

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 7 April 2022

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

**Public Redacted Version of "Prosecution's renewed application for Notice to be
Given under Regulation 55(2) on Accused Yekatom's Individual Criminal
Responsibility", 1 April 2022, ICC-01/14-01/18-1345-Conf**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Mr Karim A. A. Khan QC
Mr Mame Mandiaye Niang
Mr Kweku Vanderpuye

Counsel for Alfred Yekatom

Ms Mylène Dimitri
Mr Thomas Hannis

Counsel for Patrice-Edouard Ngaïssona

Mr Geert-Jan Alexander Knoops
Mr Richard Omissé-Namkeamai
Ms Marie-Hélène Proulx

Legal Representatives of Victims

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

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. Further to Trial Chamber V's ("Chamber") Decision of 2 June 2020 in which the Chamber, *at that point* deemed it unnecessary to give Regulation 55 Notice, but without prejudice to provide notice at a later point in time,¹ the Office of the Prosecutor ("Prosecution") requests the Chamber to provide notice that the facts described in the charges regarding the Accused YEKATOM's criminal responsibility may be re-characterised to accord with articles 28 and 25(3)(c) and (d), pursuant to regulation 55(2) of the Regulations of the Court ("Regulation 55(2) Notice").²

2. There is no legal impediment for the Chamber to re-characterise facts and circumstances to include a mode of liability that was considered, but not confirmed, by the Pre-Trial Chamber.³ Rather, notice of any legal re-characterisation depends on whether it *appears to the Chamber* that legal re-characterisation may be possible.

3. Considering the body of evidence adduced before the Chamber since the commencement of the trial, including testimonies and items "formally submitted", together with the facts and circumstances described in the charges,⁴ the issuance of Regulation 55(2) Notice is timely. Importantly, the Chamber can take note of the evidence to be introduced during trial, such as prior recorded statements tendered pursuant to rule 68(2) and (3) of the Rules of Procedure and Evidence ("Rules"), and items on the Prosecution's List of Evidence, which further support the objective possibility of a different legal characterisation of the facts.⁵

4. Regulation 55(2) Notice on the grounds sought does not exceed the facts and circumstances described in the charges, nor would it result in any unfair prejudice to

¹ ICC-01/14-01/18-542 ("Decision") para. 16 ") para. 16, rejecting the Prosecution's initial request for Regulation 55(2) Notice, ICC-01/14-01/18-503-Conf ("First Application"), "without prejudice".

² Hereinafter, "RoC".

³ ICC-01/12-01/18-1211-Red ("*Al Hassan* Decision") paras. 12, 90.

⁴ ICC-01/14-01/18-403-Conf-Corr ("Confirmation Decision").

⁵ See ICC-02/05-01/20-634 ("*Ali Kushayb* Decision") para. 22.

the Accused. To the contrary, it is consistent with the principal purpose of the regulation, that is, to ‘close accountability gaps’.⁶

5. 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

6. Pursuant to regulation 23*bis* of the Regulations of the Court, this application is filed as “Confidential”, as it refers to material that is not available to the public and concerns a previous Prosecution filing of the same classification. A public redacted version will be filed as soon as practicable.

III. SUBMISSIONS

A. There is no legal impediment to giving Regulation 55(2) Notice

7. *First*, as noted above, Pre-Trial Chamber II’s (“Pre-Trial Chamber”) consideration of the modes of liability for which re-characterisation is sought⁷ cannot impede the “task of a trial chamber [which] is always to interpret and apply the sources of law as codified in article 21 of the Statute.”⁸ As the Appeals Chamber has stated, a Pre-Trial Chamber may not restrain this ‘core judicial function’ of the Trial Chamber before the trial even begins.⁹

8. As the Appeals Chamber has also confirmed, 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, provided that the

⁶ *Al Hassan* decision, para. 11, citing ICC-01/04-01/06-2205 (“*Lubanga* Appeal Decision”), para. 77 and ICC-01/04-01/07-3363 (“*Katanga* Appeal Decision”), paras. 22 and 104.

⁷ Decision, para. 14.

⁸ ICC-01/14-01/18-874 (“*Yekatom* Appeal Decision”), para. 46.

