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**APPEALS CHAMBER**

**Before:** **Judge Solomy Balungi Bossa, Presiding Judge**
**Judge Chile Eboe-Osuji**
**Judge Howard Morrison**
**Judge Piotr Hofmański**
**Judge Luz del Carmen Ibáñez Carranza**

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II**

**IN THE CASE OF**
***THE PROSECUTOR v. ALFRED YEKATOM AND***
***PATRICE-ÉDOUARD NGAÏSSONA***

**Public**

# Common Legal Representatives' Joint Response to the "Yekatom Defence Appeal Brief – Admissibility" (ICC-01/14-01/18-523)

**Source:** **Common Legal Representatives of Victims**

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

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## I. INTRODUCTION

1. The Common Legal Representative of the Former Child Soldiers and the Common Legal Representatives of the Victims of Other Crimes (jointly the "Common Legal Representatives" or the "CLRV")[1] hereby file their joint response to the "Yekatom Defence Appeal Brief - Admissibility" (the "Appeal Brief").[2]

2. The Common Legal Representatives oppose in whole the ground of appeal raised by the Defence of Mr Yekatom and the relief sought. In particular, they submit that the Defence fails to demonstrate that the Trial Chamber committed an error of procedure in denying its Admissibility Challenge without first seeking observations from the Central African Republic Authorities.

3. The Common Legal Representatives note that the Defence, while raising only one ground of appeal, in fact advances disparate arguments which seem to pertain to several distinct alleged errors of procedure or law. In this regard, the Common Legal Representatives request the Appeals Chamber to dismiss *in limine* the Defence's arguments contained in points D and E of the Appeal Brief because already brought before, and addressed by, the Trial Chamber, and are simply reiterated in the Appeal Brief without further substantiation. In any case, they do not reveal a discernible error, or are otherwise unsubstantiated, and constitute no more than mere disagreements with the Trial Chamber's assessment of the relevant factors before it.

[1] See the "Decision regarding the Registry's First Assessment Report on Applications for Victim Participation, the Registry's First Transmission of Group C Applications, the appointment of counsel for Victims of Other Crimes, and the victims' procedural position" (Pre-Trial Chamber II), No. ICC-01/14-01/18-227-Red, 21 June 2019.

[2] See the "Yekatom Defence Appeal Brief – Admissibility" No. ICC-01/14-01/18-523 OA01, 19 May 2020 (the "Appeal Brief").

## II. PROCEDURAL BACKGROUND

4. On 11 December 2019, Pre-Trial Chamber II partially confirmed the charges against Mr Yekatom (the "Decision confirming the charges").[3]

5. On 16 March 2020, the Presidency constituted Trial Chamber V and referred the present case to it.[4]

6. On 17 March 2020, the Defence for Mr Yekatom filed a request to declare the case inadmissible before the Court based on the complementarity principle (the "Admissibility Challenge").[5]

7. On 30 March 2020, the Prosecution filed its response to the Admissibility Challenge.[6]

8. On 14 April 2020, the Registry filed the observations of the Kingdom of the Netherlands and of the Central African Republic on the interim release of Mr Yekatom.[7]

9. On 17 April 2020, the Common Legal Representatives submitted their joint observations on the Admissibility Challenge (the "CLRV Observations").[8]

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[3] See the "Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona", No. ICC-01/14-01/18-403-Conf, 11 December 2019. A public redacted version was issued on 20 December 2019 as No. ICC-01/14-01/18-403-Red.

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

[5] See the "Yekatom Defence's Admissibility Challenge—Complementarity", No. ICC-01/14-01/18-456, 17 March 2020 (the "Admissibility Challenge").

[6] See the "Prosecution's Response to the "Yekatom Defence's Admissibility Challenge – Complementarity", No. ICC-01/14-01/18-466, 30 March 2020.

