

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 11 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 NGAÏSSONA***

Public

Decision on the Prosecutor's request for reconsideration or, in the alternative, leave to appeal the 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona'

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

The Office of the Prosecutor
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James Stewart, Deputy Prosecutor

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Peter Robinson

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Geert-Jan Alexander Knoops

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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

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REGISTRY

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Defence Support Section

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Detention Section

**Victims Participation and Reparations
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Philipp Ambach, Chief

Other

PRE-TRIAL CHAMBER II of the International Criminal Court hereby issues this Decision on the ‘Prosecution’s Request for Reconsideration of, or alternatively Leave to Appeal, the “Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard [Ngaïssona]”’ (respectively, the ‘Prosecutor’s Request’ or the ‘Request’¹ and the ‘Confirmation Decision’).²

I. PROCEDURAL BACKGROUND

1. On 11 November 2018, the Chamber issued a warrant of arrest against Alfred Rombhot Yekatom (‘Yekatom’).³ He was surrendered to the Court by the authorities of the Central African Republic (the ‘CAR’) on 17 November 2018⁴ and his initial appearance before the Chamber took place on 23 November 2018.⁵

2. On 7 December 2018, the Chamber issued a warrant of arrest against Patrice-Edouard Ngaïssona (‘Ngaïssona’).⁶ He was surrendered to the Court by the French authorities on 23 January 2019⁷ and his initial appearance before the Chamber took place on 25 January 2019.⁸

3. The Confirmation Hearing was held from 19 September 2019 to 11 October 2019.

4. On 11 December 2019, the Chamber issued the Confirmation Decision in which it found ‘it necessary to decide *motu proprio* that the time limit for filing an application for leave to appeal shall be suspended until the translation of this decision into French is submitted by the Registry in the record of the case’.⁹

¹ Prosecutor, Prosecution’s Request for Reconsideration of, or alternatively Leave to Appeal, the “Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard [Ngaïssona]”, 2 March 2020, ICC-01/14-01/18-437.

² Pre-Trial Chamber II, Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona, 11 December 2019, ICC-01/14-01/18-403-Conf (public redacted version notified on 20 December 2019, ICC-01/14-01/18-403-Red).

³ Pre-Trial Chamber II, Warrant of Arrest for Alfred Yekatom, 11 November 2018, ICC-01/14-01/18-1-Conf-Exp (public redacted version notified on 17 November 2018, ICC-01/14-01/18-1-Red).

⁴ Registry, Rapport du Greffe sur l’Arrestation et la Remise de M. Alfred Yekatom, 22 November 2018, ICC-01/14-01/18-17-US-Exp.

⁵ Pre-Trial Chamber II, Transcript of Hearing, 23 November 2018, ICC-01/14-01/18-T-001-ENG.

⁶ Pre-Trial Chamber II, Warrant of Arrest for Patrice-Edouard Ngaïssona, 7 December 2018, ICC-01/14-01/18-89-Conf-Exp (public redacted version notified on 13 December 2018, ICC-01/14-01/18-89-Red).

⁷ Registry, Rapport du Greffe sur l’Arrestation et la Remise de Patrice-Edouard Ngaïssona, ICC-01/14-01/18-101-US-Exp.

⁸ Pre-Trial Chamber II, Transcript of Hearing, 25 January 2019, ICC-01/14-02/18-T-001-ENG.

⁹ Confirmation Decision, para. 240.

5. On 21 February 2020, the Registry filed the official French translation of the Confirmation Decision.¹⁰

6. On 26 February 2020, the Defence for Ngaissona filed the ‘Defence request for a swift transmission of the case record to the Presidency pursuant to Rule 129 of the Rules of Procedure and Evidence’ (the ‘Rules’), thereby ‘inform[ing] the Chamber that Mr Ngaissona will not seek leave to appeal the Confirmation Decision’ and requesting the Chamber, with a view at ‘proceed[ing] to trial as soon as possible’, to ‘swiftly transmit the record of the current proceedings to the Presidency, so that the latter may expeditiously constitute a Trial Chamber’.¹¹

7. On 2 March 2020, the Prosecutor filed the Request in order for ‘the Chamber to reconsider the [Confirmation] Decision, or alternatively to certify [two] proposed issues for appeal’ (respectively, the ‘Request for Reconsideration’ and the ‘Request for Leave to Appeal’).