⁹ *Yekatom* Appeal Decision, para. 46; *see also* ICC-01/04-01/06-1084, paras. 47-50; ICC-02/11-01/15-185 (“*Gbagbo* Decision”), para. 11; ICC-01/09-01/11-1122 (“*Ruto and Sang* Decision”), paras. 27-28.

facts and circumstances that could potentially be re-characterised were confirmed.¹⁰ A Pre-Trial Chamber's legal characterisation of the facts and circumstances does not bind a Trial Chamber,¹¹ nor is it necessarily entitled to deference. As noted by the Pre-Trial Chamber in its disposition of the Prosecution's previous request for reconsideration of article 28 responsibility regarding YEKATOM, "regulation 55 of the Regulations would constitute 'available *redress*' for the grievances listed in support of the Request for Reconsideration."¹² Thus, the Chamber has the authority (indeed, the obligation) to assess the facts and circumstances described in the charges and the evidence submitted before it in determining whether Regulation 55(2) Notice must be issued in this case at this stage.

9. *Second*, notice of any legal re-characterisation depends on *whether and when it appears to the Chamber* that legal re-characterisation may be possible.¹³ Based on the jurisprudence, this can arise from: (i) the 'facts and the circumstances' described in the charges; and/or (ii) the evidence led at trial.¹⁴ In this application the Prosecution does not request the Chamber to review or reconsider the Confirmation Decision. Instead, it requests the Chamber to consider the factual findings set out in the Confirmation Decision and the evidence already called and submitted since the beginning of this trial in order to give notice of the possible re-characterisation of YEKATOM's criminal responsibility.¹⁵ Additionally, the Prosecution will summarise below the evidence it

¹⁰ *Al Hassan* Decision, paras. 90 - citing ICC-02/11-01/15-369 ("*Gbagbo* Appeal Decision") - and 98.

¹¹ See ICC-01/12-01/18-1562-Red ("*Al Hassan* Appeal Decision") para. 41, reaffirming without qualification that "the trial chamber has a power to modify the legal characterisation given to those facts by the pre-trial chamber". See *Yekatom* Appeal Decision, paras. 46 and 50, respectively, as the Appeals Chamber pronounced, "the findings in a confirmation decision about the constituent *legal elements* of a crime ... are not binding on a trial chamber. Regardless of the views about the *legal elements* of an offence that may be expressed in a decision confirming the charges, *the task of a trial chamber* is always to interpret and apply the sources of law as codified in article 21 of the Statute. *This core judicial function must not be fettered before the trial begins*"; referring to the legal elements of forms of commission, "[a]ny judicial pronouncement by the Pre-Trial Chamber before the trial has commenced *cannot be taken to prejudge* the Trial Chamber's later interpretation of the applicable statutory provisions (emphasis added).

¹² ICC-01/14-01/18-447, para. 23

¹³ *Gbagbo* Appeals Decision, para. 51; *Al Hassan* Decision, para. 12.

¹⁴ *Al Hassan* Decision, para. 12.

¹⁵ In order to ensure that adequate notice is given in accordance of regulation 55(2), the relevant facts and circumstances are required to be exhaustively identified. However, the Chamber need not indicate the evidence which may be presented in support of the proposed re-characterisation: *Al Hassan* Decision, para. 14.

intends to formally submit at trial that further supports the *objective* possibility of legal re-characterisation.¹⁶ By its plain text, “if [...] it appears to the Chamber that the legal characterisation of facts may be subject to change”, regulation 55(2) conveys an objective threshold. Thus, it requires that notice be given where a reasonable Chamber possessed of the same information and evidence *could* conclude that a different legal characterisation of the facts established and confirmed by the Pre-Trial Chamber is possible. In that case, the failure to follow the procedure set out in regulation 55(2) of the RoC amounts to an error of law.¹⁷

B. Regulation 55(2) Notice at this stage of the proceedings is appropriate

10. Based on the totality of the evidence already adduced since the commencement of the trial, together with the facts and circumstances described in the charges, Regulation 55(2) Notice at this stage of the proceedings is appropriate and warranted. 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”.¹⁸ Doing so advances procedural fairness,¹⁹ enables the Parties and Participants to prepare and diminishes the prospect of recalling witnesses.²⁰ Conversely, delaying Regulation 55(2) Notice may increase the chance of prejudice.²¹

11. Before the start of the evidentiary phase of the trial, the Prosecution had already requested the Chamber to give notice of a possible re-characterisation of the facts and circumstances confirmed by the Pre-Trial Chamber regarding the modes of liability charged against YEKATOM.²² At that stage, the Chamber denied giving such notice, having found that the Pre-Trial Chamber had rejected those modes of liability in its Confirmation Decision, and then again in its Decision on Reconsideration and Leave

¹⁶ See *Ali Kushayb* Decision, para. 22.

¹⁷ *Al Hassan* Appeal Decision, paras. 48, 49.

¹⁸ *Katanga* Appeals Decision, para. 24 (“emphasis added”).

¹⁹ *Lubanga* Appeals Decision, para. 85.

²⁰ *Ruto and Sang* Decision, paras. 27, 42.

²¹ *Ruto and Sang* Decision, para. 27.

