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**International
Criminal
Court**

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Date: **10 June 2020**

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 NGAÏSSONA***

Public

Public redacted version of "Prosecution Response to "Yekatom Defence Appeal Brief - Admissibility"", 10 June 2020

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INTRODUCTION

1. Yekatom’s appeal against Trial Chamber V’s decision rejecting his request for a “Sequential Approach” should be dismissed.¹ Yekatom did not substantiate his request on any ground in article 17(1). Indeed, he argued that the Central African Republic (“CAR”) authorities were not investigating or prosecuting him but that he wanted the Chamber to enquire with them whether they might be willing and able to do so. The Chamber correctly rejected his request for a “Sequential Approach”. In addition, and based on the information before it, the Chamber correctly concluded that the case against him was admissible before the Court. Further, the Chamber reasonably exercised its discretion and declined to request observations from the CAR authorities. Such a request was clearly not necessary. *First*, Yekatom conceded that there were no domestic proceedings against him. *Second*, no information introduced in the record suggested that the CAR authorities were investigating or prosecuting him for this case, or that they intended to challenge its admissibility. The Chamber’s decision was reasonable and correct in the circumstances.

CONFIDENTIALITY LEVEL

2. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, the Prosecution files this response as confidential since it refers to confidential information. A public redacted version will be filed.

SUBMISSIONS

3. Yekatom raises a single ground of appeal, arguing that “the Trial Chamber erred [procedurally] when denying the Defence’s admissibility challenge without first seeking observations from Central African Republic (“CAR”) authorities”.² He submits that the “concerned State” (that is, the CAR)³ must *necessarily* be heard when an admissibility

¹ ICC-01/14-01/18-523 (“[Appeal](#)”). See ICC-01/14-01/18-493 (“[Decision](#)”), ICC-01/14-01/18-456 (“[Request](#)”) and ICC-01/14-01/18-466 (“[Prosecution Response](#)”).

² [Appeal](#), paras. 1, 10, 85. With respect to the standard of review for procedural errors, “the Appeals Chamber’s functions extend to reviewing the exercise of discretion by the Pre-Trial Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with the Pre-Trial Chamber’s exercise of discretion under article 19 (1) of the Statute to determine admissibility, save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination.” See [ICC-02/04-01/05-408](#), para. 80; ICC-01/09-01/11-307 (“[Ruto et al. Admissibility AD](#)”), para. 89; ICC-01/09-02/11-274 (“[Muthaura et al. Admissibility AD](#)”), para. 87; see also [Appeal](#), para. 13.

³ Yekatom uses this term to refer to the State which has jurisdiction over a person or case. See [Appeal](#), paras. 34-40, 57; see also [Request](#), para. 41 (arguing that Yekatom being prosecuted before the SCC “would [...] allow for

challenge is based on complementarity because (A) it has been uniform practice to receive observations from concerned States;⁴ (B) the complementarity principle so requires it;⁵ and (C) rule 58 so requires it.⁶ Further, even if the Court’s legal framework does not require a Chamber to seek observations from a concerned State, they are necessary in this case (D) due to the unique features of the CAR law (this being—according to Yekatom—that the ICC Prosecutor is the “the sole arbiter of admissibility”)⁷ and (E) due to the notion of “Qualified Deference,” which Yekatom considers to be consistent with the complementarity regime.⁸ Yekatom also challenges (F) the Chamber’s purported inference of the CAR authorities’ position;⁹ and (G) the Chamber’s reliance on the need for an expeditious trial.¹⁰ He argues that the procedural error (not requesting observations from the CAR authorities) materially impacted on the decision.¹¹

4. The Chamber did not err by not requesting observations from the CAR authorities in deciding Yekatom’s Request. *First*, Yekatom’s purported admissibility challenge was not substantiated on any of the grounds in article 17(1); rather it was a request for the Chamber to speculatively enquire with the CAR authorities whether they might be amenable to investigating or prosecuting him. The Chamber reasonably rejected the Request and, although not necessary, correctly found the case was admissible before the Court. *Second*, the Court’s legal framework does not oblige a Chamber to request observations from concerned States to decide an admissibility challenge based on complementarity; rather this falls within a Chamber’s discretion. Notably, Yekatom’s Request is distinguishable from previous admissibility challenges since it does not rely on any of the grounds in article 17(1)(a)-(c). Yekatom did not argue that the case against him (a) was being investigated or prosecuted; (b) had been investigated, but not prosecuted; or (c) had been the subject of a previous trial. In fact, he conceded that none of these situations applied to his case. He only argued that his case *might* be investigated or prosecuted in the CAR in the future. Yekatom clearly misunderstands the complementarity regime enshrined in the Rome Statute, and his interpretation of the notion of “Qualified Deference” is inconsistent with it. *Third*, the

a national jurisdiction to prosecute its own nationals”). In this case, the CAR is also the referring State pursuant to article 13(a) of the Statute.

⁴ [Appeal](#), paras. 25-33.

⁵ [Appeal](#), paras. 34-40.

⁶ [Appeal](#), paras. 41-46.

⁷ [Appeal](#), paras. 47-54.

⁸ [Appeal](#), paras. 55-65.

⁹ [Appeal](#), paras. 66-75.

¹⁰ [Appeal](#), paras. 76-84.

¹¹ [Appeal](#), paras. 85-87.

Chamber reasonably decided not to request observations from the CAR authorities in the circumstances of this case. In so doing, it considered relevant factors. *Fourth*, the Appeals Chamber should dismiss *in limine* Yekatom’s submissions regarding the validity of article 37 of the CAR Special Criminal Court (“SCC”) Organic Law, since this issue does not arise from the Decision.

5. Finally, even if the Chamber had erred by not requesting observations from the CAR authorities (which it did not), the error did not materially affect the Decision. Nor did the Registrar’s belated formal notification of the Request to the CAR authorities materially affect the Decision. Yekatom’s Appeal should accordingly be dismissed.