8. On 3 March 2020, the Defence for Yekatom filed an application for interim release in which it recalled that Yekatom ‘did not seek reconsideration or leave to appeal’ and requested the Chamber ‘to grant [Yekatom] interim release to the [CAR] under such conditions as it deems necessary’ (‘Yekatom’s Request for Interim Release’).¹²

9. On 6 March 2020, the Legal Representatives of Victims (the ‘LRVs’) filed the ‘Common Legal Representatives’ Joint Response to the Prosecution’s Request for Reconsideration or Leave to Appeal’ (the ‘LRVs’ Response’).¹³ On the same day, the Defence for Yekatom responded to the Request by filing the ‘Yekatom Defence Opposition to Prosecution’s Request for Reconsideration or Leave to Appeal Confirmation Decision’.¹⁴

10. On 10 March 2020, the Defence for Yekatom filed the ‘Yekatom Defence Request not to include Ex Parte Evidentiary material in Record of the Proceedings’, requesting the Chamber not to ‘include any *ex parte* evidentiary material in the record of the proceedings

¹⁰ See ICC-01/14-01/18-403-Conf-tFRA.

¹¹ Defence for Ngaissona, Defence request for a swift transmission of the case record to the Presidency pursuant to Rule 129 of the Rules of Procedure and Evidence, 26 February 2020, ICC-01/14-01/18-434.

¹² Defence for Yekatom, Yekatom Defence Application for Interim Release, 3 March 2020, ICC-01/14-01/18-438 with public Annexes A-C and confidential Annexes D-F.

¹³ LRVs, Common Legal Representatives’ Joint Response to the Prosecution’s Request for Reconsideration or Leave to Appeal, 6 March 2020, ICC-01/14-01/18-442.

¹⁴ Defence for Yekatom, Yekatom Defence Opposition to Prosecution’s Request for Reconsideration or Leave to Appeal Confirmation Decision, 6 March 2020, ICC-01/14-01/18-443.

when it transmits that record to the Presidency pursuant to Rule 129' (the '10 March 2020 Yekatom's Request').¹⁵

II. THE PROSECUTOR'S SUBMISSIONS

A. The Prosecutor's Request for Reconsideration

11. The Prosecutor requests the Chamber to reconsider the Confirmation Decision 'regarding the modes of liability charged against [Yekatom]', (i) since it is 'affected by a clear error of reasoning' and (ii) with a view to 'prevent[ing] an injustice'.¹⁶

12. As to the alleged error of reasoning, the Prosecutor submits that, '[o]n the basis of the evidence adduced at this preliminary stage, [the Chamber] should have confirmed the additional modes specified, so that they could be considered by the Trial Chamber';¹⁷ by finding that 'it did not need to confirm [Yekatom's] additional responsibility for the charges as a commander [under article 28 of the Rome Statute (the 'Statute')], nor assess the underlying evidence', the Chamber failed 'to assess evidence and make findings in relation to command responsibility'.¹⁸ Similarly, in the view of the Prosecutor, the Chamber erred in 'declining to give substantive consideration to, or indeed to confirm, the alternative charges under article 23(3)(c) and (d) [...] based on its view that these alternatives were "unnecessary" given its findings that the evidence showed [...] that Yekatom has committed the crimes [...] under article 25(3)(a) or alternatively [...] under article 25(3)(b)'.¹⁹

13. In respect of the need to 'prevent an injustice', the Prosecutor submits that the Chamber's alleged failure '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'.²⁰ Since the discretionary authority of the Chamber to modify the legal characterisation of facts pursuant to regulation 55 of the Regulations of the Court (the 'Regulations') would be 'the only other available redress', reconsideration is 'necessary to prevent an injustice' because, were a Trial Chamber 'to deny a request to give notice of a potential re-characterisation [...], Yekatom will never be held culpable under these additional

¹⁵ Defence for Yekatom, Yekatom Defence Request not to include Ex Parte Evidentiary material in Record of the Proceedings, 10 March 2020, ICC-01/14-01/18-445.