²² ICC-01/14-01/18- 437.

to Appeal.²³ However, the Chamber expressly noted that its decision was without prejudice to its prerogative to provide notice at a later point in time, either *proprio motu* or upon request, should it consider it to be appropriate to do so at the relevant time.²⁴

12. The Prosecution submits that notice of a possible re-characterisation regarding YEKATOM's criminal responsibility is now warranted and necessary not only based on the facts and circumstances described in the charges, but also on the evidence already led in this trial.²⁵ Such a notice will serve the principal purpose of regulation 55 to "close accountability gaps", as established by the Appeals Chamber.²⁶

13. As described in sections E and F below, the Chamber now has before it a substantial amount of evidence submitted at trial. This evidence further supports the possible re-characterisation of the facts concerning YEKATOM's criminal responsibility. In addition, this application identifies specific items of evidence that the Prosecution intends to formally submit at trial during the coming period. This includes prior recorded testimony to be introduced pursuant to rule 68(2) and (3) of the Rules and material in the Prosecution's List of Evidence that, in combination with the evidence already submitted at trial, will further substantiate the legal elements of all the proposed modes of liability.²⁷ The Chamber can and should properly take note of the contents of this expected evidence in assessing whether they objectively support the possibility of a different characterisation of those modes of liability.²⁸

14. The facts whose legal characterisation may change and the underlying evidence do not exceed the facts and circumstances described in the charges. Indeed, based on the Confirmation Decision alone, YEKATOM is already on notice of such prospective

²³ Decision, para. 14.

²⁴ Decision, para. 16.

²⁵ *Al Hassan* Decision, para. 12; *Ruto and Sang* Decision, para. 24; *Katanga* Appeal Decision, paras. 21-22; ICC-01/04-01/07-3319-tENG ("*Katanga* Notice Decision"), paras 5-6, 17, 19.

²⁶ *Al Hassan* decision, para. 11, citing *Lubanga* Appeal Decision, para. 77 and *Katanga* Appeal Decision, paras. 22 and 104.

²⁷ See ICC-01/14-01/18-724-Conf-AnxA, pp.12-47, listing prior recorded statements to be introduced by the Prosecution under rule 68(3) of the Rules.

²⁸ See *Ali Kushayb* Decision, para. 22.

modification. As discussed in the section below, Regulation 55(2) Notice would not result in any unfair prejudice.

C. There is no prejudice to the Accused

15. Providing Regulation 55(2) Notice now accords with the Court's jurisprudence. The Appeals Chamber has found that regulation 55(2) requires notice to be given when it appears that the legal characterisation of facts may change. "This may become apparent to the Trial Chamber at any time before a decision under article 74 of the Statute is rendered."²⁹

16. The Chamber may consider different factors. In particular, regard may be given to whether giving Regulation 55(2) Notice would be consistent with its primary purpose to close accountability gaps. As has been noted, the provision introduces a procedural framework to avoid "[...] the 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 trial."³⁰

17. While the Prosecution's application raises an issue that could result in an accountability gap, notice of a possible re-characterisation with respect to YEKATOM's criminal responsibility at this stage of the proceedings does not infringe upon the Accused's rights.³¹

18. In fact, YEKATOM has notice of the facts and circumstances described in the charges, as well as of the evidence submitted before the Chamber, which support the proposed potential re-characterisation. The Prosecution disclosed the relevant evidence in the list of evidence provided before the confirmation of charges proceedings and before the commencement of the trial. YEKATOM has had ample opportunity to prepare his defence. And, since the Prosecution case is still ongoing,

²⁹ *Gbagbo* Appeal Decision, para. 51.

³⁰ *Lubanga* Appeal Decision, para. 77; see also *Katanga* Appeal Decision, paras. 22, 104.

³¹ *Al Hassan* Decision, paras. 83-85, 112, 113.

he may adapt his strategy with regard to a Regulation 55(2) Notice and address any resulting issue that may arise as part of his case.

19. Moreover, the Defence has been aware that such notice was possible in light of the Prosecution's First Application and the Chamber's Decision that rejected it "[...] without prejudice to provide notice at a later point in time".³²

20. In any event, the safeguards in paragraphs 2 and 3 of Regulation 55 may be adopted, if deemed necessary, to further protect the rights of the Accused. Therefore, the requested Regulation 55(2) Notice would not cause any unfairness. To the contrary, it would fully accord with the Accused's rights under article 67(1)(a) of the Statute "[t]o be informed promptly and in detail of the nature, cause and content of the charge", and with the Chamber's duty to "ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused," set out in article 64(2) of the Statute.

