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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-ÉDOUARD NGAÏSSONA

Public

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"

Source: Common Legal Representatives of Victims

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

The Office of the Prosecutor

Ms Fatou Bensouda Mr Kweku Vanderpuye Counsel for Alfred Yekatom

Ms Mylène Dimitri Mr Peter Robinson

Counsel for Patrice-Édouard Ngaïssona

Mr Geert-Jan Alexander Knoops

Legal Representatives of the Victims

Mr Dmytro Suprun

Legal Representatives of the Applicants

Mr Abdou Dangabo Moussa

Ms Marie Édith Douzima Lawson

Mr Yaré Fall

Ms Paolina Massidda

Ms Elisabeth Rabesandratana

Unrepresented Victims Unrepresented Applicants

(Participation/Reparation)

The Office of Public Counsel for

Victims

Ms Paolina Massidda Mr Dmytro Suprun Ms Anne Grabowski

Ms Carine Pineau

Ms Nadia Galinier

The Office of Public Counsel for the

Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar Counsel Support Section

Mr Peter Lewis

Victims and Witnesses Unit Detention Section

Victims Participation and Reparations Other

Section

I. INTRODUCTION

- 1. The Common Legal Representative of the Former Child Soldiers and the Common Legal Representatives of the Victims of Other Crimes (jointly the "Common Legal Representatives" or the "CLRV") hereby file their joint response to the "Prosecution's Application for Notice to be given pursuant to Regulation 55(2) on Accused Yekatom's Individual Criminal Responsibility" (the "Prosecution's Application" or the "Application").¹
- 2. The Common Legal Representatives submit that the Prosecution's Application meets the legal criteria under regulations 55(1) and (2) of the Regulations of the Court (the "Regulations"). Indeed, the facts and circumstances as confirmed by the Pre-Trial Chamber 'appear' to support the re-characterisation of the modes of liability in relation to Mr Yekatom. Providing a regulation 55 notice is timely, in the interest of a fair and expeditious trial, consistent with the Accused's rights under article 67(1)(a) to (c) of the Rome Statute (the "Statute"), 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 during the trial.
- 3. Finally, the Victims express their concern about the Prosecution's choice to not also request a regulation 55 notice as regards the modes of liability of Mr Ngaïssona.

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¹ See the "Prosecution's Application for Notice to be given pursuant to Regulation 55(2) on Accused Yekatom's Individual Criminal Responsibility", No. ICC-01/14-01/18-503-Conf, 30 April 2020. A public redacted version was issued on 1 May 2020 as No. ICC-01/14-01/18-503-Red (the "Prosecution's Application").

II. PROCEDURAL BACKGROUND

- 4. On 11 November 2018, Pre-Trial Chamber II (the "Pre-Trial Chamber") issued the "Warrant of Arrest for Alfred Yekatom".²
- 5. On 11 December 2019, the Pre-Trial Chamber issued the "Decision on the confirmation of charges against Alfred Yekatom and Patrice-Édouard Ngaïssona" (the "Decision confirming the charges").³
- 6. On 11 March 2020, the Pre-Trial Chamber issued the "Decision on the Prosecutor's request for reconsideration or, in the alternative, leave to appeal the 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona'", rejecting the Prosecution's request.⁴
- 7. On 16 March 2020, the Presidency constituted Trial Chamber V (the "Chamber") and referred the present case to it.⁵ On 17 March 2020, Judge Schmitt was elected Presiding and Single Judge.⁶

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

³ See the "Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona" (Pre-Trial Chamber II), No. ICC-01/14-01/18-403-Conf, 11 December 2019. A public redacted version was issued on 20 December 2019 as No. ICC-01/14-01/18-403-Red (the "Decision confirming the charges").