[7] See the "Transmission of observations from the Kingdom of the Netherlands and the Central African Republic on interim release of Alfred Yekatom", No. ICC-01/14-01/18-478, with No. ICC-01/14-01/18-478-Conf-AnxI and No. ICC-01/14-01/18-478-Conf-AnxII, 14 April 2020.

10. On 28 April 2020, the Trial Chamber rejected the Admissibility Challenge (the "Impugned Decision").[9]

11. On 29 April 2020, the Defence filed its Notice of Appeal.[10]

12. On 19 May 2020, the Defence filed its Appeal Brief against the Impugned Decision.[11]

## III. SUBMISSIONS

### 1. On the Appellant's obligation to adequately substantiate the appeal

13. Preliminarily, the Common Legal Representatives recall that an appellant must sufficiently substantiate his or her appeal clearly identifying an alleged error, providing appropriate arguments in support of the appeal, and demonstrating that the alleged error had materially affected the impugned decision.[12]

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[8] See the "Common Legal Representatives' Joint Observations on the 'Yekatom Defence's Admissibility Challenge – Complementarity'", No. ICC-01/14-01/18-482-Conf, 17 April 2020. A public redacted version was filed the same day as No. ICC-01/14-01/18-482-Red) (the "CLRV Observations").

[9] See the "Decision on the Yekatom Defence's Admissibility Challenge" (Trial Chamber V), No. ICC-01/14-01/18-493, 28 April 2020 (the "Impugned Decision").

[10] See the "Yekatom Defence Appeal Against Admissibility Decision", No. ICC-01/14-01/18-499 OA01, 29 April 2020.

[11] See the Appeal Brief, *supra* note 2.

[12] See the "Judgment on the appeal of Mr Fidele Babala Wandu against the decision of Pre-Trial Chamber II of 14 March 2014 entitled 'Decision on the 'Requete urgente de la Defense sollicitant la mise en liberté provisoire de monsieur Fidele Babala Wandu'" (Appeals Chamber), No. ICC-01/05-01/13-559 OA3, 11 July 2014, para. 87; the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility and Abuse of Process Challenges'" (Appeals Chamber), No. ICC-01/05-01/08-962-Corr OA3, 19 October 2010, para. 102; the "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009" (Appeals Chamber), No. ICC-02/04-01/05-408 OA3, 16 September 2009, para. 48; and the "Judgment on the appeal of Mr Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber II of 17 March 2014 entitled 'Decision on the 'Requête de mise en liberté' submitted by the Defence for Jean-Jacques Mangenda" (Appeals Chamber), No. ICC-01/05-01/13-560 OA4, 11 July 2014, para. 28.

14. The Appeals Chamber has previously dismissed *in limine* arguments not alleging errors, obscure or otherwise unsubstantiated,[13] as well as submissions merely referring to arguments advanced before the Trial Chamber without further substantiation.[14] Moreover, a mere disagreement with a chamber's assessment or conclusion on the facts before it is not sufficient to establish a clear error.[15]

15. Consequently, the Common Legal Representatives contend that the Appeals Chamber should dismiss *in limine* the arguments raised by the Defence under points D and E of the Appeal Brief. Indeed, said arguments were already presented before, and addressed by, the Trial Chamber[16] and the Defence does not further or appropriately substantiate its arguments in relation to the type of error(s) eventually committed by the Trial Chamber but simply reiterate them. Moreover, some arguments simply show a disagreement with the Trial Chamber's conclusion.

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[13] See the "Public Redacted 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 Rome Statute"" (Appeals Chamber), No. ICC-01/05-01/13-2275-Red A A2 A3 A4 A5, 8 March 2018, para. 1456; the "Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled "Judgment pursuant to article 74 of the Statute'' (Appeals Chamber), No. ICC-01/04-02/12-271-Corr A, 7 April 2015, para. 284; the "Public redacted document Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction" (Appeals Chamber), No. ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 30; the "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009" *supra* note 12, para. 48; the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility and Abuse of Process Challenges'" *supra* note 12, paras. 103-104; the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled 'Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence'" (Appeals Chamber), No. ICC-01/05-01/08-1019 OA4, 24 November 2010, para. 69; and the "Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the 'Defence Request for Interim Release'" (Appeals Chamber), No.ICC-01/04-01/10-283 OA01, 14 July 2011, para. 18.