D. Regulation 55(2) notice should be given for different modes of liability

21. Nothing in the Court's legal framework prevents consideration of alternative modes of liability.³³ It is noteworthy that alternative legal characterisations, both with regard to crimes and modes of liability, when the evidence supports each alternative, is expressly endorsed in the Chambers Practice Manual.³⁴

22. On the basis of the Pre-Trial Chamber's findings and the evidence submitted at trial, and taking into account the evidence the Prosecution intends to formally submit, it is apparent that the facts concerning YEKATOM's criminal responsibility may be re-characterised to accord with articles 28(a), and 25(3)(c) and (d). Therefore, Regulation 55(2) Notice should be given regarding these modes of liability.

³² Decision, para. 16.

³³ *Ruto and Sang* Decision, paras. 30-44.

³⁴ See Chambers Practice Manual (29 November 2019), para. 67, last visited 29 March 2022 https://www.icc-cpi.int/about/judicial-divisions/Pages/chambers_practice_manual.aspx.

E. Re-characterisation under article 28 (a)

a. Elements

23. Article 28(a) responsibility requires: (a) a crime within the jurisdiction of the Court was committed; (b) the accused was a military commander or acting as such; (c) forces under his or her effective command or authority and control, committed crimes within the Court’s jurisdiction; (d) the accused knew or should have known that these forces were committing or about to commit such crimes; and (e) 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 investigation and prosecution.³⁵

24. Below, the Prosecution summarises the evidence so far adduced in this trial (together with the facts and circumstances described in the charges), which demonstrate that the Regulation 55 Notice is supported and is necessary at this stage.

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

YEKATOM was a military commander or person acting as such

25. YEKATOM was indisputably a military commander or a person acting as such during the relevant time. Based on Pre-Trial Chamber’s findings and on evidence, YEKATOM was the chief of an Anti-Balaka group (“YEKATOM’s Group”).³⁶

26. The Pre-Trial Chamber found that, in relation to the 5 December BANGUI Attack, YEKATOM commanded a large group of Anti-Balaka elements.³⁷ According to P-1647, an Anti-Balaka element, such a group was organised as a military-like

³⁵ See also First Application, paras. 12-19, setting out the legal elements of article 28(a) in more detail.

³⁶ P-1647: CAR-OTP-2050-0654, at 0658; P-0487: [CAR-OTP-2076-0130](#), at 0138, l. 272-273; P-0487: [CAR-OTP-2076-0146](#), at 0158, l. 432-438; CAR-OTP-2055-2610 from [00:01:17] to [00:03:04]] and its transcript and translation CAR-OTP-2107-6906, at 6909-6910, l. 39-99, and CAR-OTP-2122-2271, at 2275-2276, l. 39-99.

³⁷ Confirmation Decision, para.63. See also P-0446: CAR-OTP-2059-1672, at 1690 l. 676-689. This prior recorded testimony was formally submitted under Rule 68(3) of the Rules (ICC-01/14-01/18-T-096-CONF-ENG ET p. 15 l. 1-4).

structure. It was composed of companies, overseen by an “*Adjutant*”. Above the *Adjutant* was the Deputy and YEKATOM was the commander.³⁸

27. This evidence accords with the Pre-Trial Chamber’s finding that the Anti-Balaka comprised an armed *group*, of which YEKATOM’s Anti-Balaka Group was part, 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.”³⁹

28. Another Anti-Balaka element confirmed that YEKATOM was the chief of the Anti-Balaka based south of BANGUI. He acted as a Chief of Battalion.⁴⁰ Notably, according to the account of P-1819, “*RHOMBOT était le chef de ce groupe d’Anti-Balaka. Pour moi cela est clair car il se présentait aux militaires français comme étant le chef.*”⁴¹

29. After 5 December 2013, YEKATOM set up his base at the Yamwara School in BOEING⁴² where, in his capacity as commander, he addressed his soldiers on a daily basis.⁴³

30. The Pre-Trial Chamber 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”.⁴⁴ These findings are corroborated by YEKATOM himself who, interviewed by a journalist on 17 March 2014, asserted: “*Ici sur le terrain ... J’ai 3000 hommes.*”⁴⁵ Another Prosecution witness confirmed that “YEKATOM had around

³⁸ P-1647: CAR-OTP-2050-0654, at 0659.

³⁹ Confirmation Decision, paras. 65, 69.

⁴⁰ P-1193: CAR-OTP-2045-0048, at 0053, 0058.

⁴¹ P-1819: CAR-OTP-2065-0003, at 0016, para. 73.

⁴² P-0884 : ICC-01/14-01/18-T-055-CONF-ENG ET, p. 74 l. 1-2.

⁴³ P-1647: CAR-OTP-2050-0654, at 0659.