⁴ See the "Decision on the Prosecutor's request for reconsideration or, in the alternative, leave to appeal the 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona'" (Pre-Trial Chamber II), No. ICC-01/14-01/18-447, 11 March 2020. See also, the "Prosecution's Request for Reconsideration of, or alternatively Leave to Appeal, the 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaissona'", No. ICC-01/14-01/18-437, 2 March 2020; the "Common Legal Representatives' Joint Response to the Prosecution's Request for Reconsideration or Leave to Appeal", No. ICC-01/14-01/18-442, 6 March 2020; and the "Yekatom Defence Opposition to Prosecution's Request for Reconsideration or Leave to Appeal Confirmation Decision", No. ICC-01/14-01/18-443, 6 March 2020.

⁵ See the "Decision constituting Trial Chamber V and referring to it the case of The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona" (Presidency), No. ICC-01/14-01/18-451, 16 March 2020.

⁶ See the "Decision notifying the election of a Presiding Judge and Single Judge" (Trial Chamber V), No. ICC-01/14-01/18-454, 17 March 2020.

- 8. On 31 March 2020, the Prosecution filed before the Pre-Trial Chamber its "[...] Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges" (the "Prosecution's Request to Amend Charges and Notice of Intention to Add Additional Charges").⁷
- 9. On 14 April 2020, the Common Legal Representatives filed their joint response to the Prosecution's Request to Amend Charges and Notice of Intention to Add Additional Charges.⁸ The Defence for Mr Yekatom filed its response the same day.⁹
- 10. On 30 April 2020, the Prosecution filed its Application.¹⁰
- 11. On 3 May 2020, the Defence for Mr Yekatom requested by email an extension of two days to respond to the Prosecution's Application after the notification of the CLRV response, and reiterated its previous request for a standing order requiring the Common Legal Representatives to file any response to any Prosecution motions within five days of notification of the relevant motion.¹¹
- 12. On 4 May 2020, the Prosecution¹² and the CLRV¹³ responded by email opposing the Defence's request.

⁷ See the "Prosecution's Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges", No. ICC-01/14-01/18-468-Conf, 31 March 2020. A public redacted version was issued on 31 March 2020 as No. ICC-01/14-01/18-468-Red. On 16 April 2020, a corrected confidential version was issued as No. ICC-01/14-01/18-480-Conf. On 17 April 2020 a public redacted version of the corrected version was issued as No. ICC-01/14-01/18-480-Red.

⁸ See the "Common Legal Representatives' Joint Response to the 'Prosecution's Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges'", No. ICC-01/14-01/18-475, 14 April 2020.

⁹ See the "Defence Response to the Prosecution's Request to Amend Charges pursuant to Article 61(9) (ICC-01/14-01/18-468-Conf)", No. ICC-01/14-01/18-477-Conf, 14 April 2020. A public redacted version was filed on 16 April 2020 as No. ICC-01/14-01/18-477-Red.

¹⁰ See the Prosecution's Application, *supra* note 1.

¹¹ See the Email correspondence from the Yekatom Defence on 3 May 2020 at 19:25.

¹² See the Email correspondence from the Prosecution on 4 May 2020 at 9:45.

¹³ See the Email correspondence from the Common Legal Representatives on 4 May 2020 at 10:36.

13. The same day, the Single Judge of the Chamber rejected the Defence's request in its entirety.¹⁴

III. SUBMISSIONS

1. Applicable law

- 14. Regulation 55(1) and (2) of the Regulations reads as follows:
 - "1. In its decision under article 74, the Chamber may change the legal characterisation of facts 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.
 - 2. 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 to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change".
- 15. In the *Bemba et al.* case the trial chamber held that regulation 55 of the Regulations establishes a three-stage procedure to modify the legal characterisation of facts:
 - "(1) 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;
 - (2) 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 recharacterisation; and
 - (3) 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 recharacterisation for which notice was given at the first stage". 15

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¹⁴ See the Email correspondence from Trial Chamber V on 4 May 2020 at 16:20.

¹⁵ See the "Decision on Prosecution Application to Provide Notice pursuant to Regulation 55" (Trial Chamber VII), No. ICC-01/05-01/13-1250, 15 September 2015, para. 8.

