

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **6 March 2020**

PRE-TRIAL CHAMBER II

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

**Yekatom Defence Opposition to Prosecution's Request for Reconsideration or
Leave to Appeal Confirmation Decision**

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. Ngaiïsona

Me Geert-Jan Alexander Knoops

Legal Representatives of Victims

Mr. Dmytro Suprun

Mr. Abdou Dangabo Moussa

Mr. 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**

1. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence” and “Mr. Yekatom”, respectively) respectfully oppose the *Prosecution’s Request for Reconsideration of, or alternatively Leave to Appeal, the “Decision on Confirmation of Charges against Alfred Yekatom and Patrice-Edouard Ngaissona”* (“Request”).¹ Having found that the remedy of reconsideration was not available to the Defence throughout the proceedings, it would be unfair for the Pre-Trial Chamber (“Chamber”) to now afford such a remedy to the Prosecution. Leave to appeal is likewise inappropriate as an immediate resolution by the Appeals Chamber on either issue identified by the Prosecution will not materially advance the proceedings at this stage because the Prosecution can seek to have the charges recharacterised by the Trial Chamber under Regulation 55. In any event, the issues would not significantly affect the fair and expeditious conduct of the proceedings nor the outcome of the trial

RELEVANT PROCEDURAL HISTORY

2. Alfred Yekatom made his initial appearance before this Court on 23 November 2018. His hearing on the confirmation of charges was set for 30 April 2019.² It was subsequently postponed, at the Prosecution’s request,³ and over Defence objection,⁴ to 18 June 2019.⁵ A second postponement at the request of the Prosecution,⁶ also objected to by the Defence,⁷ was granted until 19 September 2019.⁸

3. The confirmation hearing commenced on 19 September⁹ and concluded on 11 October 2019.¹⁰

¹ [ICC-01/14-01/18-437](#).

² [ICC-01/14-01/18-T-1-ENG](#).

³ [ICC-01/14-01/18-76](#), para. 11.

⁴ [ICC-01/14-01/18-82](#), para. 6.

⁵ [ICC-01/14-01/18-87](#). Leave to appeal this decision was denied on 21 March 2019 ([ICC-01/14-01/18-154](#)).

⁶ [ICC-01/14-01/18-186-Red2](#).

⁷ [ICC-01/14-01/18-194-Red](#), paras. 28-31.

⁸ [ICC-01/14-01/18-199](#).

⁹ [ICC-01/14-01/18-T-004-Red2-ENG](#).

¹⁰ [ICC-01/14-01/18-T-011-Red-ENG](#).

4. On 11 December 2019, the Chamber issued its *Decision on the Confirmation of Charges Against Alfred Yekatom and Patrice-Edouard Ngaïssona* in which it confirmed all but one of the charges against Alfred Yekatom and declined to confirm alternative modes of liability proposed by the Prosecution.¹¹ In its decision, the Chamber suspended the time limit for the filing of leave to appeal the decision until a French translation was provided.¹² The translation was distributed to the parties on 21 February 2020.¹³ Neither Mr. Yekatom nor Mr. Ngaïssona sought leave to appeal.

5. On 2 March 2020, the very last day in which to file a request for leave to appeal, the Prosecution filed the *Request*.¹⁴

RECONSIDERATION

6. On four occasions during the proceedings, the Chamber refused to entertain Defence motions for reconsideration, or to allow the Defence leave to appeal its refusal. It ruled that reconsideration was simply not an available remedy before the Pre-Trial Chamber.¹⁵ It would be monumentally unfair, and a violation of the principle of equality of arms, for the Chamber to now, at the last moment, entertain a motion for reconsideration on behalf of the Prosecution.

7. On 12 December 2018, the Chamber rejected the Defence Request for Disclosure of the Prosecutor’s Application for Mr. Yekatom’s warrant of arrest.¹⁶ When the Defence sought reconsideration of this decision, the Chamber refused, holding that “instruments governing the Court’s procedure make no provision for such a broad remedy as an unqualified ‘motion for reconsideration’ and that the review of judicial decisions can only be requested on the basis of the mechanisms

¹¹ [ICC-01/14-01/18-403-Red](#).

¹² [ICC-01/14-01/18-403-Red](#), para. 240.

¹³ [ICC-01/14-01/18-403-Conf-tFRA](#).

