

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/14-01/18
Date: 14 December 2020

THE APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

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

Public

**Common Legal Representatives' Joint Response to
Mr Yekatom's Request for Leave to Reply (ICC-01/14-01/18-763)**

Source: Common Legal Representatives of Victims

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

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I. INTRODUCTION

1. The Common Legal Representative of the Former Child Soldiers and the Common Legal Representatives of the Victims of Other Crimes (jointly the “Common Legal Representatives” or the “CLRV”) hereby file their joint response to the “Request for leave to reply to ‘Common Legal Representatives’ Joint Response to the ‘Yekatom Defence appeal Brief – Notice of Co-Perpetration’ (ICC-01/14-01/18-742)’, (ICC-01/14-01/18-754) and ‘Prosecution Response Prosecution Response to ‘Yekatom Defence Appeal Brief – Notice of Co-Perpetration’ and request for an expedited decision’, (ICC-01/14-01/18-756)” (the “Defence Request” or the “Request”).¹

2. With regards to the first and third issues identified in the Request, the Common Legal Representatives submit that the Defence does not raise any new issues which could not have been reasonably anticipated. Indeed, the Defence knew months in advance that the Prosecution was ordered to file a Trial Brief on 9 November 2020 and the Court’s jurisprudence clearly indicates that trial briefs may serve as notice and may be taken into account when assessing whether the Accused has been sufficiently informed of the charges brought against him. The Defence was also aware of the CLRV’s argument that it should have sought leave to appeal the Decision Confirming the Charges, as raised in previous submissions.

3. The CLRV further submit that, by making substantive submissions in its Request, the Defence has not strictly complied with regulation 24(5) of the Regulations of the Court (the “Regulations”). Finally, the CLRV contend that, while falling short of demonstrating that the relevant legal criteria have been met, the Defence has also not shown why a reply to the issues identified in its Request is otherwise necessary for the adjudication of the appeal.

¹ See the “Request for leave to reply to ‘Common Legal Representatives’ Joint Response to the ‘Yekatom Defence appeal Brief – Notice of Co-Perpetration’ (ICC-01/14-01/18-742)’, (ICC-01/14-01/18-754) and ‘Prosecution Response Prosecution Response to ‘Yekatom Defence Appeal Brief – Notice of Co-Perpetration’ and request for an expedited decision’, (ICC-01/14-01/18-756)”, [No. ICC-01/14-01/18-763](#), 10 December 2020 (the “Defence Request”).

II. PROCEDURAL BACKGROUND

4. On 29 October 2020, Trial Chamber V (the “Trial Chamber”) issued its “Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial”.²
5. On 9 November 2020, the Prosecution filed its “[...] Trial Brief” (the “Prosecution’s Trial Brief”).³
6. On 26 November 2020, the Defence filed its “[...] Appeal Brief – Notice of Co-Perpetration” (the “Appeal Brief”).⁴
7. On 7 December 2020, the Prosecution⁵ and the CLRV⁶ responded to the Appeal Brief (the “Prosecution’s Response” and the “CLRV’s Response” respectively).
8. On 10 December 2020, the Defence filed its Request.⁷

III. SUBMISSIONS

1. Applicable law

9. Regulation 24(5) of the Regulations stipulates that:

“Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations. Unless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated”.

² See the “Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial” (Trial Chamber V), [No. ICC-01/14-01/18-703-Conf](#), 29 October 2020 (the “Impugned Decision”). A public redacted version was issued on 30 October 2020 as [No. ICC-01/14-01/18-703-Red](#).

³ See the “Prosecution’s Trial Brief”, [No. ICC-01/14-01/18-723-Conf](#), 9 November 2020.

⁴ See the “Yekatom Defence Appeal Brief – Notice of Co-Perpetration”, [No. ICC-01/14-01/18-742](#), 26 November 2020.

⁵ See the “Prosecution Response to ‘Yekatom Defence Appeal Brief – Notice of Co-Perpetration’ and request for an expedited decision”, [No. ICC-01/14-01/18-756](#), 7 December 2020.

⁶ See the “Common Legal Representatives’ Joint Response to the ‘Yekatom Defence Appeal Brief – Notice of Co-Perpetration’, (ICC-01/14-01/18-742)”, [No. ICC-01/14-01/18-754](#), 7 December 2020.

⁷ See the Defence Request, *supra* note 1.

10. Regulation 34(c) of the Regulations reads as follows:

“A request for leave to reply shall be filed within three days of notification in accordance with regulation 31 of the response. The participants may respond to the request for leave to reply within two days. A Chamber may grant the request to file a reply within such time as it may specify in its order”.

2. The Defence Request does not meet the relevant legal criteria and should be dismissed

11. The Defence seeks to reply to the following issues:

“a. the Prosecution Trial Brief provides curing notice of the constituent elements of Article 25(3)(a);

b. the Appeals Chamber should create a self-contained Document Containing the Charges (“DCC”) or amend the Decision on the Confirmation of Charges against Alfred Yekatom and Patrice-Edouard Ngaïssona (“Confirmation Decision”);

c. the Defence should have sought leave to appeal the Confirmation Decision.”⁸

12. The Common Legal Representatives will only address the first and the third issues as they did not raise the second issue in their Response. The CLRV submit that the Defence Request should be rejected because it does not meet the relevant legal criteria, and in particular it has not identified new issues raised in the responses which the Defence could not have reasonably anticipated.

13. With regards to the first issue, the Common Legal Representatives argue that the Defence knew that the Prosecution was due to file a Trial Brief by 9 November 2020, in accordance with the Trial Chamber’s order of 16 July 2020.⁹ Because the Defence knew five months ago that the Prosecution would file a Trial Brief and should be aware of the Court’s jurisprudence clearly indicating that said briefs may serve as notice¹⁰ and may be taken into account when assessing whether

⁸ *Idem*, para. 1.

