

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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THE APPEALS CHAMBER

Before: Judge Solomy Balungi Bossa, Presiding Judge
Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF THE

**PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA**

**Public redacted version of
‘Judgment on Mr Yekatom’s appeal against Trial Chamber V’s “Decision on the
Yekatom Defence’s Admissibility Challenge”’, 9 October 2020,
ICC-01/14-01/18-678-Conf**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for Mr Alfred Yekatom
Ms Mylène Dimitri

Legal Representatives of Victims

Mr Abdou Dangabo Moussa
Ms Elisabeth Rabesandratana
Mr Yaré Fall
Ms Marie-Edith Douzima-Lawson
Ms Paolina Massidda
Mr Dmytro Suprun

States Representatives
Central African Republic

Counsel for Mr Patrice-Edouard Ngaissona
Mr Geert-Jan Alexander Knoops

REGISTRY

Registrar
Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Alfred Yekatom against the decision of Trial Chamber V entitled ‘Decision on the Yekatom Defence’s Admissibility Challenge’ of 28 April 2020 (ICC-01/14-01/18-493),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

Trial Chamber V’s ‘Decision on the Yekatom Defence’s Admissibility Challenge’ is confirmed.

REASONS

I. KEY FINDINGS

1. Chambers dealing with admissibility challenges brought by an accused person based on the argument that a State having jurisdiction over the case may be willing and able to investigate and/or prosecute that person must invite that State to submit its views.

II. PROCEDURAL HISTORY

A. Proceedings before the Trial Chamber

2. On 30 May 2014, the Central African Republic (the ‘CAR’) referred the situation in its country to the Court.¹

¹ [ICC-01/14-1-Anx1](#).

3. On 11 November 2018, Pre-Trial Chamber II issued the Warrant of Arrest for Mr Alfred Rombot Yekatom ('Mr Yekatom').²
4. On 17 November 2018, the CAR surrendered Mr Yekatom to the Court.
5. On 11 December 2019, Pre-Trial Chamber II confirmed charges against Mr Yekatom.³
6. On 17 March 2020, the case against Mr Yekatom and Mr Ngaissona was transferred to Trial Chamber V ('Trial Chamber').⁴
7. On 17 March 2020, Mr Yekatom challenged the admissibility of the case against him ('Admissibility Challenge') on the grounds that pursuant to article 19(2)(a) of the Statute, the CAR authorities were now able to prosecute him in their own Special Criminal Court (the 'SCC').⁵ Mr Yekatom acknowledged that there were no ongoing investigations against him before the SCC at the time of filing the admissibility challenge.⁶ However, he argued that according to the so-called principle of 'qualified deference', the Chamber should give the CAR an opportunity to commence an investigation against Mr Yekatom by adopting a step-by-step approach whereby the Trial Chamber would: (i) 'invite written submissions from the CAR authorities addressing whether, notwithstanding the OTP's invocation of Article 37 [of the CAR's Organic Law 15/003], it would be willing and able to investigate and prosecute Mr. Yekatom's case if given the opportunity to do so';⁷ (ii) 'if the answer is in the affirmative, give the CAR authorities a fixed period of time to open an investigation and/or commence a prosecution of Mr. Yekatom and encourage the OTP to share the

² 'Warrant of Arrest for Alfred Yekatom', 11 November 2018, ICC-01/14-01/18-1-Conf-Exp; [Public redacted version of 'Warrant of Arrest for Alfred Yekatom'](#), 17 November 2018, ICC-01/14-01/18-1-Red.

³ 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaissona', 11 December 2019, ICC-01/14-01/18-403; [Public redacted version of 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaissona'](#), 20 December 2019, ICC-01/14-01/18-403-Red.

⁴ ['Transmission to Trial Chamber V of the record of the proceedings, including the Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaissona'](#) 17 March 2020, ICC-01/14-01/18-455; ['Decision constituting Trial Chamber V and referring to it the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaissona*'](#) 16 March 2020, ICC-01/14-01/18-451.

