

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **27 October 2020**

THE PRESIDENCY

Before: Judge Chile Eboe-Osuji, President
Judge Robert Fremr, First Vice-President
Judge Marc Perrin de Brichambaut, Second Vice-President

**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
the Prosecution's Request for the Designation of an Alternate Judge**

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. Thomas Hannis

Ms. Yuqing Liu

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

Registrar

Mr. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr. Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other: Trial Chamber V

Judge Bertram Schmitt, Presiding Judge

Judge Péter Kovács

Judge Chang-ho Chung

1. Counsel representing Mr. Alfred Rombhot Yekatom (the “Defence”) hereby responds to the *Prosecution’s Request for the Designation of an Alternate Judge (“Request”)*.¹ It does not oppose to the request but asks that two clarifications be made, should the Presidency rule in the Prosecution’s favour.

APPLICABLE LAW

2. Article 74(1), in its relevant part, provides that:

The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.
3. Rule 39, in its relevant part, provides that:

[a]n alternate judge [...] shall sit through all proceedings and deliberations of the case, but may not take any part therein and shall not exercise any of the functions of the members of the Trial Chamber hearing the case, unless and until he or she is required to replace a member of the Trial Chamber if that member is unable to continue attending.

SUBMISSIONS

4. The Defence does not oppose the designation of an alternate judge for the trial proceedings and defers to the Presidency’s discretion. Should the Presidency decide to assign such a judge, however, the Defence requests the following be clarified.
5. *First*, an alternate judge is not to participate in the proceedings and deliberations. This is clearly set out in Rule 39 of the Rules.² However, since this would be the first instance where an alternate judge is designated at this

¹ [ICC-01/14-01/18-695](#).

² *Prosecutor v. Lubanga*, [Decision on whether two judges alone may hold a hearing and Recommendations to the Presidency on whether an alternate judge should be assigned for the trial](#), ICC-01/04-01/06-1349, 22 May 2008, para. 14(c):

The provisions of Article 74(1) [...] restrict the involvement of the alternate judge to “presence” only, once appointed, unless and until a member of the Chamber ceases permanently to function judicially during the trial.

Court, should the Presidency so allow, the Defence requests it be made clear that the alternate judge may not interrogate a witness, question the counsel, or partake in the making or drafting of any ruling.³

6. *Second*, the participation of the alternate judge, if assigned, shall not be a recourse for the temporary absence of any member of the Trial Chamber.⁴
7. The replacement envisaged by Rule 39 is on a permanent basis when a member of the Trial Chamber “is unable to continue attending”. The rule does not allude to being “temporarily unable” to function judicially.
8. This interpretation is consistent with the provision of Rule 38, where examples of judge “replacement” are all that of permanent unavailability.⁵ It is further confirmed by the draft Rule 140*bis*.⁶ The proposed amendment seeks to provide “a resolution in situations in which a judge is absent for a temporary period”, given that “alternate judges are conceived as a means of enabling

³ Cf. [ICTY RPE](#), Rule 15*ter*(C) and [STL RPE](#), Rule 27(B), explicitly permitting an alternate judge to pose questions that are necessary to his/her understanding of the trial. This provision is absent from Rule 39, which specifically prohibits any form of participation. See also Otto Triffterer and Alejandro Kiss, “Article 74” in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Beck Hart Nomos 2016), pp. 1832, marginal note 13 (emphasis added):

Concerns may be raised from the perspective that the absent judge would be unable to question the witness or otherwise intervene actively in the course of the evidentiary debate. However, this reason alone is not persuasive for such prerogative is also *not conferred upon alternate judges* pursuant to Rule 39 and they are capable of participating in a valid verdict despite their lack of power to actively engage with the evidence, even potentially during the entire trial.

and p. 1835, marginal note 21:

The alternate judge is not allowed to formally interfere in the proceedings or influence the deliberation of the Trial Chamber.

⁴ Cf. [ICC-01/14-01/18-695](#), para. 16 where the Prosecution portrays the participation of an alternate judge as a resolution in situation where “a member of the Trial Chamber be unable to be present throughout the trial, either *limitedly* or over an extended period” (emphasis added).

⁵ Rule 38(1)(a)-(e) addressing the situations of resignation, accepted excuse, disqualification, removal from office, and death.

⁶ [Report of the Working Group on Amendments](#), ICC-ASP/13/31, 7 December 2014, paras 14-24 and p. 18.

permanent replacement of a judge who is unable to continue serving on a bench".⁷

9. The Defence respectfully requests the Presidency makes it clear that the alternate judge, if and when assigned, is not permitted and shall not be required to exercise any of the functions of the currently sitting three judges in Trial Chamber V. Should any one of the current member judges become permanently unavailable, then steps could be taken to upgrade the status and role of the alternate judge.

RESPECTFULLY SUBMITTED ON THIS 27TH DAY OF OCTOBER 2020



Me Mylène Dimitri
Lead Counsel for Mr. Yekatom



Mr. Thomas Hannis
Associate Counsel for Mr. Yekatom

The Hague, the Netherlands

⁷ [Report of the Bureau on Study Group on Governance, Appendix II – Working Group on Lessons Learnt: Recommendation on a proposal to introduce a rule 140 bis to the Rules of Procedure and Evidence: Temporary Absence of a Judge](#), ICC-ASP/13/28, 28 November 2014, para. 8.