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**International  
Criminal  
Court**

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Date: **01 May 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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-  
EDOUARD NGAÏSSONA***

**Public Redacted**

**Public Redacted Version of “Prosecution’s Application for Notice to be given pursuant to  
Regulation 55(2) on Accused Yekatom’s Individual Criminal Responsibility”  
01 May 2020, (ICC-01/14-01/18-503-Conf)**

**Source:** Office of the Prosecutor

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

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## I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) requests Trial Chamber V (“Chamber”) to notify the Parties and Participants of the possibility that the legal characterisation of facts regarding Accused YEKATOM’s individual criminal responsibility, as described in the Decision on the Confirmation of Charges,<sup>1</sup> may be subject to change.<sup>2</sup> Pre-Trial Chamber II’s (“Pre-Trial Chamber”) factual findings justify the issuance of Regulation 55(2) Notice to accord with articles 28, and 25(3)(c) and (d).

2. As the Chamber is aware, the Pre-Trial Chamber denied a previous request to reconsider or, in the alternative, grant leave to appeal the non-confirmation of charges under these modes of liability as pled in the Document Containing the Charges (“DCC”).<sup>3</sup> However, the Chamber is not bound by that decision or the Pre-Trial Chamber’s legal characterisation of the facts in the Confirmation Decision. This is because there is no legal impediment to a Trial Chamber re-characterising facts and circumstances to include modes of liability considered but not confirmed by a Pre-Trial Chamber<sup>4</sup>, but also because Regulation 55(2) Notice responds expressly to a lower evidentiary threshold.<sup>5</sup>

3. Thus, to the extent that the findings in the Confirmation Decision “appear”<sup>6</sup> to this Chamber to support the *possibility* of a change in the legal characterisation of facts Regulation 55(2) Notice must be issued. As such, the Prosecution relies solely on the findings of fact in the Confirmation Decision which fully substantiate this Request, and will facilitate its efficient and expeditious disposition.<sup>7</sup> Because of the importance of this issue to the nature and scope of the prospective trial, the Prosecution respectfully requests that it be referred to the full Chamber for determination.

## II. CONFIDENTIALITY

4. This filing is classified as “Confidential”, as it refers to material that is not available to

<sup>1</sup> ICC-01/14-01/18-403-Conf (“Confirmation Decision”).

<sup>2</sup> See regulation 55(2) of the Regulations of the Court (“RoC” or “Regulation 55(2) Notice”).

<sup>3</sup> See ICC-01/14-01/18-447 and ICC-01/14-01/18-437, respectively.

<sup>4</sup> See ICC-02/11-01/15-369, paras. 31, 32 (noting the rationale as, “the risk of acquittals that are merely the result of legal qualifications confirmed in the pre-trial phase that turn out to be incorrect”); see also ICC-01/09-01/11-1122, para. 39.

<sup>5</sup> See regulation 55(2) of the RoC (“appear[ance] to the Chamber that the legal characterisation of facts may be subject to change”). The plain text of the provision contains no other qualification as to evidentiary threshold for such ‘appearance’, such as substantial grounds, or reasonable grounds for instance.

<sup>6</sup> Regulation 55(2) of the RoC (“If, at any time during the trial, it *appears* to the Chamber that the legal characterisation of facts *may* be subject to change, the Chamber *shall* give notice” (emphasis added)).

<sup>7</sup> The Prosecution reserves its right to rely on factual allegations contained in the Document Containing the Charges (“DCC”) that were not rejected in the Confirmation Decision, should it consider it necessary.

the public. The Prosecution will file a public redacted version as soon as possible.

### III. SUBMISSIONS

#### A. A Chamber may properly give Regulation 55(2) Notice before trial

5. The Court’s jurisprudence confirms that Regulation 55(2) Notice may be issued before trial,<sup>8</sup> especially since it “... [does] not result in an actual legal re-characterisation of any facts ... [but, is] simply a notice of the possibility of such re-characterisation.”<sup>9</sup> Regulation 55(2) Notice is thus “the first step of the procedure” to modify the legal character of facts within the framework of regulation 55.<sup>10</sup>

6. The Appeals Chamber has held that “it is preferable that notice under regulation 55(2) of the RoC should always be given *as early as possible*”.<sup>11</sup> In the *Ruto* and *Sang* case, Trial Chamber V(A) recognised that this should be done “particularly in circumstances in which the Prosecution has made an early application for this notice on the basis of the facts and circumstances pleaded in the charging document.”<sup>12</sup> Here, the Request is based squarely on the Pre-Trial Chamber’s factual findings in the Confirmation Decision.

7. Providing Regulation 55(2) Notice promptly ensures trial fairness<sup>13</sup> and enables the Parties and Participants adequately to prepare. Moreover, it avoids delay, diminishes the prospect of recalling witnesses,<sup>14</sup> allows the Parties timely to adapt their trial presentations, and mitigates the risk of surprise at the end of trial.<sup>15</sup>

8. The Request is fully consonant with these substantive and procedural interests, and with article 67(1)(a)’s safeguards to ensure that an Accused be informed “*promptly* and in detail of the nature, cause and content of the charge[s]”<sup>16</sup> they may face at trial.

#### B. Regulation 55(2) Notice should be given for different modes of liability

9. Although the Pre-Trial Chamber declined to confirm YEKATOM’s criminal responsibility under articles 28(a), and 25(3)(c) and (d), their application is readily apparent

<sup>8</sup> ICC-01/04-01/06-1084, paras. 48-49 (issuing regulation 55 notice in advising the Parties that it “may modify the characterisation of the facts” and to prepare their case accordingly).

<sup>9</sup> ICC-01/09-01/11-1334, para. 30.

<sup>10</sup> ICC-01/05-01/13-1250, para. 8 (noting the three stages under regulation 55 of the RoC for modifying the legal character of facts).

<sup>11</sup> ICC-01/04-01/07-3363, para. 24 (“emphasis added”).

<sup>12</sup> ICC-01/09-01/11-1122, para. 27.

<sup>13</sup> ICC-01/04-01/06-2205, para. 85; ICC-01/04-01/07-3363, para. 1.

<sup>14</sup> ICC-01/09-01/11-1122, paras. 27, 42.