[14] See the "Public Redacted 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 Rome Statute'", *supra* note 13, paras. 856, 1568, and 1584.

[15] See the "Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the 'Defence Request for Interim Release'", *supra* note 13, paras. 21 and 31.

[16] See the Admissibility Challenge, *supra* note 5, paras. 14-25, and 28-59. See also, the Impugned Decision, *supra* note 9, paras. 22-24.

16. In particular, concerning point D of the Appeal Brief, the Common Legal Representatives contend that the Defence does not identify the type of error(s) allegedly committed by the Trial Chamber and seems to imply an error of law which it does not allege *per se* in a separate ground of appeal. The issue of the "*unique feature of the CAR law*"[17] was already brought before, and addressed by, the Trial Chamber[18] and it is simply reiterated in the Appeal Brief without further substantiation. Moreover, the Defence's arguments on the Central African Republic ("CAR") law features and its alleged incidence on the Prosecutor being the "*sole Arbiter of Admissibility*"[19] are purely speculative.[20]

17. Concerning point E of the Appeal Brief, the Common Legal Representatives again contend that the issue was already brought before, and addressed by, the Trial Chamber[21] and it is simply reiterated in the Appeal Brief without further substantiation. Moreover, the Defence clearly shows a pure disagreement with the Trial Chamber's conclusions.

18. In any case, the Appeals Chamber held, in the matter, that "*in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17(1)(d) of the Statute*".[22]

19. The "inaction test" has been applied consistently throughout different cases before the Court[23] and the Defence does not advance any valid reason justifying departing from the established practice. In fact, in light of the material and

[17] See the Appeal Brief, *supra* note 2, para. 47.
[18] See the Admissibility Challenge, *supra* note 5, paras. 6-13, and 28-31.
[19] See the Appeal Brief, *supra* note 2, paras. 47-54.
[20] *Idem*, e.g., para. 71.
[21] See the Admissibility Challenge, *supra* note 5, paras. 15, and 37-59. See also, the Impugned Decision, *supra* note 9, paras. 22-24.
[22] See the "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case" (Appeals Chamber), No. ICC-01/04-01/07-1497 OA08, 25 September 2009, para. 78.
[23] See the CLRV Observations, *supra* note 8, para. 56.

information presented before it, the Trial Chamber correctly relied on said test. The Defence's argument only demonstrates that it plainly refuses to acknowledge the Trial Chamber's determination which already entertained the claims in concluding, *inter alia*, that "[…] *the CAR authorities, including the SCC, are presently inactive insofar as Mr Yekatom's Case is concerned*" and that "*for this reason alone, and irrespective of the CAR authorities 'hypothetical willingness or ability to investigate and prosecute, the Chamber is of the view that the case against Mr Yekatom is admissible*".[24]

20. Ultimately, the Defence merely disagrees with the Trial Chamber's conclusion but fails to demonstrate that the latter erred in any way or that a reasonable chamber would have reached different conclusions in applying said test under similar circumstances.

21. Regarding the concept of "*qualified deference*", it is not envisioned by the Court's legal texts and anyway it does not apply to the present case as there is currently no ongoing investigation in CAR against Mr Yekatom. In addition, said concept seems "*more suited for cases where the State is actually willing to exercise jurisdiction over a person or prosecution in CAR against the Accused*".[25]

22. The Defence's arguments – apart for being unpersuasive - are repetitive and do not bring new or different elements than the ones already presented before the Trial Chamber. Thus, the Defence fails to properly substantiate how, in not relying on "*qualified deference*", the Trial Chamber committed an error which materially affects the Impugned Decision.

