

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **25 April 2022**

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

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

Confidential with Confidential Annexes A and B

**Yekatom Defence Response to 'Prosecution's renewed application for Notice
to be Given under Regulation 55(2) on Accused Yekatom's Individual
Criminal Responsibility' (ICC-01/14-01/18-1345-Conf)**

Source: Defence for Mr. Alfred Rombhot Yekatom

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

The Office of the Prosecutor

Mr Karim Asad Ahmad Khan
Mr Kweku Vanderpuye

Counsel for Mr. Yekatom

Ms Mylène Dimitri
Mr Thomas Hannis
Ms Anta Guissé
Mr Gyo Suzuki
Ms Laurence Hortas-Laberge
Ms Lena Casiez

Counsel for Mr. Ngaïssona

Mr Geert-Jan Alexander Knoops
Mr Richard Omissé-Namkeamaï
Ms Marie-Hélène Proulx

Legal Representatives of Victims

Mr Dmytro Suprun

Legal Representatives of Applicants

Mr Abdou Dangabo Moussa
Ms Elisabeth Rabesandratana
Mr Yaré Fall
Ms Marie-Edith Douzima-Lawson
Ms Paolina Massidda

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

INTRODUCTION

1. The Defence for Mr Alfred Rombhot Yekatom ('Defence') hereby responds to the 'Prosecution's renewed application for Notice to be Given under Regulation 55(2) on Accused Yekatom's Individual Criminal Responsibility' ('Application').¹

2. The Application should be denied. The Prosecution does not justify the proposed departure from the Decision confirming the charges ('Confirmation Decision'). Further, the sought recharacterisation would impermissibly exceed the facts and circumstances described in the charges, contrary to Regulation 55. Nor is the Application warranted, in light of the purpose of this provision. Lastly, the sought Notice would cause undue prejudice to the fairness of these proceedings.

SUBMISSIONS

I. The Prosecution does not justify departing from the charges as confirmed by Pre-Trial Chamber II.

3. As the Chamber is aware, the Application constitutes the latest in a series of attempts by the Prosecution to include in these proceedings modes of liability that were not confirmed by Pre-Trial Chamber II ('PTC II').²

4. In the Confirmation Decision,³ PTC II declined to confirm charges brought under Article 25(3)(c) and (d), and Article 28(a) for two reasons. First, PTC II found that the charges for these modes of liability 'were not sufficiently supported by the evidence'.⁴ Second, with respect to Article 28(a), PTC II held that 'the narrative of the relevant events as emerging from the available evidence is such that Yekatom's conduct resulted in the realisation of the objective elements of the crimes, rather than

¹ [ICC-01/14-01/18-1345-Conf](#); Public redacted version: [ICC-01/14-01/18-1345-Red](#).

² See, [ICC-01/14-01/18-437](#); [ICC-01/14-01/18-503-Conf](#), Public redacted version: [ICC-01/14-01/18-503-Red](#).

³ [ICC-01/14-01/18-403-Conf-Corr](#); Public redacted version: [ICC-01/14-01/18-403-Red-Corr](#).

⁴ [ICC-01/14-01/18-447](#), paras 19-20; PTC II held with regard to Article 28(a) that 'the charges for this mode of liability were not supported to the relevant evidentiary threshold'.

only consisting in the mere failure to prevent or repress crimes committed by other persons.’⁵

5. After unsuccessfully seeking reconsideration and leave to appeal the Confirmation Decision, the Prosecution filed a Regulation 55 application, seeking to restore the modes of liability that the Pre-Trial Chamber had rejected twice; this was also denied.⁶ In rejecting this first application, the Chamber notably held that the statutory framework of the court ‘does not provide for the possibility of a review of confirmation decisions by trial chambers’ and decided that it would ‘defer to the PTC II’s findings’.⁷

a) The Confirmation Decision is entitled to a degree of deference.

6. While the Defence notes appellate jurisprudence, previously cited by the Chamber, holding that there is ‘no legal impediment to a Trial Chamber re-characterising facts and circumstances to include a mode of liability that was considered, but not confirmed by [a] Pre-Trial Chamber’, it nonetheless submits, contrary to the Prosecution’s position, that PTC II’s findings are entitled to a degree of deference.⁸

7. This is especially so, given that the Prosecutions’ proposed recharacterisation would represent a drastic departure from the Confirmation Decision. In this regard, the Court’s Regulation 55 case law demonstrates that the Application is exceptional in its breadth, in seeking recharacterisation of multiple modes of liability, across both Article 25 and Article 28, that were expressly rejected by PTC II on the dual bases of insufficient evidence and differing narratives.⁹

⁵ [ICC-01/14-01/18-403-Conf-Corr](#), para. 58.

⁶ [ICC-01/14-01/18-437](#); [ICC-01/14-01/18-503-Conf](#).

⁷ [ICC-01/14-01/18-542](#), para. 15.

⁸ [ICC-01/14-01/18-542](#), para 13; contra, [ICC-01/14-01/18-1345-Conf](#), para. 8; see also, *Prosecutor v. Al Hassan*, Public redacted version of ‘Decision on application for notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court’, [ICC-01/12-01/18-1211-Red](#), 25 June 2021 (‘Al Hassan R55 Decision’), paras 99-100, 124-125, 134-135 and 139-140.

⁹ See, [ICC-01/14-01/18-515](#), paras 18-22; no decision has been issued that would render the Defence’s previous submissions invalid as regards the exceptional nature of the proposed recharacterisation.

