour confirmation of all pleaded cumulative or alternative modes of liability that are supported by the evidence.<sup>57</sup>

33. As a result, the proposed issue is not merely an isolated disagreement with the Decision but instead represents a legal question which is essential in determining the scope of Yekatom's trial and also touches upon fundamental questions relevant to the operation of the Court as a whole.

**b) The proposed issues significantly affects the fair and expeditious conduct of the proceedings, or alternatively, the outcome of the trial**

34. The proposed issues significantly affect the fair and expeditious conduct of the proceedings, or alternatively, the outcome of the trial. As mentioned above, as a consequence of the Chamber's approach in the Decision, Yekatom cannot be tried by the Trial Chamber under article 25(3)(c) or (d), nor under article 28, unless the Trial

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<sup>56</sup> See above para. 15.

<sup>57</sup> See above paras. 16-19.

Chamber re-characterises the facts and circumstances under regulation 55.<sup>58</sup> If the Trial Chamber were to deny such re-characterisation, Yekatom's criminal responsibility would be limited to article 25(3)(a) and (b). If the Trial Chamber were to find his personal participation under article 25(3)(a) or (b) not sufficiently supported, Yekatom would be acquitted. The proposed issues would therefore significantly affect the outcome of the trial, as well as engaging its fairness insofar as charges which may be adequately supported by the evidence are not presented for the Trial Chamber's eventual consideration.

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

35. For the same reasons, immediate resolution of the proposed issues by the Appeals Chamber will materially advance the proceedings, in the sense that a determination that the Chamber erred would invalidate the Decision and potentially lead to Yekatom being committed for trial under article 25(3)(c) or (d), or article 28.<sup>59</sup>

36. Furthermore, even if the Appeals Chamber were to remand the matter back to the Pre-Trial Chamber to assess the sufficiency of the supporting evidence for the relevant cumulative and alternative modes, it would still avoid the potential delays and uncertainty that later resort to regulation 55 may occasion. At the very least, it would ensure that the correct scope of the charges against Yekatom is properly delineated before the commencement of the trial.

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<sup>58</sup> See above paras. 20-26.

<sup>59</sup> It is also open for the Appeals Chamber to assess by itself if the Prosecution had adduced sufficient evidence to have command responsibility confirmed, without remanding the matter back to the Pre-Trial Chamber to make a new determination. Under rule 158 of the Rules of Procedure and Evidence, the Appeals Chamber may confirm, reverse or amend the decision appealed.



37. Finally, as mentioned, given the refusal of some Trial Chambers to entertain applications for re-characterisation pursuant to regulation 55 if the confirmation decision has not been appealed,<sup>60</sup> absent timely appellate intervention at this stage, there may be no other remedy available to the Prosecution to resort to once the case is before a Trial Chamber. In this sense, the current application ensures that, if the Pre-trial Chamber is in error – a matter that ought not to be discussed in an article 82 (1) (d) application – no irreparable harm to the Prosecution’s rights flows from its decision.

### III. CONCLUSION

38. For the reasons above, the Prosecution respectfully requests the Chamber to reconsider the Decision, or alternatively to certify the proposed issues for appeal.



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**Fatou Bensouda, Prosecutor**

Dated this 2<sup>nd</sup> day of March 2020  
At The Hague, The Netherlands

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<sup>60</sup> See above, fns. 5, 31.