<sup>15</sup> See ICC-01/09-01/11-1122, para. 27 (“waiting to give such notice increases the chances of prejudice”).

<sup>16</sup> ICC-01/04-01/06-1122, para. 27; see ICC-02/11-01/15-369, paras. 49-50.

from the factual findings in the Confirmation Decision, such that Regulation 55(2) Notice is required for these modes of liability.<sup>17</sup>

### C. Re-characterisation under article 28

#### i. Responsibility under article 28

10. YEKATOM’s individual criminal responsibility for the charged crimes requires notice of a possible legal re-characterisation of the facts under article 28(a).

11. Article 28 is distinct in the Court’s legal framework.<sup>18</sup> It addresses different policy considerations regarding a superior’s responsibility for crimes committed by subordinates, and is not subsumed by article 25.<sup>19</sup> The provision addresses a superior’s responsibility for their subordinates’ crimes because of a failure in his or her duty to prevent or repress them, or to submit the matter to the competent authorities to investigate or prosecute.<sup>20</sup> This is cumulative to, and contrasts with, a superior’s separate responsibility for crimes to which they personally contribute.<sup>21</sup> Hence, article 28’s preface – “[i]n addition to other grounds of criminal responsibility”.<sup>22</sup>

#### a. Elements

12. This mode of liability requires: (a) the accused was a military commander or a person effectively acting as such; (b) forces under his or her effective command and control, or authority and control, committed crimes within the Court’s jurisdiction; (c) the accused knew or should have known that these forces were committing or about to commit such crimes; and (d) the accused failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission, or submit the matter to the competent authorities for

<sup>17</sup> See regulation 55(2) of the RoC (“[i]f.. it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice”); see ICC-02/11-01/15-369, para. 51.

<sup>18</sup> ICC-01/05-01/08-3343, para. 173 (observing that “[t]he plain terms of Article 28—‘[i]n addition to other grounds of criminal responsibility’—and its placement in Part 3 of the Statute indicate that Article 28 is intended to provide a distinct mode of liability from those found in Article 25.”).

<sup>19</sup> ICC-01/14-01/18-403-Conf, para. 58.

<sup>20</sup> See ICC-01/05-01/08-424, para. 405; see ICC-02/11-01/11-656-Red, para. 262; and see, ICC-02/04-01/15-422-Red para. 45; see also *Prosecutor v. Oric*, IT-03-68, Judgement, 30 June 2006, para. 302 (recognising “a superior’s criminal responsibility for crimes of subordinates is not limited the subordinates’ active perpetration or participation, but also comprises their committing by omission”). Accordingly, a subordinate’s criminal participation in the crimes will support the imputation of criminal responsibility to their superior and/or commander.

<sup>21</sup> See ICC-02/11-01/11-656-Red, para. 262; and see ICC-02/04-01/15-422-Red, para. 45

<sup>22</sup> Article 28 (emphasis added).

investigation and prosecution.<sup>23</sup>

b. Salient issues

i. *Causality*

13. Although the Court's jurisprudence on this mode of liability is limited, article 28 does not necessarily require a 'causal' nexus between the superior's failure to intervene and the crimes.<sup>24</sup> For instance, Pre-Trial Chamber II observed in the *Bemba* case that, "it is illogical to conclude that a failure relating to [the duties to repress or submit the matter to the competent authorities] can retroactively cause the crimes to be committed."<sup>25</sup>

ii. *Acting as a military commander*

14. Article 28(a)'s application to a "person effectively acting as a military commander"<sup>26</sup> contemplates "a distinct as well as a broader category of commanders. This category refers to those who are not elected by law to carry out a military commander's role, yet they perform it *de facto* by exercising effective control over a group of persons through a chain of command."<sup>27</sup> Moreover, it encompasses persons wielding authority and control over "irregular forces [...] such as rebel groups, paramilitary units including, inter alia, armed resistance movements and militias that follow a structure of military hierarchy or a chain of command."<sup>28</sup>

iii. *Effective command and control*

15. Effective control manifests a superior-subordinate relationship between an accused and his or her forces,<sup>29</sup> comprising the "material ability [or power] to prevent and punish the commission of offences, [...]. In the context of article 28(a) of the Statute, 'effective control' also refers to the material ability to prevent or repress the commission of crimes or submit the

<sup>23</sup> ICC-01/05-01/08-424, paras. 444-455, *et seq*; ICC-01/05-01/08-3343, para. 59.

<sup>24</sup> See ICC-01/05-01/08-3636-Anx2, paras. 51-56 ("it is not possible that an omission after a fact has occurred (that is, a failure to refer a criminal behaviour to the competent authorities) *causes* this fact. If causality were to be an element of article 28, then it would have to be accepted that a commander can never be held responsible for a single crime or for the first crime in a series on the basis of failure to refer the physical perpetrator to the competent authorities", at para. 52).

<sup>25</sup> See ICC-01/05-01/08-424, para. 424.

<sup>26</sup> Article 28(a).

<sup>27</sup> ICC-01/05-01/08-424, para. 409.

<sup>28</sup> ICC-01/05-01/08-424, para. 410.

<sup>29</sup> See ICC-01/05-01/08-424, para. 414.

matter to the competent authorities.”<sup>30</sup>

16. The exercise of effective control is not dependent on proof of a direct superior-subordinate relationship.<sup>31</sup> Rather, such control may be exercised through intermediary subordinates between the commander and the forces which committed the crimes.<sup>32</sup> The question is simply whether the commander had *effective control* over the relevant forces.<sup>33</sup> Exclusive control is not required. Shared control is sufficient.<sup>34</sup>

*iv. The forces*

17. An accused’s subordinates are sufficiently identified by category, group or function, and the superior need not know the exact identity of his or her subordinate.<sup>35</sup>

*v. Failure to intervene – necessary and reasonable measures*

18. Although linked,<sup>36</sup> the duties to prevent and to punish are distinct.<sup>37</sup> Importantly, the latter is not merely restricted to discipline or sanctions, but encompasses reporting the crimes to the competent authorities to take appropriate action.<sup>38</sup>

19. Necessary measures are those appropriate for the superior to discharge his or her obligations. They are established by a showing that the accused genuinely tried to prevent or punish (or repress). Reasonable measures comprise those within the material power of a

<sup>30</sup> ICC-01/05-01/08-424, para. 415; *see also Prosecutor v. Prlic*, IT-04-74-T, Judgement, 29 May 2013, para. 240 (noting, this “pertains to every superior, whether a military chief or any civilian person vested with authority within a hierarchy, even a leader of a paramilitary group”); *see also Prosecutor v. Nizeyimana*, ICTR-00-55C-A, Judgement, 29 September 2014, para. 342 (noting “It is settled jurisprudence that the test for effective control is the material ability to prevent or punish the proven offences”); *Prosecutor v. Karadzic*, IT-95-5/18-T, Judgement, 24 March 2016, paras. 580-583; *but see, Prosecutor v. Perisic*, IT-04-81-A, Judgement, 28 February 2013, para. 88 (noting that a superior’s ability to prevent a crime is not necessarily a prerequisite to demonstrating effective control)..