8. As the Appeals Chamber has held, the confirmation of charges stage 'serves the purpose of filtering out those charges for which the evidence is insufficient to justify a trial'.¹⁰ In overseeing this stage, the Pre-Trial Chamber is accorded the role of 'gatekeeper', tasked with 'defin[ing] the parameters of the subject matter of that trial',¹¹ and ensuring that 'only those cases proceed to trial for which the Prosecutor has presented sufficiently compelling evidence going beyond mere theory or suspicion.'¹²

9. In the circumstances therefore, to allow the Prosecution to re-introduce three non-confirmed modes of liability for which evidence was found to be lacking by PTC II, would be 'tantamount to depriving this [...] critical aspect of the filtering function of the Pre-Trial Chamber of any meaningful content.'¹³

10. In line with due deference to the role and function of the Pre-Trial Chamber, it is submitted that compelling reasons should be demonstrated to justify such a drastic departure from the Confirmation Decision. By extension, Regulation 55(2) notice ('Notice') should only be given if it is abundantly clear to the Chamber that doing so is absolutely warranted in light of the trial record and the principal purpose of Regulation 55, and that it would not exceed the facts and circumstances as described in the charges.

b) The evidence relied upon by the Prosecution does not support the sought recharacterization.

11. In the Application, the Prosecution has failed to indicate any evidence that might remedy the evidentiary lacunae in its Document Containing the Charges

¹⁰ *Prosecutor v. Mbarushimana*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges", [ICC-01/04-01/10-514](#), 30 May 2012, para. 47.

¹¹ *Prosecutor v Al Hassan*, Judgment on the appeal of Mr Al Hassan against the decision of Trial Chamber X entitled 'Decision on application for notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court', [ICC-01/12-01/18-1562-Red](#), 1 July 2021 ('Al Hassan R55 Appeals Decision'), para. 92.

¹² [ICC-01/14-01/18-517](#), para. 23.

¹³ *Ibid*, para. 23 (albeit in the context of a Prosecution request to amend the charges).

(‘DCC’); by extension, the Prosecution has failed to establish any reason to depart from the PTC II’s findings.

12. On the contrary, the Prosecution presents allegations and evidence for the most part already relied upon within the DCC, despite the fact that this evidence has already been “carefully analysed” by PTC II and deemed insufficient to support the sought modes of liability.¹⁴ In this regard, the Defence addresses each item of evidence relied upon by the Prosecution in support of the sought recharacterisations under Article 28 and Article 25, in Annexes A and B to this Response, respectively.

13. Further, the Defence makes the following general observations: first, the Prosecution relies on transcripts solely for the purpose of demonstrating that a given witness statement, relied on at the confirmation stage, has been introduced into evidence via Rule 68(3). The mere fact that a witness statement was subsequently introduced under that rule does render it new, nor does it affect its probative value. Second, evidence (whether presented at the confirmation of charges stage or otherwise) relied upon within the Application to support facts that have been confirmed by PTC II, remains repetitive as opposed to complementary, and therefore does not remedy the evidentiary lacunas found by PTC II. Third, the Defence notes that the Prosecution has mischaracterised certain items of evidence it cites in support of the Application. These items not being probative of the allegation in question, they cannot remedy evidentiary lacunas, despite being ‘new’ in the sense that it was not considered by PTC II.

14. More broadly, the Defence here raises its concern as to the manner in which the Prosecution appears to have transformed the Regulation 55(2) mechanism into a procedure whereby it bombards the Chamber with its necessarily one-sided, and at times unfounded, interpretations of the evidence heard to date.

¹⁴ [ICC-01/14-01/18-447](#), para. 19.

15. While Regulation 55 does envisage an assessment of the trial record, the Defence should not be impelled to enter into a debate as to whether the legal elements of modes of liability are met on the basis of the (incomplete) evidential record at this stage in the trial proceedings; indeed, nor should the Chamber, for the sake of its impartiality.

16. This is especially so, given that this approach forces the Defence to choose between, on the one hand, responding in kind and prematurely revealing Defence lines of argument, contrary to Mr Yekatom's right to silence and his right against self-incrimination;¹⁵ and on the other, withholding its arguments and letting the Prosecution submissions go unanswered and uncorrected, in the context of exceptionally consequential litigation, and contrary to the principle of *audi alteram partem*.

17. In any event, the Defence is confident that, if the Chamber is minded to consider the evidence for the purposes of its determination of the Application, it will review the trial record in its totality, and not rely solely on the Prosecution's necessarily biased and incomplete submissions on the evidence.

18. Lastly, the Prosecution suggestion that the Chamber assess pending or unsubmitted evidential material in its assessment of the Application is without merit.¹⁶ For obvious reasons, basing a decision as consequential as Regulation 55(2) Notice on material that is not part of the evidential record would inject a prejudicial degree of legal uncertainty into these proceedings.

19. The Prosecution's reliance on Trial Chamber I's decision in *Abd-Al-Rahman*, the sole cited authority in this regard, is misplaced.¹⁷ In that decision, Trial Chamber I

¹⁵ See, Article 67(1)(g), which enshrines an accused's right 'Not to be compelled to testify or to confess guilt and to remain silent[.]'; see also, *Prosecutor v. Ongwen*, Decision on 'Prosecution's request to order the Defence to comply with rule 79', [ICC-02/04-01/15-460](#), 7 June 2016, para. 19.

