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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***

**Public
with Annex A**

**Public Redacted Version of “Yekatom Defence Response to Third
Prosecution Application for Regulation 55(2) Notice”, 21 August 2023, ICC-
01/14-01/18-2040-Conf**

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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INTRODUCTION

1. The Defence for Mr Alfred Rombhot Yekatom hereby responds to the 'Prosecution's Application for Notice to be given pursuant to Regulation 55(2) on Accused YEKATOM's Individual Criminal Responsibility' ('Third Application').¹
2. As the Chamber is aware, the Third Application constitutes the latest in a series of unwarranted and unsuccessful attempts, dating back to the pre-trial phase of these proceedings, by the Prosecution to add three further modes of liability to its case as charged and confirmed by Pre-Trial Chamber II ('PTC II').²
3. More pertinently, the Third Application substantially mirrors and repeats the Prosecution's Second Application,³ which was already rejected by the Trial Chamber on 24 June 2022.⁴ Whilst effectively demanding reconsideration of the Trial Chamber's Decision, the Prosecution fails to point to any development in the intervening period which would justify its submission of the Third Application at this stage.
4. As such, the Third Application is beset with the same fundamental flaws as its predecessors. The proposed re-characterisation under article 28(a) would exceed the facts and circumstances as described in PTC II's Decision confirming the charges ('Confirmation Decision').⁵ Further, the Prosecution has again failed to demonstrate why the issuance of notice of the proposed recharacterization is necessary or appropriate in light of the dual purpose of regulation 55. The Prosecution also fails to address the material prejudice that the sought notice

¹ ICC-01/14-01/18-1973-Conf.

² See, ICC-01/14-01/18-437; ICC-01/14-01/18-503-Conf; ICC-01/14-01/18-1345-Conf.

³ See Annex A.

⁴ ICC-01/14-01/18-1482.

⁵ ICC-01/14-01/18-403-Conf-Corr.

would occasion to defence preparations, and to Mr Yekatom's right to expeditious proceedings.

5. Given the substantive overlap between the Prosecution submissions in the Third Application and its predecessor regulation 55(2) notice applications, many of the Defence's previous arguments remain applicable to the former. As such, where cited in this response, the Defence respectfully refers the Chamber to these previous arguments, with the aim of supplementing the Defence's submissions in this response in a manner that promotes judicial economy and avoids undue repetition.

SUBMISSIONS

6. As a preliminary matter, the Defence again raises its concerns as to the manner in which the Prosecution has weaponised the regulation 55 procedure to make extensive one-sided and incomplete submissions on the evidence heard to date, thereby forcing the Defence to choose between prematurely revealing its case and arguments, and allowing the Prosecution's submissions to go unanswered and uncorrected.⁶ Submissions as to the (in)sufficiency of the evidence are best considered following the close of the Defence case,⁷ with due weight given to the manifest credibility issues affecting the reliability of witnesses such as P-2475 and P-1339,⁸ both of whom are heavily relied upon by the Prosecution in the Third Application.

A. Re-characterisation under article 28(a) would exceed the facts and circumstances confirmed by Pre-Trial Chamber II

7. As previously submitted,⁹ the Prosecution's proposed recharacterization under article 28(a) would exceed the facts and circumstances as described in the

⁶ See, previous Defence submissions in ICC-01/14-01/18-1378, paras 14-17.

⁷ In accordance with ICC-01/14-01/18-631, para. 53.

⁸ See e.g., ICC-01/14-01/18-1790-Conf-Exp, paras 46-56; and ICC-01/14-01/18-1785-Conf, paras 16-36, 43-44.

⁹ See, previous Defence submissions in ICC-01/14-01/18-1378, paras 20-49.

Confirmation Decision, and is therefore impermissible, pursuant to established case law.

8. Specifically, in the Confirmation Decision, PTC II declined to confirm facts and circumstances that could underpin the elements of i) a commander's duty to take 'all necessary and reasonable measures' to prevent or repress crimes, and ii) causality; both of which are material elements of the 'command responsibility' mode of liability.
9. In the Third Application, the Prosecution again fails to meaningfully address the 'necessary and reasonable measures' element, simply claiming that evidence that Mr Yekatom 'directed his elements in the commission of the charged crimes' satisfies this element; and citing to extracts from a single transcript, alleging that Mr Yekatom gave general instructions to kill Muslims indiscriminately.¹⁰
10. The Prosecution thus apparently seeks to maintain the untenable position –*inter alia* contrary to Mr Yekatom's statutory right to not have the burden of proof imposed upon him¹¹ – that facts and circumstances underpinning culpable omissions can simply be derived from those underpinning culpable positive acts.¹² Again, it is submitted that PTC II's finding that the Prosecution's allegations as to Mr Yekatom's liability under article 28(a) 'were not sufficiently supported by the evidence' strongly indicates the untenable nature of this position.¹³
11. Lastly, the Third Application, like its predecessors, is also entirely silent on the causality element; and the Prosecution thus fails to indicate the facts and

¹⁰ ICC-01/14-01/18-1973-Conf, para. 25, fn 62.