¹⁶ Request, para. 1.

¹⁷ Request, para. 14.

¹⁸ Request, paras 7, 9.

¹⁹ Request, para. 10.

²⁰ Request, para. 26.

modes of responsibility, even if the evidence proves that responsibility beyond reasonable doubt' or, were a Trial Chamber 'to find his personal participation under article 25(3)(a) or (b) not sufficiently supported, Yekatom will be acquitted, even if the evidence otherwise establishes his responsibility under article 25(3)(c) or (d), or article 28'.²¹

B. The Prosecutor's Request for Leave to Appeal

14. As an alternative to the Request for Reconsideration, the Prosecutor requests leave to appeal under article 82(1)(d) of the Statute for the following issues:

- (i) '[w]hether the Pre-Trial Chamber erred in declining to confirm article 28 as a cumulative/alternative mode of liability to article 25' (the 'First Issue'); and
- (ii) '[w]hether 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)' (the 'Second Issue').²²

15. In the Prosecutor's submission, both Issues (i) 'arise directly' from the Confirmation Decision, since they relate to the Chamber's findings through which '[i]t specifically declined to confirm [Yekatom's] responsibility under article 28' and 'deemed it unnecessary to address and to confirm Yekatom's alternative criminal liability under article 25(3)(c) and (d)'; (ii) 'comprise identifiable subjects whose resolution by the Appeals Chamber is essential' and (iii) are not tantamount to a mere 'question over which there is disagreement or conflicting opinion' because they directly touch upon the definition of the scope of the charges on the basis of which Yekatom shall be tried: furthermore, they would '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'; accordingly, their immediate resolution by the Appeals Chamber would materially advance the proceedings since 'a determination that the Chamber erred would invalidate the [Confirmation] Decision and potentially lead to Yekatom being committed for trial under article 25(3)(c) or (d), or article 28' and, thus, 'ensure that the correct scope of the charges against Yekatom is properly delineated before the commencement of the trial'.²³

²¹ Request, paras 20, 22.

²² Request, para. 28.

²³ Request, paras 29-37.

III. THE CHAMBER'S DETERMINATION

A. The Prosecutor's Request for Reconsideration

16. As acknowledged by the Prosecutor, a request for reconsideration is 'an exceptional remedy', considered to be either non-existent or only allowed in 'limited circumstances', at the Court and elsewhere. As correctly pointed out by the Prosecutor, this Chamber has found in the past that reconsideration may be allowed; however, only under strict and limited conditions and subject to the fulfilment of a twofold requirement: reconsideration should only be undertaken when (i) 'the conditions upon which the decision was grounded have changed', and (ii) 'it is necessary to prevent an injustice'.²⁴

17. None of the reasons brought forward by the Prosecutor satisfy either requirement. In the Prosecutor's submission, the need for reconsideration would arise from the fact that 'the [Confirmation] Decision is flawed by a clear error of reasoning', in particular since the Chamber 'refrained from assessing' Yekatom's criminal liability under article 28 and article 25(3)(c) and (d) of the Statute.²⁵

18. The Chamber notes that the Prosecutor has not identified any changed circumstances since the issuance of the Confirmation Decision; the language of the Request makes it apparent that the Prosecutor's grievances are all related to its content. Furthermore, while discussing the correctness – or not – of some of the Chamber's choices as enshrined in the Confirmation Decision, and hence its merits,²⁶ the Prosecutor also mischaracterises it.