A. Yekatom’s Request was not properly substantiated as an admissibility challenge under article 17(1)

6. The Request was not properly substantiated as an admissibility challenge under the Rome Statute. Rule 58(1) requires that “[a] request or application made under article 19 [...] contain the basis for it”. Article 19(2) refers to “[c]hallenges to the admissibility of a case on the grounds referred to in article 17”. As the Appeals Chamber has recalled, “article 17(1)(a) to (c) of the Statute sets out the circumstances in which the Court shall determine that a case is inadmissible because of the actions of a State which has jurisdiction over that case”.¹² Yet Yekatom did not rely on any of these grounds. Instead, he conceded that the SCC does not currently have an active investigation or prosecution against him,¹³ and requested the Chamber to ask the CAR authorities whether they might be amenable to investigate and prosecute him. If they were receptive, Yekatom would then ask the Chamber to adopt a timeline that would give enough time to the CAR domestic authorities to investigate the case before deciding on Yekatom’s challenge. By neither substantiating the challenge nor relying on any of the grounds referred to in article 17, his Request was defective.

7. In the introductory paragraph of his Request, Yekatom argued that “the Central African Republic (“CAR”) authorities are now capable to prosecute him in their own Special

¹² ICC-01/11-01/11-695 (“[Gaddafi Second Admissibility AD](#)”), para. 58. The question of unwillingness and inability under article 17(2) and (3) is only relevant when due to ongoing or past investigations or prosecutions, the case appears to be inadmissible. See ICC-01/04-01/07-1497 (“[Katanga Admissibility AD](#)”), paras. 1, 75-76.

¹³ [Request](#), paras. 13, 32.

Criminal Court (“SCC”).¹⁴ In the conclusory paragraphs, Yekatom requested the Chamber to take the following “Step-by-Step Approach”:

60. To implement the approach suggested by Mr. Yekatom, the Chamber is requested to do the following:

61. First, invite written submissions from the CAR authorities addressing whether, notwithstanding the OTP’s invocation of Article 37, it would be willing and able to investigate and prosecute Mr. Yekatom’s case if given the opportunity to do so.

62. Second, 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 results of its investigation with the SCC to enable it to act expeditiously.

63. Third, 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.

CONCLUSION

[..]

65. The Chamber is respectfully requested to grant the relief sought by this motion and ultimately declare Mr. Yekatom’s case inadmissible.¹⁵

8. The Chamber noted that the relief requested by Yekatom was confusing:

[..] it is not entirely discernible from the Defence’s Admissibility Challenge whether the requested relief at this point is to find the case inadmissible (the ‘Inadmissibility Request’), or that the Chamber adopt the proposed Sequential Approach (the ‘Sequential Approach Request’). However, the Chamber interprets the Admissibility Challenge to contain two alternative requests and will therefore address them separately in the following.¹⁶

9. Despite its ambiguity, the Chamber decided to rule on Yekatom’s Request. *First*, the Chamber recalled the two-prong “Inactivity Test” that the Appeals Chamber has repeatedly applied in its admissibility assessments under article 17(1). The question of a State’s unwillingness or inability only arises if (i) there are ongoing investigations or prosecutions, or (ii) there have been investigations in the past, and a State with jurisdiction has decided not to prosecute the person concerned.¹⁷ The Chamber noted that Yekatom had “concede[d] that there are presently no investigations or prosecutions against [him] at the SCC and that the

¹⁴ [Request](#), para. 1.

¹⁵ [Request](#), paras. 60-65.

¹⁶ [Decision](#), para. 14; *see also* [Decision](#), para. 5 (“In essence, the Defence requests that the Chamber declare Mr Yekatom’s Case inadmissible on the grounds that the CAR authorities are ‘now capable to prosecute him in their own Special Criminal Court’) (the ‘SCC’). At the same time, the Defence requests that the Chamber take a step-by-step approach [...]”).

¹⁷ [Decision](#), paras. 17-18.

Inactivity Test is currently not satisfied”.¹⁸ It further noted that “there is no indication that the CAR authorities have any intention to investigate or prosecute Mr Yekatom.”¹⁹ It did so based on the following reasoning: “the CAR authorities not only referred the situation in its territory since 1 August 2012 to the Court, but subsequently implemented the Court’s warrant of arrest against Mr Yekatom by transferring him to the Court and have up to this date not challenged the Court’s jurisdiction. Moreover, [...] nothing in the recent CAR observations indicates that the CAR authorities intend to challenge the Court’s jurisdiction or to investigate or prosecute Mr Yekatom in the future”.²⁰ Thus, in addition to Yekatom’s concession that there was no case against him before the SCC, the Chamber did not identify any factor that might suggest the need for further enquiry.

10. Based on the information before it, the Chamber concluded that the case against Yekatom was admissible because “the CAR authorities, including the SCC, are presently inactive insofar as Mr Yekatom’s Case is concerned”.²¹

11. *Second*, the Chamber rejected Yekatom’s request for a “Sequential Approach” because “increasing or encouraging State capacity for the investigation and prosecution of the most serious international crimes is not within the Chamber’s purview. On the contrary, the Chamber must limit its decisions to the judicial matters at hand.”²² It also noted that it is statutorily mandated to ensure that the trial is expeditious.²³ Finally, with respect to Yekatom’s request to seek observations from the CAR, the Chamber found:

Lastly, as regards the Defence’s submission that other Chambers have sought observations from States on admissibility before ruling on the challenge, the Chamber notes that in light of the Defence’s concession that there are currently no proceedings against Mr Yekatom and the other reasons listed above, no further observations were required to adjudicate the present Admissibility Challenge.²⁴

12. As explained below, the Chamber did not commit a procedural error. Rather, the Chamber’s approach was reasonable in the circumstances of this case and its Decision was correct.

¹⁸ [Decision](#), para. 19.

¹⁹ [Decision](#), para. 20.

²⁰ [Decision](#), para. 20.

²¹ [Decision](#), para. 21 (further noting that this ruling is made “irrespective of the CAR authorities’ hypothetical willingness or ability to investigate and prosecute”).

²² [Decision](#), para. 22.

²³ [Decision](#), paras. 23.

²⁴ [Decision](#), para. 25.