<sup>31</sup> *Prosecutor v. Nahimana et al*, ICTR-99-52A, Judgement, 28 November 2007, para. 785.

<sup>32</sup> *Prosecutor v. Oric*, IT-03-68-A, Judgement, 3 July 2008, para. 20.

<sup>33</sup> ICC-01/05-01/08-3343, para. 184.

<sup>34</sup> *Prosecutor v. Bagosora*, ICTR-98-41-A, Judgement, 14 December 2011, para. 495, also citing *Prosecutor v. Halilovic*, IT-01-48-T, Judgement, 16 November 2005, para. 62; *Prosecutor v. Strugar*, IT-01-42-T, Judgement, 31 January 2005, para. 365; *Prosecutor v. Blaskic*, IT-95-14-T, Judgement, 3 March 2000, para. 303.

<sup>35</sup> *Prosecutor v. Muvunyi*, ICTR-2000-55A, Judgement, 29 August 2008, para. 55; *Prosecutor v. Renzaho*, ICTR-97-31-A, Judgement, 1 April 2011, paras. 64, 116; *Prosecutor v. Boskovski and Tarculovski*, IT-04-82-A, Judgement, 19 May 2010, paras. 75, 89; *See also Prosecutor v. Prlic*, IT-04-74-T, Judgement, 29 May 2013, para. 239.

<sup>36</sup> *See* ICC-01/05-01/08-424, para. 424 (noting that “[a]s punishment is an inherent part of prevention of future crimes, a commander’s past failure to punish crimes is likely to increase the risk that further crimes will be committed in the future”) (emphasis added).

<sup>37</sup> *Prosecutor v. Hadzihasanovic*, IT-01-47-A, Judgement, 22 April 2008, para. 259; *Prosecutor v. Perisic*, IT-04-81-A, Judgement, 28 February 2019, para. 88.

<sup>38</sup> *Prosecutor v. Hadzihasanovic*, IT-01-47-A, Judgement, 22 April 2008, para. 154; *Prosecutor v. Bagosora*, ICTR-98-41-A, Judgement, 14 December 2011, para. 510.

superior.<sup>39</sup>

c. Facts supporting article 28(a) re-characterisation

20. The facts as found by the Pre-Trial Chamber also substantiate YEKATOM's possible criminal responsibility for the charged crimes under article 28(a).

i. *YEKATOM was a military commander or acting as such*

21. The Pre-Trial Chamber found that the Anti-Balaka comprised an armed *group* (of which Yekatom's Anti-Balaka group was part ("YEKATOM's Group")) and an organisation demonstrating in some respects the characteristics of a "military-like structure, with elements organised into sections and companies, under a functioning command structure with clear reporting lines."<sup>40</sup>

22. In this context, it further found that "[YEKATOM] was *in command* of an active group of Anti-Balaka which at one point numbered 3,000 members, who were first located in Cattin, Boeing and Bimbo and, later on, in the Lobaye Prefecture along the Bangui-Mbaïki axis".<sup>41</sup> This alone, is dispositive of this element. In addition, the Pre-Trial Chamber also found that, in relation to the 5 December Bangui Attack, YEKATOM "commanded" a group of Anti-Balaka,<sup>42</sup> and was among a number of Anti-Balaka Zone-Commanders "appointed to control specific areas and discipline their respective groups."<sup>43</sup>

23. It is well-established that "members of a self-proclaimed government who hold *de facto* power may be held responsible as superiors if they have the material ability to issue orders and have them executed."<sup>44</sup> Thus, it is highly relevant that the Pre-Trial Chamber made specific findings concerning YEKATOM's capacity to issue orders. The Pre-Trial Chamber found that YEKATOM had, *inter alia*, "issu[ed] orders to Anti-Balaka members, including patently illegal instructions",<sup>45</sup> founding his criminal responsibility for the confirmed charges, alternatively under article 25(3)(b). This finding demonstrates both a superior-subordinate relationship between YEKATOM and his Anti-Balaka elements, as well as his effective control over them, addressed below.

<sup>39</sup> *Prosecutor v. Oric*, IT-03-68-A, Judgement, 3 July 2008, para. 177; *Prosecutor v. Bagosora*, ICTR-98-41-A, Judgement, 14 December 2011, para. 683.

<sup>40</sup> ICC-01/14-01/18-403-Conf, paras. 65, 69.

<sup>41</sup> ICC-01/14-01/18-403-Conf, para. 65 (emphasis added).

<sup>42</sup> ICC-01/14-01/18-403-Conf, para. 63.

<sup>43</sup> ICC-01/14-01/18-403-Conf, para. 65.

<sup>44</sup> *Prosecutor v. Prlic*, IT-04-74-T, Judgement, 29 May 2013, para. 242.

<sup>45</sup> ICC-01/14-01/18-403-Conf, p. 107, and *see e.g.*, paras. 94, 98, 124.



ii. *YEKATOM exercised effective control*

24. As a corollary to the above, effective control is sufficiently shown where “the superior was able to give orders, but also [where] these orders were actually followed”.<sup>46</sup>

25. On the evidence presented during the confirmation hearing, the Pre-Trial Chamber concluded not only that YEKATOM was able and disposed to give orders, but that he also *ordered* the commission of crimes by his Group, which they carried out. These include crimes committed in relation to the 5 December 2013 Bangui Attack,<sup>47</sup> the Yamwara School Base,<sup>48</sup> and along the PK9 – Mbaiki Axis, as well as the conscription and/or enlistment of children under age 15, and their use in hostilities.<sup>49</sup> YEKATOM’s orders and directions were executed<sup>50</sup>, including in respect of these crimes, as found by the Pre-Trial Chamber. And, they further demonstrate his exercise of effective control over his subordinates.<sup>51</sup>

26. The operative part of the Confirmation Decision and the underlying factual findings cross-referenced therein, underscore the evidence establishing that YEKATOM’s Group acted, *inter alia*, pursuant to his orders in committing the charged crimes.