19. This is particularly apparent as regards the purported failure by the Chamber to 'assess the underlying evidence' allegedly substantiating the charges brought against Yekatom under article 28 of the Statute, a statement in support of which the Prosecutor refers to paragraph 58 of the Confirmation Decision.²⁷ This paragraph, far from suggesting that the Chamber failed to assess the evidence, refers *inter alia* to 'the narrative of the relevant events as emerging from the available evidence', as well as to 'the Chamber's own understanding of the relevant facts'; an understanding which is illustrated in detail in the following pages, including by way of abundant references to the relevant items of evidence. At no point did the Chamber indicate that it had not assessed the evidence relating to the article 28 charges. Rather, it stated that,

²⁴ Pre-Trial Chamber II, Decision on the 'Ngaïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters', 24 May 2019, ICC-01/14-01/18-206, para. 20.

²⁵ Request, paras 5-13.

²⁶ See *e.g.* Request, paras 7, 12-13, 36.

²⁷ Request, para. 7.

having carefully analysed the totality of the evidence, it found that the charges for this mode of liability were not supported to the relevant evidentiary threshold.

20. The Prosecutor's submission 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)', likewise mirrors the Prosecutor's (partial) dissatisfaction and disagreement with the outcome of the confirmation proceedings and, accordingly, is similarly flawed.²⁸ The Confirmation Decision explicitly states that 'the Chamber [...] assess[ed] the evidence in light of the elements of each of the modes of liability' listed in article 25 of the Statute.²⁹ Contrary to the submission of the Prosecutor, the Chamber did not '[refrain] from assessing Yekatom's criminal liability under article 25(3)(c) and (d)';³⁰ the extent of the Chamber's reasoning and of the material referenced in the footnotes demonstrate that, after giving substantive consideration to all of the modes of liability, it found that some of them were not sufficiently supported by the evidence.

21. The Prosecutor also detects an inconsistency between the Chamber's findings on counts 11 and 12 (*i.e.*, confirmed charges of other inhumane acts and torture, respectively, based on partially overlapping facts), on the one hand, and its findings as to the different modes of liability, on the other hand. First, the Chamber reiterates that, in the absence of the relevant exceptional requirements, a request for reconsideration is not the appropriate venue to engage in a debate as to the correctness of a given determination and, more fundamentally, cannot be granted on the mere basis of an allegation of error. Second, the Chamber underlines that the detected inconsistency is the result of the mischaracterisation of the Confirmation Decision: the Defence's request for non-confirmation of either of those two charges was rejected because the Chamber found that they were both supported by the evidence to the relevant standard;³¹ the Chamber stands by its conclusion that, in that scenario, determinations as to the most suitable legal qualifications are indeed better left to the Trial Chamber.

22. The Chamber is also not persuaded by the Prosecutor's submission to the effect that reconsideration would be necessary to prevent an injustice 'since the only other available

²⁸ Request, para. 10.

²⁹ Confirmation Decision, para. 60.

³⁰ Request, II.A.b.ii.

³¹ Confirmation Decision, paras 114-116, 120-123.

redress is regulation 55 – but this is discretionary, not automatic’ and ‘does not accord the Prosecution any right to such a remedy’.³²

23. First, the Chamber notes that the Prosecutor accepts that regulation 55 of the Regulations would constitute ‘available redress’ for the grievances listed in support of the Request for Reconsideration. At the heart of the submission to the effect that regulation 55 of the Regulations would not be adequate ‘to prevent an injustice’ seem therefore to lie two assumptions: first, the (speculative) assumption that the Trial Chamber might decide *not* to grant this remedy; second, that the existence of the possibility of rejecting a party’s application or views – or even being allowed to do so, on the basis of statutory powers – would be tantamount to an injustice. As very clearly stated by Trial Chamber VII in the *Bemba et al* case, the Trial Chamber – as any other Chamber of the Court – ‘is not required to accept every Prosecution submission’, for the purposes of regulation 55 of the Regulations or otherwise.³³ In trying to substantiate its claim that a Trial Chamber’s (hypothetical) failure to reconsider would result in an injustice, the Prosecutor seems to be entertaining the following scenario: first, the evidence would prove beyond reasonable doubt that Yekatom is responsible in one of the alternative modes not confirmed by the Decision; second, the Trial Chamber would not realise this and fail to resort to regulation 55 of the Regulations on its own motion; third, upon the Prosecutor’s request, it would arbitrarily exercise its discretion and decline to allow for re-characterisation. In the Chamber’s view, this scenario is as hypothetical as it is unrealistic; as such, it is not suitable to form the basis for a request for reconsideration.