⁵ ['Yekatom Defence's Admissibility Challenge – Complementarity'](#), 17 March 2020, ICC-01/14-01/18-456 (with [Public Annex A](#)), paras 1, 6-12.

⁶ [Admissibility Challenge](#), paras 13, 32.

⁷ [Admissibility Challenge](#), para. 61.

results of its investigation with the SCC to enable it to act expeditiously’;⁸ and (iii) ‘if an active investigation and/or prosecution has been commenced during this period, declare Mr. Yekatom’s case inadmissible and order his transfer to the custody of the CAR authorities’ (the ‘Sequential Approach’).⁹ If the CAR were to seize this opportunity and actually commence a genuine investigation/prosecution within a prescribed period of time, the Chamber would then have to declare the case inadmissible.

8. On 30 March 2020, the Prosecutor responded to Mr Yekatom’s Admissibility Challenge.¹⁰

9. On 17 April 2020, the victims participating in the proceedings (‘Victims’) filed observations on Mr Yekatom’s Admissibility Challenge.¹¹

10. On 28 April 2020, Trial Chamber V issued its decision on Mr Yekatom’s Admissibility Challenge, rejecting the challenge on the basis of the inactivity test (‘Impugned Decision’).¹²

B. Proceedings before the Appeals Chamber

11. On 29 April 2020, Mr Yekatom filed a notice of appeal against the Impugned Decision.¹³

12. On 19 May 2020, Mr Yekatom filed his appeal brief (‘Appeal Brief’).¹⁴

13. On 10 June 2020, the Prosecutor and the Victims filed responses to the Appeal Brief (‘Prosecutor’s Response’ and ‘Victims’ Joint Response’ respectively).¹⁵

⁸ [Admissibility Challenge](#), para. 62.

⁹ [Admissibility Challenge](#), para. 63.

¹⁰ [Prosecution’s Response to the “Yekatom Defence’s Admissibility Challenge – Complementarity”](#), 30 March 2020, ICC-01/14-01/18-466.

¹¹ ‘Common Legal Representatives’ Joint Observations on the “Yekatom Defence’s Admissibility Challenge — Complementarity”, 17 April 2020, ICC-01/14-01/18-482-Conf; [Public redacted version of ‘Common Legal Representatives’ Joint Observations on the “Yekatom Defence’s Admissibility Challenge — Complementarity”](#), 17 April 2020, ICC-01/14-01/18-482-Red.

¹² [Decision on the Yekatom Defence’s Admissibility Challenge](#), 28 April 2020, ICC-01/14-01/18-493.

¹³ [Yekatom Defence Appeal Against Admissibility Decision](#), 29 April 2020, ICC-01/14-01/18-499.

¹⁴ [Yekatom Defence Appeal Brief](#), 19 May 2020, ICC-01/14-01/18-523.

¹⁵ ‘Prosecution Response to “Yekatom Defence Appeal Brief – Admissibility”’, 10 June 2020, ICC-01/14-01/18-548-Conf; [Public redacted version of ‘Prosecution Response to “Yekatom Defence Appeal Brief – Admissibility”](#), 10 June 2020, ICC-01/14-01/18-548-Red; ‘Common Legal Representatives’

14. On 15 June 2020, the Appeals Chamber issued an order inviting the Central African Republic to submit observations and giving the parties an opportunity to respond to the Victims' observations and the submissions of the CAR.¹⁶

15. On 3 August 2020, the Central African Republic filed its observations (the 'CAR Observations')¹⁷ [REDACTED].¹⁸

16. On 5 August 2020, Mr Yekatom filed a response to the CAR Observations ('Mr Yekatom's Response to CAR Observations').¹⁹ Mr Yekatom observes that the CAR Observations [REDACTED].²⁰

17. On 6 August 2020, the Prosecutor filed her response to the CAR Observations ('Prosecutor's Response to CAR Observations').²¹ The Prosecutor submits, *inter alia*, that [REDACTED].²² The Prosecutor therefore requests that the Appeals Chamber dismiss Mr Yekatom's appeal and confirm the Impugned Decision.²³

18. On 28 August 2020, following consultations with the CAR authorities concerning its amenity to reclassify the CAR Observations as public, the Registrar filed a report indicating that the CAR wished to maintain its filing as confidential ('Registrar's Report').²⁴

Joint Response to the "Yekatom Defence Appeal Brief – Admissibility" (ICC-01/14-01/18-523)', 10 June 2020, ICC-01/14-01/18-547.