27. YEKATOM’s ordering of his elements sufficiently establishes his exercise of effective control over them in their commission of a pattern of serious crimes during a protracted period (*i.e.*, from 5 December 2013 through August 2014<sup>52</sup>) comprising the following:

- Directing attacks against the civilian population, starting on 5 December 2013 (Count 1);
- Murder, regarding the Boeing Market incident, Boeing and Cattin, the Yamwara School Base incident, and the death of the Mbaiki’s Deputy Mayor in the context of the advance of YEKATOM’s Group through, and takeover of, the PK9 - Mbaiki Axis (and its constituent villages) (Counts 2, 3, 15, 16, 26 and 27);<sup>53</sup>

<sup>46</sup> *Prosecutor v. Prlic*, IT-04-74-T, Judgement, 29 May 2013, para. 242.

<sup>47</sup> ICC-01/14-01/18-403-Conf, para. 99.

<sup>48</sup> ICC-01/14-01/18-403-Conf, para. 125.

<sup>49</sup> ICC-01/14-01/18-403-Conf, paras. 154, 155.

<sup>50</sup> ICC-01/14-01/18-403-Conf, para. 94 (noting, “Yekatom’s instructions were executed by his Anti-Balaka elements”).

<sup>51</sup> ICC-01/14-01/18-403-Conf, pp. 104-107.

<sup>52</sup> ICC-01/14-01/18-403-Conf, para.144.

<sup>53</sup> ICC-01/14-01/18-403-Conf, pp. 104-107 (*cf.* para. 140, finding liability for the murder of Mbaiki’s Deputy Mayor under 25(3)(a) only – as opposed to including 25(3)(b) alternatively, in the operative part of the Confirmation Decision).

- Forcible transfer, displacement and deportation, regarding Cattin and Boeing, and the dislocation of civilians along the PK9 - Mbaiki Axis (and its constituent villages) (Counts 4, 5, 24 and 25);
- Directing an attack against a building dedicated to religion - the destruction of the Boeing Mosque (Count 6);
- Persecution, regarding Bangui, Cattin, Boeing, the Yamwara School Base incident, and the PK9 – Mbaiki Axis (including the constituent villages of Sekia, Ndangala, Bimon, Kapou, Bossongo, Pissa) (Counts 8, 17, 28);
- Other inhumane acts, concerning the Yamwara School Base incident, (Count 11);
- Torture and Cruel Treatment regarding the Yamwara School Base incident (Counts 12, 13);
- Imprisonment and other forms of severe deprivation of physical liberty, regarding the Yamwara School Base incident (Count 14); and
- Conscription and/or enlistment of children under age 15 in YEKATOM's Group at various locations, and their use, *inter alia*, in hostilities (Count 29).

28. The factual findings in the Confirmation Decision on the ordering and commission of the above crimes by YEKATOM and his group fully substantiate the remaining elements of article 28(a) responsibility.<sup>54</sup> They show that (a) the crimes fall within the Court's jurisdiction and were committed by YEKATOM's subordinates; (b) YEKATOM knew or should have known that his forces were committing or about to commit such crimes; and (c) YEKATOM failed to take all necessary and reasonable measures within his power to prevent or repress their commission, or to submit the matter to the competent authorities (having participated in them as a co-perpetrator under article 25(3)(a) or otherwise ordered their commission pursuant to article 25(3)(b)).

#### **D. Re-characterisation under article 25(3)(c) and (d)**

29. The Pre-Trial Chamber's findings on YEKATOM's participation in the charged crimes also substantiate his possible criminal liability under article 25(3)(c) and 25(3)(d), such that Regulation 55(2) Notice is required.

30. The Confirmation Decision recognises that a Trial Chamber is not constrained by the non-confirmation of substantiated charges, holding:

<sup>54</sup> ICC-01/14-01/18-403-Conf, paras. 83-92; 113-117; 129-137; pp. 104-107.

[a] Trial Chamber is better poised to fully assess the relevant circumstances and that, in light of regulation 55 of the Regulations, providing early notice as to the applicable legal qualifications is beneficial both for the rights of the Defence and judicial economy.<sup>55</sup>

31. Here, the Pre-Trial Chamber’s finding that YEKATOM’s conduct “resulted in the *realisation* of the objective elements of the crimes”<sup>56</sup> is significant, if not dispositive of the possible legal –re-characterization of the facts under article 25(3)(c) and (d). Such conduct subsumes an obvious ‘contribution’ to the commission of the crime which, particularly under article 25(3)(c), may not necessarily even entail “an effect”<sup>57</sup> - let alone, the realisation of its objective elements. For purposes of article 25(3)(d), a contribution merely requires a ‘link’ or ‘nexus’ to the commission of the crime, as discussed below.

32. Ordering a crime that is executed<sup>58</sup> or attempted, obviously entails conduct which assists in its commission. For this reason, compared to article 25(3)(b), article 25(3)(c) “implies a lower degree of blameworthiness [...] deduced from the fact that the instigator, the intellectual author of the offence, directly prompts its commission, while the assistant’s contribution hinges on the determination of the principal perpetrator to execute the offence”.<sup>59</sup>

33. Like *committing* the crime under article 25(3)(a), such conduct comprises a contribution manifestly made with the aim of furthering the criminal activity or objective of a perpetrator group, or in the knowledge of the group’s intention to commit the crime.<sup>60</sup> In this case, the group clearly possesses the requisite intent under article 30 by virtue of its execution of the order.

34. There is no reason why an accused cannot be *charged* with criminal responsibility for a crime under multiple modes of liability. Charging alternative/cumulative modes of liability is

<sup>55</sup> ICC-01/14-01/18-403-Conf, para. 121; *see* ICC-02/11-01/15-369, para. 32; *see also* *Prosecutor v. Naletilić & Martinović*, IT-98-34-A, Judgment, 3 May 2006, para. 103; *Prosecutor v. Mučić, et al.*, IT-96-21-A, Judgment, 20 February 2001, para. 400.