¹⁶ [ICC-01/14-01/18-1345-Conf](#), paras 3, 24; see also, Annexes A and B.

¹⁷ [ICC-01/14-01/18-1345-Conf](#), para. 3, fn. 5, citing *Prosecutor v. Abd-Al-Rahman*, Decision on the Prosecution's application for notice to be given pursuant to Regulation 55(2), [ICC-02/05-01/20-634](#), 18 March 2022 ('Abd-Al-Rahman Decision'), para. 22 and fn. 32.

merely noted the 'Prosecution's submissions as to the anticipated contents of the evidence it intends to submit' – only citing the Prosecution's trial brief – in ultimately issuing Regulation 55(2) notice.¹⁸

II. The proposed re-characterisation under Article 28(a) would exceed the facts and circumstances described in the charges.

20. As previously held by the Chamber, under Regulation 55, a chamber seeking to change the legal characterisation of facts is 'bound by the facts and circumstances as described in the Confirmation Decision'.¹⁹

21. Further, as held by the Appeals Chamber in *Lubanga*, for the purposes of that provision, 'the term "facts" refers to the factual allegations which support each of the legal elements of the crime charged'.²⁰ The *Lubanga* Trial Chamber further held in that case:

As the Appeals Chamber has emphasised, therefore, these specific factual allegations are to be distinguished from the general evidence in the case, as well as background or other information, whether advanced by the Prosecutor or otherwise referred to in the proceedings, and including in the Decision on the Confirmation of Charges, unless the Pre-Trial Chamber has identified with sufficient clarity and detail in the Decision on the Confirmation of Charges that they are facts which support the legal elements of the crimes charged.²¹

22. The Prosecution's proposed recharacterisation under Article 28(a) would exceed the facts and circumstances as described in the Confirmation Decision contrary to Regulation 55.

23. The specific elements of Article 28(a) in relation to which facts and circumstances have not been confirmed by PTC II are set out below. At the outset however, the Defence recalls that Article 28 is *sui generis* mode of liability. Successive

¹⁸ [Abd-Al-Rahman Decision](#), para. 22 and fn 32, citing only to the Prosecution's Trial Brief filed in those proceedings.; see also, para. 18 (where Trial Chamber found that there was 'no need, in the present context, to look beyond the operative part of the decision on the confirmation of charges').

¹⁹ [ICC-01/14-01/18-542](#), para. 9, fn. 29 and references cited therein.

²⁰ *Prosecutor v. Lubanga*, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, [ICC-01/04-01/06-2205](#), 8 December 2009, ('Lubanga R55 AC Decision') para. 90, fn. 163.

²¹ *Prosecutor v. Lubanga*, Decision on the Legal Representatives' Joint Submissions concerning the Appeals Chamber's Decision on 8 December 2009 on Regulation 55 of the Regulations of the Court, [ICC-01/04-01/06-2223](#), 8 January 2010, para. 30, referring to Lubanga R55 AC Decision.

chambers have expressly noted the fundamental difference between command responsibility and the various modes of liability set out in Article 25.²² The Prosecution has repeatedly argued that the elements of Article 28 are not subsumed in Article 25, in these very proceedings.²³ In the circumstances therefore, the fact that PTC II expressly declined to confirm the Prosecution's allegations regarding Mr Yekatom's responsibility under Article 28(a), including on the basis that they 'were not supported to the relevant evidentiary threshold',²⁴ is itself a strong indication that the proposed recharacterization under that article will exceed the scope of the facts and circumstances as confirmed.

24. Further, in light of PTC II's rejection of the Prosecution case under Article 28(a) on the basis of its divergent narrative, the Defence notes that the Appeals Chamber has expressly contemplated circumstances in which 'the change of narrative is of such an extent or nature that it does, in fact, exceed the facts or circumstances'.²⁵

25. Noting the Prosecution's extensive reference to evidence and evidential material in the Application, the Defence also recalls that, as held by the Appeals Chamber, even where unconfirmed facts 'have come to light during the trial and build a unity, from the procedural point of view, with the course of events described in the charges', reliance on such facts would breach Regulation 55.²⁶

²² See e.g., *Prosecutor v. Bemba*, Judgment pursuant to Article 74 of the Statute, [ICC-01/05-01/08-3343](#), 21 March 2016 ('Bemba Trial Judgement') para. 173; *Prosecutor v. Gbagbo*, Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, [ICC-02/11-01/11-656-Red](#), para. 262, and reference cited therein.

²³ [ICC-01/14-01/18-503-Conf](#), para. 11; [ICC-01/14-01/18-437](#), para. 8.

²⁴ [ICC-01/14-01/18-447](#), para. 19.

²⁵ *Prosecutor v. Katanga*, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons", [ICC-01/04-01/07-3363](#), 27 March 2013, para. 58.

²⁶ [Lubanga R55 AC Decision](#), paras 88-93.