¹⁶ ['Order on the filing of observations by the Central African Republic'](#), 15 June 2020, ICC-01/14-01/18-552.

¹⁷ 'Observations de la République Centrafricaine sur la possibilité de mener un enquête ou d'engager des poursuites contre YEKATOM Alfred Rombhot pour les crimes de guerre et contre l'humanité par la Cour Pénale Spéciale', 30 July 2020, ICC-01/14-01/18-610-Conf-Anx *annexed to* ['Transmission of Observations from the Central African Republic pursuant to Appeals Chamber Order ICC-01/14-01/18-552 of 15 June 2020'](#), 3 August 2020, ICC-01/14-01/18-610.

¹⁸ CAR Observations, p.2, para. 3; CAR Observations, p.4, para. 5.

¹⁹ 'Yekatom Defence Response to Observations of Government of the Central African Republic', ICC-01/14-01/18-613-Conf; ['Public redacted version of "Yekatom Defence Response to Observations of Government of the Central African Republic", 5 August 2020'](#), 5 August 2020, ICC-01/14-01/18-613-Red.

²⁰ Mr Yekatom's Response to CAR Observations, para. 5.

²¹ 'Prosecution Response to "Observations from the Central African Republic pursuant to Appeals Chamber Order ICC-01/14-01/18-552 of 15 June 2020" (ICC-01/14-01/18-610-Conf-Anx)', ICC-01/14-01/18-614-Conf.

²² Prosecutor's Response to CAR Observations, para. 1.

²³ Prosecutor's Response to CAR Observations, para. 7.

²⁴ 'Registry Report on the Confidentiality of the Observations of the Central African Republic submitted on 3 August 2020', 28 August 2020, ICC-01/14-01/18-637-Conf.

19. On 31 August 2020, Mr Yekatom responded to the Registrar’s Report (‘Mr Yekatom’s response to Registrar’s Report’),²⁵ requesting, *inter alia*, that the Appeals Chamber invite the Central African Republic ‘to reclassify its observations from confidential to public, submit a public redacted version, or state the factual or legal basis for maintaining its observations fully confidential’.²⁶

20. On 28 September 2020, the CAR authorities had not yet been able to file its reasons for maintaining its observations fully confidential. For this reason, this Judgment is currently rendered confidentially. The Appeals Chamber will revisit this aspect as soon as the CAR authorities have had an opportunity to submit their views. A public version of this Judgment, possibly with redactions, will be issued in due course.

III. MERITS

A. Ground of appeal

21. Mr Yekatom raises one ground of appeal:

The Trial Chamber erred when denying the Defence’s admissibility challenge without first seeking observations from CAR authorities.²⁷

1. Relevant part of the Impugned Decision

22. In the Impugned Decision, the Trial Chamber considered that the Admissibility Challenge comprised two alternative requests: namely a request to find the case inadmissible on the grounds that the CAR authorities were now able to prosecute him in their own Special Criminal Court or, in the alternative, to adopt a sequential approach, based on the so-called principle of ‘qualified deference’.²⁸

23. The Trial Chamber recalled that, according to the jurisprudence of the Appeals Chamber, the question of whether a State was willing or able to investigate or prosecute arose only if there are or were investigative or prosecutorial activities by a State having jurisdiction and that, in the absence of any such activities, a case was admissible before

²⁵ ‘Yekatom Defence Response to Registry Report on the Confidentiality of the Observations of Government of Central African Republic’, ICC-01/14-01/18-641-Conf.