<sup>56</sup> ICC-01/14-01/18-403-Conf, para. 58 (emphasis added).

<sup>57</sup> *See* ICC-01/05-01/13-2275-Red, para. 1327 (addressing TC VII’s determination that the causal relationship between an accessory’s conduct and the relevant crime need merely be one of ‘an effect’); *see also* ICC-01/05-01/13-1989-Red, paras. 90, 94.

<sup>58</sup> *See* ICC-01/14-01/18-403-Conf, para. 94 (noting in relation to the 5 December 2013 Attack and related crimes “Yekatom’s instructions were executed by his Anti-Balaka elements”).

<sup>59</sup> ICC-01/05-01/13-1989-Red, para. 86.

<sup>60</sup> *See e.g.*, ICC-01/04-02/06-309, paras. 158-163 (confirming charges against Bosco Ntaganda under 25(3)(d) for crimes for charges also confirmed under 25(3)(a) and 25(3)(b)).

expressly permitted by the Chamber's Practice Manual<sup>61</sup> and the Court's jurisprudence. Further, other Courts, such as the Appeals Chamber of the Special Court for Sierra, have observed that "[i]n light of the practice at international criminal courts of charging multiple instances of an offence within a single Count, no identifiable legal principle should prevent compound convictions for multiple instances of the same offence charged in a single Count, when multiple convictions would be allowed if multiple instances of the same offence at issue were charged in separate Counts."<sup>62</sup> Similarly, a noted ICTY and ICTR Appeals Judge maintained that "there is no reason why a single crime cannot be perpetrated by multiple methods".<sup>63</sup> Certainly this may be the case when, in relation to a single cluster of crimes, an accused performs different types of contributions, falling under separate modes of liability (e.g., ordering some crimes and otherwise assisting in the commission of others). Thus, where the commission of a crime under article 25(3)(a) may also involve distinct conduct comprising different forms of criminal participation under article 25, *charging* criminal responsibility under each is fully justified. In the facts of this case, these different forms of liability, including under article 25(3)(c) and (d), are clearly applicable and apparent.

*i. Responsibility under article 25(3)(c) and (d)*

35. The Prosecution's DCC charged YEKATOM in the alternative for his individual responsibility pursuant to article 25(3)(c) and (d) which, as discussed above, the Pre-Trial Chamber deemed "unnecessary to address",<sup>64</sup> having found him otherwise responsible. The Pre-Trial Chamber's factual findings nevertheless give rise to the possibility of a legal re-characterisation of facts under article 25(3)(c) and (d) and thus, the Chamber's issuance of Regulation 55(2) Notice.

Article 25(3)(c)

a. Elements

36. Article 25(3)(c) liability entails that: (a) a crime within the jurisdiction of the Court is attempted or committed; (b) the accused acts for the purpose of facilitating the crimes; and

<sup>61</sup> Chamber's Trial Manual, Fourth Edition, November 2019, para. 67 ("in the charges, the Prosecutor may plead alternative legal characterisations, both in terms of the crime(s) and the person's mode(s) of liability").

<sup>62</sup> *Prosecutor v. Brima, et al*, SCSL-2004-16-A, Judgement, 22 February 2008, para. 214.

<sup>63</sup> *Kamuhanda v. Prosecutor*, ICTR-99-54-A, Judgement *Sep. Op. Shahabuddeen*, 19 September 2005, paras. 405, 411 (involving the commission of the same crime through different conduct).

<sup>64</sup> ICC-01/14-01/18-403-Conf, paras.100, 141, 156; *but see* ICC-01/14-01/18-447, at para. 20 (indicating that the Pre-Trial Chamber assessed YEKATOM's liability under article 25(3)(c) and (d) and that "...after giving substantive consideration to all of the modes of liability, it found that some of them were not sufficiently supported by the evidence").

(c) the act aids, abets or otherwise assists in its commission.<sup>65</sup>

b. Salient issues

i. *Assistance*

37. The Appeals Chamber has held that this provision:

“requires that the assistance in the commission [...] of the crime be provided for the purposes of facilitating such commission without indicating whether the conduct must have also had an effect on the commission of the offence [...] the actus reus [...] is certainly fulfilled when the person’s assistance in the commission of the crime facilitates or furthers the commission of the crime, as the showing of such an effect indicates that the person indeed assisted in its commission. Whether a certain conduct amounts to “assistance in the commission of the crime” within the meaning of article 25 (3) (c) of the Statute even without the showing of such an effect can only be determined in light of the facts of each case.”<sup>66</sup>

38. The Appeals Chamber further confirmed Trial Chamber VII’s assessment of these elements in holding that “the form of contribution under Article 25(3)(c) of the Statute does not require the meeting of any specific threshold.”<sup>67</sup> For example, an accused’s assistance need not be substantial.<sup>68</sup>

39. Moreover, as the Appeals Chamber has observed, “[n]othing in [article 25(3)(c)] requires that an accessory aid, abet or otherwise assist a specific person, whether considered a “principal perpetrator”, “intermediary perpetrator”, or otherwise; rather, individual criminal liability under article 25 (3) (c) of the Statute is established in reference to the assistance in the commission or attempted commission of a crime”.<sup>69</sup>

ii. *Mens rea*

40. Finally, an accused need not know the exact offence intended or the specific circumstances of its commission, but merely be aware of its essential elements. In other words, the *type* of crime contemplated. In essence, “[a] person may be said to be acting for the purpose of facilitating the commission of a crime, *even if he or she does not know all the*

<sup>65</sup> ICC-01/12-01/15-84-Red, para. 26; ICC-02/04-01/15-422-Red, para. 43; ICC-01/05-01/13-1989-Red, para. 83.

<sup>66</sup> ICC-01/05-01/13-2275-Red, para. 1327.

<sup>67</sup> ICC-01/05-01/13-1989-Red, para. 93.

<sup>68</sup> ICC-01/05-01/13-2275, paras. 1326-1327; ICC-01/05-01/13-1989-Red, para. 93.