¹¹ Article 67(1)(i); see also, previous Defence submissions in ICC-01/14-01/18-1378, paras 42-43.

¹² See, previous Defence submissions in ICC-01/14-01/18-1378, paras 27-44.

¹³ See, previous Defence submissions in ICC-01/14-01/18-1378, paras 30-35.

circumstances that could ground recharacterisation under article 28(a) with respect to this element.¹⁴

B. The Sought Notice is unnecessary and inappropriate.

12. The Prosecution fails to demonstrate how the sought notice and proposed recharacterization would meet the dual purpose of regulation 55 – i.e. to ‘close accountability gaps’ and to promote judicial efficiency;¹⁵ nor has the Prosecution justified departing from the Confirmation Decision and the findings of PTC II.

i) The Prosecution has not established the existence of any ‘accountability gaps’ or demonstrated any risk of ‘technical acquittal’.

13. The Chamber has previously held:

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’.¹⁶

14. While claiming that the sought notice and proposed recharacterization would meet the purpose of addressing these ‘impunity gaps’,¹⁷ the Prosecution (again¹⁸) fails to explain where any such gaps might be found, or to demonstrate any risk of ‘technical acquittal’ that may have arisen.
15. Given that the Prosecution case has now all but concluded,¹⁹ the Prosecution would necessarily be in a position to demonstrate where, and in what manner, the legal qualifications confirmed by PTC II have ‘turn[ed] out to be incorrect’, and where any tangible risk of an impunity gap may lie. However, nowhere in

¹⁴ See, previous Defence submissions in ICC-01/14-01/18-1378, paras 45-49.

¹⁵ ICC-01/14-01/18-542, para. 10, fn 31, and jurisprudence cited therein; and *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.

¹⁶ ICC-01/14-01/18-542, para. 10.

¹⁷ ICC-01/14-01/18-1973-Conf, para. 3.

¹⁸ See, previous Defence submissions in ICC-01/14-01/18-1378, paras 50-60.

¹⁹ See, ICC-01/14-01/18-2016-Conf, paras 48, 63.

the Third Application does the Prosecution suggest that the evidence underpinning its case against Mr Yekatom as charged and confirmed has turned out differently than anticipated, so as to justify recourse to that provision.

16. The Prosecution thus continues to seek to have its cake and eat it too: on the one hand, it claims that notice of possible recharacterisation is necessary at this stage to close impunity gaps; while on the other, it omits to point the Chamber to any such gaps, thereby effectively implying that none exist, and that the Prosecution has succeeded in presenting the evidence underpinning its case as originally confirmed.
17. The incongruity inherent within this position is made apparent in the Prosecution's repurposing of elicited evidence that purportedly establishes the already-charged and confirmed modes of liability, to plead the proposed recharacterisation under articles 25(3)(c) and (d). In other words, the Prosecution simply cites i) evidence of the four alleged culpable 'essential contributions' of Mr Yekatom that underpin the currently charged article 25(3)(a) mode of liability;²⁰ and ii) evidence underpinning its allegations as to Mr Yekatom's role within the group, and to his power to issue orders, discipline subordinates, and control the group's finances.²¹
18. Having failed to establish that the proposed recharacterization would meet its aims, the Prosecution simply attempts to move the goalposts by subtly reworking the phrasing of the applicable jurisprudential framework, suggesting that the principle purpose of regulation 55 is 'to close any potential

²⁰ ICC-01/14-01/18-1973-Conf, para. 29-36. These allegations are relied on within the Prosecution's Pre-Trial Brief to argue Mr Yekatom's liability under article 25(3)(a) and (b) as confirmed; see, ICC-01/14-01/18-723-Conf paras 355-378.