¹⁴ [ICC-01/14-01/18-437](#).

¹⁵ [ICC-01/14-01/18-190](#), para. 11; [ICC-01/14-01/18-211](#); [ICC-01/14-01/18-163](#), paras. 34 and 36; [ICC-01/14-01/18-206](#), para. 19.

¹⁶ [ICC-01/14-01/18-31-Conf](#).

specified in the Statute and the Rules.”¹⁷ The Chamber subsequently denied the Defence request for leave to appeal its refusal to entertain a motion for reconsideration.¹⁸

8. The Chamber had earlier held that reconsideration was not permitted by the legal texts of the Court when dismissing a request by Mr. Ngaissona.¹⁹ It reaffirmed that position for the fourth time when ruling on a request for leave to appeal that decision.²⁰

9. The principle of equality of arms has been held to be encompassed into Article 67’s guarantee of a fair trial. This principle requires that the Defence be placed, insofar as possible, on an equal footing with the prosecution, in order to protect fully the right of the accused to a fair trial.²¹ Each party to the proceedings must be afforded a reasonable opportunity to present its case under conditions which do not disadvantage it vis-à-vis its adversary.²²

10. At the *ad hoc* Tribunals, Appeals Chambers have declared that the principle of equality of arms “goes to the heart of the fair trial guarantee.”²³ The ICTR Appeals Chamber held that basic principles of fairness and justice dictate that a Trial Chamber should not apply differing standards in its treatment of Prosecution and Defence evidence.²⁴ Likewise, the Pre-Trial Chamber should not apply differing standards when considering requests for reconsideration from the Prosecution and the Defence.

¹⁷ [ICC-01/14-01/18-190](#), para. 11.

¹⁸ [ICC-01/14-01/18-211](#).

¹⁹ [ICC-01/14-01/18-163](#), paras. 34 and 36.

²⁰ [ICC-01/14-01/18-206](#), para. 19.

²¹ *Prosecutor v. Lubanga*, [Decision on Defence’s Request to Obtain Simultaneous French Transcripts](#), ICC-01/04-01/06-1091, 14 December 2007, para. 18.

²² *Prosecutor v. Katanga*, [Judgment pursuant to Article 74 of the Statute](#), ICC-01/04-01/07-3436, 7 March 2014, para. 1572.

²³ *Prosecutor v. Tadić*, Case No. IT-94-1-A, [Judgement](#), 15 July 1999, para. 44.

²⁴ *Renzaho v. Prosecutor*, Case No. ICTR-97-31-A, [Judgement](#), 1 April 2011, para. 540.

11. In the *Lubanga* case, the Trial Chamber held that the availability of live French transcripts to the Prosecution and not to the Defence violated the principle of equality of arms because it placed the Defence at a disadvantage.²⁵ Likewise, making the remedy of reconsideration available to the Prosecution after denying the existence of the same remedy to the Defence would amount to a violation of this principle. It would open a door to the Prosecution that had been closed to the Defence. This would be unjust and unfair. The Prosecution's motion for reconsideration should be denied.²⁶

LEAVE TO APPEAL

12. The issue of alternative modes of liability can be addressed by the Trial Chamber under Regulation 55.²⁷ Therefore, the Pre-Trial Chamber's decision not to confirm alternative modes of liability is not one that would significantly affect the fair and expeditious conduct of the proceedings nor the outcome of the trial. Nor would an immediate resolution by the Appeals Chamber materially advance the proceedings.

13. No Chamber of this Court has ever granted leave to appeal a decision on confirmation of charges.²⁸ Chambers have observed that the drafters of the Statute

²⁵ *Prosecutor v. Lubanga*, [Decision on Defence's Request to Obtain Simultaneous French Transcripts](#), ICC-01/04-01/06-1091, 14 December 2007, para. 20.

²⁶ Because the Chamber has repeatedly found that reconsideration is not an available remedy, and declined to engage with the Defence's substantive arguments that the test for reconsideration had been met, the Defence likewise declines to engage with the Prosecution's arguments that the test for reconsideration has been met in this case.

²⁷ *Prosecutor v. Katanga*, [Judgment on the Appeal of Mr. Germain Katanga against the Decision of Trial Chamber II of 21 November 2012 entitled « Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against the Accused Persons »](#), ICC-01/04-01/07-3363, 27 March 2013, para. 57.