- 16. The Appeals Chamber further clarified that the purpose of regulation 55 is to "close accountability gaps", ¹⁶ and that if a trial chamber could not re-visit the legal characterisation of facts that were confirmed by the pre-trial chamber at the end of the confirmation procedure, 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 [...]. This would be contrary to the aim of the Statute to 'put an end to impunity". ¹⁷
- 17. The Appeals Chamber also found that notice under regulation 55(2) of the Regulations "should always be given as early as possible", ¹⁸ and that "the ordinary meaning of the phrase 'at any time during the trial' in the context of regulation 55 does not exclude the stage after a Trial Chamber is seized of a case and before opening statements". ¹⁹
- 18. Furthermore, a trial chamber can re-characterise the facts and circumstances for a mode of liability that was considered, but not confirmed by the

¹⁶ See the "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'" (Appeals Chamber), No. ICC-01/04-01/06-2205 OA 15 OA 16, 8 December 2009, para. 77. See also the "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'" (Appeals Chamber), No. ICC-01/04-01/07-3363 OA 13, 27 March 2013, para. 22 and 104. See also the "Decision on Prosecution Application to Provide Notice pursuant to Regulation 55", *supra* note 15, para. 7.

¹⁷ See the "Judgment on the 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'" (Appeals Chamber), No. ICC-02/11-01/15-369, 18 December 2015, para. 31. See also the "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'", *supra* note 16, para. 77.

¹⁸ See the "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'", *supra* note 16, para. 24. See also the "Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court" (Trial Chamber I), No. ICC-02/11-01/15-185, 19 August 2015, para. 11

¹⁹ See the "Judgment on the 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", *supra* note 17, para. 51.

pre-trial chamber, so long as the facts and circumstances that could potentially be re-characterised were confirmed by said chamber.²⁰

- 19. Finally, "there is no additional requirement for a Trial Chamber to establish that the circumstances of the case are 'special' or 'extraordinary' in order to issue notice under that provision prior to the start of the presentation of evidence in the case." Rather, "regulation 55(2) of the Regulations of the court requires notice to be issued when it 'appears' to the Trial Chamber that the legal characterisation of facts may be subject to change".²²
- 20. The Common Legal Representatives note that the Prosecution's Request for Reconsideration or Leave to Appeal²³ has been rejected,²⁴ and that the Prosecution's Request to Amend Charges and Notice of Intention to Add Additional Charges²⁵ is still under consideration before the Pre-Trial Chamber.
- 21. In this regard, they recall the Appeals Chamber's findings according to which "resort to regulation 55 by the Trial Chamber is not contingent on whether the procedure under article 61(9) of the Statute for the amendment of charges was applied". ²⁶

²⁰ *Idem*, para. 32.

²¹ *Idem*, para. 67.

²² See the "Judgment on the 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", *supra* note 17, para. 51.

²³ See the "Prosecution's Request for Reconsideration of, or alternatively Leave to Appeal, the 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaissona'", *supra* note 4.

²⁴ See the "Decision on the Prosecutor's request for reconsideration or, in the alternative, leave to appeal the 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona'", *supra* note 4.

²⁵ See the "Prosecution's Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges", *supra* note 7.

²⁶ See the "Judgment on the 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", *supra* note 17, para. 32.

2. Application of the legal criteria to the Prosecution's Application

22. The Common Legal Representatives submit that the Application fully meets the legal criteria under regulation 55(1) and (2) of the Regulations as developed by the Appeals Chamber, insofar as a notice has to be provided at the early stage of the proceedings, after the trial chamber has been seized of the case and regardless of the fact that the pre-trial chamber declined to confirm all the modes of liability.²⁷ Indeed, what is essential under said provision is that the notice is requested in relation to the facts and circumstances confirmed by the pre-trial chamber.²⁸ Moreover, providing such notice at this early stage of the preparation for trial is consistent with Mr Yekatom's rights and in the interests of the effectiveness and efficiency of the proceedings.

a) Regulation 55 notice is timely

23. The Common Legal Representatives emphasise that the Prosecution's Application is only the first step in the three-stage procedure to modify the legal characterisation under regulation 55 of the Regulations.²⁹ It is not an application for the *actual* legal re-characterisation of any facts under regulation 55(1), but rather for a notice of the *possibility* of such a re-characterisation under sub-regulation 2 of said provision.

