Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/14-01/18**
Date: **17 April 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 YEKATOM AND
PATRICE-ÉDOUARD NGAÏSSONA

Public Redacted Version of

Common Legal Representatives' Joint Observations on the "Yekatom Defence's Admissibility Challenge—Complementarity"

Source: **Common Legal Representatives of Victims**

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 Kweku Vanderpuye

Counsel for the Defence
Ms Mylène Dimitri
Mr Peter Robinson

Mr Geert-Jan Alexander Knoops

Legal Representatives of the Victims
Mr Dmytro Suprun

Mr Abdou Dangabo Moussa
Ms Marie Édith Douzima Lawson
Mr Yaré Fall
Ms Paolina Massidda
Ms Elisabeth Rabesandratana

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims
Ms Paolina Massidda
Mr Dmytro Suprun
Ms Anne Grabowski
Ms Carine Pineau
Ms Nadia Galinier

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

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") hereby file their joint observations on the "Yekatom Defence's Admissibility Challenge — Complementarity" (the "Admissibility Challenge").[1]

2. The Common Legal Representatives submit that the Admissibility Challenge should be rejected because there is currently no active investigation or prosecution against Mr Yekatom before either the Special Criminal Court (the "SCC") or other national court. Absent any such investigation or prosecution at the national level, there is no legal basis for entertaining said Challenge.

3. In any case, through the adoption of article 37 of the Organic Law 15/003, the Central African Republic ("CAR") explicitly resolved issues of jurisdiction in favour of the International Criminal Court (the "Court" or "ICC"). CAR authorities have further clearly expressed their preference for Mr Yekatom being tried before the ICC rather than before national courts. Moreover, CAR has never challenged the admissibility of the case before the Court, nor ever taken any concrete steps to demonstrate its willingness to investigate or prosecute the Accused.

4. While submitting that there is no legal basis to entertain the Admissibility Challenge, the Common Legal Representatives further address the arguments raised by the Defence in the interest of the Victims they represent. In particular, they contend that the legal doctrine put forward by the Defence, not being itself an authoritative legal source, does not support said Challenge and does not present a cogent reason for Trial Chamber V (the "Chamber") to depart from the settled case law in the matter.

[1] See the "Yekatom Defence's Admissibility Challenge—Complementarity", No. ICC-01/14-01/18-456, 17 March 2020 (the "Admissibility Challenge").

5. Finally, the Victims indicate that the Admissibility Challenge should have been brought earlier and not at this advanced stage of the proceedings in which preparation for trial has started. They express deep concern about the Defence's proposal to transfer Mr Yekatom's case to the SCC which they consider unable to investigate and prosecute the Accused, and in any case not willing by virtue of national law. In fact, referring Mr Yekatom´s case to the SCC would undermine the credibility of the Court and contribute to impunity. Some Victims also recall that they do not trust the national jurisdiction and that they fear that the presence of the Accused in Bangui will endanger their safety and well-being and that eventual national proceeding before the SCC will not take into account the important rights they enjoy before the ICC.

II. PROCEDURAL BACKGROUND

6. On 11 November 2018, Pre-Trial Chamber II issued the "Warrant of Arrest for Alfred Yekatom" (the "Warrant of Arrest").[2]

7. On 11 December 2019, Pre-Trial Chamber II issued the "Decision on the confirmation of charges against Alfred Yekatom and Patrice-Édouard Ngaïssona" (the "Decision confirming the charges").[3]

8. On 2 March 2020, the Prosecution filed a Request for Reconsideration of, or alternatively Leave to Appeal, the Decision confirming the charges,[4] which was rejected by the Pre-Trial Chamber on 11 March 2020.[5]

---

[2] See the "Warrant of Arrest for Alfred Yekatom", No. ICC-01/14-01/18-1-US-Exp, 11 November 2018" (Pre-Trial Chamber II), No. ICC-01/14-01/18-1-US-Exp, 11 November 2019. A public redacted version of the Warrant of Arrest was issued on 17 November 2019; see No. ICC-01/14-01/18-1-Red.

[3] 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. A public redacted version was issued on 20 December 2019, see No. ICC-01/14-01/18-403-Red.

9. On 3 March 2020, the Defence for Mr Yekatom filed the Application for interim release.[6]

10. On 16 March 2020, the Presidency constituted Trial Chamber V and referred the present case to it.[7] On 17 March 2020, Judge Schmitt was elected Presiding and Single Judge.[8]

11. On 17 March 2020, the Defence for Mr Yekatom filed its Admissibility Challenge.[9]

12. On 25 March 2020, following the Common Legal Representatives' request,[10] the Chamber extended, by e-mail, the deadline for their response to the Admissibility Challenge until 17 April 2020.[11]

13. On 30 March 2020, the Prosecution submitted its response to the Admissibility Challenge.[12]

14. On 14 April 2020, the Registry transmitted the observations of the Kingdom of the Netherlands and the Central African Republic on the interim release of Mr Yekatom.[13]

---

[4] See the "Prosecution's Request for Reconsideration of, or alternatively Leave to Appeal, the 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaissona'", No. ICC-01/14-01/18-437, 2 March 2020.

[5] See the "Decision on the Prosecutor's request for reconsideration or, in the alternative, leave to appeal the 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona'" (Pre-Trial Chamber II), No. ICC-01/14-01/18-447, 11 March 2020, p. 14.