23. The Defence further advances arguments on a hypothetical impact of the CAR law on the responsibilities of the Prosecutor. However, the Appeals Chamber is not expected to determine on a matter before it *in abstracto*, but rather on evidence and

[24] See the Impugned Decision, *supra* note 9, para. 21.
[25] See the CLRV Observations, *supra* note 8, para. 60.

concrete relevant circumstances and factors. In this regard, the Defence fails to demonstrate how concretely this issue may be of relevance and eventually which concrete pertinent factor(s) the Trial Chamber did not take into account which would have materially affected the Impugned Decision.

24. Consequently, the Defence fails to demonstrate any error, and in particular that any other reasonable chamber would have proceeded in a different way from the one adopted by the Trial Chamber. Moreover, the Defence fails to show how, should its proposed approach be adopted, the decision would have substantially differed from the one rendered.

25. Having addressed the arguments which they respectfully request to be dismissed *in limine*, the Common Legal Representatives discuss *infra* the remaining arguments under points A, B, C, G and F of the Appeal Brief.

### 2. On the Ground of Appeal

#### a) Appellate standard of review for errors of procedure

26. The Common Legal Representatives recall that, as far as alleged errors of procedure are concerned, the Appeals Chamber held that "*an allegation of a procedural error may be based on events which occurred during the pre-trial and trial proceedings. However, as with errors of law, the Appeals Chamber will only reverse a decision of acquittal if it is materially affected by the procedural error. In that respect, the appellant needs to demonstrate that, in the absence of the procedural error, the decision would have substantially differed from the one rendered*".[26]

[26] See the "Public redacted document Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction"*supra*, note 13, para. 20; the "Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the 'Decision on Sentence pursuant to Article 76 of the Statute'" (Appeals Chamber), No. ICC-01/04-01/06-3122 A4 A6, 1 December 2014, para. 41; and the "Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled 'Judgment pursuant to article 74 of the Statute'", *supra* note 13, para. 21.

27. Therefore, the Appeals Chamber "[…] *will not interfere with* [a lower] *Chamber's exercise of discretion* […] *merely because the Appeals Chamber, if it had the power, might have made a different ruling.* […] *The function of the Appeals Chamber* [is to review] *the exercise of discretion by* [a lower] *Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with* [a lower] *Chamber's exercise of discretion* […], *save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions* [including]*: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion*".[27]

28. Consequently, when alleging a procedural error, an appellant has not only to identify an error, but also to indicate, with sufficient precision, how said error would have materially affected the impugned decision.[28]

[27] See the "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19(1) of the Statute' of 10 March 2009", *supra* note 12, paras. 79-80; and the "Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the 'Decision on Sentence pursuant to Article 76 of the Statute'", *supra* note 26, paras. 41-42.

[28] See the "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", *supra* note 12, para. 48; the "Corrigendum to Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility and Abuse of Process Challenges'" (Appeals Chamber), *supra* note 12, para. 103. See also the practice before the *ad hoc* international or internationalised tribunals on the fact that the appellant must demonstrate how the error impacts on the impugned decision, *e.g.*, ICTY, *Furundžija*, Case No. IT-95-17/1-A, Judgement (Appeals Chamber), 21 July 2000, para. 36; and the consequent power of the Appeals Chamber to reverse the impugned decision in said instance, *e.g.*, SCSL, *Fofana and Kondewa*, SCSL-01-14-A, Judgement (Appeals Chamber), 28 May 2008, para. 35.

**b) The Trial Chamber did not commit a procedural error in denying the Admissibility Challenge without first seeking observations from the Central African Republic Authorities**

29. The Common Legal Representatives submit that the legal texts of the Court do not require a chamber seized with an admissibility challenge to mandatory seek the views of the concerned State(s) and that it is within the discretionary power of the relevant chamber to determine how to deal with said challenge.

