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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-EDOUARD
NGAISSONA***

Public

**Decision on the Prosecution's Application for Notice to be given pursuant to
Regulation 55(2) on Mr Yekatom's Individual Criminal Responsibility**

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

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TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Regulation 55 of the Regulations of the Court, issues this ‘Decision on the Prosecution’s Application for Notice to be given pursuant to Regulation 55(2) on Mr Yekatom’s Individual Criminal Responsibility’.

I. Procedural history and submissions

1. On 11 December 2019, Pre-Trial Chamber II (the ‘PTC II’) confirmed several charges against Mr Yekatom but declined to confirm charges under Article 28 and 25(3)(c) and (d) of the Rome Statute (the ‘Confirmation Decision’ and the ‘Statute’, respectively).¹ With respect to Article 28 of the Statute, PTC II, *inter alia*, held that ‘the narrative of the relevant events as emerging from the available evidence is such that [Mr] Yekatom’s conduct resulted in the realisation of the objective elements of the crimes, rather than only consisting in the mere failure to prevent or repress crimes committed by other persons’. PTC II thus concluded that it ‘shall not address the allegation of command responsibility’ nor ‘retain for the relevant confirmed counts the cumulative mode of liability of article 28(a) of the Statute as requested by the Prosecutor.’² PTC II further ‘deem[ed] it unnecessary’ to address Mr Yekatom’s alleged responsibility under Article 25(3)(c) or (d) of the Statute, having found responsible under Article 25(3)(a) and (b) of the Statute.³
2. On 2 March 2020, the Office of the Prosecutor (the ‘Prosecution’) requested PTC II to reconsider the Confirmation Decision regarding the modes of liability charged against Mr Yekatom.⁴ In the alternative, the Prosecution requested PTC II to grant leave to appeal the Confirmation Decision and to certify the following issues: (i) ‘[w]hether the Pre-Trial Chamber erred in declining to

¹ Corrected version of ‘Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona’, 14 May 2020, ICC-01/14-01/18-403-Conf-Corr (with one annex) (public redacted version notified on 20 December 2019; corrected public redacted version notified on 14 May 2020, ICC-01/14-01/18-403-Red-Corr).

² Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, para. 58.

³ *See for instance* Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, para. 100.

⁴ Prosecution’s Request for Reconsideration of, or alternatively Leave to Appeal, the “Decision on the confirmation of charges against Alfred Yekatom and Patrice Edouard Ngaïssona”, ICC-01/14-01/18-437, para. 1.

confirm article 28 as a cumulative/alternative mode of liability to article 25’, and (ii) ‘whether the Pre-Trial Chamber erred in failing to confirm article 25(3)(c) and (d) as alternative modes of liability to article 25(3)(a) and (b)’ (the ‘Request for Reconsideration or Leave to Appeal’).⁵

3. On 6 March 2020, the Common Legal Representative of Former Child Soldiers and the Common Legal Representatives of the Victims of Other Crimes (jointly, the ‘CLR/V’) requested in their response that PTC II grant the Request for Reconsideration or Leave to Appeal, ‘preferably certifying the two issues or one reformulated issue for appeal’.⁶
4. The same day, the Yekatom Defence (the ‘Defence’) opposed the Request for Reconsideration or Leave to Appeal.⁷ The Defence argued, *inter alia*, that the Prosecution can seek to re-characterise charges by the Trial Chamber pursuant to Regulation 55 of the Regulations.⁸
5. On 11 March 2020, PTC II rejected the Request for Reconsideration or Leave to Appeal (the ‘Decision on Reconsideration and Leave to Appeal’).⁹ PTC II found that (i) the Prosecution had not brought forward reasons to satisfy the requirements for reconsideration, which is an exceptional remedy,¹⁰ and (ii) the issues raised by the Prosecution did not qualify as appealable issues within the meaning of Article 82(1)(d) of the Statute.¹¹
6. On 30 April 2020, the Prosecution requested that the Chamber give notice for different modes of liability, pursuant to Regulation 55(2) of the Regulations (the

⁵ Request for Reconsideration or Leave to Appeal, ICC-01/14-01/18-437, para. 2.