[6] See the "Yekatom Defence Application for Interim Release", No. ICC-01/14-01/18-438, 3 March 2020.

[7] See the "Decision constituting Trial Chamber V and referring to it the case of The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona" (Presidency), No. ICC-01/14-01/18-451, 16 March 2020.

[8] See the "Decision notifying the election of a Presiding Judge and Single Judge" (Trial Chamber V), No. ICC-01/14-01/18-454, 17 March 2020.

[9] See the Admissibility Challenge, *supra* note 1.

[10] See the Email correspondence from the Common Legal Representatives of 25 March 2020 at 16:31

[11] See the Email correspondence from Trial Chamber V of 25 March 2020 at 18:18.

[12] See the "Prosecution's Response to the "Yekatom Defence's Admissibility Challenge – Complementarity", No. ICC-01/14-01/18-466, 30 March 2020.

15. The Common Legal Representatives file their observations pursuant to regulation 38(2)(c) of the Regulations of the Court which provides for a specific page-limit for responses to admissibility challenges.

III. CONFIDENTIALITY

16. Pursuant to regulation 23*bis*(1) and (2) of the Regulations of the Court, the present observations are classified as confidential since they refer to documents likewise classified as confidential. A public redacted version is filed simultaneously.

IV. SUBMISSIONS

1) Applicable law

17. Article 17 of the Rome Statute (the "Statute'') provides as follows:

> *"1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:*
> *(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;*
> *(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;*
> *(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;*
> *(d) The case is not of sufficient gravity to justify further action by the Court".*

[13] See the "Transmission of observations from the Kingdom of the Netherlands and the Central African Republic on interim release of Alfred Yekatom", No. ICC-01/14-01/18-478, 14 April 2020. The observations are annexed in two confidential annexes, see No. ICC-01/14-01/18-478-Conf-AnxI and No. ICC-01/14-01/18-478-Conf-AnxII.

18. Article 19(2) of the Statute states that:

> *"2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:*
> *(a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58".*

19. For the purposes of the present admissibility proceedings, the relevant provision is article 17(1)(a) of the Statute, since the Defence does not allege either the existence of any past investigation or trial against Mr Yekatom in CAR, nor that the relevant crimes do not attain the threshold of sufficient gravity.

20. The Appeals Chamber has held that article 17(1)(a) of the Statute entails a two-step analysis to determine whether a case is inadmissible; in particular: *"in considering whether a case is inadmissible under article 17(1)(a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability".*[14]

21. According to the Appeals Chamber, article 17 of the Statute stipulates "*the substantive conditions under which a case is inadmissible before the Court. It gives effect to the principle of complementarity (tenth preambular paragraph and article 1 of the Statute), according to which the Court 'shall be complementary to national jurisdictions'. Accordingly, States have the primary responsibility to exercise criminal jurisdiction and the Court does not*

[14] See the "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case" (Appeals Chamber), No. ICC-01/04-01/07-1497 OA8, 25 September 2009, para. 78. See also, the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'" (Appeals Chamber), No. ICC-01/09-01/11-307 OA, 30 August 2011, para. 41; and the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'" (Appeals Chamber), No. ICC-01/09-02/11-274 OA, 30 August 2011, para. 40.

replace, but complements them in that respect. Article 17(1)(a) to (c) sets out how to resolve a conflict of jurisdictions between the Court on the one hand and a national jurisdiction on the other. Consequently, under article 17(1)(a), first alternative, the question is not merely a question of 'investigation' in the abstract, but is whether the same case is being investigated by both the Court and a national jurisdiction".[15]

22. The Appeals Chamber has also established that "*in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court*".[16]

2) There is no active investigation or prosecution against Mr Yekatom in CAR

23. The Common Legal Representatives posit that, as the Defence acknowledges several times in its application,[17] there is no active investigation or prosecution against Mr Yekatom in CAR.

24. This fact is fatal to the Admissibility Challenge. Indeed, since the first requirement of article 17(1)(a) of the Statute is not met, the case against Mr Yekatom is automatically admissible before the Court. In this regard, because the purpose of the admissibility proceedings under article 19 of the Statute is to determine whether the case brought by the Prosecution is inadmissible for reason of jurisdictional

[15] See the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", *supra* note 14, para. 37.
[16] See the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", *supra* note 14, para. 62; and the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", *supra* note 14, para. 61.
[17] See the Admissibility Challenge, *supra* note 1, paras. 13 and 32.

conflict, where no investigation or prosecution exists at the national level – as in the present case - there is simply no such conflict. As explained by the Appeals Chamber: "[i]*f the suspect or conduct have not been investigated by the national jurisdiction, there is no legal basis for the Court to find the case inadmissible*".[18]

25. The admissibility of a case must be determined on the basis of the facts as they exist at the time the challenge is triggered.[19] While the Defence claims that the fact that the SCC is now operative means that the national authorities are now willing and able to prosecute,[20] the fact remains that, at the time of the submission of the admissibility challenge, no active investigation or prosecution was pending against Mr Yekatom before the SCC or any other national court. For that reason alone, and irrespective of the willingness of the CAR authorities to investigate or prosecute the Accused, the Common Legal Representatives submit that the Chamber should dismiss the Admissibility Challenge.