30. Indeed, as acknowledged by the Defence itself, "[t]*here is no provision in the Court's Statute, Rules, or Regulations explicitly requiring a Chamber to seek observations from a concerned State when an admissibility challenge based on complementarity is made by an accused*".[29]

31. Contrary to the Defence's assertions, the Trial Chamber did not fail "*to comply with the mandatory language of Rule 58 when it ruled on the admissibility challenge without first deciding on the procedure to be followed*".[30] The Defence's interpretation of said provisions is flawed and based on the assumption that the Trial Chamber was required to take some procedural steps.

32. However, rule 58(2) of the Rules of Procedure and Evidence (the "Rules") provides that the relevant Chamber "*shall decide on the procedure to be followed and* ***may*** *take appropriate measures for the proper conduct of the proceedings*" (emphasis added). Therefore, from the plain wording of the provision it is clear that any initiatives from the Chamber to "*take appropriate measures*" prior to the issuance of its decision are subject to its discretionary power. In the absence of any binding provision in this regard, the Defence is thus wrong in concluding that the Trial Chamber made a procedural error.

[29] See the Appeal Brief, *supra* note 2, para. 26.
[30] *Idem*, para. 42.

33. The Appeals Chamber already recognised the discretionary power of the relevant Chamber on admissibility matters indicating that: "*Save for express stipulations in rule 58 of the Rules of Procedure and Evidence*, ***a Chamber seized of an admissibility challenge enjoys broad discretion in determining how to conduct the proceedings relating to the challenge***".[31]

34. The Preparatory Works for the establishment of the Court confirm the broad discretion of the relevant chamber in dealing with admissibility challenges. The 1994 International Law Commission's Draft Statute of the International Criminal Court (ILC Draft Statute) included article 35 on "*Issues of admissibility*" which reads as follows:

> "*The Court* ***may****, on application by the accused or at the request of an interested State at any time prior to the commencement of the trial, or of its own motion, decide, having regard to the purposes of this Statute set out in the preamble, that a case before it is inadmissible* […]".[32]

35. Said provision was proposed to allow "*the Court to decide, having regard to specified factors, whether a particular complaint is admissible* […]";[33] and the drafters clarified that "[w]*here more than one State has or may have jurisdiction over the crime in question,* ***the court may take into account the position of each such State***".[34]

36. Moreover, in relation to the Defence's assertion that "*it has been a uniform practice to hear from the concerned State before deciding a complementarity challenge*",[35] the Common Legal Representatives contend that a scrutiny of the jurisprudence quoted

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[31] See the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'" (Appeals Chamber), No. ICC-01/09-02/11-274 OA01, 30 August 2011, paras. 3 and 87 (emphasis added).
[32] See the "Draft Statute for an International Criminal Court - with commentaries", International Law Commission (ILC), 1994, p. 52 (emphasis added).
[33] *Ibid.*
[34] *Ibid.* (emphasis added).
[35] See the Appeal Brief, *supra* note 2, paras. 25-33.

by the Defence reveals that the factors to be considered by a chamber in adjudicating an admissibility challenge are very specific to each case and that also in said instances the relevant chamber rightly exercised its discretion in the conduct of the proceedings.

37. In the *Katanga* case, the Defence challenged the admissibility of the case after the confirmation of charges[36] on the basis that, *inter alia,* the Pre-Trial Chamber committed an error of law in its interpretation of the word "*unwilling*" in article 17(2) of the Statute when issuing the warrant of arrest against the suspect because Mr Katanga was at the time detained by the Congolese authorities since 2005 as a result of an arrest warrant issued for crimes against humanity before his transfer to the Court in 2007.[37] In the circumstances, there were therefore sound reasons for the trial chamber to consult the State concerned in order to seek clarifications and ascertain whether the Congolese authorities intended to prosecute Mr Katanga in relation to the Bogoro incident for which he was committed for trial before the Court.

38. In the *Bemba* case, the Defence submitted an admissibility challenge on 25 February 2010.[38] At the time, judicial proceedings were ongoing against the defendant before the Indictment Chamber of the Bangui Court of Appeal.[39] The context was therefore different from the present case whereas the Central African Republic Authorities did not report any ongoing proceedings engaged against Mr Yekatom and, again, in that instance, the relevant chamber needed information from the State concerned to adjudicate the matter.