24. As to the submission that this is what happened in the *Ngudjolo, Bemba and Bemba et al* cases, the Chamber is not persuaded that the Prosecutor’s representation of those cases is accurate. The reasons that led the relevant Trial Chamber not to entertain the regulation 55 application in the cases recalled by the Prosecutor were more nuanced than the simple fact that ‘the confirmation decision ha[d] not been appealed’.³⁴ In the *Bemba et al* case, Trial Chamber VII initially declined to grant the application on the basis of considerations mainly relating to its timing, as revealed by its express caveat to the effect that the determination was without prejudice to the possibility that notification might become appropriate at a later stage; it later also further clarified that ‘it did not state that it was procedurally barred from giving

³² Request, para. 20.

³³ Trial Chamber VII, *The Prosecutor v. Jean Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean Jacques Magenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on Prosecution’s Re-application for Regulation 55(2) Notice, 15 January 2016, ICC-01/05-01/13-1553, para. 8.

³⁴ Request, para. 37 and footnotes 5 and 31.

notice for rejected modes of liability prior to the commencement of trial – it rather held that the proposed recharacterisations did not ‘appear[] to the Chamber’ at that time’.³⁵ In *Gbagbo*, Trial Chamber I went so far as to clarify that ‘the Prosecution’s failure to exhaust other remedies does not impact on the Chamber’s obligation to give notice under Regulation 55(2) of the Regulations’;³⁶ the Appeals Chamber clarified that ‘there is no additional requirement for a Trial Chamber to establish that the circumstances of the case are “special” or “extraordinary” in order to issue notice under that provision prior to the start of the presentation of evidence in the case’.³⁷

25. In sum, the Prosecutor’s submission to the effect that the Trial Chamber’s hands would be tied as regards possible modes of liability as a result of this Chamber’s approach in the Confirmation Decision, and that this would constitute an injustice warranting reconsideration, does not withstand scrutiny. According to the statutory framework, the only limitation affecting the scope of action of the Trial Chamber is to be found in the facts and circumstances described in the charges or any amendment thereof and not in their legal characterisation.

B. The Prosecutor’s Request for Leave to Appeal

26. It has long been well-established in the case law of the Court that an interlocutory appeal pursuant to article 82(1)(d) of the Statute can only be allowed in respect of issues arising out of the impugned decision, meaning issues essential for the disposition of the matter. In addition, an appeal can only be certified in respect of issues which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Chamber, immediate appellate resolution may materially advance the proceedings.

27. The considerations developed above – and the choice of requesting reconsideration as a first option, and as an alternative to leave to appeal – already point to the fundamental weakness affecting the Prosecutor’s Request as a whole: both the Request for Reconsideration and the Request for Leave to Appeal are centred on the Prosecutor’s disagreement with the

³⁵ Trial Chamber VII, *The Prosecutor v. Jean Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean Jacques Magenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on Prosecution’s Re-application for Regulation 55(2) Notice, 15 January 2016, ICC-01/05-01/13-1553, para. 7.

³⁶ Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court, 19 August 2015, ICC-02/11-01/15-185, para. 8.

³⁷ Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled “Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court”, 18 December 2015, ICC-02/11-01/15-369, para. 67.

Chamber's deliberations as contained in the Confirmation Decision. A similar weakness mars the observations submitted by the LRVs in support of the Prosecutor's Request for Leave to Appeal, in particular when they discuss the extent to which the Chamber's reference to some of the relevant precedents is to be regarded as correct.

28. Since the two issues are very similar in nature and content, the Chamber considers it appropriate to address them jointly.