26. However, the Common Legal Representatives deem it necessary, in the interest of the Victims they represent, to address some arguments on the unwillingness by the national authorities to investigate or prosecute the Accused.

---

[18] See the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", *supra* note 14, para. 44; and the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", *supra* note 14, para. 43.

[19] See the "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", *supra* note 14, paras. 56 and 80. See also the "Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo'" (Appeals Chamber), No. ICC-02/11-01/12-75-Red OA, 27 May 2015, para. 32.

[20] See the Admissibility Challenge, *supra* note 1, paras. 11 and 14.

3) The CAR authorities are unwilling to investigate or prosecute Mr Yekatom

27. At the outset, the Common Legal Representatives, highlight the Appeals Chamber's case law according to which the question of unwillingness or inability of a State having jurisdiction over a case only becomes relevant where, due to ongoing or past investigations or prosecutions in that State, said case appears to be inadmissible.[21] Consequently, the question of unwillingness or inability does not arise in the present instance, because, at the time the admissibility challenge was filed, there was no active domestic investigation or prosecution against the Accused in the sense of article 17 of the Statute. Nevertheless, the Common Legal Representatives will demonstrate that, in addition and contrary to the Defence's assertion, the CAR authorities are unwilling to investigate or prosecute Mr Yekatom.

28. First, the Common Legal Representatives submit that article 37 of the Organic Law 15/003[22] adopted in 2015 states in a clear and unambiguous manner the explicit will by the CAR authorities to defer to the ICC the primary jurisdiction over cases falling under both the Court and the SCC.

29. Thus, while CAR authorities wished to avoid situations of concurring jurisdictions between the SCC and the ICC, and adopted a legal provision to that effect, the Defence is now effectively suggesting inviting the national authorities to disregard their own legislation by opening an investigation against Mr Yekatom despite him being already tried before the Court.

30. Second, more recently, and in line with the Organic Law 15/003, during a press conference held after the suspect's surrender to the ICC, the Attorney General at the Bangui Court of Appeal, Mr Éric Didier Tambo, stated that he believed the

[21] See the "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", *supra* note 14, para. 75.
[22] See the "Loi organique n°15/003 portant création, organisation et fonctionnement de la Cour pénale spéciale", 3 June 2015 (the "Organic Law 15/003").

Court was in a better position to try Mr Yekatom because it had a larger capacity to investigate compared to national jurisdictions. He further explained that if the authorities believe they do not have the means to deal with a case, they can refer it to the ICC.[23]

31. In light of this unequivocal statement which summarises the CAR's position on the matter, namely a preference for proceedings to be held before the ICC, the Common Legal Representatives do not see how the national authorities can revise their own legislation in general and reverse their recent position with respect to Mr Yekatom. Had the CAR been willing to try the Accused, it would have taken concrete steps in that regard. This is clearly not the case.

32. Third, the Common Legal Representatives aver that the CAR authorities have not investigated Mr Yekatom not because they did not have the opportunity to do so, as the Defence claims, but because there was a conscious and legitimate choice to refrain from exercising jurisdiction in favour of the ICC.

33. In this regard, Trial Chamber II in the *Katanga* case foresaw the present situation and held that: "[t]*here is also the case of a State which may not want to protect an individual, but, for a variety of reasons, may not wish to exercise its jurisdiction over him or her. This second form of "unwillingness", which is not expressly provided for in article 17 of the Statute, aims to see the person brought to justice, but not before national courts. The Chamber considers that a State which chooses not to investigate or prosecute a person before its own courts, but has nevertheless every intention of seeing that justice is done, must be considered as lacking the will referred to in article 17*".[24]

34. Mr Yekatom has been in the Court's custody since November 2018. Although CAR authorities have had the opportunity to express the wish to investigate or

[23] See *Deutsche Welle*, "Pourquoi la RCA préfère envoyer "Rambo" à La Haye", 19 November 2018.
[24] See the "Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)" (Trial Chamber II), No. ICC-01/04-01/07-1213-tENG, 16 June 2009, para. 77.

prosecute the Accused for fourteen months, they have not done so. Therefore, this cannot be but a deliberate and legitimate choice, and is as much an act of sovereignty as exercising jurisdiction.

35. In this regard, the Trial Chamber in the *Katanga* case also held that: "[i]*n fact, it appears to the Chamber that this second form of "unwillingness" is in line with the object and purpose of the Statute, in that it fully respects the drafters' intention "to put an end to impunity", while at the same time adhering to the principle of complementarity. This principle is designed to protect the sovereign right of States to exercise their jurisdiction in good faith when they wish to do so. As holder of this right, the State may waive it, just as it may choose not to challenge the admissibility of a case, even if there are objective grounds for it to make a challenge*".[25]

36. The CAR authorities have declined exercising jurisdiction with respect to Mr Yekatom in favour of the ICC, more generally through the enacting of article 37 of the Organic Law 15/003, and in particular through the statement of the Attorney General at the Bangui Court of Appeal. The CAR has never challenged the admissibility of the case since the very moment the warrant of arrest was communicated to it and Mr Yekatom was promptly transferred to The Hague. In light of the above, the Common Legal Representatives can only conclude that the CAR authorities clearly intended for the Court to prosecute Mr Yekatom. In the words of Trial Chamber II: "[…] *according to paragraph 6 of the Preamble, 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. However, if a State considers that it is more opportune for the Court to carry out an investigation or prosecution, the State will still be complying with its duties under the complementarity principle, if it surrenders the suspect to the Court in good time and cooperates fully with the Court in accordance with Part IX of the Statute*".[26]

[25] *Idem*, para. 78.
[26] *Idem*, para. 79.