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[36] See the "Public Redacted version of the "Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) of the Statute"", No.ICC-01/04-01/07-949, 11 March 2009.
[37] *Idem*, para. 18.
[38] See the "Application Challenging the Admissibility of the Case pursuant to Articles 17 and 19(2)(a) of the Rome Statute", No. ICC-01/05-01/08-704-Red3-tENG, 25 February 2010.
[39] See the "Decision on the Admissibility and Abuse of Process Challenges", *supra* note 13, para. 19.

39. In the *Gbagbo* case, the Defence filed an admissibility challenge[40] during the confirmation of charges hearing before the pre-trial chamber which subsequently granted the parties and participants "*an opportunity*" to submit written observations.[41] At that stage, however, the chamber did not consult the Ivorian authorities which spontaneously filed a leave to submit observations.[42] Notably, the pre-trial chamber granted the request pursuant to rule 103 of the Rules and not under rule 58(2).[43]

40. Finally, in the *Kony and al*. case, Pre-Trial Chamber II triggered *proprio motu* the procedure under article 19(1) of the Statute while all the suspects were still at large and because Uganda created the Special War Crimes Division of the High Court. [44] Said development could indeed suggest an increased willingness of the State to exercise its jurisdiction over crimes of international concern. It was therefore justified in that instance for the chamber to seek information from the Ugandan authorities in relation to the State's intention of investigating and prosecuting crimes for which warrants of arrest had been issued by the Court against five Lord Resistance Army leaders.

41. Consequently, the Common Legal Representatives submit that, contrary to the Defence's contention, far from being "*uniform*", the practice on the admissibility proceedings is in fact multifaceted. The Defence referred to incomparable cases on

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[40] See the "Version publique expurgée de la requête relative à la recevabilité de l'affaire en vertu des Articles 19 et 17 du Statut", No. ICC-02/11-01/11-404-Red, 15 February 2013.
[41] See the transcript of the hearing held before Pre-Trial Chamber I on 19 February 2013, No. ICC-02/11-01/11-T-14-ENG ET WT, p. 6, lines 18-20.
[42] See the "Demande d'autorisation de la République de Côte d'Ivoire aux fins de déposer des observations sur la requête relative à la recevabilité de l'affaire en vertu des articles 19 et 17 du Statut déposée par l'équipe de la défense de M. Laurent Gbagbo", No. lCC-02/11-01/11-416, 11 March 2013, paras. 3-11.
[43] See the "Decision on the 'Demande d'autorisation de la République de Côte d'Ivoire aux fins de déposer des observations sur la requête relative à la recevabilité de l'affaire en vertu des articles 19 et 17 du Statut déposée par l'équipe de la défense de M. Laurent Gbagbo'", (Pre-Trial Chamber I), No. ICC-02/11-01/11-418, 14 March 2013, paras. 5, 6 and 8.
[44] See the "Decision on the admissibility of the case under article 19(1) of the Statute" (Pre-Trial Chamber II), No.ICC-02/04-01/05-377, 10 March 2009.

legal, procedural and factual levels, thus making them irrelevant in the present instance.

42. The Defence further alleges that the Trial Chamber wrongly inferred the State's position,[45] relying, *inter alia*, on "*CAR's self-referral, transfer, failure to make an admissibility challenge, and submissions on* interim release *as a substitute for seeking observations on Mr. Yekatom's admissibility challenge*".[46]

43. In this regard, the Common Legal Representatives submit that, in exercising its discretion, the relevant chamber can ultimately deduce the concerned State's position. Indeed, in order to determine whether a State is unwilling within the meaning of article 17 of the Statute to exercise jurisdiction over a particular case, said intent can be conveyed expressly by the State or inferred "*from unambiguous facts*".[47] In particular, "*in order to ascertain the real intentions of a State, the level and form of cooperation received by the Court from that State with regard to a particular case may also be taken into consideration*".[48]