26. Lastly, the Defence recalls that the facts and circumstances that would support any proposed recharacterization must be 'exhaustively defined',²⁷ in accordance with Mr Yekatom's right to notice and effective defence preparation.²⁸

a) *PTC II did not confirm facts and circumstances that could underpin the element of a commander's duty to take 'all necessary and reasonable measures'.*

27. For criminal liability to arise under Article 28, an accused must have 'failed to take all necessary and reasonable measures within his or her power to prevent or repress [the commission of crimes] or to submit the matter to the competent authorities for investigation and prosecution' ('Measures Element').²⁹

28. The Measures Element is integral to Article 28(a) liability. In *Bemba*, the Appeals Chamber found by majority that Trial Chamber III had erred *inter alia* in finding that the redeployment of MLC troops was a 'necessary and reasonable measure' that Mr Bemba should have taken, because Mr Bemba had not been provided sufficient notice of this factual allegation.³⁰ It notably held, in relation to the Measures Element, that '[i]t follows that the accused person must be informed of the factual allegations on the basis of which the Prosecutor seeks to establish this element'.³¹ Further, and more broadly, one of the two bases on which the conviction of Mr Bemba was reversed was the Appeals Chamber's finding by majority that multiple errors identified in Trial Chamber III's findings on the 'Measures Element' 'extinguishe[d] in full his criminal liability for these crimes.'³²

²⁷ [Al Hassan R55 Decision](#), para. 14 and fn. 30 and references cited therein; see also, [ICC-01/14-01/18-1345-Conf](#), fn. 15.

²⁸ Article 67(1)(a) and (b).

²⁹ Article 28(a)(ii); see also, [ICC-01/14-01/18-1345-Conf](#), para. 23.

³⁰ *Prosecutor v. Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", [ICC-01/05-01/08-3636-Red](#), 8 June 2018 ('Bemba Appeals Judgement') paras 185-188.

³¹ *Ibid.*, para. 186.

³² Notably, the other basis for which the conviction of Mr Bemba was overturned was Trial Chamber III's error in relying on 'criminal acts that did not fall within the "facts and circumstances described in the charges" in terms of article 74(2)'; see [Bemba Appeals Judgment](#), para. 196.

29. The Prosecution's own extensive, albeit ultimately inadequate and unfounded, submissions in the DCC as regards the Measures Element further illustrate the importance of the latter to the law of command liability.³³

30. Further, the Prosecution allegations in this regard, and specifically the fifteen pleaded culpable omissions ('Omissions')³⁴ shed light on PTC II's conclusion that the Prosecution had failed to establish its case as regards Article 28(a).

31. Strikingly, not one of the fifteen Omissions is supported by a direct reference to evidence. Six Omissions are entirely unsupported.³⁵ Notably, these include Omissions that would particularly appear to lend themselves to being understood as culpable omissions going to the Measures Element – for example, the alleged failures to report crimes to international forces or domestic authorities; or to issue clear directions or orders to refrain from harming civilians.³⁶ The remainder simply cross-reference various paragraphs within the DCC.

32. Moreover, it is clear from these cross-referenced submissions, as well as from the Application, that the Prosecution mistakenly suggests that facts and circumstances underpinning culpable omissions can simply be directly derived from those underpinning culpable positive actions.

33. Omissions (xii), (xiii) and (xv) are particularly illustrative in this regard, in that the Prosecution simply referred PTC II to the crimes that Mr Yekatom allegedly ordered or committed³⁷ – the argument being that, if the PTC II confirmed a given order or a crime as a culpable positive act, then it could simply confirm the reverse as a culpable omission; i.e. where the culpable positive act was his order or crime, the

³³ [ICC-01/14-01/18-282-Conf-AnxB1](#), paras 198, cross-referencing paras 230-233, Public redacted version: [ICC-01/14-01/18-282-AnxB1-Red2](#).

³⁴ Ibid, para. 233(i)-(xv).

³⁵ Ibid, para 233(v)-(viii), (x), (xiv).

³⁶ Ibid., para. 233(vi) and (x).

³⁷ Ibid., para. 233(xii), (xiii), and (xv), especially fns 542-544.

culpable omission is sufficiently proven by his failure not to order, or his failure not to commit the crime.

34. In the same vein, Omission (ii) claims that Mr Yekatom failed to protect Muslim civilians within the custody of his group, 'including by ensuring the humane treatment of detainees', simply citing to the allegations underpinning *inter alia* Count 11, 'Inhumane Acts'.³⁸ Likewise, Omission (i) cites to Mr Yekatom's alleged leading of military operations, the implication simply being that his culpable omission was his failure to halt these same operations.

35. Even setting aside the lack of evidentiary support for the Omissions, PTC II was correct to reject this unduly schematic pleading of the Measures Element.

36. Criminal liability under Article 28(a) is not a simple box-ticking exercise of the kind proposed by the Prosecution. As held in *Bemba*, '[c]ommand responsibility is not strict liability for all the crimes that are committed by subordinates'.³⁹

37. On the contrary, the question of whether a commander took 'all necessary and reasonable measures' requires an in-depth analysis, noting especially the inherent sub-element of 'reasonableness'. In relation to the Measures Element, in holding that a chamber 'must specifically identify what a commander should have done *in concreto*,' the *Bemba* Appeals Chamber Majority stated:

It is for the trial chamber to demonstrate in its reasoning that the commander did not take specific and concrete measures that were available to him and which a reasonably diligent commander in comparable circumstances would have taken.⁴⁰

38. In this regard, the Defence recalls that Pre-Trial Chamber II in *Bemba* set out, by way of guidance, the following four measures:

³⁸ Ibid., para. 233(ii), fn. 357.

³⁹ *Prosecutor v. Bemba*, Separate Opinion of Judge Christine Van den Wyngaert and Judge Howard Morrison, [ICC-01/05-01/08-3636-Anx2](#), 8 June 2018, para. 33.