⁴⁴ Confirmation Decision, para. 65 (emphasis added).

⁴⁵ CAR-OTP-2055-2610 from [00:07:58] to [00:08:05] and its transcript and translation CAR-OTP-2107-6906, at 6914, l.229-233, and CAR-OTP-2122-2271, at 2280, l. 229-233. See also P-1647: CAR-OTP-2050-0654, at 0658. CAR-OTP-2012-0523 from [00:43:50] to [00:44:20] and its transcript and translation CAR-OTP-2118-5507, at 5539-5540, l. 1098-1110, and CAR-OTP-2118-5547, at 5581-5582, l. 1115-1127.

3000 elements under his command. He had also around 200 FACA under his command.”⁴⁶

31. A Prosecution witness who was in contact with YEKATOM during the relevant time, testified that YEKATOM organised Anti-Balaka elements around PISSA, southwest of BANGUI. In the witness’s words: “It was in December that I got to see him (YEKATOM) and to know him and then to understand also that he is the one who had created the group around Pissa in a bid to move on Bangui.”⁴⁷ YEKATOM’s Group was essentially composed of soldiers, although civilian combatants also joined them.⁴⁸

32. Another witness explained during testimony that everyone referred to YEKATOM as “colonel”.⁴⁹ The latter appears in military uniform in a video recorded in January 2014.⁵⁰

33. The Pre-Trial Chamber also found that YEKATOM was among a number of Anti-Balaka Zone-Commanders “appointed to control specific areas and discipline their respective groups.”⁵¹ P-0992 testified that “... he (YEKATOM) was a ComZone, zone commander in the southwest.”⁵² Another Prosecution witness added that YEKATOM was a “powerful ComZone.”⁵³ Significantly, YEKATOM was the one deciding how to distribute among his Group weapons seized from the Seleka.⁵⁴

34. The Pre-Trial Chamber also made specific findings concerning YEKATOM’s authority to issue orders. It established that YEKATOM had, *inter alia*, “issu[ed] orders to Anti-Balaka members, including patently illegal instructions”,⁵⁵ founding his

⁴⁶ P-0954: [CAR-OTP-2048-0171](#), at 0185. This prior recorded testimony was introduced into evidence subject to the fulfilment of the legal requirements of Rule 68(3) of the Rules (ICC-01/14-01/18-1317-Conf).

⁴⁷ P-0884: ICC-01/14-01/18-T-055-CONF-ENG ET, p. 73 l. 10-17.

⁴⁸ P-0884: ICC-01/14-01/18-T-055-CONF-ENG ET, p. 74 l. 2-5.

⁴⁹ P-0287 : ICC-01/14-01/18-T-021-CONF-ENG ET, p. 46 l. 16 to p. 47 l. 2.

⁵⁰ CAR-OTP-2012-0523 at 00:10:45:21.

⁵¹ Confirmation Decision, para. 65.

⁵² P-0992: ICC-01/14-01/18-T-092-CONF-ENG ET, p. 62 l. 19-25; see also p. 65 l. 12-15.

⁵³ P-0808: ICC-01/14-01/18-T-072-ENG ET WT, p. 49 l. 12 to p. 50 l. 5.

⁵⁴ P-1647: CAR-OTP-2050-0654, at 0665.

⁵⁵ Confirmation Decision, p. 107, and *see e.g.*, paras. 94, 98, 124.

criminal responsibility for the crimes charged alternatively under article 25(3)(b). This finding demonstrates a superior-subordinate relationship between YEKATOM in his capacity as a military commander, and the Anti-Balaka elements of his Group. It is also relevant to prove his effective command/ authority and control over them, addressed below.

YEKATOM had effective command/ authority and control over the perpetrators - in the sense that he had material ability to prevent or repress

35. The evidence in this case – both relied upon by the Pre-Trial Chamber and received by the Chamber at trial – shows that YEKATOM had authority to give orders to his elements (and to secure compliance).⁵⁶ This is consistent with the Anti-Balaka structure, in which issuing orders and instructions to the troops was among the prerogatives of a ComZone.⁵⁷ YEKATOM’s soldiers turned to him when they needed any authorisation.⁵⁸ Examples of orders issued by YEKATOM include the installation of checkpoints⁵⁹ and [REDACTED].⁶⁰ YEKATOM also gave orders to the ComZones, directly or through his deputy.⁶¹ A Prosecution witness explained the extent of YEKATOM’s authority as follows: “I had seen him (YEKATOM) giving orders and threats. It seemed to me that people, even FACA, were afraid of him. His elements were also afraid of him and his orders were obeyed without question.”⁶²

36. The Pre-Trial Chamber found not only that YEKATOM had the ability to give orders, but that he also *ordered* the commission of crimes by his Group. These include crimes committed in relation to the 5 December 2013 Bangui Attack,⁶³ at the Yamwara

⁵⁶ P-0884: ICC-01/14-01/18-T-056-CONF-ENG CT, p. 71 l. 14-17; P-1647: CAR-OTP-2050-0654, at 0660, 0661.