²⁶ Mr Yekatom’s Response to Registrar’s Report, paras 1, 13.

²⁷ [Appeal Brief](#), para. 10.

²⁸ [Impugned Decision](#), para. 14.

the Court ('inactivity test').²⁹ Consequently, the Trial Chamber rejected the admissibility challenge proper, because it was uncontested that the authorities of the CAR were not investigating and/or prosecuting Mr Yekatom at the time that he filed his Admissibility Challenge.³⁰

24. As regards Mr Yekatom's specific request that the Trial Chamber invite the CAR to make observations, the Trial Chamber determined that there was no need for further observations in order to decide the Admissibility Challenge. The Trial Chamber based its decision on the following factors: (i) that the Defence itself conceded that there are currently no proceedings against Mr Yekatom before the SCC,³¹ and (ii) that based on the information before it there was no indication that the CAR authorities have any intention to investigate or prosecute Mr Yekatom.³² With regard to the latter factor, the Trial Chamber noted that since referring the situation in its territory to the Court and subsequently implementing the Court's warrant of arrest against Mr Yekatom, the CAR have to date not challenged the Court's jurisdiction.³³ In addition, the Trial Chamber noted that in the context of the recent interim release proceedings in which the CAR had made observations, nothing therein 'indicate[d] that the CAR authorities intend to challenge the Court's jurisdiction or to investigate or prosecute Mr Yekatom in the future'.³⁴

25. On Mr Yekatom's request for a proposed Sequential Approach, the Trial Chamber determined that it was mindful of the complementarity principle but limited its decision to the issues of admissibility in accordance with article 17 of the Statute. The Trial Chamber considered that it was not within its purview to encourage State capacity for the investigation and prosecution of international crimes.³⁵ In addition, the Trial Chamber noted that articles 64(2) and 68 of the Statute mandate that it ensure that the 'trial is expeditious, with full respect for the rights of the accused and due regard to

²⁹ [Impugned Decision](#), paras 17-18.

³⁰ [Impugned Decision](#), para. 21.

³¹ [Impugned Decision](#), para. 25.

³² [Impugned Decision](#), para. 20.

³³ [Impugned Decision](#), para. 20.

³⁴ [Impugned Decision](#), para. 20.

³⁵ [Impugned Decision](#), para. 22.

the protection of victims and witnesses'.³⁶ Accordingly, the Trial Chamber rejected the request for a Sequential Approach.³⁷

2. *Submissions of the parties and participants*

(a) **Mr Yekatom**

26. In essence, Mr Yekatom argues that the Trial Chamber's failure to seek observations from Central African Republic constitutes an error because the Court's complementarity regime requires that a State always be consulted when an issue of complementarity is before the Court.³⁸ In particular, Mr Yekatom claims that, by applying the 'inactivity test' before seeking observations from the CAR, the Trial Chamber 'precluded the possibility that the State could overcome the inactivity test at the time of the Chamber's determination on the complementarity challenge if given the opportunity to do so'.³⁹

27. Mr Yekatom claims that the Trial Chamber's obligation to seek observations from a State with jurisdiction prior to ruling on an admissibility challenge by a suspect or accused is confirmed by the Court's 'uniform practice'.⁴⁰ He also seems to argue that such an obligation is implied by the requirement contained in rule 58(2) of the Rules of Procedure and Evidence ('Rules'), which requires Chambers to determine the applicable procedure for dealing with admissibility challenges.⁴¹

28. Mr Yekatom disputes that the Trial Chamber could dispense with the purported need to seek observations from the CAR on grounds of expeditiousness of the proceedings, considering that the case is still at a very early stage.⁴² He further argues that it was wrong for the Trial Chamber to infer the CAR's present position from its referral of the case, transfer of the suspect, failure to bring its own admissibility challenge, and failure to object to admissibility when submitting observations on interim release.⁴³

³⁶ [Impugned Decision](#), para. 23.

³⁷ [Impugned Decision](#), para. 24.