B. A Chamber is not legally required to request observations from concerned States

1. The Court's legal framework does not mandate a Chamber seised with an admissibility challenge based on complementarity to request observations from concerned States

13. Yekatom argues somewhat inconsistently that a Chamber seised with an admissibility challenge based on complementarity *must* request observations from the concerned State,²⁵ while also acknowledging that “[t]here is no provision in the Court’s Statute, Rules, or Regulations explicitly requiring a Chamber to seek observations from a concerned State when an admissibility challenge based on complementarity is made by an accused”.²⁶ The latter is correct and a Chamber is not required under the Statute to request observations from concerned States before deciding an admissibility challenge.

14. Neither the Statute nor the Rules contain such requirement. In particular, rule 58(2) does not require a Chamber to request observations from concerned States.²⁷ Under this provision a Chamber seised with an admissibility challenge or question under article 19(2) or (3), or acting on its own motion under article 19(1), “*shall* decide on the procedure to be followed and *may* take appropriate measures for the proper conduct of the proceedings”. From the plain terms of the provision, a Chamber “has discretion to ‘decide on the procedure to be followed’ and to ‘take the appropriate measures’”.²⁸ The Appeals Chamber has recalled that “[s]ave for these express stipulations [in rule 58(3)]²⁹ the [...] Chamber enjoys broad

²⁵ See [Appeal](#) Sections (A), (B) and (C); see e.g. paras. 40 (“the Rome Statute requires that a State always be consulted when an issue of complementarity is before the Court”), 46 (“the procedure to be followed for admissibility challenges based on complementarity must include seeking observations from the concerned State”), 47 (arguing in the alternative to his first argument, which is “observations from the concerned State should always be sought in admissibility challenges based on complementarity”).

²⁶ [Appeal](#), para. 26.

²⁷ *Contra* [Appeal](#), paras. 41-46 (arguing that since rule 58(2) requires the Chamber to issue a decision setting out the procedure to be followed, this means that in admissibility challenges based on complementarity the Chamber must seek observations from the concerned State).

²⁸ See K. Hall et al. ‘Article 19,’ in K. Ambos and O. Triffterer (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016) (“Hall et al.”), pp. 871-872 (mn. 30: reviewing the jurisprudence and explaining that this broad discretion may include “the holding of a hearing and joining this matter with ‘a confirmation or trial proceeding as long as this does not cause undue delay, and in this circumstance shall hear and decide on the challenge or question first’. In light of this broad discretionary mandate, the Appeals Chamber has upheld various exercises of discretion including decisions not to hold hearing, to decide challenges prior to determining requests for assistance, to deny further time for the parties to submit additional evidence, to deny Defence requests for unredacted evidence, and with respect to the participation of the concerned person in proceedings”).

²⁹ Rules, rule 58(3) (“The Court shall transmit a request or application received under sub-rule 2 to the Prosecutor and to the person referred to in article 19, paragraph 2, who has been surrendered to the Court or who

discretion in determining how to conduct the proceedings relating to challenges to the admissibility of a case”.³⁰ Although this discretion is not unlimited and “has to be exercised in conjunction with other relevant legal provisions”,³¹ there is no provision requiring the Chamber to request observations from concerned States. Moreover, as explained below, the Chamber reasonably exercised its discretion in the circumstances of this case.

2. Yekatom’s Request is not comparable to previous admissibility challenges

15. Yekatom argues that requesting States to provide observations is uniform practice in previous admissibility challenges lodged by a suspect or accused person.³² Yet Yekatom’s comparison of his Request with previous challenges does not assist him. Moreover, he confuses representations made by States Parties which have referred situations to the Court under article 13(a) (referring States) and observations of other States authorised by the Chamber under rule 58(2). While referring States are entitled to make representations regarding admissibility challenges or questions pursuant to article 19(3) and rule 59(3) after being notified by the Registrar, other States (or another relevant participant) may only provide observations if they are authorised by the Chamber.

16. *First*, admissibility determinations are case-specific and the admissibility challenges relied on by Yekatom are distinguishable from his Request.³³ Hence, that a Chamber might have considered it desirable to permit or consider observations from a State to resolve a specific factual issue in dispute does not oblige another Chamber to request or consider observations from a State in resolving a different challenge, and particularly where there are no facts in dispute.

has appeared voluntarily or pursuant to a summons, and shall allow them to submit written observations to the request or application within a period of time determined by the Chamber”).

³⁰ [Muthaura et al. Admissibility AD](#), para. 87; [Ruto et al. Admissibility AD](#), para. 89; ICC-01/11-01/11-547-Red (“[First Gaddafi Admissibility AD](#)”), para. 160; ICC-01/11-01/11-565 (“[Al-Senussi Admissibility AD](#)”), para. 149.

³¹ ICC-02/11-01/11-321 (“[Gbagbo Jurisdiction AD](#)”), para. 39; in the *Gbagbo* case the Pre-Trial Chamber allowed the Government of Côte d’Ivoire’s request to provide observations to Gbagbo’s jurisdictional challenge without issuing a decision permitting the Parties to respond to those observations: *see* para. 43 (“rule 103 of the Rules of Procedure and Evidence regulates the procedure for hearing entities that would not otherwise participate in the proceedings. In the view of the Appeals Chamber, rule 103 of the Rules of Procedure and Evidence requires the Chamber to render a separate decision on requests for leave to submit observations. This is because, under sub-rule 2, “[t]he Prosecutor and the defence” are entitled to respond to the observations, if any, and the Chamber should set the applicable time limits for such responses. In the case at hand, the Pre-Trial Chamber should therefore have treated the Request for Leave to Submit Observations as a request pursuant to rule 103 (1) of the Rules of Procedure and Evidence. It should have decided on this request and allowed Mr Gbagbo and the Prosecutor the opportunity to respond to Côte d’Ivoire’s Observations on the Jurisdictional Challenge. Since this procedure was not followed, the Appeals Chamber finds that the Pre-Trial Chamber erred”).

³² [Appeal](#), paras. 25-33.

³³ [Al-Senussi Admissibility Decision](#), para. 66 (i).