⁵⁷ P-0876: CAR-OTP-2046-0324, at 0325-0326 l.9-54. This statement was formally submitted under Rule 68(3) of the Rules [REDACTED].

⁵⁸ P-1819: CAR-OTP-2065-0003, at 0016, 0017.

⁵⁹ P-1647: CAR-OTP-2050-0654, at 0661.

⁶⁰ P-1647: CAR-OTP-2050-0654, at 0660.

⁶¹ P-1647: CAR-OTP-2050-0654, at 0664.

⁶² P-1858: [CAR-OTP-2063-0050](#), at 0063. The Prosecution has filed its request for the formal submission of this prior recorded testimony pursuant to Rule 68(3) on 15 February 2022 (ICC-01/14-01/18-1281-Conf).

⁶³ Confirmation Decision, para. 99.

School Base,⁶⁴ and along the PK9 – Mbaiki Axis, as well as the conscription and/or enlistment of children under the age of 15, and their use in hostilities.⁶⁵ The Pre-Trial Chamber further established that YEKATOM’s orders and directions were executed, as YEKATOM’s Group acted, *inter alia*, pursuant to his orders in committing the charged crimes.⁶⁶ This further demonstrates his exercise of effective command/ authority and control over his subordinates.

37. YEKATOM’s command/ authority and control over his troops is also demonstrated by his ability to negotiate and represent his Group during relevant events. For instance, YEKATOM negotiated the release of Muslim hostages abducted by his elements. His engagement in the negotiations and his Group’s ultimate release of the remaining abductees shows that his soldiers respected his decisions and complied with his orders.⁶⁷

38. YEKATOM’s command/ authority is also shown by his control over large portions of territory, through his Group. [REDACTED].⁶⁸ YEKATOM further controlled the area from PK9 to Mbaiki and Mongoumba.⁶⁹ Moreover, he was vested with disciplinary authority.⁷⁰

39. Furthermore, according to evidence heard by the Chamber, YEKATOM [REDACTED].⁷¹

Remaining legal elements of article 28

40. As set out in the operative part of the Confirmation Decision,⁷² the Pre-Trial Chamber found, in relation to the charged war crimes and crimes against humanity

⁶⁴ Confirmation Decision, para. 125; see also P-0954: [CAR-OTP-2048-0171](#), at 0185-0186.

⁶⁵ Confirmation Decision, paras. 154, 155.

⁶⁶ Confirmation Decision, pp.104-107.

⁶⁷ P-0884: ICC-01/14-01/18-T-056-CONF-ENG CT, p. 13 l. 21 to p. 14 l. 3; [REDACTED].

⁶⁸ [REDACTED].

⁶⁹ P-0884: ICC-01/14-01/18-T-056-CONF-ENG CT, p. 31 l. 1-11; [REDACTED]; P-1647: CAR-OTP-2050-0654, at 0661.

⁷⁰ P-0808: ICC-01/14-01/18-T-072-ENG ET WT, p. 31 l. 3-8; P-1647: CAR-OTP-2050-0654, at 0660.

⁷¹ [REDACTED].

⁷² Confirmation Decision, pp.104-107.

that, “[...] all [were] committed as part of a widespread attack conducted by the Anti-Balaka, including Yekatom’s group”, and that YEKATOM’s criminal responsibility arose from his commission of those crimes “jointly with another or through another” or ordering their commission. These findings plainly substantiate the remaining legal elements of article 28(a) responsibility.⁷³

41. First, they show that (a) the crimes fall within the Court’s jurisdiction and were committed by YEKATOM’s subordinates. Second, the findings that YEKATOM participated in the charged crimes as a co-perpetrator or otherwise ordered their commission subsume that (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.

42. Additionally, YEKATOM’s presence at locations within his area of responsibility, where his elements committed numerous crimes, further satisfy the requisite knowledge element.⁷⁴

43. In conclusion, the Pre-Trial Chamber’s findings and the evidence underlined in this application warrant the requested Notice of a possible re-characterisation of the facts regarding YEKATOM’s criminal responsibility, so as to accord with article 28(a).

F. Re-characterisation under article 25(3)(c) and (d)

a. Elements

⁷³ Confirmation Decision, paras. 83-92; 113-117; 129-137; pp. 104-107.

