



Original: **English**

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

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 *PROSECUTOR* v. *ALFRED YEKATOM* AND *PATRICE-EDOUARD NGAÏSSONA*

Public

Prosecution Response to Yekatom's Request to Reply

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Mr James Stewart
Ms Helen Brady

Counsel for Alfred Yekatom

Ms Mylène Dimitri
Mr Thomas Hannis

Counsel for Patrice-Edouard Ngaïssona

Mr 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**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. Yekatom seeks leave to reply to three issues in the Prosecution’s response to the “Yekatom Defence Appeal Brief – Notice of Co-Perpetration” (“Request”).¹ The Appeals Chamber should deny leave for Yekatom to file a reply regarding the first and third issues. The first issue—regarding the notice provided in the Prosecution’s Trial Brief—is not new and is premised on a mischaracterisation of the Prosecution’s arguments in its response, and therefore undermines the utility of any reply. The third issue—that the Defence should have sought leave to appeal the Confirmation Decision—is not a new issue, and is one that Yekatom himself had anticipated in his original motion before the Trial Chamber. The Prosecution defers to the Chamber as to whether a reply regarding the second issue—the power of the Chamber to amend a Confirmation Decision or to create a self-contained set of charges—will assist its determination of Yekatom’s appeal.

2. If a reply is granted, the Prosecution respectfully requests that Yekatom be required to file it before the commencement of the winter judicial recess so as to ensure an expedited resolution of the appeal.

Submissions

3. A reply in the context of an interlocutory appeal should be limited to new issues raised in the response that the requesting party could not reasonably have anticipated.² The requesting party should show good cause for filing a reply,³ and

¹ ICC-01/14-01/18-763 (“[Request](#)”).

² Regulation 24(5) of the Regulations of the Court. If permitted, replies must be “narrowly tailored to only address new issues” ([ICC-01/05-01/08-3165-Red](#), para. 5; [ICC-01/05-01/13-893-Red](#), para. 10), raised in a response which “could not have been foreseen” ([ICC-02/11-01/15-284 OA7](#), para. 11), and “may not be used to strengthen the arguments” previously advanced ([ICC-01/04-02/12-296-tENG](#), para. 7; [ICC-01/05-01/08-3480 A](#), para. 8).

³ See e.g. [ICC-01/05-01/08-294](#), para. 3; [ICC-02/04-01/15-252](#), p. 3.

demonstrate that its submissions will be relevant and will assist the Chamber in its deliberations.⁴

4. The **First Issue** that Yekatom raises concerns the Prosecution’s argument that Yekatom received further notice of the charges in the Prosecution’s Trial Brief.⁵ Yekatom proposes to demonstrate in reply that the Trial Brief cannot cure a defect such as a non-confirmed constituent element of the charged mode of liability⁶ and requests the Appeals Chamber to disregard the Trial Brief for the purposes of deciding the appeal.⁷ Yekatom’s request for leave to reply on the First Issue would not assist the Chamber, and should be rejected.

5. *First*, Yekatom’s proposed reply is premised on a mischaracterisation of the Prosecution’s arguments and of the Trial Chamber and Pre-Trial Chamber’s decisions that are the subject of his appeal. Yekatom’s proposed reply will therefore not assist the Chamber. Specifically:

- a. The Prosecution did not argue that the facts relevant to the objective elements of co-perpetration need not be set out in the charges.⁸ Instead, the Prosecution argued that the Pre-Trial Chamber confirmed that the *relevant facts of the objective elements* of co-perpetration had been confirmed in the charges,⁹ and that this issue is not a subject of the instant appeal;¹⁰

⁴ [ICC-01/04-01/06-824 OA7](#), para. 67 (finding that leave to reply was “unnecessary” and “not relevant to the deliberations of the Appeals Chamber”); [ICC-01/09-01/11-1417 OA7 OA8](#), para. 13 (rejecting a request to make additional submissions—albeit under regulation 28, rather than as a reply—on the basis that the issues for which leave was sought fell “within the ambit of the issues on appeal”, that the arguments in response were “foreseeable” in the circumstances, and that the applicants had already received the material possibility of presenting “all arguments” within the scope of their appeals).

⁵ [Request](#), paras. 1(a), 7-10. See ICC-01/14-01/18-756 (“[Prosecution Response](#)”), paras. 17, 32.

⁶ [Request](#), para. 8.

⁷ [Request](#), para. 10.

⁸ *Contra* [Request](#), para. 9.

⁹ *Contra* [Request](#), para. 8. See [Prosecution Response](#), para. 28, citing 01/14-01/18-703-Conf (public redacted version: ICC-01/14-01/18-703-Red”) (“[Decision](#)”), paras. 27-37.