²¹ ICC-01/14-01/18-1973-Conf, para. 37, fn. 99 citing paras 13-23; these allegations are relied on within the Prosecution's Pre-Trial Brief to argue Mr Yekatom's liability under article 25(3)(a) and (b) as confirmed; see, ICC-01/14-01/18-723-Conf, paras 367, 373 (on Mr Yekatom's alleged role within the group); paras 373-376 (on his alleged power to issue orders); para. 376 (on his alleged disciplinary power); and paras 357, 361, 368 (on his alleged control of the group's finances).

accountability gaps that might arise as a result of legal qualifications adopted before the trial but which may turn out to be incorrect or incomplete, relative to the evidence ultimately presented.’²² In other words, the Prosecution misrepresents the recharacterization framework by couching it in the language of hypothetical and potentiality, with the aim of relieving itself of the burden of demonstrating actual accountability gaps or actual risk of technical acquittal; and by extension, the burden of establishing the necessity of the proposed recharacterization.

19. In the same vein, the Prosecution attempts to amend the framework by suggesting that the regulation 55 procedure should be triggered not only where legal qualifications ‘turn out to be incorrect’ (as set out in the jurisprudence); but where they ‘turn out to be incorrect or incomplete’.²³ The Prosecution offers no support for this additional alternative sub-limb; nor can any meaningful support be found in the Court’s jurisprudence.²⁴
20. This transparent attempt to lower the threshold for triggering regulation 55 should be rejected. As stated in the Chambers’ Practice Manual, recharacterization is deemed ‘an exceptional instrument which, as such, should be used only sparingly if absolutely warranted’.²⁵ It therefore follows that the recharacterization test and its principal purpose, as articulated in the Court’s jurisprudence, require that purported accountability gaps (and any

²² ICC-01/14-01/18-1973-Conf, para. 7.

²³ Ibid.

²⁴ The Defence notes that in *Abd-Al-Rahman*, Trial Chamber I rejected the defence’s suggestion that recharacterization is permissible ‘only if the original legal characterisation is not sustained’; however, that decision can be materially distinguishable given that i) Trial Chamber I expressly found that ‘the purpose of closing accountability gaps would be served’; and ii) the proposed recharacterisation was limited to the addition of a sub-limb within a single mode of liability, i.e. still within article 25(3)(b), and characterised as ‘a change from a general to a more specific legal characterisation’; see *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](https://www.icc-cpi.int/sites/default/files/2023-07/230707-chambers-manual-eng.pdf), 18 March 2022, paras 4, 12; see also, *infra*, para. 26 and fn. 31.

²⁵ See, ICC Chambers Practice Manual, 7th ed., <https://www.icc-cpi.int/sites/default/files/2023-07/230707-chambers-manual-eng.pdf>.

concomitant risk of ‘technical acquittal’) be sufficiently tangible, so as to justify recourse to this provision.

21. The Prosecution’s unilateral attempt to amend the recharacterisation legal framework is in fact doubly telling. First, it evidences the Prosecution’s failure to establish the necessity or appropriateness of triggering regulation 55 in the circumstances. Second, it reveals that the Prosecution misconceives the regulation 55 procedure: namely, as a provision to be strategically employed with the aim of maximising the chances of a conviction – in this case, by charging Mr Yekatom with every mode and sub-mode of liability available under the Statute bar one – to which the Prosecution is entitled, regardless of whether it has established that the recharacterisation would serve its purpose.
22. The Prosecution’s attempt to modify the regulation 55 threshold thus also improperly interferes with the discretion of the Chamber. In this regard, the Third Application constitutes a continuation of the strategy adopted in the Prosecution’s Second Application, in which it made the untenable claim that the Chamber was obliged to give regulation 55(2) notice ‘where a reasonable chamber [...] could conclude that a different legal characterisation of the [confirmed facts] is possible’.²⁶
23. On the contrary, it is clear from the Court’s jurisprudence that the regulation 55(2) procedure remains the prerogative of the Chamber.
24. First, the Defence recalls that in both previous Decisions denying the Prosecution’s regulation 55(2) applications in these proceedings, the Chamber held that regulation 55(2) remains at its discretion.²⁷

²⁶ ICC-01/14-01/18-1345-Conf, para. 9; see also, previous Defence submissions in ICC-01/14-01/18-1378, para. 59.

²⁷ See, ICC-01/14-01/18-542, para. 16; and ICC-01/14-01/18-1482, para. 8.