⁷⁴ Confirmation Decision, paras. 91, 124, 139, 146, 153; P-1858: [CAR-OTP-2063-0050](#), at 0060, 0071; CAR-OTP-2012-0523 from [00:49:52] to [00:51:28] and its transcript and translation CAR-OTP-2118-5507 at 5544-5545, l. 1249-1297, and CAR-OTP-2118-5547, at 5586-5587, l. 1264-1316, showing YEKATOM at the Yamwara School.

44. Article 25(3)(c) liability entails: (a) a crime within the jurisdiction of the Court was committed; (b) the accused acted for the purpose of facilitating the crime; and (c) the act aided, abetted or otherwise assisted in its commission⁷⁵

45. As to article 25(3)(d), the elements are the following: (a) a crime within the jurisdiction of the Court was committed; (b) a group of persons acting with a common purpose committed such crime; (c) the accused contributed to the crime 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.⁷⁶

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

YEKATOM's contributions to the charged crimes

47. The Pre-Trial Chamber expressly established that YEKATOM's contributions to the charged crimes consisted of the following:

- (i) structuring, training and equipping his Anti-Balaka elements;
- (ii) preparing the Anti-Balaka attacks and advances, and participating and leading his group in their execution;
- (iii) issuing orders to Anti-Balaka members, including patently illegal instructions; and
- (iv) conscripting and/or enlisting children under 15 years into his group and using them to assist him in the camp-bases, ordering them to be stationed at barriers and checkpoints as well as to actively participate in hostilities.⁷⁷

⁷⁵ See also First Application, paras. 36-40, setting out the legal elements of article 25(3)(c) in more detail.

⁷⁶ See also First Application, paras. 41-49, setting out the legal elements of article 25(3)(d) in more detail.

⁷⁷ Confirmation Decision, p. 107.

48. Further findings include YEKATOM's involvement in the preparation of the 5 December 2013 attack; YEKATOM leading his Anti-Balaka elements in that attack;⁷⁸ his orders for the children to receive military training and to be mobilised to participate in hostilities;⁷⁹ and the training and instructions given to his elements, including to kill Muslims and Selekas.⁸⁰

49. These confirmed facts fully satisfy the legal element of providing contributions to the *commission* of a crime, under article 25(3)(c) and (d). Additionally, evidence formally submitted and that intended to be introduced by the Prosecution substantiate these findings, with specific regard to YEKATOM providing military training to his elements;⁸¹ providing weapons and ammunition;⁸² preparing Anti-Balaka attacks;⁸³ and participating and leading his Group in those attacks.⁸⁴ In this respect, P-0884 testified as follows: "It's only on 5 December when I saw him (YEKATOM) that I realised that he was the one who was leading the actions or activities against Séléka";⁸⁵ "I met him (YEKATOM) at his base at the Yamwara school ... He was giving an interview to this journalist. He was explaining how he had carried out his attacks, why he had begun the attack and so on and so forth."⁸⁶

50. In addition to the findings in the Confirmation Decision, relevant evidence adduced at trial substantiates YEKATOM's conscripting and/or enlisting children under 15 years. For instance, P-0808 testified that he attended a demobilisation ceremony where young children working under YEKATOM's supervision were

⁷⁸ Confirmation Decision, para. 98.

⁷⁹ Confirmation Decision, para. 149.

⁸⁰ Confirmation Decision, para. 85.

⁸¹ P-1647: CAR-OTP-2050-0654, at 0658; P-1819: CAR-OTP-2065-0003, at 0029.

⁸² P-1647: CAR-OTP-2050-0654, at 0665.

⁸³ P-0884: ICC-01/14-01/18-T-055-CONF-ENG ET, p. 76 l. 25 to p. 77 l. 4; [REDACTED].

⁸⁴ P-0287: ICC-01/14-01/18-T-021-CONF-ENG CT, p. 52 l. 3-24; P-0992: ICC-01/14-01/18-T-092-CONF-ENG ET, p. 51 l. 11-18; P-1858: [CAR-OTP-2063-0050](#), at 0057.

⁸⁵ P-0884: ICC-01/14-01/18-T-055-CONF-ENG ET, p. 77 l. 25 to p. 78 l.7.