⁶ Common Legal Representatives’ Joint Response to the Prosecution’s Request for Reconsideration or Leave to Appeal, ICC-01/14-01/18-442, paras 2-3, p. 17.

⁷ Yekatom Defence Opposition to Prosecution’s Request for Reconsideration or Leave to Appeal Confirmation Decision, ICC-01/14-01/18-443, paras 1, 22 (the ‘Defence Opposition’).

⁸ Defence Opposition, ICC-01/14-01/18-443, para. 1.

⁹ 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’, ICC-01/14-01/18-447.

¹⁰ Decision on Reconsideration and Leave to Appeal, ICC-01/14-01/18-447, paras 16-25.

¹¹ Decision on Reconsideration and Leave to Appeal, ICC-01/14-01/18-447, paras 26-34.

‘Request’).¹² Specifically, the Prosecution requests that notice be given for a possible legal re-characterisation of the facts under Article 28(a)¹³ and Article 25(3)(c) and (d) of the Statute.¹⁴ The Prosecution submits that (i) the Chamber is not bound by PTC II’s legal characterisation of the facts in the Confirmation Decision or in the Decision on Reconsideration and Leave to Appeal;¹⁵ (ii) Regulation 55(2) of the Regulations contains a lower evidentiary threshold than the one applicable for the confirmation of charges;¹⁶ (iii) notice under Regulation 55(2) of the Regulations should be given as early as possible and may be given before trial;¹⁷ and (iv) alternative/cumulative modes of liability are ‘permitted by the Chamber’s Practice Manual and the Court’s jurisprudence’.¹⁸ The Prosecution requests that the issue be determined by the full Chamber.¹⁹

7. On 14 May 2020, the CLRV filed their response, requesting that the Chamber grant the Request.²⁰ The CLRV submit, *inter alia*, that (i) the Request meets the legal criteria under Regulations 55(1) and (2) of the Regulations as developed by the Appeals Chamber;²¹ (ii) the facts and circumstances confirmed by PTC II ‘appear’ to support the re-characterisation of the modes of liability;²² and (iii) timely notice is in the ‘interest of a fair and expeditious trial’²³ and ‘necessary for the realisation of the Victims’ right to truth and justice in an effective and efficient manner, since it will allow for an in-depth investigation of all possible forms of Mr Yekatom’s involvement in the commission of the crimes’.²⁴

¹² Prosecution’s Application for Notice to be given pursuant to Regulation 55(2) on Accused Yekatom’s Individual Criminal Responsibility, ICC-01/14-01/18-503-Conf (public redacted version notified on 1 May 2020, ICC-01/14-01/18-503-Red).

¹³ Request, ICC-01/14-01/18-503-Red, paras 10-28.

¹⁴ Request, ICC-01/14-01/18-503-Red, paras 29-64.

¹⁵ Request, ICC-01/14-01/18-503-Red, para. 2.

¹⁶ Request, ICC-01/14-01/18-503-Red, para. 2.

¹⁷ Request, ICC-01/14-01/18-503-Red, paras 5-8.

¹⁸ Request, ICC-01/14-01/18-503-Red, para. 34.

¹⁹ Request, ICC-01/14-01/18-503-Red, para. 3.

²⁰ Common Legal Representatives’ Joint Response to the “Prosecution’s Application for Notice to be given pursuant to Regulation 55(2) on Accused Yekatom’s Individual Criminal Responsibility”, ICC-01/14-01/18-514 (the ‘CLR V Response’), para. 35.

²¹ CLR V Response, ICC-01/14-01/18-514, paras 2, 22.

²² CLR V Response, ICC-01/14-01/18-514, paras 2, 25-27.

²³ CLR V Response, ICC-01/14-01/18-514, paras 2, 22-24, 28-31.