25. In *Bemba et al*, Trial Chamber VII held that it was ‘not required to accept every Prosecution submission that a recharacterisation can be derived from the facts and circumstances described in the charges’ (as expressly cited by PTC II in these proceedings).²⁸
26. In the same vein, Trial Chamber X in *Al Hassan* twice declined to provide notice under regulation 55(2), 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[.]’²⁹ Trial Chamber X’s findings in this regard thus demonstrate that i) in the absence of a demonstrable ‘accountability gap’, recharacterisation based only on a purported ‘incompleteness’ in the confirmed characterisation of charges is inappropriate;³⁰ and ii) the Chamber is empowered to deny the Third Application on the basis of the Prosecution’s failure to indicate any purported ‘accountability gap’ that the proposed recharacterisation would serve to address.
- ii) *The Prosecution has not demonstrated that the sought notice and proposed recharacterization would promote judicial efficiency.*
27. It is self-evident that, far from streamlining the proceedings, the addition of three further modes of liability – including the *sui generis* mode of liability under article 28(a), and the concomitant additional narrative of facts against which Mr

²⁸ *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; ICC-01/14-01/18-447, para. 23.

²⁹ *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, 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.s

³⁰ It is submitted that Trial Chamber’s X findings in this regard support the Defence’s argument as to the distinguishable nature of Trial Chamber I’s Decision in *Abd-Al-Rahmnan*; see, *supra*, fn 24.

Yekatom would be obliged to mount a defence – would only further bloat the Prosecution case being brought against him.³¹ In the circumstance therefore, the Sought Notice would in fact run contrary to purpose.

28. The Prosecution's claim that '[t]he Statute foresees that the Chamber's prospective article 74 judgment should reflect to the full extent the Accused's level of participation in, and responsibility for, the charged crimes' is a similarly unavailing argument in light of the purpose of regulation 55. Given that Mr Yekatom is currently charged as a principal perpetrator, who was allegedly directly present and directly perpetrating the charged crimes, it is unclear as to how supplementing the Prosecution case with three additional accessorial (and therefore more remote) modes of liability would be necessary to meet this aim.
29. For the same reasons, it is unclear how the CLR's support for the Third Application can be reconciled with the victims' expressed wish for 'justice to be done in the most effective way and without undue delay'.³²

iii) The Prosecution has failed to justify departing from the findings of PTC II in the Confirmation Decision.

30. The Prosecution's failure to demonstrate how the sought notice and proposed recharacterization would serve the purpose of regulation 55 dovetails with its failure to justify departing from the findings of PTC II, themselves entitled to a degree of deference.
31. 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'.³³ In overseeing this stage, the Pre-Trial Chamber is accorded the role of 'gatekeeper', tasked with 'defin[ing] the parameters of the subject matter

³¹ See, previous Defence submissions in ICC-01/14-01/18-1378, paras 7, 63-67.

³² ICC-01/14-01/18-1992-Conf, para. 29.

³³ *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.

of that trial’,³⁴ and ensuring that ‘only those cases proceed to trial for which the Prosecutor has presented sufficiently compelling evidence going beyond mere theory or suspicion.’³⁵

32. The Defence also recalls that, in denying the Prosecution’s first regulation 55 application, filed prior to the commencement of trial proceedings, the Chamber expressly deferred to the findings of PTC II, noting ‘the distinct powers afforded to determine the factual scope of the charges’.³⁶
33. As previously submitted, in line with due deference to the role and function of PTC II, the sought notice should only be given if it is abundantly clear to the Chamber that doing so is warranted in light of the trial record and the dual purpose of regulation 55, and that it would not exceed the facts and circumstances as described in the charges.³⁷
34. As the Chamber is aware, PTC II declined to confirm charges brought under articles 28(a), 25(3)(c), and 25(3)(d) *inter alia* on the basis that the proposed charges ‘were not sufficiently supported by the evidence’.³⁸
35. In the Third Application, the Prosecution claims that the evidence ‘available before the Chamber differs substantially – both qualitatively and quantitatively – from that considered by’ PTC II.³⁹ However, while the Prosecution cites (for the most part) evidence that was heard since the Second Application was denied by the Chamber, critically, the Prosecution fails to indicate how this ‘new’ evidence fills the evidentiary lacunae underpinning PTC II’s decision not to confirm modes of liability under articles 28(a), 25(3)(c), and 25(3)(d).

³⁴ *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, para. 92.

³⁵ ICC-01/14-01/18-517, para. 23.

³⁶ ICC-01/14-01/18-542, para. 15.

³⁷ See, previous Defence submissions in ICC-01/14-01/18-1378, paras 6-10.

³⁸ ICC-01/14-01/18-447, paras 19-20.

³⁹ ICC-01/14-01/18-1973-Conf, para. 7.