³⁸ [Appeal Brief](#), paras 34-46.

³⁹ [Appeal Brief](#), paras 58.

⁴⁰ [Appeal Brief](#), paras 25-33.

⁴¹ [Appeal Brief](#), paras 41-46.

⁴² [Appeal Brief](#), paras 76-84.

⁴³ [Appeal Brief](#), paras 66-75.

(b) Prosecutor

29. The Prosecutor claims that the Court's legal framework does not oblige a Chamber to request observations from concerned States to decide an admissibility challenge based on complementarity, arguing that this falls within the Chamber's discretion.⁴⁴

30. In relation to Mr Yekatom's claim that in all previous cases the relevant States were invited to make submissions, the Prosecutor points out that Mr Yekatom's request is distinguishable from previous admissibility challenges since he does not rely on any of the grounds in article 17(1)(a) to (c) and concedes that there were no (and never had been) domestic proceedings against him at the time of filing the Admissibility Challenge.⁴⁵

31. As far as the idea of 'qualified deference' and the sequential approach proposed by Mr Yekatom are concerned, the Prosecutor is of the view that they are inconsistent with the Court's complementarity regime.⁴⁶

32. The Prosecutor further suggests that rule 58(2) of the Rules does not require Chambers to request observations from States that may have jurisdiction over the case. However, the Prosecutor acknowledges that, as the referring entity, the Central African Republic was entitled, pursuant to article 19(3) of the Statute and rule 59 of the Rules, to make representations to the Trial Chamber if it so wished. The Prosecutor points out, in this regard, that the Registry failed to inform the Central African Republic of Mr Yekatom's Admissibility Challenge.⁴⁷ Nevertheless, the Prosecutor is of the view that the lack of timely notification does not invalidate the Impugned Decision, given that it was not disputed that the inactivity criterion was met and that the Statute does not prescribe the so-called 'sequential approach'.⁴⁸ The Prosecutor stresses that the complementarity regime only gives States the right to challenge admissibility, it does not impose an obligation on the Court to ascertain the views of all States who might

⁴⁴ [Prosecutor's Response](#), para. 4.

⁴⁵ [Prosecutor's Response](#), paras 4, 15-19.

⁴⁶ [Prosecutor's Response](#), paras 4, 27-29.

⁴⁷ [Prosecutor's Response](#), para. 21.

⁴⁸ [Prosecutor's Response](#), para. 22.

potentially be able to exercise jurisdiction over a case before rendering an admissibility decision.⁴⁹

33. The Prosecutor also points out that the burden to substantiate the admissibility challenge rested upon Mr Yekatom and that the Trial Chamber had no obligation to conduct preliminary inquiries on his behalf.⁵⁰

34. The Prosecutor is further of the view that the Trial Chamber reasonably concluded from the information on the record that there was no evidence indicating that the Central African Republic's authorities intended to investigate or prosecute Mr Yekatom or to challenge the admissibility of the case against him.⁵¹

35. Finally, the Prosecutor claims that any purported error by the Trial Chamber did not materially affect the Impugned Decision.⁵²

(c) Victims

36. Like the Prosecutor, the Victims are of the view that the sequential approach proposed by Mr Yekatom is not envisioned by the Court's statutory provisions.⁵³ Instead, the Impugned Decision was correctly based on the inactivity test.⁵⁴

37. The Victims also argue that it was proper for the Trial Chamber to infer the Central African Republic's unwillingness from its inaction in terms of investigating and prosecuting Mr Yekatom.⁵⁵

38. The Victims further argue that rule 58(2) of the Rules does not create any obligation for (Pre-)Trial Chambers dealing with admissibility challenges, but simply gives them wide discretion to organise the proceedings as they see fit.⁵⁶

⁴⁹ [Prosecutor's Response](#), paras 24-29.

⁵⁰ [Prosecutor's Response](#), paras 23, 30-31.

⁵¹ [Prosecutor's Response](#), paras 32-37.