⁴⁰ [Bemba Appeals Judgment](#), para. 170; see also, where Pre-Trial Chamber II assessed and made specific findings on measures taken (and not taken) by Mr Ntaganda, *Prosecutor v. Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, [ICC-01/04-02/06-309](#), 9 June 2014 ('Ntaganda Confirmation Decision'), paras 171-173.

(i) to ensure that [the] superior's forces are adequately trained in international humanitarian law; (ii) to secure reports that military actions were carried out in accordance with international law; (iii) to issue orders aiming at bringing the relevant practices into accord with the rules of war; (iv) to take disciplinary measures to prevent the commission of atrocities by the troops under the superior's command.⁴¹

39. As is clear from the jurisprudence, criminal liability under Article 28(a) does not simply arise by default; PTC II thus was correct in declining to confirm the Prosecution allegations in this regard. The Prosecution's approach of seeking to rely on Mr Yekatom's alleged culpable acts to prove his alleged culpable omissions was inadequate in accordance with the existing law.

40. In the Application, the Prosecution addresses the Measures Element in the same inadequate fashion.⁴² The Prosecution fails to cite a single PTC II finding specifically in support of the claim that 'YEKATOM fail to take all necessary and reasonable measures within his power to prevent or repress [the commission of crimes], or to submit the matter to the competent authorities'; instead, summarily referring to the entirety of the factual allegations that were confirmed in relation to Mr Yekatom, as well as the operative part of the Confirmation Decision.⁴³

41. To simply rely on charged positive acts under Article 25 modes of liability on the basis that, in the strictest possible sense, these acts can be reconceptualised in reverse as 'failures to act', would not only be insufficient to establish this element to the requisite threshold; it would also be to ignore the *sui generis* nature of Article 28, and to improperly and unnecessarily collapse the boundaries between these articles, and the differing values underpinning them. Further, given that the Prosecution's case as regards Article 28(a) would thus be entirely reliant on the crimes allegedly ordered and committed by Mr Yekatom as confirmed under Article 25, this co-

⁴¹ *Prosecutor v. Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, [ICC-01/05-01/08-424](#), 15 June 2009, para. 438; see also, additional factors as set out by Trial Chamber in *Bemba*, [Bemba Trial Judgement](#), para. 204.

⁴² [ICC-01/14-01/18-1345-Conf](#), paras 40-41.

⁴³ *Ibid*, paras 40-43; see especially, para. 41.

dependency itself raises further questions as to the appropriateness, and the very necessity, of the sought recharacterization.⁴⁴

42. Furthermore, the mere fact that command responsibility concerns itself with culpable omissions, i.e. lack of action, does not relieve the Prosecution of the burden of proving, with evidence, the facts and circumstances underlying these omission. For instance, regarding an alleged failure to punish a subordinate's criminal acts: it remains the Prosecution's obligation to prove that a commander failed to punish; the fact that there is no evidence of a punishment, of itself, is insufficient. To find otherwise would be contrary to Mr Yekatom's right not to have imposed on him any burden of proof.⁴⁵

43. Pre-Trial Chamber II's findings – notably, citing directly to evidence – in *Ntaganda*, in relation to Mr Ntaganda's 'failure to react' to crimes, in its assessment of the Measures Elements, are highly illustrative in this respect; as they provide a valuable contrast to the Confirmation Decision in these proceedings, they are set out in full as follows (with citations removed):

Mr. Ntaganda did not: (i) reprimand anyone for attacks against Lendu civilians during UPC/FPLC operations; (ii) act to prevent any crimes against Lendu civilians through, for instance, orders not to harm them; or (iii) investigate crimes committed against civilians. More specifically, in the First Attack, acts of rape and killing went unpunished and Mr. Ntaganda did not prevent the killing of prisoners. In addition, with regard to the Second Attack, not a single subordinate, including Mr. Mulenda, was punished for the Kobu massacre. Furthermore, in respect of the crimes of conscripting, enlisting and using children under the age of 15 years to participate actively in hostilities, as well as rape and sexual slavery of UPC/FPLC child soldiers, Mr. Ntaganda: (i) did not order the demobilisation of children under the age of 15 years; and (ii) protected his chief of security after the latter had raped a 12 or 13 year old girl from his own escort.⁴⁶

44. It thus follows that the Chamber cannot simply 'read between the lines' of the Confirmation Decision to find facts and circumstances of culpable omissions. In other words, to continue the example of a 'failure to punish', the Chamber cannot find facts and circumstances underpinning the element of Mr Yekatom's 'failure to punish',

⁴⁴ See, regarding the non-existent 'accountability gap', *infra*, paras 55-65.

⁴⁵ Article 67(1)(i).

⁴⁶ [Ntaganda Confirmation Decision](#), para. 172.

from the fact that PTC II made no findings on punishment in that decision. As with any culpable act, facts and circumstances underpinning culpable omissions must have been specifically confirmed for the Chamber to recharacterize them as such.

b) *PTC II did not confirm facts and circumstances underpinning the element of causality.*

45. Command responsibility under Article 28(a) further requires that the alleged crimes be committed 'as a result of [a commander's] failure to exercise control properly over' the forces under his or her effective command and control.

