

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **14 May 2020**

**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**

**Yekatom Defence Response to Prosecution's Regulation 55 Application**

**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**

Ms. Fatou Bensouda

Mr. James Stewart

Mr. Kweku Vanderpuye

**Counsel for Mr. Yekatom**

Me Mylène Dimitri

Mr. Peter Robinson

**Counsel for Mr. Ngaïssona**

Me Geert-Jan Alexander Knoops

**Legal Representatives of Victims**

Mr. Dmytro Suprun

Mr. Abdou Dangabo Moussa

Ms. Elisabeth Rabesandratana

Mr. Yaré Fall

Ms. Marie-Edith Douzima-Lawson

Ms. Paolina Massidda

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation / Reparation)**

**The Office of Public Counsel for  
Victims**

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

Me Xavier-Jean Keïta

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr. Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

Mr. Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

1. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence” and “Mr. Yekatom” respectively) respectfully oppose the *Prosecution’s Application for Notice to be Given pursuant to Regulation 55(2) on Accused Yekatom’s Individual Criminal Responsibility*.<sup>1</sup> The application is a *de facto* appeal of the Pre-Trial Chamber’s adverse decision. The Prosecution has not shown the need for the Trial Chamber to resort to Regulation 55 at this time.

### **PROCEDURAL HISTORY**

2. On 11 November 2018, the Pre-Trial Chamber issued a warrant of arrest against Mr. Yekatom.<sup>2</sup> Mr. Yekatom made his initial appearance before this court on 23 November 2018.<sup>3</sup>
3. On 19 August 2019, the Prosecution filed its Document Containing the Charges. It sought confirmation of the charges against Mr. Yekatom under all possible modes of liability.<sup>4</sup>
4. The Pre-Trial Chamber held the confirmation hearing between 19 September and 11 October 2019. On 11 December 2019, the Pre-Trial Chamber issued its decision on the confirmation of charges.<sup>5</sup>
5. The Pre-Trial Chamber declined to confirm the command responsibility mode of liability set forth in Article 28 on the grounds that:

[T]he 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 only consisting in the mere failure to prevent or repress crimes committed by other persons.<sup>6</sup>

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<sup>1</sup> [ICC-01/14-01/18-503-Red.](#)

<sup>2</sup> [ICC-01/14-01/18-1-Red.](#)

<sup>3</sup> [ICC-01/14-01/18-T-1.](#)

<sup>4</sup> [ICC-01/14-01/18-282-AnxB1-Red.](#), para. 185.

<sup>5</sup> [ICC-01/14-01/18-403-Red.](#)

<sup>6</sup> *Id.*, para. 58.

6. The Pre-Trial Chamber also declined to confirm aiding and abetting (Article 25(3)(c)) and common purpose (Article 25(3)(d)) as modes of liability. Having found that:

[Mr.] Yekatom committed the aforementioned crimes jointly with others or through other persons under article 25(3)(a) of the Statute or, in the alternative, ordered the commission of these crimes pursuant to article 25(3)(b) of the Statute. [...] [T]he Chamber deems it unnecessary to address Yekatom's alleged individual criminal responsibility under article 25(3)(c) or (d) of the Statute.<sup>7</sup>

7. On 2 March 2020, the Prosecution sought reconsideration or leave to appeal this aspect of the confirmation decision.<sup>8</sup> The Pre-Trial Chamber rejected its request on 11 March 2020.<sup>9</sup>

8. In its decision, the Pre-Trial Chamber held that:

At no point did the Chamber indicate that it had not assessed the evidence relating to the article 28 charges. Rather, it stated that, having carefully analysed the totality of the evidence, it found that the charges for this mode of liability were not supported to the relevant evidentiary threshold.<sup>10</sup> [...]

Contrary to the submission of the Prosecutor, the Chamber did not '[refrain] from assessing Yekatom's criminal liability under article 25(3)(c) and (d)'; the extent of the Chamber's reasoning and of the material referenced in the footnotes demonstrate that, after giving substantive consideration to all of the modes of liability, it found that some of them were not sufficiently supported by the evidence.<sup>11</sup>

9. On 16 March 2020, the Presidency constituted Trial Chamber V to hear Messrs Yekatom and Ngaïssona's joint case.<sup>12</sup>

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<sup>7</sup> *Id.*, paras. 98-100.