17. In the cases that Yekatom relies upon, the accused person alleged that there were domestic proceedings against them under article 17(1)(a) (*Katanga*³⁴ and *Laurent Gbagbo*)³⁵ or that there had been domestic proceedings under article 17(1)(b) and (c) (*Bemba*).³⁶ In the *Gbagbo* case, the Cote d'Ivoire authorities requested *proprio motu* to provide observations,³⁷ and the Chamber granted the request since Gbagbo's challenge was based on the argument that those authorities were investigating his case.³⁸ The referenced cases are therefore distinguishable from Yekatom's Request. Specifically, and as already advanced, Yekatom did not argue that the case against him (a) was being investigated or prosecuted; (b) had been investigated, but not prosecuted; or (c) had been the subject of a previous trial under article 17(1)(a) to (c). He conceded that none of these situations applied to him but he wanted to give the national authorities the opportunity to act. He therefore wanted the Chamber to enquire with the CAR authorities whether they might be willing and able to do so in the future.

18. *Second*, Yekatom confuses the Chamber's discretion to request observations under rule 58 with the right of a referring State to make representations in admissibility proceedings under article 19(3) and rule 59(3). The CAR (in *Bemba*),³⁹ the DRC (in *Katanga*),⁴⁰ and Uganda (in *Kony*)⁴¹ were notified by the Registrar pursuant to rule 59(1) and invited to provide observations pursuant to article 19(3) and rule 59(3) as *referring States*. Rule 59(1) requires *the Registrar* to inform the Security Council or State Party that referred a situation to the Court pursuant to article 13, and the victims (or their legal representatives) who have already communicated with the Court in relation to the case of any challenge or question concerning jurisdiction or admissibility under article 19(1) to (3). In application to article 19(3),⁴² rule 59(3) permits those notified to "make representation in writing to the competent Chamber within such time limit as it considers appropriate". The Registrar's notification to

³⁴ ICC-01/04-01/07-891-Conf-Exp, para. 28; *see also* paras. 51-53.

³⁵ [ICC-02/11-01/11-404-Red](#), paras. 33-89.

³⁶ ICC-01/05-01/08-704-Conf, paras. 69-74, 109 (on article 17(1)(b)) and 115-131 (on article 17(1)(c)).

³⁷ [ICC-02/11-01/11-416](#).

³⁸ [ICC-02/11-01/11-418](#), para. 7 ("The Single Judge notes that the Admissibility Challenge is based on the argument, under article 17(1)(a) of the Rome Statute, that that the case against Mr Gbagbo is being investigated or prosecuted in Côte d'Ivoire. Thus, the Single Judge is satisfied that it is desirable for the proper determination of the Admissibility Challenge to obtain observations from Côte d'Ivoire").

³⁹ [ICC-01/05-01/08-T-20-Red](#), 1:13-2-13.

⁴⁰ ICC-01/04-01/07-943-Conf, para. 4, p. 7.

⁴¹ [ICC-02/04-01/05-320](#), p. 7 ("NOTING that, in the context of the proceedings leading to such determination, the Republic of Uganda as well as victims who have communicated with the Court in relation to the Case or their legal representatives, are entitled, pursuant to rule 59 (1) of the Rules, to receive from the Registrar information on the question which has arisen and to make written observations or representations in accordance with article 19(3) of the Statute and rule 59(3) of the Rules within a time limit set by the Chamber").

⁴² Statute, art. 19(3) ("In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court").

the Security Council or referring State results from the automatic application of the rules, and is different from the Chamber's discretionary decision to request further observations under rule 58(2).⁴³ Although in previous admissibility proceedings the *referring State* was also the State alleged to be conducting or have conducted proceedings involving the accused or suspected person, the two entities are not always the same. The State which could provide observations relevant to an admissibility challenge and could exercise jurisdiction over the relevant case need not be the referring State.

19. The distinction between the two notions and the lack of an obligation under rule 58 to request observations from States is evidenced in the recent admissibility proceedings in the *Gaddafi* case, where the Registrar notified the Security Council of Mr Gaddafi's Challenge (as the referring entity under article 13(b)), but Pre-Trial Chamber I did not request any observations from Libya (the State where the national proceedings in dispute were said to have occurred).⁴⁴ Yekatom's explanation that this is because the case related to the application of article 17(1)(c) and the *ne bis in idem* principle lacks merit.⁴⁵

20. Notwithstanding that a Chamber is not obliged to request observations from States pursuant to rule 58, the Prosecution agrees that in certain cases this is desirable. For example, a Chamber may benefit from observations from domestic authorities when issues regarding their proceedings are in dispute or are unclear. Because of this benefit, even though the Pre-Trial Chamber did not require Libya to provide observations after Gaddafi challenged the admissibility of the case against him, the Prosecution requested such information from Libya and provided it to the Chamber.⁴⁶ Since Gaddafi argued that he had been convicted and amnestied by the Libyan authorities and relied on his interpretation of Libyan law instead, the Prosecution considered that the Libyan authorities were well placed to explain Libyan law

⁴³ See e.g. [Gbagbo Jurisdiction AD](#), para. 38 ("Mr Gbagbo correctly points out that Côte d'Ivoire is not a State entitled to participate in the proceedings pursuant to article 19 (3) of the Statute and rule 59 of the Rules of Procedure and Evidence. However, the Pre-Trial Chamber did not act on that legal basis. The Pre-Trial Chamber based its decision on rule 58 (2) of the Rules of Procedure and Evidence, which provides that the Pre-Trial Chamber "shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings").

⁴⁴ [ICC-01/11-01/11-641](#), p. 6 (requesting the Prosecutor, the Security Council and victims who have communicated with the Court in relation to the present case, should they wish to do so, to submit written observations on the Admissibility Challenge).

⁴⁵ [Appeal](#), para. 26 (fn. 33: explaining that "the challenge was based on the *ne bis in idem* provisions of Article 17 and did not affect the State's prosecution of the accused. In addition, the case arose from [sic] a Security Council referral of a non-member State"); see also para. 45.