46. This causality element has been interpreted by two Appeals Chamber Judges as requiring the Prosecution to establish 'a *high probability* that, had the commander discharged his duties, the crime would have been prevented or it would not have been committed by the forces in the manner it was committed.'⁴⁷ As held in that Separate Opinion, failure to read this element of causality into Article 28(a) would be incompatible with the fundamental fair trial principle of culpability, according to which, 'nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated.'⁴⁸

47. Also notable, in light of PTC II's decision not to confirm the Prosecution case under Article 28(a), is the Prosecution's contradictory approach to this element in the DCC. Specifically, the Prosecution denied that Article 28(a) included any such element, while claiming in the same sentence that Mr Yekatom's alleged 'failure to take all necessary and reasonable measures within his power establishes his failure to exercise control properly over elements of YEKATOM's Anti-Balaka Group and

⁴⁷ *Prosecutor v Bemba*, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, [ICC-01/05-01/08-3636-Anx1-Red](#), 8 June 2018 ('Bemba Dissenting Opinion of Judges Monageng and Hofmański'), paras 326-339; see also, *Prosecutor v Bemba*, Separate Opinion of Judge Sylvia Steiner, [ICC-01/05-01/08-3343-AnxI](#), 21 March 2016; see also, [Ntaganda Confirmation Decision](#), para. 174.

⁴⁸ [Bemba Dissenting Opinion of Judges Monageng and Hofmański](#), para. 333; citing ICTY, IT-94-1-A, *Prosecutor v Tadić*, [Appeal Judgment](#), 15 July 1999, para. 186.

casually contributed to the commission of the crimes charges' – all while failing to provide any support whatsoever for this submission.⁴⁹

48. Further, even setting aside the lack of evidential support cited for this element, the fact the Prosecution sought to rely on Mr Yekatom's alleged 'failure to take all necessary and reasonable measures' in this regard, coupled with the fact that these alleged omissions were not subsequently confirmed by PTC II, demonstrate that no facts and circumstances that could support the causality element have been confirmed by PTC II.

49. Indeed, the very fact that in the Application, the Prosecution omits to even mention the element of causality would further suggest that nothing in the Confirmation Decision would support recharacterization in relation to this element.⁵⁰

III. The Prosecution has failed to demonstrate the existence of any accountability gap that might warrant issuing of Regulation 55 notice.

50. As the Chamber has previously held, the 'principal purpose' of Regulation 55 is to 'close accountability gaps':

If a chamber were unable to revisit the legal characterisation confirmed or rejected by a pre-trial chamber, there would be a 'risk of acquittals that are merely the result of legal qualifications confirmed in the pre-trial phase, that turn out to be incorrect, in particular based on the evidence presented at the trial'.⁵¹

51. While repeated reference is made in the Application to the closing of 'accountability gaps', nowhere does the Prosecution actually explain where those gaps might be found, or how the sought recharacterization would serve that purpose.⁵²

⁴⁹ [ICC-01/14-01/18-282-Conf-AnxB1](#), para. 199.

⁵⁰ [ICC-01/14-01/18-1345-Conf](#), para. 23.

⁵¹ [ICC-01/14-01/18-542](#), para. 10, fns 30-31, and references cited therein.

⁵² [ICC-01/14-01/18-1345-Conf](#), paras 4, 12.

52. The sought recharacterization would not serve to close any 'accountability gaps', because none exist. Any suggestion of any risk of 'technical acquittal' is entirely unfounded, not to mention vastly premature.⁵³

53. On the contrary: through the Application, the Prosecution improperly seeks to have its cake and eat it too. In seeking confirmation of the charges, the Prosecution had alleged that Mr Yekatom was directly present and directly perpetrating and/or ordering the crimes for which he is charged, and presented evidence in support of this narrative.⁵⁴ The Prosecution case as confirmed thus had Mr Yekatom at the very front and centre of the alleged events in question. Indeed, as noted above, in confirming the charges, PTC II held that 'the narrative of the relevant events is such that Yekatom's conduct resulted in the realisation of the objective elements of the crimes'.⁵⁵

54. Now however, the Prosecution claims before the Chamber that recharacterization to residual and accessorial modes of liability is 'necessary' and will serve its primary purpose of closing accountability gaps. Yet there is no suggestion that the Prosecution will be unable to present its case via the charged modes of liability; indeed, the vast majority of the crime base witnesses, or those who will testify to Mr Yekatom's alleged contributions, are yet to appear.

55. The fact the Application is itself critically dependent on the facts and circumstances underpinning those very same allegations regarding Mr Yekatom's direct presence and direct perpetration and/or ordering of the crimes, further undercuts the Prosecution claims as to the accountability gap.⁵⁶

⁵³ [Lubanga R55 AC Decision](#), para. 77; see also, *Prosecutor v. Katanga*, Dissenting Opinion of Judge Christine Van den Wyngaert, [ICC-01/04-01/07-3319](#), 21 November 2012 ('Dissenting Opinion of Judge Van den Wyngaert'), para. 7.

⁵⁴ [ICC-01/14-01/18-282-Conf-AnxB1](#), paras 257-260; 303-306; 361-364; with regard to the PK9-Mbaiki Axis crime base charges, the Prosecution argued that Mr Yekatom 'ordered, endorsed, and/or was present' when the crimes underlying Counts 24-27 were committed; see, paras 348-335.

⁵⁵ [ICC-01/14-01/18-403-Conf-Corr](#), para. 58.

⁵⁶ See e.g. [ICC-01/14-01/18-1345-Conf](#), paras 42, 52, 58.