37. Fourth, in its Admissibility Challenge, the Defence refers to instances of prosecutions of former Seleka and Anti-Balaka members by national courts.[27] The Common Legal Representatives posit that said examples further illustrate that the CAR authorities chose not to bring a case against Mr Yekatom before a national court in line with the State's commitments set out in the Organic Law 15/003.

38. Furthermore, while CAR courts have been dealing with lower ranked members of the Seleka and Anti-Balaka, the ICC, on the other hand, has been trying the highest ranking leaders of the latter armed group, namely Mr Ngaïssona and Mr Yekatom. This only strengthens complementarity and insures that all those responsible for the crimes committed in CAR are properly prosecuted.

39. Moreover, the Common Legal Representatives note that Mr Yekatom still enjoys parliamentary immunity in CAR. Had the national authorities wished to investigate or prosecute the Accused, they would have requested the lifting of his immunity before the National Assembly.

40. Faced with the above circumstances, the Defence has argued that the national authorities are: "*now willing and able to prosecute, but cannot do so because the OTP has asserted its primacy over the case"* and therefore *"the Chamber should provide the CAR authorities with the opportunity to begin an investigation and prosecution and then declare the case inadmissible if they do so*".[28]

41. The Common Legal Representatives submit that the Defence's assertion is entirely speculative as there is no basis for alleging that the CAR authorities are willing to prosecute Mr Yekatom. Indeed, the Defence has presented no evidence whatsoever in support of the alleged willingness by the national authorities to prosecute the Accused.

---

[27] See the Admissibility Challenge, *supra* note 1, paras. 51-53.
[28] *Idem*, para. 14.

42. The Common Legal Representatives recall that the Appeals Chamber has held in the context of admissibility proceedings that "*even though the State bears the burden of proof in general,* [it] *considers that the Pre-Trial Chamber was reasonable in placing an 'evidential' burden on the Defence sufficiently to substantiate the factual allegations it was making*".[29] It follows that, if the Defence contends that the CAR authorities are willing to prosecute Mr Yekatom, it must sufficiently substantiate this assertion presenting elements indicating that indeed said willingness exists.

43. According to the Defence, "[g]*iving the CAR authorities every opportunity to investigate and prosecute Mr. Yekatom, in addition to recognising these achievements, will empower the CAR to continue to pursue justice*".[30] However, the purpose of admissibility proceedings is not to empower national jurisdictions and the ICC has no specific mandate to develop the domestic criminal justice sector.[31] Arguably, the examples of prosecution by national courts referred to by the Defence illustrate that CAR national courts do not need the encouragement of the ICC to render justice.

44. Therefore, the Common Legal Representatives submit that, absent an ongoing investigation at the national level, or willingness to start one, the Admissibility Challenge falls short of meeting the relevant criteria under article 17 of the Statute. Indeed, in this regard when a "*State makes clear its unwillingness to bring the accused to justice, the fact of the matter is that a challenge to admissibility by the Defence can only be made within the scope of the expression of the sovereignty of the State in question*".[32]

45. Even assuming that the Chamber were inclined to follow the Defence's suggestion, at such an advanced stage of the proceedings, it would be wholly

[29] See the "Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi'" (Appeals Chamber), No. ICC-01/11-01/11-565 OA6, 24 July 2014, para. 167.
[30] *Idem*, para. 54.
[31] See MCAULIFFE (P), "Bad Analogy: Why the Divergent Institutional Imperatives of the ad hoc Tribunals and the ICC Make the Lessons of Rule 11bis Inapplicable to the ICC's Complementarity Regime" in (2014) *International Organizations Law Review* No. 11, p. 417.
[32] See the "Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)", *supra* note 24, para. 88.

inappropriate to suspend the trial, wasting precious Court's resources in the process, based solely on an hypothetical scenario rather than on the reality. And the reality is that the CAR authorities have never expressed any sign of opposition to the prosecution of Mr Yekatom before the ICC, or any indicia of willingness to prosecute him before the SCC or other national court.

46. Although the above reasons are sufficient to reject the Admissibility Challenge, the Common Legal Representatives nevertheless find it necessary, in the interest of the Victims they represent, to counter the other arguments presented by the Defence.

4) The SCC is currently unable to hear the case against Mr Yekatom

47. Contrary to the Defence's assertions, the SCC is currently unable to hear the case against Mr Yekatom. Since its creation in 2015, it is yet to become fully operational. Some entities that are essential to guarantee a fair and expeditious trial are still not operational, such as the Special Bar Association (*Corps special d'avocats*)[33] and the Victims and Witnesses Protection Unit.[34]

48. Pursuant to Chapter 7 of the Rules of Procedure and Evidence of the SCC, a Special Bar Association must be established.[35] This entity is still not operational and the call for applications for admission to said Bar Association was only issued on 6 March 2020.[36] Similarly, article 46 of the Rules of Procedure and Evidence provides for the creation of a Victims and Witnesses Protection Unit. However, to date, this unit is still not functional. Evidently, the SCC is an incomplete institutional structure and, for the time being, cannot hold a trial with the complexity of Mr Yekatom's case.