¹⁰ ICC-01/14-01/18-730 (“[ALA Decision](#)”), para. 13 (where the Trial Chamber stated that “[i]ts conclusion that Mr Yekatom had been sufficiently informed of the facts establishing the objective elements of co-perpetration was based entirely and exclusively on the facts as confirmed by PTC II”).

b. The Pre-Trial Chamber expressly confirmed which “variant of Article 25(3)(a) is legally in play”.¹¹ Specifically, it confirmed Yekatom’s participation in the commission of the crimes “jointly with another or through another under article 25(3)(a)”,¹² which encapsulates co-perpetration (and its variant, indirect co-perpetration) and indirect perpetration.¹³ The Prosecution explained that it pursues its case against Yekatom under these confirmed modes of liability.¹⁴

6. *Second*, the Prosecution’s reference to the Trial Brief was foreseeable—in fact Yekatom foreshadowed it in his motion requesting the Trial Chamber to dismiss co-perpetration as a mode of liability.¹⁵

7. *Third*, Yekatom’s proposed reply seeks to repeat his argument that the constituent elements of the modes of liability need to be specified in the charges and linked to the facts and circumstances.¹⁶ This was the crux of his first ground of appeal and the Appeals Chamber would not benefit from repeated submissions.

8. *Finally*, that the Trial Brief was filed after the impugned decision of the Trial Chamber is irrelevant.¹⁷ The Appeals Chamber has confirmed that auxiliary documents provided before the start of the trial may be considered in order to determine whether the accused person has received sufficient notice.¹⁸

¹¹ *Contra* [Request](#), paras. 8-9. See [Prosecution Response](#), paras. 10, 17.

¹² ICC-01/14-01/18-403-Conf-Corr (public redacted version: ICC-01/14-01/18-403-Red-Corr) (“[Confirmation Decision](#)”), p. 103, paras. 99, 125, 140, 155.

¹³ [Prosecution Response](#), para. 17; and see [Decision](#), paras. 23-24.

¹⁴ [Prosecution Response](#), paras. 17 (fn. 31), 32.

¹⁵ ICC-01/14-01/18-565-Conf (“[Yekatom Motion](#)”), para. 45 (“[.] it is not possible for the Prosecution to cure the defective notice provided by the Confirmation Decision by repeating facts from the DCC that would support constituent elements of co-perpetration in its Pre-Trial Brief (a non-statutory document) and which were, in any event, *deliberately excluded* from the Confirmation Decision”).

¹⁶ [Request](#), para. 8. See ICC-01/14-01/18-742 (“[Yekatom Appeal](#)”), paras. 2, 12, 29-32.

¹⁷ *Contra* [Request](#), para. 10.

¹⁸ ICC-01/04-01/06-3121-Red (“[Lubanga AJ](#)”), para. 129.

9. The **Third Issue** that Yekatom raises concerns the Prosecution's observation that he had not elected to appeal the Confirmation Decision, from which his alleged lack of clarity about the charges stems.¹⁹ The Prosecution did not suggest that this issue should prevent the Appeals Chamber from addressing the merits of the appeal—to the contrary, the Prosecution stated that it would be in the interests of the proceedings to obtain appellate certainty on the matters raised in the appeal.²⁰ In any case, the third issue is also not new: Yekatom anticipated it in his original motion before the Trial Chamber,²¹ yet remained silent in his appeal brief. Yekatom's request to reply to this issue should be rejected.

10. The **second issue**, concerning the Prosecutor's submission that the Appeals Chamber may amend the Confirmation Decision or create a self-contained charging document, may not have been foreseeable to Yekatom when he filed his appeal. However, the Chamber will be cognisant of its own powers in the context of the remedies requested in this appeal. Thus, unless the Chamber considers that further submissions on this issue may assist in its determination of the appeal, a reply is not necessary.

11. The Prosecution is mindful of its request to the Chamber to issue an expedited decision in the appeal.²² If the Chamber grants the Request (whether in whole or in part), the Prosecution respectfully requests that Yekatom be required to file his reply before the commencement of the winter judicial recess to ensure an expedited resolution of the appeal.

¹⁹ [Request](#), paras. 1(c), 13. See [Prosecution Response](#), paras. 6-8.

²⁰ [Prosecution Response](#), para. 8.

²¹ [Yekatom Motion](#), para. 45 (“[] any argument that the Defence should have sought leave to appeal the Confirmation Decision does not deprive the Defence of its right to have the critical issue of defective charges resolved before the commencement of trial, pursuant to rule 134(1) of the Rules”).

²² [Prosecution Response](#), para. 40.

Conclusion and Relief Sought

12. For the foregoing reasons the Prosecution respectfully requests the Appeals Chamber to reject the Request insofar as it relates to the First and Third Issues, and leaves to the Chamber's discretion whether it would be assisted by further submissions regarding the Second Issue. In the event the Chamber grants the Request, the Prosecution requests that Yekatom be required to file his reply before the commencement of the winter judicial recess.



James Stewart, Deputy Prosecutor

Dated this 14th day of December 2020

At The Hague, The Netherlands