56. The Chamber is empowered to decline to issue Notice on the basis of the Prosecution's failure to demonstrate that the sought recharacterization would serve this purpose of addressing accountability gaps. In *Al Hassan*, Trial Chamber X twice declined to provide Notice for sought recharacterisations, despite finding that the legal elements of the crimes in question 'may be derived' from confirmed facts and circumstances, on the basis that Pre-Trial Chamber I's legal characterisation of the acts 'properly capture[d] the essence of the acts committed in terms of accountability and the establishment of the truth'; and that in such circumstances issuing Notice 'would essentially involve the Chamber in a prosecutorial function [...] as it is not necessary to address any accountability gap[.]'⁵⁷

57. Trial Chamber X's reasoning applies in these circumstances. The sought recharacterization would not address any accountability gaps; nor is it necessary to 'capture the essence' of the charged acts. In this regard, the Defence notes that with the Application, the Prosecution will have attempted to charge Mr Yekatom with no less than eight modes and sub-modes of liability. In the circumstances, the Application is thus best understood as a manifestation of the Prosecution's overzealous pursuit of unconfirmed charges in the broader hope that, with enough mud thrown at the wall, some of it will stick.⁵⁸

58. This Prosecution approach is not in the spirit of Regulation 55. As stated in the Court's Chambers Practice Manual, Regulation 55 is 'an exceptional instrument which, as such, should be used only sparingly if absolutely warranted'.⁵⁹ Simply put, this condition is not met.

59. Further, the Prosecution claim that Regulation 55(2) 'conveys an objective threshold' is without merit, as is clear from a plain language reading of the

⁵⁷ [Al Hassan R55 Decision](#), para. 35; see also, 44; cf. para. 25 (where Trial Chamber X issued Notice on the basis that the recharacterized crime 'most properly described the acts committed' and 'has a distinct value in terms of accountability and the establishment of the truth') and para 53.

⁵⁸ [ICC-01/14-01/18-1362](#), para. 39.

⁵⁹ 'Chambers Practice Manual', 2019, <https://www.icc-cpi.int/sites/default/files/iccdocs/other/191129-chamber-manual-eng.pdf>, para. 67.

provision.⁶⁰ Nor does this interpretation find support in the cited *Al Hassan* decision, which the Prosecution mischaracterises.⁶¹ The Prosecution suggestion that the Chamber is bound by what a 'reasonable Chamber' would conclude in the circumstances is curious, given its previous reliance on the argument that Regulation 55 was 'discretionary', in its submissions seeking reconsideration and/or leave to appeal the Confirmation Decision.⁶² In any event, this Prosecution argument amounts to a transparent attempt to lower the Regulation 55(2) threshold and should be dismissed as such. Regulation 55 remains the prerogative, and at the discretion, of the Chamber; nor is the Chamber 'required to accept every Prosecution submission that a recharacterisation can be derived from the facts and circumstances described in the charges'.⁶³

60. Lastly, the Defence notes the submission made by the Common Legal Representatives of Victims ('CLR'), that 'Mr Yekatom's responsibility as commander should be considered at trial'.⁶⁴ As the Prosecution has itself previously noted, facts and circumstances establishing an accused's superior role within a hierarchy can comprise aggravating circumstances in sentencing.⁶⁵ The Prosecution remains free to lead any such facts at trial, and the Chamber is free to consider them as such. The sought recharacterisation is entirely unnecessary for this purpose, especially given that convictions cannot be entered for both principal and accessorial modes of liability for a given charge.⁶⁶ More broadly, any such policy considerations would be met without any need to resort to the sought recharacterization.

⁶⁰ I.e. 'if it appears to the Chamber', which wording, if anything, connotes a subjective standard.

⁶¹ [ICC-01/14-01/18-1345-Conf](#), para. 9; in *Al Hassan*, the error arose where Trial Chamber X held that it was unnecessary to formally issue Notice despite expressing its intention to de facto recharacterise certain facts, by relying on them as underlying facts for a confirmed charge, where those facts had not been confirmed in relation to the charge in question; see, [Al Hassan R55 Appeals Decision](#), paras 42-49, esp. 44; see also, *supra*, para. 61.

⁶² [ICC-01/14-01/18-437](#), para. 20.

⁶³ [ICC-01/14-01/18-542](#), para. 16, citing *Prosecutor v Bemba et al*, Decision on Prosecution's Re-application for Regulation 55(2) Notice, [ICC-01/05-01/13-1553](#), 15 January 2016, para. 8; see also, [ICC-01/14-01/18-447](#), para. 23.

⁶⁴ [ICC-01/14-01/18-1362](#), para. 40.

⁶⁵ [ICC-01/14-01/18-437](#), para. 9.

⁶⁶ See, *Prosecutor v. Ruto & Sang*, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, [ICC-01/09-01/11-1](#), 8 March 2011, para. 36; cited in *Prosecutor v. Ruto & Sang*, Decision on Applications for Notice of Possibility of Variation of Legal

IV. The sought Notice would prejudice the fairness of these proceedings.

61. As noted above, the Application is exceptional in its scope. While Regulation 55(2) does not *stricto sensu* impose limitations on the number of potential recharacterisations, the Chamber's assessment of the Application must nonetheless be guided by the overriding interests of fairness and expeditiousness, and full respect for the rights of Mr Yekatom.⁶⁷

62. As held by PTC II:

Any change or addition to the case as emerging from the confirmation decision has by its nature a disruptive effect on this preparation, and hence on the fundamental rights of the accused; while both the statutory framework and its interpretation by the Court's case law clearly make an allowance for changes and additions to occur, it must be avoided that unjustified recourse to this prerogative by the Prosecutor turns into abuse.⁶⁸