---

[33] See the Organic Law 15/003, *supra* note 22, article 65.
[34] See the "Loi n° 18.010 du 02 juillet 2018, portant règlement de procedure et de prevue devant la Cour pénale spéciale de la République Centrafricaine", article 46 (the "SCC Rules").
[35] *Idem*, Chapter 7, articles 55-59.
[36] See the "*Appel à candidatures pour le Corps Spécial d'Avocats près la Cour Pénale Spéciale*", 6 March 2020.

49. In this regard, in the *Kony et al.* case, in examining whether the creation of a war crimes division within the High Court of Uganda raised issues of complementarity, Pre-Trial Chamber II concluded that: "[p]*ending the adoption of all relevant legal texts and the implementation of all practical steps, the scenario against which the admissibility of the Case has to be determined remains therefore the same as at the time of the issuance of the Warrants, that is one of total inaction on the part of the relevant national authorities; accordingly, there is no reason for the Chamber to review the positive determination of the admissibility of the Case made at that stage*".[37]

50. The Common Legal Representatives contend that the Chamber is faced with a similar situation as far as the SCC is concerned. Indeed, besides the fact that there currently exists no pool of lawyers deemed qualified to represent the suspect/accused and victims before said court, there is also no operational structure in place to assist and protect the hundreds and possibly thousands of victims and witnesses that will be involved in the proceedings.

51. The Common Legal Representatives also note that threats to the staff of entities which should ensure the functioning of the SCC, such as the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (UNMISCAR), severely hamper the SCC's ability to function fully.[38] Additionally, there is currently no prison in the CAR that meets international standards and that could accommodate Mr Yekatom.[39]

52. In these circumstances, transferring Mr Yekatom's case to the SCC would go against fundamental guarantees of integrity and fairness of judicial proceedings.

---

[37] See the "Decision on the admissibility of the case under article 19(1) of the Statute" (Pre-Trial Chamber II), No. ICC-02/04-01/05-377, 10 March 2009, para. 52.
[38] See *A Bangui*, La MINUSCA remet des ex-combattants du FPRC à la justice et met en garde contre toute attaque contre son personnel, 16 October 2019.
[39] See *RFI*, RCA: surpopulation et manque de moyens chroniques à la principale prison de Bangui, 31 August 2019.

53. Therefore, the Common Legal Representatives conclude that not only does the Admissibility Challenge lack a legal basis, but the factual circumstances in CAR militate against the Defence's suggestions.

5) The Chamber should apply the "inactivity test" and reject the "qualified deference" approach

54. In relation to the doctrine upon which the Defence heavily relies, the Common Legal Representatives submit that it is unpersuasive and does not present a cogent reason for the Chamber to depart from the current practice on the "inaction test".

55. The Appeals Chamber held that "*in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17(1)(d) of the Statute*".[40]

56. This "inaction test" has since been followed in admissibility challenges in the *Ruto and Sang*,[41] *Gaddafi*[42] and *Simone Gbagbo* cases.[43] It can thus be considered settled case law.

57. In this regard, the Common Legal Representatives recall the hierarchy of sources of law before the Court pursuant to article 21 of the Statute and argue that, although legal doctrine is frequently relied on in submissions and decisions before

[40] See the "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", *supra* note 14, para. 78.
[41] See the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", *supra* note 14, para. 44.
[42] See the "Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'" (Appeals Chamber), No. ICC-01/11-01/11-547-Red OA4, 21 May 2014, para. 213.
[43] See the "Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo'", *supra* note 19, para. 59.

the Court,[44] it cannot be the sole source of authority as it is not a subsidiary interpretative means enumerated in said provision.

58. In addition, the Common Legal Representatives aver that, when analysed further, the main legal doctrine presented by the Defence, the "qualified deference" approach, as developed by Professor Stahn, is not applicable to the present case.

59. The concept, which was first developed by Mark A. Drumbl, entails that "[t]*he ICC should accord national accountability mechanisms, broadly categorized, qualified deference in situations of potential jurisdictional overlap and competition. The deference is qualified, and hence rebuttable, which means that the international criminal law institution could assume jurisdiction in certain circumstances*".[45]

60. Without commenting on the substance and validity of the approach, the Common Legal Representatives opine that the "qualified deference" doctrine simply finds no application in the present case as there is currently no ongoing investigation or prosecution in CAR against the Accused. Qualified deference seems more suited for cases where the State is actually willing to exercise jurisdiction over a person. This is evidenced by the fact that Professor Stahn distinguishes between cases in which an admissibility challenge was brought by the defendant and the State opposed the challenge and supported admissibility (i.e. *Katanga*, *Gbagbo* cases), and cases in which the State brought the admissibility challenge (i.e. *Ruto, Gaddafi* cases).[46] Professor Stahn argues in favour of qualified deference in the latter instance, but is silent on the application of the doctrine in the former case. Indeed, the theory only holds up if the State in question is actually willing to investigate and prosecute the

---

[44] See STAPPERT (N.), A New Influence of Legal Scholars? The Use of Academic Writings at International Criminal Courts and Tribunals in (2018) *Leiden Journal of International Law* No. 31(4), pp. 971-974.