<sup>69</sup> ICC-01/05-01/13-2275-Red, paras. 1328-1329.

*factual circumstances in which it is committed [...].*<sup>70</sup>

#### Article 25(3)(d)

##### c. Elements

41. Article 25(3)(d) liability entails that: (a) a crime within the jurisdiction of the Court be attempted or committed; (b) a group of persons acting with a common purpose attempted to commit or committed such crime; (c) the accused contributed to the crime or its attempted commission in any way other than those set out in article 25(3)(a)-(c); (d) the contribution was intentional or volitional; and (e) the contribution was made either with the aim of furthering the criminal activity or criminal purpose of the group, or in the knowledge of the intention of the group to commit the crime.<sup>71</sup>

##### d. Salient issues

###### *i. Group acting with a common purpose*

42. A group must comprise at least a plurality of persons<sup>72</sup> and “[act] with a common purpose”.<sup>73</sup> It need not include the accused.<sup>74</sup> Nor, need the group be formally constituted or previously organised or arranged, since its concerted criminal action may also arise extemporaneously.<sup>75</sup>

43. A common purpose entails a criminal element: “the criminal purpose of the group presupposes specification of the criminal goal pursued; its scope, by pinpointing its temporal and geographic purview; the type, origins or characteristics of the victims pursued; and the identity of the members of the group, although each person need not be identified by name.”<sup>76</sup> And, as noted, the common purpose need not be explicit, but may be inferred from the group’s actions.<sup>77</sup>

44. A common purpose need not be wholly criminal in nature, but must at least encompass the attempted commission of a crime. Thus, a group “with a political and strategic goal which

<sup>70</sup> ICC-01/05-01/13-2275-Red, paras. 21, 1400 (emphasis added).

<sup>71</sup> ICC-01/09-01/11-373, para. 351; ICC-01/04-02/06-309, para. 158; ICC-01/09-01/11-1, para. 51; ICC-01/09-02/11-1, para. 47; ICC-01/04-01/10-465-Red, paras. 268-289.

<sup>72</sup> See e.g., ICC-01/04-01/06-3121-Red, para. 463 (referring to a plurality of persons in the context of article 25(3)(a); see also ICC-01/04-01/07-717, paras. 522, 524-525 (similarly, referencing article 25(3)(a)).

<sup>73</sup> ICC-01/04-01/07-3436-t-ENG, para. 1624.

<sup>74</sup> ICC-01/04-01/07-3436-t-ENG, para. 1631.

<sup>75</sup> See e.g., ICC-01/04-01/06-3121-Red, para. 445 (noting that a criminal agreement, even arising extemporaneously, binds co-perpetrators together); see also ICC-01/04-01/07-3436-t-ENG, para. 1626.

<sup>76</sup> ICC-01/04-01/07-3436-t-ENG, para. 1626.

<sup>77</sup> See ICC-01/04-01/07-3436-t-ENG, para. 1626.

also entails criminality or the execution of a crime may constitute a *group acting with a common purpose* within the meaning of article 25(3)(d).<sup>78</sup> It is enough that the persons who committed the crime “belong to the group, whether they form all or part of it.”<sup>79</sup>

*ii. Contribution*

45. Although the Court’s jurisprudence on the requisite level of contribution is not settled, the Prosecution considers the plain text dictates that article 25(3)(d) is satisfied upon a showing of ‘any’ contribution to the crime.<sup>80</sup> The only appellate indication of the requisite level of contribution confirms this interpretation.<sup>81</sup> Other Chambers have also endorsed this position, including in the *Al Mahdi*, *Al Hassan*, and *Ongwen* cases.<sup>82</sup>

*iii. Scope of liability*

46. Liability attaches only to “those crimes which the group [intends] to commit (the common purpose being to commit the crime or encompassing its execution), and falling within the ordinary course of events”.<sup>83</sup>

*iv. Mens rea*

47. As with all accessorial modes of liability, the Accused’s contribution to the crime must be intentional. However, there is no requirement that it be direct.<sup>84</sup> Under article 25(3)(d), there are two avenues for criminal liability. Under the first subsection, the contribution must be made “with the aim of furthering the criminal activity or criminal purpose of the group.”<sup>85</sup> This requires that it be made with the “specific intention to promote the practical acts and ideological objectives of the group”.<sup>86</sup> The Prosecution need not establish that the accused intended to facilitate the specific crime, nor that he or she intended its commission. It is therefore not required that the accused satisfies the mental element for the crime.<sup>87</sup>

<sup>78</sup> ICC-01/04-01/07-3436-t-ENG, para. 1627.

<sup>79</sup> ICC-01/04-01/07-3436-t-ENG, para. 1624.

<sup>80</sup> ICC-01/09-01/11-373, para. 354; ICC-02/11-02/11-186, para.172.

<sup>81</sup> See ICC-01/04-01/10-514, Sep. Op. Fernandez, paras. 8-15.

<sup>82</sup> See ICC-01/12-01/15-84-Red, para. 27; ICC-02/04-01/15-422-Red, para. 44.

<sup>83</sup> ICC-01/04-01/07-3436-t-ENG, para. 1630.

<sup>84</sup> See ICC-01/04-01/07-3436-t-ENG, para. 1635-1636.

<sup>85</sup> See article 25(3)(d)(i).

<sup>86</sup> Ambos, K. *Treatise on International Criminal Law: Volume 1: Foundations and General Part*, Oxford University Press, (2013), p. 169 (*citing* Conc. Eser, ‘International Criminal Responsibility’ in Cassese, Gaeta, and Jones, *Rome Statute* (2002) p. 103, with fn. 155); *See also* Triffterer, O. *Commentary on the Rome Statute of the International Criminal Court*, 2nd Ed., Munchen/Oxford/Baden-Baden: C.H. Beck/Hart/Nomos (2008), p. 759.

<sup>87</sup> ICC-01/04-01/10-465-Red, para. 289.