⁹ See the “Decision Setting the Commencement Date of the Trial” (Trial Chamber V), [No. ICC-01/14-01/18-589](#), 16 July 2020, para. 147.

¹⁰ See the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” (Pre-Trial Chamber II), [No. ICC-01/09-01/11-373](#), 23 January 2012, para. 98 ; the “Decision on the confirmation of charges” (Pre-Trial Chamber I), [No. ICC-01/04-01/10-465-Red](#), 16 December 2011,

the Accused has been sufficiently informed of the charges brought against him,¹¹ it could have reasonably anticipated that this argument would be raised by either the Prosecution or the CLRV. The Defence's failure to deal with it in the Appeal Brief does not qualify it as a new subject. In reality, what the Defence is seeking, is a second opportunity to address the Appeals Chamber in support of its appeal.¹²

14. The CLRV further note that, in its Request, the Defence argued that a *"Trial Brief, post-confirmation, cannot circumvent the clear requirements of Regulation 52(c) of the RoC and Article 67(1)(a), that require notice of the legal characterization of facts – which should necessarily include the constituent elements to be specified and linked to the facts and circumstances, which the Pre-Trial Chamber failed to do"*¹³ and that *"a Trial Brief cannot stipulate, [...], which variant of Article 25(3)(a) liability is legally in play, when none of them were expressly discussed or confirmed by the Pre-Trial Chamber."*¹⁴

15. In this regard, the CLRV contend that these are all substantive arguments, and that, as the Pre-Trial Chamber has already remarked in the present case, *"by making substantive submissions in its Request for Leave to Reply, [the Defence] has not strictly complied with regulation 24(5) of the Regulations."*¹⁵

16. In any case, the Defence seems to overlook the Court's jurisprudence according to which 1) a pre-trial brief may serve as notice pursuant to article 67(1)(a) of the Rome Statute,¹⁶ and 2) under regulation 52(c) of the Regulations, it is

para. 84; the "Decision on the Three Defences' Requests Regarding the Prosecution's Amended Charging Document" (Pre-Trial Chamber I), [No. ICC-01/04-01/07-648](#), 25 June 2008, para. 25; and the "Decision on the confirmation of charges" (Pre-Trial Chamber I), [No. ICC-01/04-01/06-803-tEN](#), 29 January 2007, para. 150.

¹¹ See the "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction (Appeals Chamber), [No. ICC-01/04-01/06-3121-Red A5](#), 1 December 2014, para. 130.

¹² See the "Decision on the Prosecutor's 'Application for Leave to Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur'" (Pre-Trial Chamber I), [No. ICC-01/04-01/06-424](#), 12 September 2006, Separate opinion of Judge Georgios M. Pikis, para. 1.

¹³ See the Defence Request, *supra* note 1, para. 8.

¹⁴ *Idem*, para. 9.

¹⁵ See "Decision on the 'Prosecution's Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges'" (Pre-Trial Chamber II), [No. ICC-01/14-01/18-517](#), 14 May 2020, para. 13.

¹⁶ See *supra* note 10.

sufficient for the Prosecution to identify the exact sub-provision in order to inform the Accused of the nature, cause and content of the charges against him,¹⁷ and thus it is not necessary to also identify the constituent elements. Moreover, the Defence presents no legal authority in order to support its contentions.

17. With regards to the third issue, the Common Legal Representatives submit that they have argued that the Defence should have sought leave to appeal the Decision Confirming the Charges¹⁸ in previous submissions.¹⁹ This is therefore not a novel issue and the Defence could have reasonably anticipated it.

18. Finally, the Common Legal Representatives argue that the Request should also be rejected because, while falling short of demonstrating that the relevant legal criteria under regulation 24(5) of the Regulations have been met, the Defence has not shown why a reply to said issues is otherwise necessary for the adjudication of the appeal.²⁰

¹⁷ See the “Decision on the “Defence request to amend the document containing the charges for lack of specificity” (Pre-Trial Chamber I), [No. ICC-02/11-02/11-143](#), 1 September 2014, para. 9.

¹⁸ See the “Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona” (Pre-Trial Chamber II), [No. ICC-01/14-01/18-403-Conf](#), 11 December 2019 (the “Decision Confirming the Charges”). A public redacted version was issued on 20 December 2019 as [No. ICC-01/14-01/18-403-Red](#).

¹⁹ See the “Version corrigée de « la Réponse conjointe des Représentants Légaux Communs des Victimes à la ‘Motion to Dismiss Co-Perpetration Mode of Liability’ de la Défense de M. Alfred Rhombot Yekatom (ICC-01/14-01/18-565-Conf) » 3 juillet 2020, ICC-01/14-01/18-577-Conf”, [No. ICC-01/14-01/18-577-Conf-Corr](#), 7 July 2020, paras. 7-15. A corrected public redacted version was issued on 7 July 2020 as [No. ICC-01/14-01/18-577-Corr-Red](#).

²⁰ See the “Decision on Mr Ntaganda’s request for leave to reply (Appeals Chamber), [No. ICC-01/04-02/06-1813 OA5](#), 3 March 2017, paras. 8 and 12.

IV. CONCLUSION

19. For the foregoing reasons, the Common Legal Representatives respectfully request the Appeals Chamber to reject the Defence's Request in its entirety.

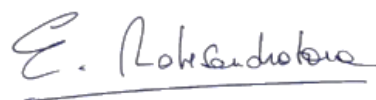


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Dated this 14th day of December 2020

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