⁵² [Prosecutor's Response](#), paras 49-51.

⁵³ [Victims' Joint Response](#), paras 18-19.

⁵⁴ [Victims' Joint Response](#), para. 21

⁵⁵ [Victims' Joint Response](#), paras 43-45.

⁵⁶ [Victims' Joint Response](#), paras 32-34.

3. *Determination by the Appeals Chamber*

39. Mr Yekatom's sole ground of appeal alleges that the Trial Chamber erred when denying the Admissibility Challenge without first seeking observations from the CAR's authorities.⁵⁷

40. It is not disputed that the Trial Chamber declined to seek observations from the CAR. What is disputed is whether or not the Trial Chamber was under an obligation to do so, in the circumstances of this case. Two questions arise in this regard. Primarily, whether the CAR had to be invited to make submissions because it was a State Party with jurisdiction over Mr Yekatom's case. Subsidiarily, whether the CAR had to be invited to make submissions because it was the referring entity under article 14 of the Statute. The Appeals Chamber will address each question in turn.

(a) Do Chambers have a general obligation to seek submissions from States that have jurisdiction over the case?

41. The main issue that arises from Mr Yekatom's appeal is whether the Trial Chamber had an obligation to proactively invite the CAR – as a State having jurisdiction over the case – to state on the record whether it intended to investigate or prosecute Mr Yekatom domestically, given that Mr Yekatom was arguing that the CAR might be willing and able to do so. For the reasons that follow, the Appeals Chamber concludes that Chambers have a general duty to invite the State(s) having jurisdiction whose (lack of) genuine investigatory or prosecutorial activity is under scrutiny to make submissions.

42. The central premise of the Court's exercise of jurisdiction is its contingency upon the failure of States to genuinely investigate and, where warranted, prosecute those that are suspected of having committed or having been complicit in crimes listed in the Statute. As the sixth recital of the Preamble to the Rome Statute emphasises, States have the primary duty to exercise their criminal jurisdiction over such persons. As long as States comply with that responsibility, the Court will not intervene. Every time the Prosecutor brings a case, she is thus necessarily alleging that none of the States that would have jurisdiction over a particular suspect or accused are actually making

⁵⁷ [Appeal Brief](#), para. 10.

genuine efforts to bring that person to justice.⁵⁸ Depending on the circumstances, this could be seen as a serious reproach and no State should have to face the prospect of being found wanting in this regard without at least being given an opportunity to explain itself. This is why articles 18 and 19 of the Statute provide several procedural avenues for States to correct the Prosecutor's assessment of their domestic efforts to pursue criminal investigations and/or prosecutions.

43. Nevertheless, although article 19(1) of the Statute imposes an obligation on the Court to always satisfy itself that it has jurisdiction over any case brought before it, there is no similar obligation in relation to admissibility. Chambers are entitled to rely on the presumption that the Prosecutor has made an earnest and objective assessment of the domestic situation before launching a criminal investigation into a particular case. Accordingly, unless the admissibility of a case is challenged by a State, an accused, or a person for whom a warrant of arrest or summons to appear has been issued, Chambers are allowed to proceed without considering the admissibility of the case before them.

44. When a suspect or accused person challenges admissibility on the basis of complementarity, that person bears the burden of demonstrating that the case is inadmissible and is expected to identify which State or States may be genuinely exercising their jurisdiction.

45. In such circumstances, the Chamber must invite that State to make submissions. This is because a finding that a State has remained inactive in the face of the need to 'exercise its criminal jurisdiction over those responsible for international crimes' could be seen as having failed to discharge 'the duty' to exercise that jurisdiction, as described in the sixth recital of the preamble to the Rome Statute. That being the case, any decision of the Trial Chamber that might imply or express a finding that a State Party has failed to discharge its obligation under the Rome Statute, engages an obligation on the part of the Trial Chamber to give that State a reasonable opportunity to make submission before that decision is rendered.