⁴⁶ [ICC-01/11-01/11-653-Anx8-Red](#).

and its judicial proceedings.⁴⁷ However, Gaddafi's case cannot be compared to Yekatom's, where he does not allege the existence of ongoing or prior domestic proceedings in the CAR, and there are no other issues which are in dispute or are unclear. As such, the Chamber correctly exercised its discretion in deciding not to seek clarifications by way of observations from the CAR.

21. Notwithstanding that the CAR authorities were not invited to provide observations under rule 58, as the referring State they were entitled, pursuant to article 19(3) and rule 59, to be informed by the Registrar of the Request (if considered an admissibility challenge) and to make representations to the Chamber thereon if they so wished. The Prosecution has recently enquired with the Registry and has been informed that the CAR authorities were notified of Yekatom's Request only after the Decision was issued.⁴⁸ Therefore, they do not appear to have been informed of the Request in a manner that would have enabled them to make representations under rule 59(3) had they wished to do so. The Prosecution understands that the matter has been brought to the Chamber's attention by the Registrar.⁴⁹

22. The lack of timely formal notification to the CAR authorities does not invalidate or materially impact the Decision. The Chamber (i) determined the admissibility of the case based on facts that were not materially in dispute or unclear; and (ii) correctly held that the "Sequential Approach" was inconsistent with article 17. Moreover, the right in rule 59 accrues to the CAR authorities, who were (and still are) in a position to lodge a complaint with the Court and request an opportunity to provide observations, if they so wish. To date, they have not done so. Absent any such complaint, the appellant cannot assert prejudice on their behalf. Further, the Chamber issued its decision 40 days after Yekatom's public filing of his Request on 17 March 2020. Since the CAR authorities were following the Court's proceedings during this period, having been invited by the Chamber to provide observations on Yekatom's request for interim release on 20 March 2020 (which they provided on 9 April 2020),⁵⁰ they could easily have asked to make representations had they wished to do so. Finally, since the Request was not made on any of the grounds contemplated in article 17(1), and Yekatom himself conceded that no relevant domestic proceedings existed, it is unclear

⁴⁷ For the appeal proceedings, the Appeals Chamber invited the Security Council and Libya to submit observations and participate in the hearing: *see* [ICC-01/11-01/11-672](#).

⁴⁸ E-mails received by the Prosecution on 4 June 2020 at 20:04, and on 5 June 2020 at 15:53.

⁴⁹ E-mails received by the Prosecution on 4 June 2020 at 20:04, and on 5 June 2020 at 15:53.

⁵⁰ *See* [ICC-01/14-01/18-478-Conf-AnxII](#) (received on 9 April). Yekatom requested interim release on 3 March ([ICC-01/14-01/18-438](#)) and the Single Judge requested observations from the Netherlands and the CAR on 20 March 2020 ([ICC-01/14-01/18-461](#)). *See* Rules, rule 119(3) and Regulations of the Court, regulation 51.

whether rule 59(3) could have been given any meaningful application to the purely hypothetical question of the proposed “Sequential Approach”.⁵¹

3. Yekatom misunderstands the complementarity regime in the Rome Statute

23. The Court’s complementarity regime does not mandate a Chamber to enquire with States whether they would be willing and able to prosecute a suspect or accused person—much less when there is no ostensible cause or self-evident factor which impels it to do so. Moreover, the party challenging admissibility has the burden to demonstrate the inadmissibility of the case.

3.1. The complementarity regime does not mean that the Court must check with concerned States whether they are interested in investigating or prosecuting a case before the Court; instead, it entitles States to challenge the admissibility of the case.

24. The Court’s complementarity regime—and the primary responsibility of domestic criminal jurisdictions—does not require that Chambers enquire with States whether they wish to investigate or prosecute a concrete case that is already before the Court.⁵²

25. Instead, the Court’s legal framework crafts a careful procedure that strikes a “balance between safeguarding the primacy of domestic proceedings *vis-à-vis* the [...] Court on the one hand, and the goal of the Rome Statute to ‘put an end to impunity’ on the other hand. If States do not [...] investigate [...], the [...] Court must be able to step in”.⁵³ Thus, the Prosecution may only open an investigation if the Court considers that the potential cases are/ would be admissible.⁵⁴ Moreover, in opening an investigation the Prosecution is obliged to notify “all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned”.⁵⁵ Upon notification from a State that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes under article 5, the Prosecution shall defer to the State unless the Pre-Trial Chamber indicates otherwise.⁵⁶ Further, States with jurisdiction which are investigating or prosecuting the case are entitled to challenge the

⁵¹ The notification page of the Request included “the Embassy of the Central African Republic to Belgium and the Netherlands”.

⁵² *Contra Appeal*, paras. 34-40.

⁵³ *Ruto et al. Admissibility Decision*, para. 44.

⁵⁴ Statute, article 53(1)(b).

⁵⁵ Statute, article 18(1).

⁵⁶ Statute, article 18(2).

admissibility of the cases before the Court.⁵⁷ Likewise, Chambers may assess admissibility *proprio motu* under article 19(1), and have done so in deciding on arrest warrants or summons to appear, and in confirmation decisions.⁵⁸ If a case is deemed to be inadmissible, the Court will defer to the domestic criminal jurisdiction subject to article 19(10), which permits the Prosecutor to request review of a decision on inadmissibility under certain circumstances.

26. However, the complementarity regime does not require the Court, once it has assessed a case to be admissible, to enquire with States whether they may still wish to exercise their jurisdiction over that case. And while a Chamber might conceivably need to seek clarification where the status of existing domestic proceedings are in dispute or unclear, this is not the case with respect to Yekatom's Request, where there is no dispute as to the non-existence of domestic proceedings.⁵⁹

27. Nor does the complementarity regime require the Court to *wait* until a State with jurisdiction decides to exercise it (or not) in order to investigate or prosecute a case, or to decide on an unsubstantiated admissibility challenge.⁶⁰ This would lead to situations of impunity contrary to the complementarity regime and the very objective of the Statute. The Chamber's admissibility determination is based on *the facts*.⁶¹ Further, the logic of articles 17 and 19 indicates that challenges should only be filed when those facts can meet the grounds in article 17(1), that is, once there are (or have been) domestic proceedings *vis-à-vis* the same case. Thus, Yekatom's notion of "Qualified Deference" and his request for a "Sequential

⁵⁷ Statute, article 19(2)(b)(c). And so is the accused person (or a person for whom an arrest warrant or summons has been issued): article 19(2)(a).