²⁸ *Prosecutor v. Lubanga*, [Decision on the Prosecution and Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges](#), ICC-01/04-01/06-915, 24 May 2007; *Prosecutor v. Katanga & Ngudjolo*, [Decision on the Applications for Leave to Appeal the Decision on the Admission of Evidence of Witnesses 132 and 287 and on the Decision on the Confirmation of Charges](#), ICC-01/04-01/07-727, 24 October 2008; *Prosecutor v. Abu Garda*, [Decision on the Prosecution's Application for Leave to Appeal the Decision on the Confirmation of Charges](#), ICC-02/05-02/09-267, 23 April 2010; *Prosecutor v. Muthaura & Kenyatta*, [Decision on the Defences' Applications for Leave to Appeal the Decision on the Confirmation of Charges](#), ICC-01/09-02/11-406, 9 March 2012; *Prosecutor v. Ruto & Sang*, [Decision on the Defences' Applications for Leave to Appeal the Decision on the Confirmation of Charges Pursuant to Article 61\(7\) \(a\) and \(b\) of the Rome Statute](#), No. ICC-01/09-01/11-399, 9 March 2012; *Prosecutor v. Ntaganda*, [Decision on the "Requete de la](#)

intentionally excluded decisions on confirmation of charges from the categories of decisions which may be appealed directly to the Appeals Chamber.²⁹ This was due to concerns that such appeals would delay the proceedings.³⁰

14. The Prosecution's appeal of the confirmation decision in this case will unnecessarily delay this case. While there is no precedent for an appeal of a confirmation decision, the closest analogy upon which to make a time estimate of appellate proceedings appears to be the Prosecution's appeal of the decision to adjourn the confirmation hearing in the *Gbagbo* case. The appeal in that case was decided six months after the application of leave to appeal.³¹

15. Such a delay will greatly prejudice Mr. Yekatom unless he is granted interim release in the meantime. To keep him in detention for an extra six months or more while the Prosecution tactically seeks to improve its chances at trial through an interlocutory appeal would be unconscionable.³²

[Defense solicitant l'autorisation d'interjeter appel de la Decision sur la confirmation des charges date du 9 juin 2014](#), ICC-01/04-02/06-322, 4 July 2014 ; *Prosecutor v. Gbagbo*, [Decision on the Defence Request for Leave to Appeal the Decision on the Confirmation of Charges against Laurent Gbagbo](#), ICC-02/11-01/11-680, 11 September 2014; *Prosecutor v. Bemba et al.*, [Joint Decision on Applications for Leave to Appeal the Decision pursuant to Articles 61\(7\)\(a\) and \(b\) of the Rome Statute](#), ICC-01/05-01/13-801, 23 January 2015; *Prosecutor v. Ongwen*, [Decision on the Defence Request for Leave to Appeal the Decision on the Confirmation of Charges](#), ICC-02/04-01/15-428, 29 April 2016; *Prosecutor v. Al Hassan*, [Décision relative à la requête de la défense aux fins d'autorisation d'interjeter appel de la Décision relative à la confirmation des charges et transmission du dossier à la présidence en vertu de la règle 129 du Règlement de procédure et de prevue](#), ICC-01/12-01/18-498-Red, 18 November 2019.

²⁹ *Prosecutor v. Lubanga*, [Decision on the Prosecution and Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges](#), ICC-01/04-01/06-915, 24 May 2007, para. 19; *Prosecutor v. Abu Garda*, [Decision on the Prosecution's Application for Leave to Appeal the Decision on the Confirmation of Charges](#), ICC-02/05-02/09-267, 23 April 2010, pp. 5-6; *Prosecutor v. Ruto & Sang*, [Decision on the Defences' Applications for Leave to Appeal the Decision on the Confirmation of Charges Pursuant to Article 61\(7\) \(a\) and \(b\) of the Rome Statute](#), ICC-01/09-01/11-399, 9 March 2012, para. 25.

³⁰ *Prosecutor v. Lubanga*, [Decision on the Prosecution and Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges](#), ICC-01/04-01/06-915, 24 May 2007, fn. 18: "The drafting history of article 82 of the Statute indicates that proposals were made to allow interlocutory appeals against rulings on evidence and appeals concerning the confirmation or denial of an indictment... [I]n relation the proposal on appeals to the confirmation of indictments, some delegations felt that this could be used to delay proceedings. Eventually a compromise was reached whereby these two provisions were deleted in favor of the current article 82(1)(d) of the Statute."