48. Alternatively, under the second subsection, the accused must know of the group's collective intention to commit the crime. This means that the accused was aware that: (a) the group meant to cause the crime; or (b) *the group was aware* that the crime would be committed in the ordinary course of events.<sup>88</sup> Although such knowledge must be established for each crime committed or attempted by the group (a general criminal intention will not suffice),<sup>89</sup> this does not mean that the accused must be aware of all the details of the crimes. Knowledge of the group's intention with respect to the *type* of crimes suffices.<sup>90</sup> There is no logical reason why an accused must know the specifics of the commission of the crimes with any greater precision than that required for aiding and abetting; namely, its essential elements.<sup>91</sup>

49. Further, "the accused's knowledge of the intention of the group must be defined with reference to article 30(3) of the Statute: the accused must be aware that the intention existed when engaging in the conduct which constituted his or her contribution."<sup>92</sup>

c. Facts supporting article 25(3)(c) and (d) re-characterisation

50. The facts found by the Pre-Trial Chamber also substantiate YEKATOM's possible criminal responsibility for the charged crimes under these two modes of liability.

*i. YEKATOM's contributions to the charged crimes*

51. The Confirmation Decision is replete with factual findings on YEKATOM's criminal participation justifying Regulation 55(2) Notice under article 25(3)(c) and (d). The Pre-Trial Chamber found expressly that YEKATOM's participation in all of the charged crimes consisted in the following conduct, denoted as "contributions" to the charged crimes:

- (i) structuring, training and equipping his Anti-Balaka elements;
- (ii) preparing the Anti-Balaka attacks and advances, and participating and leading his group in the execution of these attacks and advances;
- (iii) issuing orders to Anti-Balaka members, including patently illegal instructions; and

<sup>88</sup> ICC-01/04-01/07-3436-t-ENG, para. 1641.

<sup>89</sup> ICC-01/04-01/07-3436-t-ENG, para. 1642.

<sup>90</sup> See also the Appeals Chamber's interpretation of article 30 in the context of co-perpetration under article 25(3)(a): ICC-01/05-01/13-2275-Red, para.1308. In the context of joint criminal enterprise, see, e.g., *Prosecutor v. Šainović et al.*, IT-05-87-A, Judgement, 23 January 2014, para. 1491; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, 28 February 2005, para. 276; *Prosecutor v. Brđanin*, IT-99-36-A, Judgement, 3 April 2007, paras. 418, 420-425; *Prosecutor v. Brima, et al.*, SCSL-2004-16-A, Judgement, 22 February 2008, para. 76.

<sup>91</sup> See e.g., ICC-01/05-01/13-2275-Red, paras. 12, 1400.

<sup>92</sup> ICC-01/04-01/07-3436-t-ENG, para. 1641.



(iv) conscripting and/or enlisting children under the age of fifteen years into his group and using them to assist him in the camp-bases, giving orders for them to be stationed at barriers and checkpoints as well as to actively participate in hostilities.<sup>93</sup>

52. These contributions compel this Chamber's provision of Regulation 55(2) Notice, given that each category of conduct satisfies the relevant elements of the modes of liability under article 25(3)(c) and (d). Moreover, the Pre-Trial Chamber's findings, including the evidence supporting the confirmation of charges under article 25(3)(a) or alternatively, article 25(3)(b) show that YEKATOM was involved in planning, leading, ordering and/or the direct perpetration of the charged crimes.<sup>94</sup> This includes his having been "involved in the preparation of the 5 December 2013 Attack, led his Anti-Balaka elements in this attack and its aftermath, and issued patently illegal instructions."<sup>95</sup> It further involves his actions in training and preparing his elements<sup>96</sup>, as well as directly instructing them and or inciting their persecutory conduct<sup>97</sup> by, *inter alia*, "issu[ing] instructions to attack Muslims without distinction."<sup>98</sup> These acts, in whole or part, manifestly also satisfy all of the modes of liability pled in the DCC and for which the Chamber should now issue Regulation 55(2) Notice.

53. They encompass, encouragement, moral support, practical assistance<sup>99</sup>, and otherwise clear *contributions* to the commission of the charged crimes.<sup>100</sup> As Trial Chamber VII observed, "even the act of being present at the crime scene (or in its vicinity) as a 'silent spectator' can be construed as tacit approval or encouragement of the crime".<sup>101</sup> Here, the Pre-Trial Chamber found YEKATOM to be present during his Group's commission of

<sup>93</sup> ICC-01/14-01/18-403-Conf, p. 107.

<sup>94</sup> See ICC-01/14-01/18-403-Conf, paras. 98-99 (noting YEKATOM's leadership of his Group and preparation of the attack), paras. 124-125 (noting YEKATOM's presence during [REDACTED]), paras. 139-140 (noting his presence in the areas under his control wherein Muslims were targeted and displaced by his subordinates), paras. 149-150 (noting YEKATOM's ordering of the military-like of *training* of children for combat, including on weapons use, their threatening and plying with drugs).

<sup>95</sup> ICC-01/14-01/18-403-Conf, paras. 98.

<sup>96</sup> ICC-01/14-01/18-403-Conf, para. 149 (training children for combat and hostilities); para, 85, and fn. 145 (training elements for the express purpose of killing Muslims and Selekas).

<sup>97</sup> ICC-01/14-01/18-403-Conf, para. 85 (instructing elements to "'kill Selekas and Muslims, even Central African Republic Selekas', 'attack the Muslims and break their houses', 'go to PK5 and find the Muslims and Seleka', and to 'destroy the Muslims [sic] houses so they will go back to their country'"); para. 87 (to "shoot at the Muslims")

<sup>98</sup> ICC-01/14-01/18-403-Conf, para. 94.

<sup>99</sup> See ICC-01/05-01/13-1989-Red, para. 81, 866 (concerning article 25(3)(c)'s *actus reus* and indicating "moral support or encouragement", "practical assistance").

<sup>100</sup> See ICC-01/12-01/18-461-Corr-Red, para. 945 (noting further, that no link between the accomplice and direct perpetrator need be demonstrated).

<sup>101</sup> ICC-01/05-01/13-1989-Red, para. 89

several crimes, including the destruction of the Boeing Mosque<sup>102</sup>, the torture [REDACTED] at the Yamwara School<sup>103</sup>, the locations in which children were conscripted, enlisted and used in hostilities (including his bases and checkpoints)<sup>104</sup>, and at all of the areas under his control in and around Bangui, Bimbo and in the Lobaye Prefecture<sup>105</sup> wherein the charged crimes were committed.