⁵⁸ Statute, article 19(1). This provision does not impose a duty but rather confers discretion on the Chamber. To date, Chambers have exercised their discretion in issuing arrest warrants or summons to appear or in confirming the charges. *See Hall et al.*, pp. 855-857 (mn. 6-7). The Appeals Chamber has set out the guidelines which Pre-Trial Chambers should follow in exercising their discretion in issuing arrest warrants or summons to appear: ICC-01/04-169 ("[DRC Arrest Warrant AD](#)"), para. 52: ("The Appeals Chamber accepts that the Pre-Trial Chamber may on its own motion address admissibility. However, in the Appeals Chamber's view, when deciding on an application for a warrant of arrest in *ex parte* Prosecutor only proceedings the Pre-Trial Chamber should exercise its discretion only when it is appropriate in the circumstances of the case, bearing in mind the interests of the suspect. Such circumstances may include instances where a case is based on the established jurisprudence of the Court, uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of *proprio motu* review. In these circumstances it is also imperative that the exercise of this discretion take place bearing in mind the rights of other participants.").

⁵⁹ [Decision](#), para. 20; *see also* the contemporaneous submissions of the CAR authorities in the context of Yekatom's request for interim release: ICC-01/14-01/18-478-Conf-AnxII-tENG, pp. 1 [REDACTED].

⁶⁰ [Appeal](#), paras. 57, 58, 65.

⁶¹ ICC-01/09-01/11-101 ("[Ruto et al. Admissibility Decision](#)"), para. 45 ("Thus, while the Chamber welcomes the express will of the Government of Kenya to investigate the case sub judice, as well as its prior and proposed undertakings, the Chamber's determination on the subject-matter of the present challenge is ultimately dictated by the facts presented and the legal parameters embodied in the Court's statutory provisions").

Approach” are not “consonant with the complementarity principle [nor] consistent with the inactivity test”.⁶² As the Chamber recalled, the Appeals Chamber has already ruled on the matter:

These aims [to end impunity] would be jeopardized if, ‘despite the inaction of a State, a case would be inadmissible before the Court, unless that State is unwilling or unable to open investigations’. As pointed out by the Appeals Chamber, this would result in a situation, where the ‘Court would be unable to exercise its jurisdiction over a case as long as the State is theoretically willing and able to investigate and to prosecute the case, even though that State has no intention of doing so’.⁶³

28. Nor is a State’s simple preparedness and willingness to investigate or prosecute a case sufficient to deem a case inadmissible before the Court. As the Appeals Chamber has ruled:

[t]he mere preparedness to take such steps or the investigation of other suspects is not sufficient. This is because unless investigative steps are actually taken in relation to the suspects who are the subject of the proceedings before the Court, it cannot be said that the same case is (currently) under investigation by the Court and by a national jurisdiction, and there is therefore no conflict of jurisdictions.⁶⁴

29. Finally, the commentaries cited by Yekatom fail to support his position. Instead, the authors of those commentaries observed that a Chamber should not too quickly decide on admissibility when a *willing State* has lodged an admissibility challenge under the Statute.⁶⁵ However, in this case, the CAR authorities have not lodged any challenge nor is there an indication that they intend to do so.

3.2. The challenging party has the burden to substantiate an admissibility challenge

30. Yekatom further argues that “a suspect is not in the best position to know if he is under investigation” as a reason for why the Chamber should have sought observations from the CAR.⁶⁶ This assertion is made for the first time on appeal. In his Request before the Trial

⁶² [Appeal](#), paras. 55-65.

⁶³ [Decision](#), para. 18, quoting [Katanga Admissibility AD](#), para. 79.

⁶⁴ [Ruto et al. Admissibility AD](#), para. 41; [Muthaura et al. Admissibility AD](#), para. 40.

⁶⁵ See Stahn C. in [Stahn C. \(ed.\), The Law and Practice of the International Criminal Court \(OUP, 2015\)](#), p. 254 (first bullet point: “[o]ne solution is to award the state reasonable time to investigate and build the case after the notice of an admissibility challenge, and prior to a final decision on admissibility”); see also fn. 146: (noting that the idea of ‘qualified deference’ to domestic jurisdictions in complementarity assessments “do not seek to abrogate the application of the ‘same conduct’ test. Rather, they seek to adjust its application more closely to the context in which the ICC operates”). See Akhavan P., [Complementarity Conundrums: The ICC Clock in Transitional Times](#), *Journal of International Criminal Justice*, Vol. 14, Issue 5, December 2016, pp. 1043–1059 at p. 1047 (referring to “an admissibility challenge, [by] national jurisdictions that are clearly willing to investigate or prosecute”). *Contra* [Appeal](#), paras. 59-60.

⁶⁶ [Appeal](#), para. 32.

Chamber, Yekatom expressed no doubt but instead clearly submitted that “[t]he SCC does not currently have an active investigation or prosecution against Alfred Yekatom”.⁶⁷ To now argue that there may be doubt or uncertainty as to the existence of domestic proceedings against him raises new arguments that did not form the basis of his Request and could not be considered by the Chamber. Those arguments should be dismissed *in limine*.