<sup>8</sup> [ICC-01/14-01/18-437](#).

<sup>9</sup> [ICC-01/14-01/18-447](#).

<sup>10</sup> *Id.*, para. 19.

<sup>11</sup> *Id.*, para. 20.

<sup>12</sup> [ICC-01/14-01/18-451](#).

10. On 30 April 2020, the Prosecution filed its Regulation 55 application, seeking to restore the modes of liability that the Pre-Trial Chamber had rejected twice.<sup>13</sup>

### **RELEVANT PROVISION**

11. Regulation 55 provides:

1. In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.
2. If, at any time during the trial, it appears to the Chamber that the legal characterization of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.
3. For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure that the accused shall:
  - (a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1(b); and
  - (b) If necessary, be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1(e).

### **ARGUMENT**

12. If the Prosecution application is granted, this would be the first case in the history of the Court in which a Trial Chamber, prior to the commencement of the trial, re-instated modes of liability specifically found by a Pre-Trial

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<sup>13</sup> [ICC-01/14-01/18-503-Red.](#)

Chamber to have been unsupported by the evidence. The application amounts to using Regulation 55 as a *de facto* appeal of a decision it disagrees with.

13. A similar situation occurred in the *Bemba et al* case. There, the Trial Chamber denied the Prosecutor's motion, filed before the commencement of the trial, to recharacterize the charges to add modes of liability that had been rejected by the Pre-Trial Chamber. The Chamber found that granting the request before the commencement of trial and in the absence of any specific justification would call into question the findings of the Pre-Trial Chamber and provide the Prosecution with an opportunity to *de facto* appeal of the decision on the confirmation of the charges.<sup>14</sup>
14. The Trial Chamber held that Regulation 55 should not be a mechanism whereby the Prosecution immediately seeks to start a procedure which aims at modifying the legal characterisation of the confirmed charges and reintroduces modes of liability that were just rejected by the Pre-Trial Chamber. The Trial Chamber went on to note that the Prosecution did not provide any exceptional circumstances or any other reasons that justified providing notice prior to the commencement of the trial.<sup>15</sup>
15. This is the same situation as in Mr. Yekatom's case. In its reconsideration decision, the Pre-Trial Chamber expressly rejected the modes of liability that are now the subject of the Prosecution's application and affirmed that it did so because it did not find that the evidence supported those modes of liability.<sup>16</sup> Reinstating these modes of liability before the commencement of the trial would be an outright reversal of those findings.

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<sup>14</sup> *Prosecutor v. Bemba et al*, [Decision on Prosecution Application to Provide Notice Pursuant to Regulation 55](#), 15 September 2015, ICC-01/05-01/13-1250, para. 10.

<sup>15</sup> *Id.*, para. 11.

<sup>16</sup> [ICC-01/14-01/18-447](#), paras. 19-20.

16. The Prosecution has made no effort to show that any exceptional circumstances of this case justify providing the Regulation 55 notice before the trial has even begun.
17. An examination of the other occasions in which Regulation 55 has been used at this Court demonstrates the inappropriateness of doing so in this case.
18. In the *Lubanga* case, the Trial Chamber declined to use Regulation 55 to add crimes of sexual offenses where they were not within the facts and circumstances found in the confirmation of charges decision.<sup>17</sup>
19. In the *Katanga* case, the Trial Chamber invoked Regulation 55 only when it found it necessary during its deliberations, and on an issue upon which a contrary factual finding had not been made by the Pre-Trial Chamber.<sup>18</sup>
20. In the *Bemba* case, the Trial Chamber invoked Regulation 55 only when it found it necessary after hearing evidence, and upon an issue that had not been addressed by the Pre-Trial Chamber.<sup>19</sup>
21. In the *Ruto and Sang* case, the Trial Chamber invoked Regulation 55 before the trial, but on modes of liability that the Pre-Trial Chamber had declined to consider, rather than had rejected on the basis of its review of the evidence.<sup>20</sup>
22. Finally, in the *Gbagbo and Blé Goudé* case, the Trial Chamber added command responsibility as a mode of liability under Regulation 55 before the trial, but did so only where the Pre-Trial Chamber had not refused to confirm that

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<sup>17</sup> *Prosecutor v. Lubanga*, [Decision on the Legal Representatives' Joint Submissions concerning the Appeals Chamber Decision on 8 December 2009 on Regulation 55 of the Regulations of the Court](#), 8 January 2010, ICC-01/04-01/06-2223, paras. 33-35.