³¹ *Prosecutor v. Gbagbo*, [Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 3 June 2013 entitled "Decision Adjourning the Hearing on the Confirmation of Charges pursuant to Article 61\(7\)\(c\)\(1\) of the Rome Statute](#), ICC-02/11-01/11-572, 16 December 2013.

³² The delay may be even greater considering that if the Prosecution succeeds on appeal, a remand to the Pre-Trial Chamber for findings on the modes of liability that had not been confirmed would likely be required.

16. As stated by the Pre-Trial Chamber in the *Lubanga* case:

[P]articular attention should be paid to the status of detention of the accused. To authorize the parties to appeal the decision confirming charges when the suspect is under detention would cause avoidable delay in the procedure, which has to be carefully counterbalanced with the interests of the suspect to a fair and expeditious trial.³³

17. The *Lubanga* case also serves as precedent for denying leave to appeal when Regulation 55 provides an alternative remedy to perceived deficiencies in the confirmation decision. The Pre-Trial Chamber in that case found that the availability of Regulation 55 meant that the issue would not affect the fair and expeditious conduct of the proceedings nor the outcome of the trial.³⁴

18. A similar finding was made by the Pre-Trial Chamber in the *Gbagbo* case, which also noted that “[r]ecent cases demonstrate that such a notification [under Regulation 55] may be given not only at the conclusion of the proceedings but also immediately after the end of the confirmation process, or shortly after commencement of the trial”.³⁵

19. In the *Ongwen* case, when the defence sought leave to appeal the confirmation decision on the issue of multiple modes of liability, the Prosecution opposed leave to appeal on the grounds that the issues could be raised before the Trial Chamber.³⁶ The same is true of the *Request*.

20. The Prosecution’s argument that Regulation 55 is discretionary and the Pre-Trial Chamber’s duty to confirm alternative modes of liability is “automatic”³⁷ is fallacious. If the Trial Chamber, in its discretion and with its granular knowledge in

³³ *Prosecutor v. Lubanga*, [Decision on the Prosecution and Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges](#), ICC-01/04-01/06-915, 24 May 2007, para. 30.

³⁴ *Prosecutor v. Lubanga*, [Decision on the Prosecution and Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges](#), ICC-01/04-01/06-915, 24 May 2007, paras. 44-45.

³⁵ *Prosecutor v. Gbagbo*, [Decision on the Defence Request for Leave to Appeal the Decision on the Confirmation of Charges against Laurent Gbagbo](#), ICC-02/11-01/11-680, 11 September 2014, paras. 51-52.

³⁶ *Prosecutor v. Ongwen*, [Prosecution Response to the Defence Request for Leave to Appeal Issues in Confirmation of Charges Decision](#), ICC-02/04-01/15-426, 4 April 2016, paras. 25, 27.

³⁷ [ICC-01/14-01/18-437](#), para. 20.

the particular context of the trial, finds that adding certain modes of liability is unnecessary or unwarranted, there is no prejudice to the Prosecution from the Pre-Trial Chamber's failure to include those modes of liability in the confirmation of charges decision.

21. The Defence understands the Prosecution's need to seek leave to appeal to avoid being criticised for bypassing possible remedies prior to seeking recharacterisation under Regulation 55.³⁸ The Prosecution has now satisfied its obligation by seeking leave to appeal. But that is no reason that leave should be granted. Thus, an immediate resolution by the Appeals Chamber would not materially advance the proceedings.

22. There is, in fact, no sensible reason to grant leave to appeal. If additional modes of liability are warranted, the Prosecution can attempt to persuade the Trial Chamber to add them. Delaying the commencement of the trial to get a ruling from the Appeals Chamber is not in the interests of justice. The Prosecution's application for leave to appeal should be denied.

RESPECTFULLY SUBMITTED ON THIS 6th DAY OF MARCH 2020



Me Mylène Dimitri
Lead Counsel for Mr. Yekatom



Peter Robinson
Associate Counsel for Mr. Yekatom

The Hague, the Netherlands

³⁸ [ICC-01/14-01/18-437](#), fn. 5.