²⁴ CLR V Response, ICC-01/14-01/18-514, paras 2, 32-33.

8. On the same day, the Defence filed its response, requesting that the Request be rejected ‘at this time’.²⁵ The Defence submits in essence that (i) the Request is a ‘*de facto* appeal of the Pre-Trial Chamber’s adverse decision’;²⁶ (ii) the Prosecution has ‘made no effort to show that any exceptional circumstances of this case justify providing the Regulation 55 notice before the trial has even begun’;²⁷ and (iii) while it understands that the Request is intended to provide early notice, ‘providing what may prove to be a wholly unnecessary notice would be more burdensome than beneficial’ to the Defence.²⁸

II. Analysis

9. Regulation 55(1) of the Regulations enables a chamber ‘to change the legal characterisation of facts’ in its decision under Article 74 of the Statute ‘to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges’. In doing so, a chamber is therefore bound by the facts and circumstances as described in the Confirmation Decision.²⁹
10. The Chamber recalls the jurisprudence of this Court, according to which the principal purpose of Regulation 55 of the Regulations is to ‘close accountability gaps’.³⁰ If a chamber were unable to revisit the legal characterisation confirmed

²⁵ Yekatom Defence Response to Prosecution’s Regulation 55 Application, ICC-01/14-01/18-515 (the ‘Defence Response’), paras 1, 27.

²⁶ Defence Response, ICC-01/14-01/18-515, paras 1, 12.

²⁷ Defence Response, ICC-01/14-01/18-515, paras 16-23.

²⁸ Defence Response, ICC-01/14-01/18-515, paras 24-25.

²⁹ See also Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court, 20 August 2015, ICC-02/11-01/15-185 (the ‘*Gbagbo* Decision’), para. 9; Trial Chamber VII, *The Prosecutor v. Bemba et al.*, Decision on Prosecution Application to Provide Notice pursuant to Regulation 55, 15 September 2015, ICC-01/05-01/13-1250 (the ‘*Bemba et al.* Decision’), para. 7.

³⁰ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, 8 December 2009, ICC-01/04-01/06-2205 (OA 15 OA 16) (the ‘*Lubanga* Appeals Judgment’), para. 77. See also Appeals Chamber, *The Prosecutor v. Germain Katanga*, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled “Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons”, 27 March 2013, ICC-01/04-01/07-3363 (the ‘*Katanga* Appeals Judgment’), paras 22, 104; Appeals Chamber, *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the

or rejected by a pre-trial chamber, there would be a ‘risk of acquittals that are merely the result of legal qualifications confirmed in the pre-trial phase that turn out to be incorrect, in particular based on the evidence presented at the trial’.³¹

11. The Chamber further recalls that Regulation 55 of the Regulations establishes a three-step procedure:³²

i. The Chamber decides whether it appears to it that the legal characterisation of facts may be subject to change and the Chamber gives notice to the participants of such a possibility;³³

ii. Having heard the evidence in the case, the Chamber shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions as to the propriety of the actual legal re-characterisation;³⁴ and

iii. In its decision under Article 74 of the Statute, the Chamber may decide, pursuant to Regulation 55(1) of the Regulations, whether to make the proposed re-characterisation for which notice was given at the first stage.³⁵

12. The Request concerns the first step of this procedure. In this regard, the Chamber notes that it is established jurisprudence of this Court that notice should be given as early as possible³⁶ and can be provided before the commencement of trial,³⁷ including at the ‘stage after a trial chamber is seized

appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled “Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court”, 18 December 2015, ICC-02/11-01/15-369 (OA 7) (the ‘*Gbagbo* Appeals Judgment’), para. 31; *Bemba et al.* Decision, ICC-01/05-01/13-1250, para. 7; *Gbagbo* Decision, ICC-02/11-01/15-185, para. 9.