24. Therefore, granting the Application and providing notice accordingly as early as possible is in the interest of the effectiveness and efficiency of the proceedings, will ensure Mr Yekatom's right to be informed promptly and in detail about the charges

²⁷ See the "Decision on the Prosecutor's request for reconsideration or, in the alternative, leave to appeal the 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona'", *supra* note 4, para. 20.

²⁸ See the Prosecution's Application, *supra* note 1, paras. 21-28 and 51-64.

²⁹ See the "Decision on Prosecution Application to Provide Notice pursuant to Regulation 55", *supra* note 15, para. 8.

and avoid delays and the risk of having to recall witnesses if notice were to be given at a later stage of the proceedings.

b) The facts and circumstances 'appear' to support re-characterisation

25. The Common Legal Representatives will not duplicate the Prosecution's arguments on how the individual elements of the proposed additional modes of criminal liability are fulfilled by the finding of facts in the Decision confirming the charges for articles 28, and 25(3)(c) and (d) individually and refer to the relevant parts of the Application.³⁰ They submit additionally that the Prosecution has demonstrated that it 'appears' from the facts and circumstances referred to in the Application that the legal characterisation of facts may be subject to change as regards the modes of liability in relation to Mr Yekatom.

26. In this regard, the Common Legal Representatives recall that the Pre-Trial Chamber in the Decision confirming the charges held that "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".³¹

27. Furthermore, in citing examples of cases in which a regulation 55 notice was granted in its response to the Prosecution's Request for Reconsideration or Leave to Appeal, the Defence also seemed to agree that the Trial Chamber is the appropriate entity to adjudicate on alternative modes of liability.³²

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³⁰ See the Prosecution's Application, *supra* note 1, paras. 10-64.

³¹ See the Decision confirming the charges, *supra* note 3, para. 121.

³² See the "Yekatom Defence Opposition to Prosecution's Request for Reconsideration or Leave to Appeal Confirmation Decision", *supra* note 4, paras. 17-21.

c) Giving a regulation 55 notice is consistent with Mr Yekatom's rights

- 28. The Common Legal Representatives recall that one of the aims of regulation 55 of the Regulations is to ensure that the accused is informed of a possible change to the legal characterisation of facts.³³ This reading is consistent with the case law of the European Court of Human Rights.³⁴ and the Inter-American Court of Human Rights.³⁵
- 29. In particular, in accordance with the jurisprudence of the Court, "when making a Regulation 55(2) Assessment, the Chamber must remain mindful of the rights of the accused. In particular, the Chamber must ensure that the accused: (i) receives the specific facts within the 'facts and circumstances described in the charges' which may be relied upon and (ii) the accused is given adequate time and facilities for the effective preparation of his or her defence".³⁶
- 30. Consequently, providing a regulation 55 notice at the present stage of the proceedings is consistent with Mr Yekatom's rights and is in his very interest, insofar, as underlined *supra*, he will be informed promptly and in detail of the nature, cause and content of the charges he has to face at trial. This course of event is also consistent with the right of the Defence to adequately prepare its case, adapt its strategy in view of said notice and eventually request that safeguards be adopted as a consequence of the notice, including, but not limited to, those contained in

³³ See the "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'", *supra* note 16, paras. 100.