36. In this respect, the deficiency of the Prosecution's pleadings is readily apparent throughout the Third Application. For instance: the Prosecution's failure to cite any confirmed facts and circumstances, let alone evidence, in pleading the subjective elements of articles 25(3)(c) and (d), instead merely copy-and-pasting these legal elements along with the general claim that they are shown by 'the evidence on the record'.⁴⁰ Likewise, as noted above, the Prosecution's reliance solely on [REDACTED], to argue the 'necessary and reasonable measures' element of article 28(a).⁴¹ In the same vein, in support of its one-sentence submission as to the evidence that purportedly establishes that the charged crimes were committed by a group of persons acting with a common purpose, the Prosecution simply cites to evidence of Mr Yekatom's alleged role within the group, and to his alleged power to issue orders, discipline subordinates, and control the group's finances – without actually explaining how they could support this distinct element in respect of each charged crime.⁴²
37. The Prosecution's superficial approach to pleading is misguided, not least given that articles 25(3)(c) and (d) modes of liability are not 'lesser included' modes under article 25(3)(a),⁴³ and that the elements of Article 28 are not subsumed in Article 25;⁴⁴ and again, sheds light on PTC II's decision not to confirm these modes of liability.⁴⁵
38. The Prosecution therefore asks the Chamber to disregard PTC II's findings, including its findings as to the evidentiary lacunae in the Prosecution's confirmation pleadings, while failing to demonstrate how those findings are incorrect, or otherwise no longer worthy of due deference at this stage. While the Defence does not necessarily suggest the latter is a precondition of

⁴⁰ ICC-01/14-01/18-1973-Conf, para. 38.

⁴¹ ICC-01/14-01/18-1973-Conf, para. 25.

⁴² ICC-01/14-01/18-1973-Conf, para. 37, fn. 99, citing paras 13-23.

⁴³ Dissenting Opinion of Judge Van den Wyngaert, para. 43.

⁴⁴ ICC-01/14-01/18-503-Conf, para. 11; ICC-01/14-01/18-437, para. 8.

⁴⁵ See, previous Defence submissions in ICC-01/14-01/18-1378, paras 30-35.

triggering regulation 55, it is submitted that the Prosecution's failure to do so in the circumstances is at the very least an additional factor that militates against granting the Third Application.⁴⁶ In this regard, the Prosecution's insistence that the sought notice and proposed recharacterization would 'not amount to a reconsideration or circumvention of the confirmation decision' is somewhat beside the point.⁴⁷

39. The deficiency of the Prosecution's pleadings are especially problematic in light of the fact that, in accordance with the Court's jurisprudence, the facts and circumstances that would support any proposed recharacterization must be 'exhaustively defined', to ensure due respect of an accused's right to notice and effective defence preparation.⁴⁸ As the moving party, the Prosecution thus bears the duty to demonstrate, in concrete detail, how the evidentiary record and confirmed facts and circumstances – i.e. its own case as presented – are to be combined to form the legal elements of the modes of liability under articles 28(a), and 25(3)(c) and (d). The Prosecution's superficial efforts in this regard thus amount to an impermissible attempt to shift this burden on to the Chamber and display a disregard for the impact of the sought notice and proposed recharacterization on Mr Yekatom's fair trial rights.
40. A line can thus be drawn from the deficiency of the Prosecution's pleadings in the Third Application, to that of the Second Application, in which the Prosecution sought regulation 55(2) notice on the basis of allegations and evidence that had been relied upon by PTC II if not entirely, then predominantly, at the confirmation stage.⁴⁹

⁴⁶ See *supra*, paras 30-33.

⁴⁷ ICC-01/14-01/18-1973-Conf, para. 7.

⁴⁸ See, ICC-01/14-01/18-1378, para. 26 and references cited therein.

⁴⁹ As the Chamber will recall, the evidence relied upon by the Prosecution in the Second Application was addressed by the Defence in tables annexed to the Defence's response to Second Application; see, ICC-01/14-01/18-1378, Annexes A and B.

41. The Third Application simply provides more of the same: while it relies on ‘new’ evidence, the facts and circumstances that this ‘new’ evidence purportedly underpins were argued in the Prosecution’s charging documents and were considered by PTC II; and no meaningful effort is made to indicate how this ‘new’ evidence could address the evidentiary lacunae, and/or otherwise justify departure from PTCS’s findings as to the confirmed (an unconfirmed) legal characterisations. Moreover, the alleged facts and circumstances upon which the Prosecution’s proposed recharacterization would be based are for the most part mere repetition of those cited in the Second Application, which was denied by the Chamber.⁵⁰ In this regard, the Defence respectfully refers the Chamber to its allegation-specific submissions as set out in the Annex to this response.