⁸⁶ P-0884: ICC-01/14-01/18-T-056-CONF-ENG CT, p. 13 l. 2-6.

demobilised.⁸⁷ The witness estimated that the children demobilised from YEKATOM's Group were between 14 and 17 years of age.⁸⁸

51. The Prosecution intends to introduce more evidence, including a video that displays YEKATOM signing an agreement regarding the demobilisation of children⁸⁹ and a document entitled "*Libération des Enfants associés au mouvement*". YEKATOM, by signing this document, committed to the following: "... je prends l'engagement de les libérer et de ne plus re-enrôler dans l'avenir."⁹⁰

52. YEKATOM's presence during his Group's perpetration of charged crimes significantly contributed to their commission.⁹¹ The Pre-Trial Chamber has made findings that YEKATOM was present during the destruction of the Boeing Mosque,⁹² [REDACTED],⁹³ at locations in which children were conscripted, enlisted and used in hostilities,⁹⁴ and at all of the areas under his control in and around BANGUI, BIMBO and in the LOBAYE Prefecture⁹⁵ wherein the charged crimes were committed.

53. Thus, as to article 25(3)(c) liability, through the contributions described above, YEKATOM aided, abetted or otherwise assisted in the commission of the crimes charged. The same conduct satisfies the standard regarding the level of contributions required under article 25(3)(d).

Remaining legal elements under article 25(3)(c) and (d)

⁸⁷ P-0808 : ICC-01/14-01/18-T-069-CONF-ENG ET, p. 65 l. 3-10.

⁸⁸ P-0808: ICC-01/14-01/18-T-070-ENG ET WT, p. 3 l. 22 to p. 4 l. 12.

⁸⁹ CAR-OTP-2068-0586 from [00:00:00] to [00:00:27] and its transcript and translation CAR-OTP-2107-3148, at 3149 l. 1-18 and CAR-OTP-2107-3152, at 3154 l. 1-18; *see also* P-1974: CAR-OTP-2068-0222, at 0228.

⁹⁰ CAR-OTP-2128-1373, at 1373.

⁹¹ ICC-01/05-01/13-2275-Red ("*Bemba, et al* Appeal Judgment"), para. 1328. Under certain circumstances, 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: ICC-01/05-01/13-1989-Red ("*Bemba, et al* Trial Judgment"), para. 89. *See also Prosecutor v. Augustin Ngirabatware*, Judgement, Case No. MICT-12-29-A, 18 December 2014, ("*Ngirabatware* Appeal Judgment"), para. 150; *Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68, 16 December 2013, ("*Ndahimana* Appeal Judgment"), para.147

⁹² Confirmation Decision, para. 91.

⁹³ Confirmation Decision, para. 124.

⁹⁴ Confirmation Decision, paras. 146, 153.

⁹⁵ Confirmation Decision, para. 139.

54. The requirement under both modes of liability that YEKATOM's contributions relate to crimes within the jurisdiction of the Court has been addressed above.⁹⁶

A group of persons acting with a common purpose committed the crimes charged

55. 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."⁹⁷ 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)."⁹⁸

56. Moreover, the Pre-Trial Chamber's determination about YEKATOM's responsibility under article 25(3)(a) meets article 25(3)(d)'s requirement that the crimes be committed or attempted by a plurality of persons acting pursuant to a 'common purpose'. Although the identification of the members of the group is not a requirement,⁹⁹ the Confirmation Decision clarifies that the group in question comprised Anti-Balaka elements commanded by YEKATOM.

YEKATOM's subjective element

57. The fulfilment of YEKATOM's *mens rea* under both modes of liability is also readily apparent from the Pre-Trial Chamber's findings and the underlying evidence.

⁹⁶ See para. 41 above.

⁹⁷ Confirmation Decision, para. 107 (emphasis added), *see also* paras. 61-66.

⁹⁸ Confirmation Decision, para. 64.

⁹⁹ ICC-01/04-01/07-3436-tENG, para. 1626; ICC-02/11-01/11-656-Anx, Diss. Op. Van den Wyngaert, para. 9.

The Pre-Trial Chamber established that YEKATOM “had intent and knowledge in relation to these crimes under article 30 of the Statute”.¹⁰⁰

58. Moreover, the Pre-Trial Chamber’s findings, particularly that YEKATOM was a direct co-perpetrator of the charged crimes with his elements, and that he ordered their commission,¹⁰¹ demonstrate that YEKATOM acted (i) to facilitate the commission of those crimes; 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 that kind.

59. Therefore, the Pre-Trial Chamber’s findings and the evidence referred to in this application warrant the requested Notice of a possible legal re-characterisation of facts regarding YEKATOM’s criminal responsibility under article 25(3)(c) and (d).

IV. RELIEF SOUGHT

60. For the reasons above, the Prosecution requests the Chamber to give Regulation 55(2) Notice to the Parties and Participants that the facts 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).



Karim A. A. Khan QC, Prosecutor

Dated this 7th day of April 2022
At The Hague, The Netherlands

¹⁰⁰ Confirmation Decision, paras. 99, 125, 140, 155.

¹⁰¹ Confirmation Decision, p. 107.