54. The requirement under article 25(3)(c) and (d) that the charged crimes be within the jurisdiction of the Court are addressed above<sup>106</sup>, and accordingly, the Prosecution will not repeat its submissions. Instead the Prosecution's remaining submissions will focus on the elements of these provisions that are not subsumed above.

55. With respect to article 25(3)(c) liability, the above contributions show that YEKATOM acted for the purpose of facilitating the crimes charged; and that his contributions aided, abetted or otherwise assisted in their commission.

56. Regarding article 25(3)(d) which, as noted, is directed to group crimes, the Confirmation Decision makes clear that this mode of liability applies to the context of YEKATOM's criminal responsibility. It relates to his conduct *vis-à-vis* his group of elements which, in turn "had been operating under the [Anti-Balaka] Coordination, including Ngaissona."<sup>107</sup>

57. Notably, to this end, the Pre-Trial Chamber found that the Anti-Balaka, including YEKATOM's Group, conducted a widespread attack "against the Muslim civilian population and those perceived as [...] supportive of the Seleka, pursuant to or in furtherance of a *criminal policy* to primarily target the Muslim population in Bangui and in western CAR Prefectures."<sup>108</sup> It also determined that, pursuant to this criminal policy, the Anti-Balaka attacked the Muslim civilian population throughout western CAR between September 2013 and December 2014, including in "Bangui, including Boeing and Bimbo, and across western CAR Prefectures, including Ouham (Bossangoa), Mambere-Kadei (Berbérati, Carnot, Guen), Lobaye (Boda), Ouham-Pende (Bossemptélé) and Ombella-M'Poko (Yaloké, Gaga, Zawa, Boali)."<sup>109</sup> It found that the Anti-Balaka subgroups involved in the commission of this

<sup>102</sup> ICC-01/14-01/18-403-Conf, para. 91.

<sup>103</sup> [REDACTED].

<sup>104</sup> ICC-01/14-01/18-403-Conf, para. 146, 153.

<sup>105</sup> ICC-01/14-01/18-403-Conf, para. 139.

<sup>106</sup> See paras. 27-28 of the Request, above.

<sup>107</sup> ICC-01/14-01/18-403-Conf, para. 142.

<sup>108</sup> ICC-01/14-01/18-403-Conf, para. 107 (emphasis added), *see also* paras. 61-66.

<sup>109</sup> ICC-01/14-01/18-403-Conf, para. 64.

widespread attack,<sup>110</sup> like YEKATOM and his Group,<sup>111</sup> “were formally and politically under the umbrella of the National Coordination.”<sup>112</sup>

58. Furthermore, the Pre-Trial Chamber’s determination that YEKATOM is responsible for the charged crimes under article 25(3)(a) fully satisfies article 25(3)(d)’s requirement that the crimes be committed or attempted by a plurality of persons acting pursuant to a ‘common purpose’. While article 25(3)(d) does not require the identification of the members of the group,<sup>113</sup> the Confirmation Decision is clear in that the group concerned comprised Anti-Balaka elements commanded by YEKATOM.

59. Thus, these contributions amply meet any standard regarding the level of contribution required under article 25(3)(d). Even if the Chamber were to require the qualification of YEKATOM’s contributions as “significant”<sup>114</sup>— which it should not — their nature and relationship to the charged crimes, taken cumulatively or individually, comfortably meets this threshold.

60. In sum, the Confirmation Decision demonstrates that, in contributing to the commission of the charged crimes, YEKATOM acted (i) to facilitate their commission and with awareness that they would occur in the ordinary course of events,<sup>115</sup> and (ii) to further the criminal activity or purpose of his Group and/or with knowledge of his group’s intention to commit crimes of such nature, and certainly in respect of the wider Anti-Balaka of which his group was a part.<sup>116</sup>

*ii. YEKATOM’s intent and knowledge*

61. The Confirmation Decision demonstrates that YEKATOM possessed the requisite intent and knowledge in respect of his criminal participation in the charged crimes under article 25(3)(c) and (d).

62. YEKATOM’s fulfilment of the *mens rea* required for these modes of liability is most clearly evinced by the Pre-Trial Chamber’s findings that he was a direct co-perpetrator of the

<sup>110</sup> ICC-01/14-01/18-403-Conf, para. 70, p. 107.

<sup>111</sup> See ICC-01/14-01/18-403-Conf, para. 65; see also para. 144 (noting, YEKATOM’s crimes along the PK-9 – Mbaiki Axis were committed as part of the same course of action as the 5 December 2013 Bangui Attack as “Yekatom and his group had been operating under the Coordination”).

<sup>112</sup> ICC-01/14-01/18-403-Conf, para. 164.

<sup>113</sup> ICC-01/04-01/07-3436-tENG, para. 1626; ICC-02/11-01/11-656-Anx, Diss. Op. Van den Wyngaert, para. 9.

<sup>114</sup> See e.g., ICC-01/04-01/10-465-Red, para. 283.

<sup>115</sup> ICC-01/05-01/13-1989-Red, para. 98.

<sup>116</sup> ICC-01/14-01/18-403-Conf, para. 65.

charged crimes with his elements and further ordered their commission. In any event, as regards all the confirmed charges, the Pre-Trial Chamber found that YEKATOM “had intent and knowledge in relation to these crimes under article 30 of the Statute.”<sup>117</sup>

63. These legal conclusions and the underlying evidence concerning his conduct necessarily subsume the requisite intent and knowledge to sustain the possibility of re-characterising YEKATOM’s criminal participation in the charged crimes under both modes of liability.

64. On the whole, the Confirmation Decision alone makes readily apparent that the facts concerning YEKATOM’s criminal responsibility for the charged crimes may also be legally characterised under article 25(3)(c) and (d).

#### IV. CONCLUSION

65. For the reasons above, the Prosecution requests the Chamber to give Regulation 55(2) Notice to the Parties and Participants that the facts described in the Confirmation Decision concerning YEKATOM’s individual criminal responsibility for the charged crimes may be subject to legal re-characterisation to accord with article 28(a), article 25(3)(c), and article 25(3)(d).



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**Fatou Bensouda, Prosecutor**

Dated this 1<sup>st</sup> Day of May 2020

At The Hague, The Netherlands

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<sup>117</sup> ICC-01/14-01/18-403-Conf, para. 140, *see also*, paras. 99, 125, 155.