³⁴ See ECtHR, *Pélissier and Sassi v. France*, App. No. 25444/94, <u>Judgment</u>, 25 March 1999; *Dallos v. Hungary*, App. No. 29082/95, <u>Judgment</u>, 1 March 2001; *Sadak and others v. Turkey*, Apps. Nos. 29900/96, 29901/96, 29902/96 and 29903/96, <u>Judgment</u>, 17 July 2001; *R.H. and others v. Austria*, App. No. 42780/98, <u>Judgment</u>, 20 April 2006; *Miraux v. France*, App. No. 73529/01, <u>Arrêt</u>, 26 September 2006; *Mattei v. France*, App. No. 34043/02, <u>Arrêt</u>, 19 December 2006; *Abramyan v. Russia*, App. No. 10709/02, <u>Judgment</u>, 9 October 2008.

³⁵ See IACtHR, Fermin Ramirez v. Guatemala, <u>Judgment of 20 June 2005</u>, Series C, No. 126.

³⁶ See the "Decision on Applications for Notice of Possibility of Variation of Legal Characterisation" (Trial Chamber V(A)), No. ICC-01/09-01/11-1122, 12 December 2013, para. 20. See also, the "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'", *supra* note 16, paras. 100-101.

regulation 55(2) and (3) of the Regulations. ³⁷ Indeed, if the Chamber were to give the regulation 55 notice at a later stage when the trial starts, this would increase the chances of prejudice to the Defence.³⁸

31. In light of the above, the CLRV posit that early notice of a possible re-characterisation of the facts as sought by the Prosecution is consistent with Mr Yekatom's rights under articles 67(1)(a) to (c) of the Statute and with the duty of the Trial Chamber under article 64(2) of the Statute to "ensure that a trial is fair and expeditious and is conducted with full respect to the rights of the accused".

IV. VIEWS AND CONCERNS OF THE VICTIMS

- 32. The Victims expect for justice to be done in the most effective and efficient way, and without undue delay. Accordingly, they expressed their wish for a regulation 55 notice to be given as requested by the Prosecution at the present early stage of the proceedings. The Victims also expect for the truth to be established to the fullest extent. Thus, they believe that giving a regulation 55 notice at this stage will allow for an in-depth assessment of all possible forms of Mr Yekatom's involvement in the commission of the crimes during the trial.
- 33. In particular, the Victims Former Child Soldiers expressed their wish to see Mr Yekatom also being tried as a commander because that is the role he fulfilled in their lives. In this regard, since the Pre-Trial Chamber has recognised that "the evidence shows the presence of children, including those under the age of 15, among Yekatom's elements", that Mr Yekatom was one of the 'chiefs' and that children were present in several locations under Mr Yekatom's control,³⁹ the Victims Former Child

³⁷ See the "Decision on Applications for Notice of Possibility of Variation of Legal Characterisation", supra note 36, 12 December 2013, para. 43.

³⁸ *Idem*, para. 27.

³⁹ See the Decision confirming the charges, *supra* note 3, para. 145.

Soldiers are of the view that Mr Yekatom's responsibility as commander should at least be debated at trial.

34. Finally, the Victims wish to reiterate their concern in relation to the choice by the Prosecution to not also request a regulation 55 notice with regards to the modes of liability under article 25(3)(c) and (d) in relation to Mr Ngaïssona.⁴⁰ In this regard, they reserve their right to eventually ask the Chamber to proceed in accordance with said provision should it be necessary – having heard the evidence – to preserve and defend the interests of the Victims they represent.

⁴⁰ See the "Common Legal Representatives' Joint Response to the Prosecution's Request for Reconsideration or Leave to Appeal", No. ICC-01/14-01/18-442, 6 March 2020, para. 36.

V. CONCLUSION

35. For the foregoing reasons, the Common Legal Representatives respectfully request the Trial Chamber to grant the Prosecution's Application.

Dmytro Suprun

Common Legal Representative Victims Former Child Soldiers

Paolina Massidda

Elisabeth Rabesandratana

Yaré Fall

Abdou Dangabo Moussa

Marie-Edith Douzima-Lawson

Common Legal Representatives Victims of Other Crimes

Dated this 14th day of May 2020

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