46. The Chamber's duty to invite the views of States Parties whose compliance with their obligations under the Rome Statute is in issue follows from the general principle of law that those who will be affected by a decision must be provided with an

⁵⁸ Articles 53(1)(b) and (2)(b) of the Statute.

opportunity to present their views and to be heard (*audi alteram partem*). This principle also applies when, as in the present case, the subject matter of a decision cannot be resolved fairly without entering findings that may implicate the good faith of a State that is not (yet) involved in the proceedings in the fulfilment of its duties and obligations under the Statute.

47. The State that is alleged to be exercising its jurisdiction must thus be given a reasonable opportunity to make whatever submissions it sees fit to make that may throw the light of good faith — whenever possible — on its inactivity, with the view to discharging the obligation of exercising jurisdiction that international law places upon it. In this regard, it must always be kept in mind that the overarching concern of the drafters of the Rome Statute was to ensure that justice is done — preferably at the national level.

48. Regarding the CAR's Organic Law 15/003 (the 'Organic Law'),⁵⁹ Mr Yekatom is correct that domestic law 'cannot infringe on the balance of powers among the organs of the Court or the rights of an accused'.⁶⁰ The Court is only bound to apply the sources of law mentioned in article 21 of the Statute and the fact that the Organic Law appears to grant primacy to the Prosecutor cannot trump the principle of complementarity. Indeed, the existence of article 37 of the Organic Law does not affect the CAR authorities' ability, under international law, to prosecute Mr Yekatom domestically.⁶¹ Mr Yekatom is, however, mistaken when he suggests that '[b]y failing to seek observations from CAR authorities, the Trial Chamber allowed the [Organic Law] to be interpreted in such a way as to automatically make the case admissible.'⁶² The Trial Chamber's failure to invite the CAR to submit observations was predicated upon the *fact* that no domestic investigations were ongoing in the CAR.⁶³ This approach therefore neither depended upon nor implied any particular interpretation of special significance to the Organic Law.

⁵⁹ [Organic Law for the Creation, Organisation and Functioning of the Special Criminal Court](#), 3 June 2015.

⁶⁰ [Appeal Brief](#), para. 50.

⁶¹ [Prosecutor's Response](#), para. 48.

⁶² [Appeal Brief](#), para. 51.

⁶³ [Impugned Decision](#), paras 19-21.

49. The Appeals Chamber notes that Mr Yekatom also argues that ‘the Trial Chamber [...] justified its decision not to seek observations from CAR authorities on the grounds that it needed to ensure that the trial is expeditious’.⁶⁴ However, it is clear from paragraphs 23 and 24 of the Impugned Decision that the Trial Chamber only relied upon this argument to reject the proposed Sequential Approach. Since the question of the Sequential Approach is not on appeal, there is no need for the Appeals Chamber to address Mr Yekatom’s argument in this regard.

50. In sum, when an admissibility challenge is brought by a suspect or accused person, on the ground that a State is or may be investigating or prosecuting the same case or is willing or able to do so, Chambers must always invite the State concerned to submit observations. The State in question is free to decline the invitation and waive its entitlement to be heard. In that case, the Chamber can decide the matter without receiving submissions from the State. In light of this finding, Trial Chamber V committed a procedural error in rendering the Impugned Decision without giving the CAR a meaningful opportunity to make submissions.

(b) Whether the Trial Chamber has an obligation to give a referring State an opportunity to submit observations

51. The Appeals Chamber already concluded that the Trial Chamber erred by declining to seek the views of the CAR *as a State with potential jurisdiction* over Mr Yekatom’s case. This question is separate from the question of whether the Trial Chamber erred by not providing the CAR, *as the State Party having referred the situation to the Court*, with a reasonable opportunity to submit observations.

52. The Appeals Chamber observes that, when a situation has been referred to the Court by the Security Council or a State Party, where issues of jurisdiction or admissibility arise, the referring entity may, pursuant to article 19(3) of the Statute ‘submit observations to the Court’. Rule 59 of the Rules, in relevant part, provides:

1. For the purpose of article 19, paragraph 3, the Registrar shall inform the following of any question or challenge of jurisdiction or admissibility which has arisen pursuant to article 19, paragraphs 1, 2, and 3:

- (a) Those who have referred a situation pursuant to article 13;

⁶⁴ [Appeal Brief](#), para. 76.