31. As noted above, as the challenging party, Yekatom had the burden to demonstrate the inadmissibility of the case and had to substantiate his challenge with evidence of a sufficient degree of specificity and probative value.⁶⁸ Instead, Yekatom chose not to rely on any of the grounds in article 17, which is an essential precondition for any article 19 challenge, and conceded without qualification that there were no domestic proceedings against him in the SCC.⁶⁹ Nor did he explain whether he had exercised due diligence to enquire with the CAR authorities in the event that he had harboured such doubts, or claim that the CAR authorities were not forthcoming in responding any such requests. Yet it would have been Yekatom’s duty to diligently conduct such preliminary enquiries before filing his Request. He cannot reasonably delegate these tasks to the Court and then claim prejudice, nor can he expect that the Chamber would conduct these preliminary enquiries on his behalf.⁷⁰

C. The Chamber reasonably decided not to request observations from the CAR

32. The Chamber did not err in not requesting observations from the CAR authorities in the circumstances of this case. The Chamber reasonably considered it unnecessary in light of the nature of the Request and the arguments advanced therein.⁷¹ Moreover, the Chamber examined the information in the record and reasonably concluded that there was no evidence indicating that the CAR authorities intended to investigate or prosecute Yekatom or to

⁶⁷ [Request](#), para. 13; *see also* para. 32.

⁶⁸ [ICC-01/11-01/11-662](#), para. 32 (“the burden of proof lies on the challenging party, in this case the Defence. As the Appeals Chamber confirmed, albeit in a slightly different context, ‘a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible [and in order] [t]o discharge that burden, the State must provide the Court with evidence of a sufficient degree of specificity and probative value’. Although the Appeals Chamber made this pronouncement in the context of an admissibility challenge lodged by a State, the Chamber agrees with the Prosecutor that ‘there is no reason why the standard of proof for an individual bringing an admissibility challenge should be different from that of a State’”); [ICC-01/05-01/08-424](#), para. 201 (“The Rome Statute framework does not expressly provide where the burden of proof lies on an admissibility or abuse of process application, or to which standard. However, the compelling logic of the situation is that should an accused challenge the admissibility of the case under Article 19(2)(a) of the Statute or argue that its continuation amounts to an abuse of the process of the Court, it falls to him to establish the facts and other relevant matters that are said to support the argument.”).

⁶⁹ [Request](#), paras. 13, 32.

⁷⁰ *Contra* [Appeal](#), paras. 32, 53.

⁷¹ [Decision](#), para. 25; *see* [Request](#), paras. 13, 32.

challenge the admissibility of the case against him. As already noted, these factors were: (1) the fact that the CAR authorities referred the situation to the Court since August 2012, and executed the warrant of arrest and transferred Yekatom to the Court in November 2018; (2) the fact that the CAR authorities had not challenged the admissibility of the case; and (3) the CAR authorities' contemporaneous submissions on Yekatom's request for release.⁷² The Chamber's decision was reasonable in the circumstances—and correct.

1. The Chamber reasonably considered the CAR observations on Yekatom's interim release as one of several factors

33. Yekatom argues that the Chamber “erred by inferring, rather than obtaining, the position of CAR Authorities”.⁷³ Yekatom misapprehends the Decision.

34. *First*, the Chamber was not obliged to obtain the position of the CAR authorities with respect to Yekatom's Request. Hence, it did not err in relying on the above factors to conclude that “there is no indication that the CAR authorities have any intention to investigate or prosecute Yekatom [or] to challenge the Court's jurisdiction”.⁷⁴ This conclusion is supported by Yekatom's own admission that there were no domestic proceedings against him.⁷⁵

35. *Second*, while State referrals and the transfer of a suspected person to the Court do not bar a State from challenging the admissibility of a case, and are not a waiver of the State's right to prosecute its own citizens,⁷⁶ this is not what the Chamber said or inferred. Rather, the Chamber considered these factors, together with others, to determine that the CAR authorities had not shown any intention to investigate or prosecute Yekatom or to challenge the admissibility of his case. This fact, together with other factors (such as Yekatom's acknowledgement that there are no domestic proceedings against him in the SCC) led to the Chamber's decision that observations from the CAR authorities were not necessary to adjudicate Yekatom's Request.⁷⁷

⁷² [Decision](#), paras. 19-20, 25. *See also* ICC-01/14-01/18-478-Conf-AnxII (received on 9 April). Yekatom requested interim release on 3 March ([ICC-01/14-01/18-438](#)) and the Single Judge requested observations from the Netherlands and CAR on 20 March ([ICC-01/14-01/18-461](#)).

⁷³ [Request](#), paras. 66-75.

⁷⁴ [Decision](#), para. 20.

⁷⁵ [Request](#), paras. 13, 32.

⁷⁶ [Request](#), paras. 69-71.

⁷⁷ [Decision](#), para. 20.

36. *Third*, while it is correct that “the fact that a State has not brought its own admissibility challenge cannot be a valid reason to deny a challenge by the accused as of right”,⁷⁸ this is not what the Chamber said or did. The Chamber rejected Yekatom’s Request because it was unsupported. It is Yekatom’s responsibility to substantiate his request, and he did not do so.

37. *Finally*, the Chamber did not “expect[] CAR authorities to indicate its intention to investigate and prosecute Mr Yekatom in a submission on Mr Yekatom’s proposed interim release”.⁷⁹ The Chamber reasonably relied on contemporaneous submissions (provided on 9 April 2020) on Yekatom’s request for interim release which, together with other factors, indicated that there was nothing on the record to indicate that the CAR authorities intended to investigate or prosecute Yekatom or to challenge the admissibility of his case. This, together with Yekatom’s admission that there are no domestic proceedings against him, permitted the Chamber to safely conclude that the case remained admissible without seeking any further observations.

2. The Chamber reasonably considered its obligation to ensure an expeditious trial

38. The Chamber reasonably considered its obligation under articles 64(2) and 68 of the Statute to ensure an expeditious trial in rejecting Yekatom’s request for a “Sequential Approach”.⁸⁰ Moreover, this was only a supplemental consideration since the Chamber primarily relied on the fact that the basis of Yekatom’s Request, that is “increasing or encouraging state capacity for the investigation and prosecution of the most serious international crimes [was] not within the Chamber’s purview”.⁸¹

39. Further, it is entirely speculative that “seeking observations from CAR authorities on the admissibility challenge, or even giving them time to begin an investigation and prosecution, would have no impact on the commencement of the ICC trial should the admissibility challenge fail”.⁸² Assuming *arguendo* that the trial will start in early 2021 and that the CAR authorities were in fact willing to investigate Yekatom, it is highly unlikely that a domestic investigation capable of satisfying the test under article 17(1)(a) could even begin

⁷⁸ [Request](#), paras. 72-73.