44. Hence, the Trial Chamber correctly drew its conclusions about the inaction (and thus unwillingness to exercise its jurisdiction over Mr Yekatom) of the CAR Authorities from several "*unambiguous facts*", such as, the Defence's concession that there are currently no proceedings against Mr Yekatom;[49] the level of cooperation between the concerned State and the Court with regard to the referral and the

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[45] See the Appeal Brief, *supra* note 2, paras. 66-75.
[46] *Idem*, para. 75.
[47] See the "Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)" (Trial Chamber II), No. ICC-01/04-01/07-1213-tENG, 16 June 2009, para. 90: "*The Chamber considers that what must be taken into consideration for the purpose of determining whether a State is in fact unwilling, within the meaning of article 17 of the Statute, to exercise jurisdiction over a particular case is the intent of that State to see the person or persons involved brought to justice. This intent can be conveyed expressly by the State, either in the specific context of a proceeding before the Court or generally. This intent can also be inferred from unambiguous facts*".
[48] *Idem*, para. 91.
[49] See the Impugned Decision, *supra* note 9, para. 25.

implementation of the arrest warrant against the Accused;[50] the observations presented by the CAR Authorities on the request for interim release of Mr Yekatom which were filed when the admissibility challenge was ongoing and contained relevant information about the absence of national proceedings and/or willingness to open investigations against the defendant;[51] the absence of any admissibility challenge submitted by the Central African Republic Authorities[52]; and the plain wording of article 37 of the Organic Law establishing the Special Criminal Court.

45. The Common Legal Representatives posit that all above factors undoubtedly lead the Trial Chamber to reasonably and within its discretionary powers conclude that the CAR Authorities do not intend to investigate or prosecute Mr Yekatom.

46. Finally, concerning the Defence's arguments under point G of the Appeal Brief, the Common Legal Representatives contend that the Defence does not clearly substantiate how said assertion relates to the alleged procedural error. Indeed, the Trial Chamber referred to its duty to ensure that the trial is expeditious, under articles 64(2) and 68 of the Statute,[53] in rejecting the sequential approach proposed by the Defence in its Admissibility Challenge (namely to give the CAR Authorities a period of time to open an investigation or to commence a prosecution) - and not in assessing whether the CAR Authorities are inactive in investigating/prosecuting the Accused. In fact, this part of the Impugned Decision is a mere corollary to the finding that the case is admissible before the Court. Having reached said determination, it was only reasonable for the Trial Chamber to reject the proposed approach also taking into due consideration the rights of the accused and having due regard to the protection of victims and witnesses.

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[50] *Idem*, para. 20.
[51] See the "Annex II to the Transmission of observations from the Kingdom of the Netherlands and the Central African Republic on interim release of Alfred Yekatom", No. ICC-01/14-01/18-478-Conf-AnxII, 14 April 2020.
[52] *Ibid.*
[53] See the Impugned Decision, *supra* note 9, para. 23.

47. Therefore, the Common Legal Representatives conclude that the Defence fails to demonstrate how the Trial Chamber committed a procedural error and how said alleged error materially affects the Impugned Decision. In particular, the Defence does not demonstrate how, in light of the information and evidence submitted before it, a reasonable chamber would have reached another conclusion in appreciating the facts differently or in taking into account factors that were not taken into account by the Trial Chamber in the present case.

48. Moreover, the Defence fails to demonstrate that the Trial Chamber improperly used its discretionary power, based on an erroneous interpretation of the law; or that in exercising said discretion the Trial Chamber reached patently incorrect conclusion of fact; or that the decision was "*so unfair and unreasonable as to constitute an abuse of discretion*".[54]

## IV. CONCLUSION

49. For the foregoing reasons, the Common Legal Representatives respectfully request the Appeals Chamber to dismiss the Defence's Appeal in its entirety.

[54] See *supra* note 27.

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Dated this 10th day of June 2020

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