29. Both the First and the Second Issues can be viewed as arising from the Confirmation Decision only to the extent that it is indeed accurate that, as regards Yekatom, the Chamber did not confirm the charges either under article 28 or under article 25(3)(c) and (d) of the Statute. Contrary to what the Prosecutor and the LRVs state, however, and as illustrated by the same excerpts of the Confirmation Decision as mentioned in addressing the Request for Reconsideration, it is not accurate to state that the Chamber declined to evaluate the evidence supporting either of the modes of liability; or, in the LRVs' submissions, that it 'cut its analysis short'.³⁸ Accordingly, to the extent that both the Prosecutor and the LRVs take issue with the Chamber's purported failure to consider the evidence,³⁹ the Issues are based upon a mischaracterisation of the Confirmation Decision and cannot be considered as arising from it within the meaning and for the purposes of article 82(1)(d) of the Statute.

30. Furthermore, in the Prosecutor's submission, because of the Chamber's approach 'Yekatom cannot be tried on [the] basis [of articles 28 and 25(3)(c) and (d) of the Statute] unless the Trial Chamber re-characterises the facts and circumstances under regulation 55 which [...] is – at best – a matter for its discretion':⁴⁰ in the Chamber's view, the assumption that the Trial Chamber would fail to proceed to re-characterisation if this were to be found appropriate under the circumstances is, at best, a matter of speculation, as such unsuitable to make an issue certifiable.

31. Contrary to what has been stated by the Prosecutor, there is no inconsistency between the Confirmation Decision and either 'widely established practice at the Court' or the Chamber's Practice Manual: if they both can be said to 'favour confirmation of all pleaded

³⁸ LRVs' Response, para. 31.

³⁹ That this is the central point of the LRVs' submissions is made apparent *inter alia* by their suggestion that the Chamber reformulate the issue for appeal as related to 'whether the Chamber erred in interpreting article 61(7) of the Statute as *not requiring the evaluation of the evidence* presented by the Prosecution in light of all possible modes of liability (in respect of both suspects)' (para. 38; emphasis added).

⁴⁰ Request, para. 31.

cumulative or alternative modes of liability’,⁴¹ they only do so to the extent that those modes of liability are found by the Pre-Trial Chamber to be supported by the evidence to the relevant evidentiary standard. The focus of the Prosecutor on detecting inconsistencies between the Confirmation Decision and the practice of the Court makes it apparent that – in spite of the admission that whether the Chamber has erred ‘ought not to be discussed in an article 82 (1) (d) application’⁴² – what truly lies at the heart of the Issues (as of the Request for Reconsideration) is the Prosecutor’s disagreement with the results of the approach taken by the Chamber. As acknowledged by the Prosecutor, the Appeals Chamber has not yet had the opportunity to express ‘itself on whether charges may be alternatively confirmed under different article 25(3) modes if based on the same evidence’:⁴³ the fact that this matter undoubtedly represents ‘a legal question’, and a complex one at that, does not, however, automatically render either of the Issues ‘appealable’ for the purposes of an interlocutory appeal.

32. This is especially not the case since – as illustrated above – the Prosecutor’s submission that these issues could prevent Yekatom from being tried under either of the modes of liability is as inaccurate in law as it is speculative in fact.

33. The fact that neither issue qualifies as an appealable issue within the meaning of article 82(1)(d) of the Statute makes it unnecessary for the Chamber to determine whether the additional cumulative requirements are met. The Chamber notes that the Prosecutor will soon have the opportunity to bring these – and other – issues before the Trial Chamber which will immediately start the critical phase of the preparation of the trial. At this stage, the trial is indeed the best forum to ensure ‘that the correct scope of the charges against Yekatom is properly delineated’ and that ‘potential delays and uncertainty’ are avoided;⁴⁴ interlocutory appeals proceedings of unpredictable duration would inevitably result in creating additional delays, which the Chamber and both Defence teams are determined to avoid.

34. In light of the above, the Chamber concludes that neither the First nor the Second Issue qualify as an appealable issue within the meaning of article 82(1)(d) of the Statute and, accordingly, rejects the Prosecutor’s Request.