[45] See DRUMBL (M.A.), *Atrocity, Punishment and International Law*, Cambridge University Press, Cambridge, 2007, pp. 193-194.

[46] See STAHN (C), "Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference?" in STAHN (C) (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, p. 229.

defendant, and not, as in the present instance, when the State not only has an agreement on the prosecution of the defendant before the ICC, but has also enacted national legislation resolving any issue of concurring jurisdiction.

61. The Defence also relied on Payam Akhavan's opinion in arguing that the CAR authorities should be provided an "opportunity to act".[47] The Common Legal Representatives submit that the "complementarity conundrum" identified by Akhavan is also not applicable in the present case. Indeed, in his article, Akhavan proposes that: "[i]*n order to prevail in an admissibility challenge, national jurisdictions that are clearly willing to investigate or prosecute must catch up with the ICC case within this limited window of time, imposed by expediencies at The Hague rather than domestic constraints and realities*".[48] However, Akhhavan also notes that: "[n]*ational courts should be given a fair opportunity to exercise jurisdiction. But at some point, the ICC clock must expire so that proceedings at The Hague can progress to the trial stage, not least to respect the right of an accused to a trial without undue delay*".[49]

62. In the present instance, as demonstrated above, the national authorities have never expressed the wish to see Mr Yekatom tried before national jurisdictions rather than before the Court.

6) The Defence´s proposal is impracticable and unacceptable for the Victims

63. In its Admissibility Challenge, the Defence requests the Chamber to invite written submissions from CAR on whether, notwithstanding the provision of article 37 of the Organic Law 15/003, it would be willing and able to investigate and prosecute Mr Yekatom if given the opportunity to do so. In the affirmative, the

[47] See the Admissibility Challenge, *supra* note 1, paras. 34-35.
[48] See AKHAVAN (P), "Complementarity Conundrums: The ICC Clock in Transitional Times", in (2016) *Journal of International Criminal Justice* No. 14, p. 1047 (emphasis added).
[49] *Ibid.*

Defence proposes that the Chamber give the CAR authorities a fixed period of time to open an investigation and/or commence a prosecution.[50]

64. The Common Legal Representatives note that said proposal not only finds no support in the Court's legal framework, but it is also entirely unacceptable for the participating Victims.

65. In this regard, the Common Legal Representatives recall that "*admissibility proceedings should not be used as a mechanism or process through which a State may gradually inform the Court, over time and as its investigation progresses, as to the steps it is taking to investigate a case,* [but] *should rather only be triggered when a State is ready and able, in its view, to fully demonstrate a conflict of jurisdiction on the basis that the requirements set out in article 17 are met*".[51]

66. This reasoning should apply *mutatis mutandis* when an admissibility challenge is brought by a defendant, rather than by a State concerned, as the imperative of resolving the issue of jurisdiction timely, which underlines the principle, remains applicable.[52]

67. The Common Legal Representatives further contend that, given the advanced stage of the proceedings against Mr Yekatom and the Court's finite resources, it would be unreasonable to suggest that the Chamber accept a proposal, which finds no support in the legal texts, whereby it serves as a monitoring body to national authorities that have never expressed any willingness to investigate or prosecute the Accused.

---

[51] See the "Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'", *supra* note 42, para. 164.
[52] *Idem*, para. 165.

68. As noted above, the CAR authorities have already indicated that they do not have the resources to investigate and prosecute Mr Yekatom.[53] Sending the case to the SCC would incur very high costs for an institution that is already struggling financially.[54]

69. The Common Legal Representatives further recall once more that the Accused still enjoys parliamentary immunity in CAR. Thus, if his case is transferred to the SCC, and despite Mr Yekatom's statement of being willing to ask the Parliament to waive his immunity,[55] it is highly uncertain whether said immunity would be effectively lifted, and therefore there is a real risk that he might not be prosecuted at the national level because of that impediment.

70. Moreover, the proposal by the Defence would inevitably delay the proceedings. At such an advanced stage where preparation for trial has started, further delaying the truth-seeking and justice-making process will be clearly against the interests of the Victims who have been awaiting justice for over six years.

71. In this regard, the Common Legal Representatives note that the proposal will cause months, if not years, of delay in the proceedings running against the right of Victims to an expeditious trial. Indeed, even assuming that the Prosecution is willing to share the results of its investigation with the SCC[56] - a hypothesis hardly conceivable considering the confidential nature of said investigation and the implications for the security and well-being of potential witnesses - the Special Prosecutor of the SCC cannot simply rely on that evidence and will need to undertake his own investigations.

[53] See *supra* note 23.
[54] See *Le Figaro*, "Centrafrique : la Cour pénale spéciale souffre d'un manque de moyens", 24 July 2019.
[55] See the Admissibility Challenge, *supra* note 1, footnote 73.
[56] *Idem*, para. 39.

V. VIEWS AND CONCERNS OF THE VICTIMS

72. Having consulted with the Victims they represent, the Common Legal Representatives convey to the Chamber their concerns in relation to the Admissibility Challenge.

73. Firstly, the Victims have questioned the timing chosen by the Defence for presenting its challenge. In particular, the Victims have indicated that the SCC was already established when Mr Yekatom was surrendered to the ICC and that the Defence should have asked for him to be tried before the national jurisdiction at the earliest opportunity possible during the pre-trial stage of the proceedings. The Victims are concerned that the Admissibility Challenge will delay the proceedings and find that said challenges should not be allowed at this advanced stage when the preparation for trial has started. For them, this impacts their right to seek justice in a timely manner.