63. The addition of three distinct modes of liability at this stage will place a substantial burden on the Defence,⁶⁹ in that Mr Yekatom would thus be charged with no less than seven modes and sub-modes of liability. By way of comparison, in *Ruto & Sang*, Trial Chamber V(A) noted that a Prosecution application seeking recharacterization under Article 25(b), (c), and (d), constituted 'a broader invocation of Regulation 55 [...] when compared to the way the regulation has been applied in other cases to date'.⁷⁰

64. The burden of adding three further modes of liability in these proceedings would be considerably compounded by the inclusion of Article 28 liability.⁷¹ As set out above, command responsibility is conceptually and materially distinct from Article 25 modes of liability, and the elements of the former are not subsumed by the

Characterisation, [ICC-01/09-01/11-1122](#), 12 December 2013, ('Ruto R55 Decision') para. 39, fn. 59; see also, *Prosecutor v. Ongwen*, Trial Judgment, [ICC-02/04-01/15-1762-Red](#), 4 February 2021, para. 2791.

⁶⁷ Article 64(2).

⁶⁸ [ICC-01/14-01/18-517](#), para. 24 (in the context of amendment to the charges); see also, para. 30.

⁶⁹ See, where Pre-Trial Chamber II recalled that the practice of presenting the same facts under different legal characterisations was 'risking subjecting the Defence to the burden of responding to multiple charges for the same facts and at the same time delaying the proceedings', in the context of a discussion on the practice of cumulative charging, [Bemba Confirmation Decision](#), paras. 201-202.

⁷⁰ [Ruto R55 Decision](#), para. 40.

⁷¹ See, where Trial Chamber I found that Notice would not 'place any discernible additional burden on the Defence', in part 'because the possible re-characterisation is to a similar characterisation of individual criminal responsibility within the same sub-paragraph of Article 25(3) of the Statute' (*a contrario* Notice sought in the Application), in [Abd-Al-Rahman Decision](#), para. 24.

latter.⁷² Including Article 28 would therefore add another dimension to the proceedings, and by extension, would require supplementary defence investigations and strategies. To address these additional elements, wholly new issues of relevance, and their constitutive facts and circumstances, would require eliciting by both Parties during the Prosecution case, whether through witnesses or through documentary evidence; and consequently, any Defence case would also be enlarged, in scope and in length. The expeditiousness of these proceedings, which to date have been beset with repeated delays would also be detrimentally affected in this respect.⁷³

65. Given that Regulation 55 is a spectre that hangs over all trials before the Court, the Defence has been aware of the possibility that the charges in these proceedings be recharacterized. It does not follow from this, however, that issuance of the sought Notice would not impose a substantial prejudicial burden on the Defence. The issuance of Notice would change the landscape of the proceedings by crystalising this burden, especially where the recharacterization is as materially substantial as that sought in the Application. Indeed, the very reason for the notice provision in Regulation 55 is, theoretically, to allow an accused to react accordingly; the provision thus envisages a distinction between pre-notice and post-notice defence preparation. Further, as noted by PTC II, the ICTR Appeals Chamber has held in relation to amendment of charges, that 'the fact that the accused was already familiar with the circumstances of this new charge [...] was found as per se inadequate to neutralise the prejudice entailed in the fact of having the contours of the trial redesigned and to have to accordingly adjust and modify the defence strategy'.⁷⁴

66. Lastly, drastically broadening the scope of these proceedings in the manner requested in the Application would provide the Prosecution with greater latitude to impermissibly mould this case as the trial progresses. In granting the Application,

⁷² See *supra*, para. 28.

⁷³ See *supra*, fn. 70.

⁷⁴ [ICC-01/14-01/18-517](#), para. 29, citing ICTR, *Prosecutor v. Tharcisse Muvunyi*, [Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005](#), ICTR-2000-55A-AR73, 12 May 2005, para. 22.

the Chamber would thus run the risk that, by the time the Prosecution presentation of evidence has concluded, the narrative of its case will have transformed dramatically.⁷⁵

67. Given the length and complexity of the Prosecution case, the extent of this creeping transformation may only become clear in hindsight, by which time the prejudice caused to Mr Yekatom's interlinked right to defence preparation and right to notice – the crucial importance of which has been emphasised by the Appeals Chamber⁷⁶ – will likely be irreparable.

CONFIDENTIALITY

68. The Response and Annexes A-B is filed on a confidential corresponding to the classification of the Application. A public redacted version will be filed forthwith.

RELIEF SOUGHT

69. In light of the above, the Defence respectfully requests that Trial Chamber V:

FIND that recharacterization of the charges under Article 28(a) would exceed the 'facts and circumstances as described in the charges', and

DENY the Application.

RESPECTFULLY SUBMITTED ON THIS 25th DAY OF APRIL 2022



Me Mylène Dimitri

Lead Counsel for Mr. Yekatom

The Hague, the Netherlands

⁷⁵ [Dissenting Opinion of Judge Van den Wyngaert](#), para. 22, citing ICTY, *Prosecutor v. Kupreškić et al.*, [Appeals Judgment](#), IT-95-16-A, 23 October 2001, paras 93, 115-125.

⁷⁶ See, *Prosecutor v. Ongwen*, Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision', 17 July 2019, [ICC-02/04-01/15-1562](#), para. 69; see also, [ICC-01/14-01/18-585](#), para. 18, and references cited therein.