⁴¹ Request, para. 32.

⁴² Request, para. 44.

⁴³ Request, para. 32.

⁴⁴ Request, para. 36.

C. Transmission of the Confirmation Decision and the record of the proceedings to the Presidency, including pending issues

35. This decision concludes the proceedings in the case before this Chamber. Accordingly, the Confirmation Decision and the record of the case shall be transmitted by the Registrar to the Presidency for a Trial Chamber to be constituted under article 61(11) of the Statute and rule 130 of the Rules without undue delay, in accordance with rule 129 of the Rules.

36. The Chamber notes that the filings recently submitted before it by the Defence for Yekatom (the Yekatom's Request for Interim Release and the 10 March 2020 Yekatom's Request) do not warrant that this transmission be delayed.

37. As to the Yekatom's Request for Interim Release, the Chamber notes that it is uncommon for a request for the interim release of an accused to be submitted pending a Pre-Trial Chamber's determination on a request for leave to appeal a confirmation decision. In light of both the timing and the subject matter of the request, the Chamber considers that it should be addressed and determined by the Trial Chamber which will shortly be constituted and seized of the case. It would not be appropriate for the Chamber to address a matter as crucial as the personal liberty of the accused, and to make determinations which might have an impact on the trial. Prior practice of the Court shows that it takes only a few days for the Presidency to constitute a Trial Chamber; accordingly, the Chamber finds that transmitting Yekatom's Request for Interim Release together with the record of the case is the appropriate course of action, so as not to delay the commencement of proceedings before the Trial Chamber.

38. As to the 10 March 2020 Yekatom's Request, the Chamber notes that it is premised *inter alia* on the fact that Trial Chamber X in the *Al Hassan* case indicated that, on the basis of its own specific 'evidence disclosure regime', it 'no longer require[d] access to the evidence disclosed in its non-redaction form'.⁴⁵ The Chamber notes that, pursuant to rule 129 of the Rules, it is mandated to transmit to the Presidency the 'record of the proceedings'; this wording univocally points to the transmission of the record in its entirety and rules out that any discretion may be vested in the Chamber for the purposes of reducing, amending or otherwise intervening on the content of the record.⁴⁶ Furthermore, the Chamber finds it

⁴⁵ Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the evidence disclosure protocol and other related matters, 30 December 2019, ICC-01/12-01/18-546, para. 17.

⁴⁶ See rule 129 of the Rules: 'the record of the proceedings of the Pre-Trial Chamber shall be transmitted to the Presidency'.

inappropriate to make any determination that might result in pre-empting or otherwise affecting the future determinations of the Trial Chamber, whether in matters concerning disclosure or otherwise. Accordingly, the Chamber finds it also appropriate to transmit the 10 March 2020 Yekatom's Request to the Presidency as forming part of the record of the case.

39. Accordingly, the Chamber directs the parties to submit their responses to the Yekatom's Request for Interim Release and to the 10 March 2020 Yekatom's Request to the Trial Chamber to be constituted or, pending its constitution, to the Presidency for it to include them in the case record.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Prosecutor's Request;


ORDERS the Registrar to transmit to the Presidency the Confirmation Decision and the record of the proceedings of the Chamber;

DIRECTS the parties to submit any response or observations to filings currently pending before the Chamber to the Trial Chamber to be constituted or, pending its constitution, to the Presidency for it to include them in the case record.

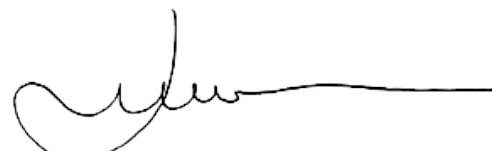
Done in both English and French, the English version being authoritative.



Judge Antoine Kesia-Mbe Mindua
Presiding Judge



Judge Tomoko Akane



Judge Rosario Salvatore Aitala

Dated this Wednesday, 11 March 2020
 At The Hague, The Netherlands