74. The Common Legal Representatives echo said concerns recalling that, with regards to the timing of an admissibility challenge, Trial Chamber II held that the provisions of paragraphs 5 to 8 of article 19 of the Statute "*are clearly aimed at avoiding challenges to admissibility needlessly hindering or delaying the proceedings, which means that they must be brought as soon as possible, preferably during the pre-trial phase*".[57]

75. Indeed, the Defence could have filed its challenge much earlier as the factual circumstances it relies on, namely the existence of the SCC and of article 37 of the Organic Law 15/003, already existed at the beginning of the pre-trial proceedings. Considering the resources that have already been deployed in the present case, granting the relief sought would be contrary to the principles of judicial economy

[57] See the "Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)", *supra* note 24, para. 44.

and the integrity of proceedings.[58] The Common Legal Representatives also recall that the requirements of integrity shall prevail over the interests of the parties.[59]

76. On the question of admissibility itself and the Defence's suggestion that the Accused be tried before the SCC instead of the ICC, the Victims have indicated their strong opposition to this course of events. They consider that the national jurisdiction is not able to investigate and prosecute Mr Yekatom because of lack of means, and some do not trust national courts. The Victims also believe the Accused may still have some influence over Anti-Balaka elements who still have weapons.[60]

77. This latter concern finds support in [REDACTED].[61]

78. Moreover, Victims trust the ICC as a unique international criminal jurisdiction where they play an independent and central role, and have the right to participate meaningfully and effectively[62] at any stage of the proceedings. Considering the novelty of the SCC and its current incomplete structure, Victims fear their participation would be lessened if the case against Mr Yekatom was to be transferred to the SCC.

---

[58] See ICTY, *Delalić*, Case No. IT-96-21-T, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence (Trial Chamber), 2 September 1997, paras. 43-44 and 55. See also, ICTY, *Brjdanin*, Case No. IT-00-36-T, Decision on the Defence "Objection to Intercept Evidence" (Trial Chamber), 3 October 2003, para. 63; and ICTR, *Karemera et al.*, Case No. ICTR-98-44-T, "Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse" (Trial Chamber), 2 November 2007, para. 25.

[59] See SCSL, *Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, Written Reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process due to the Infringement of Principles of Nullum Crimen Sine Lege and Non-Retroactivity as to Several Counts (Trial Chamber), Case No. SCSL-04-16-PT, 31 March 2004, para. 26.

[60] See the "Common Legal Representatives' Joint Response to the 'Yekatom Defence Application for Interim Release'", No. ICC-01/14-01/18-450, 16 March 2020, para. 31. On recent violence committed by Anti-Balaka groups, see the *Letter dated 30 July 2019 from the Panel of Experts on the Central African Republic extended pursuant to resolution 2454 (2019) addressed to the President of the Security Council*, 30 July 2019, S/2019/608, paras. 54-60.

[61] [REDACTED].

[62] See the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case" (Pre-Trial Chamber I), No. ICC-01/04-01/07-474, 13 May 2008, para. 51. See also, the "Order on the organisation of common legal representation of victims" (Trial Chamber II), No. ICC-01/04-01/07-1328, 22 July 2009, para. 10.

79. Furthermore, Victims fear that their right to reparations would also be lessened and not as effective as before the ICC. The Common Legal Representatives echo this concern. Pursuant to article 129 of the Rules of Procedure and Evidence of the SCC, victims may request reparations after conviction of the accused.[63] Article 129(D) states that where the convicted person is indigent or where the property owned by him or her is insufficient to finance the reparations ordered, the SCC may invite the Victims and Defence Unit to seek external funding.[64] The Common Legal Representatives submit that these provisions make clear that, although victims have a theoretical right to reparations before the SCC, the real implementation of any order to this effect will be problematic, if not impossible, and thus any concrete perspective of reparation for the harm victims´ suffered from and which still has consequences on their daily lives, vane. The right to reparations before the ICC, on the other hand, is an established right and reparations proceedings are an integral part of the overall trial process.[65] In cases where the convicted person is unable to comply with an order for reparations for reasons of indigence, the Trust Fund for Victims may advance its other resources pursuant to regulation 56 of the Regulations of the Trust Fund for Victims.[66]

80. In contrast to the ICC with the fully operative Victims and Witnesses Unit, the Victims and Witnesses Support and Protection Unit of the SCC is not yet operational. Therefore, if the case against Mr Yekatom were to be transferred to the SCC, the Victims consider that they will not be able to enjoy any protection or other assistance if interacting with the SCC.

---

[63] See the SCC Rules, *supra* note 34, article 129.
[64] *Ibid.*
[65] See the "Decision establishing the principles and procedures to be applied to reparations" (Trial Chamber I), No. ICC-01/04-01/06-2904, 7 August 2012, para. 260.
[66] See the "Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2" (Appeals Chamber), No. ICC-01/04-01/06-3129_A_A2_A3, 3 March 2015, para. 115.

81. Additionally, many Victims again expressed concerns, as they did in the context of previous submissions,[67] that trying Mr Yekatom in CAR would not only be a significant destabilising factor in an already volatile security situation, but would also seriously undermine their safety and well-being.