[...]

3. Those receiving the information, as provided for in sub-rule 1, may make representation in writing to the competent Chamber within such time limit as it considers appropriate.

53. The Appeals Chamber considers that by the plain terms of rule 59 of the Rules, the Registrar is obliged to take procedural steps that prompt the referring entity's participation in admissibility or jurisdiction proceedings. The Appeals Chamber finds the Registry's failure to inform the CAR of Mr Yekatom's admissibility challenge in accordance with rule 59(1)(a) most concerning. Under the terms of this provision, the Registry had a clear and unambiguous obligation to inform the CAR as the referring entity. The Trial Chamber as well as the parties must be able to rely on the Registry to carry out its duties, without having to verify compliance every step of the way.

54. Nevertheless, Chambers are the ultimate guardians of the procedural rights of all parties and participants, including the referring entity. Although no specific obligation is imposed on Chambers dealing with issues of jurisdiction or admissibility, the Appeals Chamber considers that it is incumbent upon them to ensure that referring entities have a reasonable opportunity to exercise their prerogative under article 19(3) of the Statute to submit observations. As rule 58 of the Rules makes plain, and as confirmed by previous decisions of this Chamber, Chambers have wide discretion in this regard.⁶⁵ However, this discretion does not extend to Chambers taking no measures whatsoever. Accordingly, Trial Chamber V erred by failing to take any steps to either ascertain whether the CAR, as the referring entity, wished to submit observations, or to provide it with a meaningful opportunity for doing so.

(c) Immateriality of the errors

55. In the specific circumstances of this case, the errors of Trial Chamber V were not material. Before the Appeals Chamber, [REDACTED]. There is thus no indication that

⁶⁵ Appeals Chamber, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, [‘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”](#)’, 30 August 2011, ICC-01/09-02/11-274, para. 87; Appeals Chamber, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, [‘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”](#)’ 30 August 2011, ICC-01/09-01/11-307, para. 89.

Trial Chamber V's failure to invite observations from the CAR had any influence on the correctness of the outcome of the Impugned Decision.

56. Moreover, the omission to provide the CAR as the referring entity with a meaningful opportunity to submit observations did not affect the rights and interests of Mr Yekatom. In order for Mr Yekatom to be able to rely on this error to challenge the Impugned Decision, he would have to demonstrate that he was prejudiced by it. Mr Yekatom has failed to do so. Accordingly, the Appeals Chamber finds that neither the Registrar's failure nor the Chamber's error affected Mr Yekatom's rights or interests; nor did they affect the outcome of the Impugned Decision.

B. Overall conclusion

57. For the reasons stated above, the Appeals Chamber considers that the Trial Chamber erred when it did not invite submissions from the CAR as a State having jurisdiction over the case whose willingness and ability to investigate and/or prosecute the case against Mr Yekatom was being disputed, given the arguments raised by Mr Yekatom in support of his challenge to the admissibility of the case. The Chamber also erred by failing to ensure that the CAR as the referring entity had a meaningful opportunity to submit observations. However, neither error materially affected the Impugned Decision.

IV. APPROPRIATE RELIEF

58. On an appeal pursuant to article 82(1)(a) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158(1) of the Rules of Procedure and Evidence). In the present case, the Appeal Chamber finds it appropriate to confirm the Impugned Decision because neither of the errors the Appeals Chamber has identified had a material effect upon it.

While Judge Ibáñez agrees with this judgment, she is of the view that it ought to have been delivered in open court pursuant to article 83(4) of the Statute, with appropriate measures to maintain confidentiality where necessary.

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



Judge Solomy Balungi Bossa

Presiding

Dated this 11th day of February 2021

At The Hague, The Netherlands