C. The sought notice would unduly prejudice the Defence.

42. The Prosecution claim that the sought notice would ‘not occasion any prejudice’ to Mr Yekatom is without merit.⁵¹
43. Contrary to the Prosecution position, the Defence’s ability to call (and/or recall) witnesses or present evidence does not sufficiently mitigate the prejudice that issuance of the sought notice at this stage would occasion.⁵²
44. As held by PTC II, any change or amendment to the Prosecution case as confirmed has ‘by its nature a disruptive effect on [an accused’s defence preparation]’ and hence on the fundamental rights of the accused’.⁵³
45. In the circumstances, this disruptive effect is exacerbated by the exceptional scope of the Third Application, which seeks the addition of three distinct modes of liability, including the conceptually and materially *sui generis* mode of

⁵⁰ ICC-01/14-01/18-1482.

⁵¹ ICC-01/14-01/18-1973-Conf, para. 8.

⁵² *Contra* ICC-01/14-01/18-1973-Conf, para. 4.

⁵³ ICC-01/14-01/18-517, para. 24 (in the context of amendment to the charges); see also, para. 30.

command responsibility, which would bring the total of charged modes and sub-modes to no less than seven.⁵⁴ As the Defence has previously argued, regulation 55(2) notice under Article 28 especially would add another distinct dimension to the Prosecution case, and would thus necessitate the adoption of further countervailing defence investigations and strategies.⁵⁵

46. The sought notice would thus not only constitute a material burden on Mr Yekatom's defence preparations, but would also detrimentally affect the expeditiousness of these proceedings. This is especially so in light of the above-noted deficiency of the Prosecution submissions which, given their lack of clarity and detail, cannot be reasonably considered to provide sufficient notice of the proposed recharacterised case against which Mr Yekatom must defend.
47. The prejudice that this additional burden would occasion is compounded by the timing of the Third Application, which comes as the Defence is currently in the midst of preparation for the impending LRV presentation of evidence; as well as the forthcoming Defence case and associated prior deadlines. Issuance of the sought notice would thus divert already strained Defence time and resources to the adjustment and modification of defence strategy that would be necessitated by the redesigning of the contours of the Prosecution case.⁵⁶
48. As such, the Prosecution claim that the 'time is ripe' to issue regulation 55(2) notice is misguided; likewise, its attempt to downplay the prejudicial impact of said notice by distinguishing it from 'actual legal re-characterisation'.⁵⁷
49. On the contrary, in the circumstances, issuance of the sought notice would fall foul of the safeguards enshrined within regulation 55(3), as well as Mr Yekatom's right to expeditious proceedings.

⁵⁴ See, previous Defence submissions in ICC-01/14-01/18-1378, paras 61-67.

⁵⁵ See, previous Defence submissions in ICC-01/14-01/18-1378, paras 64.

⁵⁶ See, previous Defence submissions in ICC-01/14-01/18-1378, para. 65, especially fn. 74 and jurisprudence cited therein.

⁵⁷ ICC-01/14-01/18-1973-Conf, paras 4, 7.

CONCLUSION

50. As set out above, regulation 55 has a well-defined and specific dual purpose; it has established pre-conditions that must be respected; and, perhaps most importantly, it has consequences, in that the recharacterization procedure carries with it the real potential for grave prejudice to an accused's fair trial rights.
51. The Prosecution appears to conceive of the Chamber's recharacterization powers as a sort of safety net, or a reserve parachute, which it is entitled to have deployed at will and at its request. This is misguided. On the contrary, there remains a clear burden on the Prosecution to address the purpose, pre-conditions and consequences of the recharacterization procedure that it seeks to have triggered. This burden remains unmet in the Third Application, as it did in its predecessor applications; and as a result, the Third Application should be denied.

CONFIDENTIALITY

52. This response is filed on a confidential basis corresponding to the classification of the Third Application. The Defence would not oppose its reclassification as public.

RELIEF SOUGHT

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

DENY the Third Application.

RESPECTFULLY SUBMITTED ON THIS 29TH DAY OF JANUARY 2024⁵⁸

⁵⁸ The Defence is grateful for Alexia Legault for her assistance with this response.

A handwritten signature in blue ink, appearing to read 'Mylène Dimitri'.

Me Mylène Dimitri
Lead Counsel for Mr. Yekatom

The Hague, the Netherlands