<sup>18</sup> *Prosecutor v. Katanga*, [Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against the Accused Persons](#), 21 November 2012, ICC-01/04-01/07-3319, para. 13.

<sup>19</sup> *Prosecutor v. Bemba*, [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](#), 21 September 2012, ICC-01/05-01/08-2324, para. 1.

<sup>20</sup> *Prosecutor v. Ruto and Sang*, [Decision on Applications for Notice of Possibility of Variation of Legal Characterisation](#), 12 December 2013, ICC-01/09-01/11-1122, para. 40.

mode of liability for lack of evidence, but because it believed that the evidence showed the accused was the perpetrator of those crimes.<sup>21</sup> The Appeals Chamber affirmed that the manner in which the Pre-Trial Chamber declined to confirm the command responsibility mode of liability due to a different understanding of the narrative of the facts and not due to a rejection of the facts themselves, was a relevant factor to the Trial Chamber's decision to issue its notice.<sup>22</sup>

23. Where, as here, the Pre-Trial Chamber had expressly found the proposed modes of liability not supported by the evidence at the confirmation hearing,<sup>23</sup> there is no precedent for invoking Regulation 55 at this stage.
24. The Defence understands that the timing of the motion is intended to provide it with the earliest possible notice. However, providing what may prove to be a wholly unnecessary notice would be more burdensome than beneficial. If the Chamber provided notice of the additional modes of liability at this stage, the 20 counts would have to be defended based on five modes of liability each instead of two, with the concomitant need to research and brief those additional modes of liability and cross-examine and call witnesses to ensure that those potential modes of liability can be refuted in the event that the Chamber were to decide to consider them.
25. Absent a showing of why this is necessary, giving a Regulation 55 notice at this stage would be counterproductive to the fair and expeditious conduct of the trial.<sup>24</sup>

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<sup>21</sup> *Prosecutor v. Gbagbo & Blé Goudé*, [Decision Giving Notice pursuant to Regulation 55\(2\) of the Regulations of the Court](#), 19 August 2015, ICC-02/11-01/15-185, para. 12.

<sup>22</sup> *Prosecutor v. Gbagbo & Blé Goudé*, [Judgement on the Appeal of Mr. Laurent Gbagbo against the Decision of Trial Chamber I entitled "Decision Giving Notice pursuant to Regulation 55 of the Regulations of the Court"](#), 18 December 2015, ICC-02/11-01/15-369, para. 71.

<sup>23</sup> [ICC-01/14-01/18-447](#), paras. 19-20.

<sup>24</sup> Indeed, in the three cases in which Regulation 55 notice was given prior to deliberation (*Bemba*, *Ruto and Sang*, *Gbagbo and Blé Goudé*), Regulation 55 was never ultimately invoked in a final judgment.

26. Judge Kaul has explained that Regulation 55 was “deemed essential to avoid lengthy indictments with cumulative and alternative charges.”<sup>25</sup> Carsten Stahn has written that Regulation 55 was introduced in order to avoid the practice of cumulative charging which had been employed at the *ad hoc* Tribunals.<sup>26</sup> The Prosecution’s shotgun approach of invoking Regulation 55 to require Mr. Yekatom to defend against every possible mode of liability for every count also runs counter to the very purpose for which Regulation 55 was adopted.

## **CONCLUSION**

27. The Prosecution’s application for a notice pursuant to Regulation 55 should be rejected at this time.

**RESPECTFULLY SUBMITTED ON THIS 14th DAY OF MAY 2020**



Me Mylène Dimitri  
Lead Counsel for Mr. Yekatom



Peter Robinson  
Associate Counsel for Mr. Yekatom

The Hague, the Netherlands

<sup>25</sup> Hans-Peter Kaul, “[Construction Site for More Justice: The International Criminal Court after Two Years](#)”, in The American Journal of International Law, Vol. 99, No.2 (2005), p.377.

<sup>26</sup> Carsten Stahn, “[Modification of the Legal Characterization of Facts in the ICC System; A Portrayal of Regulation 55](#)” in Criminal Law Forum, Vol. 16 (2005), p. 3.