³¹ *Lubanga* Appeals Judgment, ICC-01/04-01/06-2205, para. 77. See also *Katanga* Appeals Judgment, ICC-01/04-01/07-3363, para. 22; *Gbagbo* Appeals Judgment, ICC-02/11-01/15-369, para. 31; *Bemba et al.* Decision, ICC-01/05-01/13-1250, para. 7; *Gbagbo* Decision, ICC-02/11-01/15-185, para. 9.

³² *Bemba et al.* Decision, ICC-01/05-01/13-1250, para. 8; Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, 12 December 2013, ICC-01/09-01/11-1122 (the ‘*Ruto and Sang* Decision’), para. 19.

³³ Regulation 55(2) of the Regulations.

³⁴ Regulation 55(2) of the Regulations.

³⁵ Regulation 55(1) of the Regulations.

³⁶ *Katanga* Appeals Judgment, ICC-01/04-01/07-3363, para. 24; *Gbagbo* Appeals Judgment, ICC-02/11-01/15-369, paras 49-50.

³⁷ *Gbagbo* Decision, ICC-02/11-01/15-185, para. 11; *Ruto and Sang* Decision, ICC-01/09-01/11-1122, paras 27-28.

of a case and before the opening statements’.³⁸ The Appeals Chamber has emphasised that this is the case because Regulation 55 (2) of the Regulations requires notice to be issued ‘when it “appears” to the Trial Chamber that the legal characterisation of facts may be subject to change’.³⁹

13. The Chamber is also mindful of the Appeals Chamber’s jurisprudence that there is ‘no legal impediment to a Trial Chamber re[-]characterising facts and circumstances to include a mode of liability that was considered, but not confirmed by [a] Pre-Trial Chamber, so long as the facts and circumstances that could potentially be re[-]characterised were confirmed by that Pre-Trial Chamber.’⁴⁰
14. In the present case however, and at this point, it does not appear to the Chamber that the legal characterisation in this case might be subject to change, as prescribed by Regulation 55(2) of the Regulations. Notably, the Chamber recalls that the Prosecution requests that notice be given for modes of liability which have been assessed and adjudicated by PTC II twice. First, these modes of liability – which formed part of the Prosecution’s document containing the charges –⁴¹ were rejected by PTC II in its Confirmation Decision.⁴² Second, PTC II rejected the same modes of liability in its Decision on Reconsideration and Leave to Appeal.⁴³
15. Noting that the Court’s statutory framework does not provide for the possibility of a review of confirmation decisions by trial chambers and the distinct powers afforded to pre-trial chambers to determine the factual scope of the charges, the Chamber will defer to the PTC II’s findings.
16. Lastly, the Chamber emphasises that it is ultimately its prerogative to decide if and when to give notice under Regulation 55 of the Regulations. Consequently,

³⁸ *Gbagbo* Appeals Judgment, ICC-02/11-01/15-369, para. 51; *Gbagbo* Decision, ICC-02/11-01/15-185, para. 11.

³⁹ *Gbagbo* Appeals Judgment, ICC-02/11-01/15-369, para. 51.

⁴⁰ *Gbagbo* Appeals Judgment, ICC-02/11-01/15-369, paras 2, 32.

⁴¹ Document Containing the Charges, Annex B1 to the Prosecution’s Notification of Filing of the Document Containing the Charges and List of Evidence, 19 August 2019, ICC-01/14-01/18-282-Conf-AnxB1 (public redacted version filed on 18 September 2019, ICC-01/14-01/18-282-AnxB1-Red).

⁴² Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, in particular paras 58, 100.

⁴³ Decision on Reconsideration and Leave to Appeal, ICC-01/14-01/18-447, in particular paras 16-34.

the above assessment is without prejudice to provide notice at a later point in time, either *proprio motu* or at a request, should it consider it to be appropriate to do so at the relevant time.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request.

Done in both English and French, the English version being authoritative.



Judge Péter Kovács



Judge Bertram Schmitt

Presiding Judge



Judge Chang-ho Chung

Dated 2 June 2020

At The Hague, The Netherlands