82. The issue of security does not only affect the Victims, but the functioning of the SCC as a whole. Indeed, the lack of security in CAR is the primary reason why the SCC is still not fully operational to this day, according to Mr Toussaint Muntazini, Special Prosecutor of said court.[68]

83. The insecurity in the country was also highlighted by [REDACTED].[69]

84. The Victims also fear that if Mr Yekatom were to be transferred back to CAR, there is a real risk that he may evade detention, given the inadequacy of prisons in CAR[70] and the fact that escapes are not unusual.[71]

85. Finally, the Victims do not share the opinion of the legal scholar cited by the Defence that "*time heals all wounds*".[72] On the contrary, time creates uncertainty for Victims and aggravates their prejudice. Moreover, the passage of time does not contribute to reconciliation. In the view of the Victims, in order to heal, there must first be truth and justice and then reconciliation for there to be lasting peace. In this regard, the Common Legal Representatives note that the "qualified deference" approach put forward by the Defence would entail – as indicated above - a significant delay in the proceedings and is as such contrary to the Victims' right to

---

[67] See the "Common Legal Representatives' Joint Response to the 'Yekatom Defence Application for Interim Release'", *supra* note 60, para. 44.
[68] See *VOA Afrique*, "Plus aucun 'obstacle' aux enquêtes de la Cour pénale spéciale en Centrafrique", 25 June 2018.
[69] [REDACTED].
[70] See *RFI*, RCA: surpopulation et manque de moyens chroniques à la principale prison de Bangui, *supra* note 39.
[71] See *APA News*, RCA : 19 prisonniers s'évadent de la prison de Bossangoa, 21 May 2019.
[72] See the Admissibility Challenge, *supra* note 1, para. 34.

truth[73] and justice[74] with no delay. According to the Victims, justice delayed is justice denied.

VI. CONCLUSION

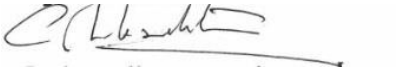
86. For the foregoing reasons, the Common Legal Representatives respectfully request the Trial Chamber to reject the Defence's Admissibility Challenge.

[73] See IACtHR, *Almohacid-Arellano et al v. Chile*, Judgement of 26 September 2006, Series C, No. 154, paras. 148 *et seq*. See also, *Masacre de Mapmpân v. Colombia*, Judgment of 25 September 2005, Series C, No. 134, para. 297; *Barrios Altos v. Peru*, Judgment of 14 March 2001, Series C, No. 75, para. 48; *Bàmaca-Velasquez v. Guatemala*, Judgement of 25 November 2000, Series C, No. 70, para. 201; ECtHR, *Hugh Jordan v. United Kingdom*, Application No. 24746/94, Judgment, 4 May 2001, para. 93; and the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *supra* note 62, paras. 31-36. See also, NAQVI (Y.), "The Right to the Truth in International Law Fact or Fiction 9", ICRC International Review, 2006, No. 88, pp. 267-268; MENDEZ (J.), "The Right to Truth", in JOYNER (Ch.)(ed.), *Reigning in Impunity for International Crimes and Serious Violations of Fundamental Human Rights' Proceedings of the Siracuse Conference*, 17-21 September 1998, Eres, Toulouse, 1998, pp. 257 *et seq*; and AMBOS (K.), El Marco Juridico de la Justicia de Transición, Tenus, Bogota, 2008, pp. 42-44.

[74] See the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case", *supra* note 62, paras. 37-44. See also, NAQVI (Y.), *op. cit. supra* note 73, pp. 267-268; MENDEZ (J.), *op. cit. supra* note 73, pp. 257 *et seq*; and AMBOS (K.), *op. cit. supra* note 73, pp. 42-44. See also, IACtHR, *La Cantuta v. Perou*, Judgement of 29 November 2006, Series C, No. 162, para. 222; *Vargas-Areco v. Paraguay*, Judgement of 26 September 2006, Series C, No. 155, paras. 153 *et seq*.; *Almohacid-Arellano et al v. Chile*, Judgement of 26 September 2006, Series C, No. 154, para. 148; *Comumdad Monvana v. Suriname*, Judgment of 15 June 2005, Series C, No. 124, para. 204; *Velasquez-Rodriguez v. Honduras*, Judgment of 29 July 1988, Series C, No. 7, paras. 162-166, 174; ECtHR, *Hugh Jordan v. United Kingdom*, Application No. 24746/94, Judgment, 4 May 2001, paras. 16, 23, 157 and 160; *Selmouni v. France*, Application No. 25803/94, Judgment, 28 July 1999, para. 79; *Kurt v. Turkey*, Application No. 24276/94, Judgment, 25 May 1998, para. 140; *Selcuk and Asker v. Turkey*, Application No. 23184/94, Judgment, 24 April 1998, para. 96; *Aydin v. Turkey*, Application No. 23178/94, Judgment, 25 September 1997, para. 103; and *Aksoy v. Turkey*, Application No. 21987/93, Judgment, 18 December 1996, para. 98.

Dmytro Suprun
Common Legal Representative of the Former Child Soldiers

Paolina Massidda



Elisabeth Rabesandratana

Yaré Fall

Abdou Dangabo Moussa

Marie Édith Douzima Lawson

Common Legal Representatives of the Victims of Other Crimes

Dated this 17th day of April 2020

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