⁷⁹ [Appeal](#), para. 74.

⁸⁰ [Decision](#), para. 23.

⁸¹ [Decision](#), para. 22. *Contra* [Appeal](#), para. 76.

⁸² [Appeal](#), para. 78.

before then.⁸³ As noted, a successful admissibility challenge under article 17(1)(a) requires “provid[ing] the Court with evidence with a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case”⁸⁴ and “taking of steps directed at ascertaining whether this individual is responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses”.⁸⁵ Mere willingness to investigate or prosecute a person does not suffice. Furthermore, after a trial has commenced, a challenge can only be brought on the basis of *ne bis in idem* principle.⁸⁶

40. Finally, Yekatom does not explain what would happen to the resource-intensive steps that are currently underway to ensure that the Parties, participants, the Registry and the Chamber are readied for the start of trial. Nor is it clear how the Prosecution would simultaneously prepare a trial before the ICC, while assisting the SCC to build up the same case domestically including complying with the requirements in article 93(10)(b)(ii).⁸⁷

D. The Appeals Chamber should dismiss *in limine* arguments regarding the validity of article 37 of the SCC Organic Law

41. Yekatom’s submissions regarding the validity of article 37 of the SCC Organic Law are irrelevant to the confined procedural error that he raises on appeal and to the *ratio decidendi* of the Decision. The Chamber ruled that “the CAR authorities, including the SCC, are presently inactive insofar as Mr Yekatom’s Case is concerned” as a *matter of fact*.⁸⁸ The Chamber did not rely on nor did it mention article 37. The Appeals Chamber should dismiss *in limine* Yekatom’s arguments on article 37 of the SCC Organic Law.⁸⁹

42. Moreover, Yekatom submissions on this point are incorrect.

43. *First*, Yekatom misrepresents the Prosecution’s submissions. The Prosecution did not “invoke” article 37;⁹⁰ it was Yekatom who referred to it.⁹¹ In fact, the Prosecution submitted

⁸³ Article 19(4) provides that the admissibility can be challenged only once before the start of the trial or at the commencement of the trial, unless the challenge is based on article 17(1)(c).

⁸⁴ [Ruto et al. Admissibility AD](#), para. 2, 62.

⁸⁵ [Ruto et al. Admissibility AD](#), paras. 1, 41.

⁸⁶ Statute, art. 19(4).

⁸⁷ Statute, art. 93(10)(b)(ii) (“In the case of assistance under subparagraph (b) (i) a: a. If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State; b. If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68”).

⁸⁸ [Decision](#), para. 21.

⁸⁹ [Appeal](#), paras. 47-54.

⁹⁰ *Contra* [Appeal](#), para. 52.

that article 37 was inapposite to the Chamber's determination since "the factual circumstance of the absence of a current investigation or prosecution of the crimes alleged here [...] is dispositive".⁹²

44. *Second*, it is not correct that "article 37 of the statute creating the SCC may be read to grant the ICC Prosecutor the exclusive power to decide on complementarity. As such, it would usurp the power of the judges of the ICC Court and vitiate the right of the accused to challenge the admissibility of the case".⁹³ The authority of the Prosecutor—who applies the admissibility regime set out in the Rome Statute—is not unchecked. A Pre-Trial Chamber may, under certain circumstances, assess admissibility before granting an arrest warrant.⁹⁴ Moreover, both the Pre-Trial Chamber (before confirmation) and the Trial Chamber (after confirmation) can also determine *proprio motu* the admissibility of a case pursuant to article 19(1). That the Chambers in this case did not do so until Yekatom filed his Request only indicates that there was no ostensible cause or self-evident factor which impelled them to do so. That remains the case.

45. *Third*, Yekatom argues that "the primacy that article 37 confers on her may conflict with the complementarity provisions of the Rome Statute" and that even the Prosecutor has observed this fact in her response.⁹⁵ The Prosecutor simply noted that "any conflict that might arise from Article 37 of the Organic Law and article 17 of the Statute would only come into play if the domestic authorities actually wished to exercise their rights under the Statute to challenge the admissibility of a case before the ICC, notwithstanding their domestic law".⁹⁶ However, the CAR authorities have not shown any intention to challenge the admissibility of the case. Hence any potential conflict has not arisen—at trial or on appeal, and the Appeals Chamber should not rule on this matter in the abstract.⁹⁷

46. To the extent that Yekatom asks the Appeals Chamber to rule on the validity of the national law, the Appeals Chamber should decline such invitation.⁹⁸ Any question regarding

⁹¹ [Request](#), paras. 9, 29-32, 38.

⁹² [Prosecution Response](#), para. 13; *see also* paras-14-15.

⁹³ [Appeal](#), paras. 48, 51.

⁹⁴ In this case (in November 2018) the Pre-Trial Chamber did not assess admissibility in issuing the arrest warrant: [ICC-01/14-01/18-1-Red](#), para. 5 ("The Chamber declines, at this stage, to use its discretionary *proprio motu* power pursuant to article 19(1), second sentence, of the Statute to determine the admissibility of the case against Yekatom as there is no ostensible cause or self-evident factor which impels it to do so").

⁹⁵ *Contra* [Appeal](#), para. 59, referring to [Prosecution Response](#), paras. 17, 20.

⁹⁶ [Prosecution Response](#), para. 20.

⁹⁷ *See cf.* [ICC-01/04-503](#) para. 30; [ICC-01/04-01/07-3132](#), para. 7.

⁹⁸ Yekatom says that he does not ask the AC to rule on the validity of the national law: [Appeal](#), para. 50.

the validity of article 37 must be determined by the CAR courts.⁹⁹ The Statute clearly denotes a division of competencies between the national authorities and the ICC.¹⁰⁰

47. Moreover, if the CAR legislator has voluntarily decided that the SCC would not investigate or prosecute cases which are currently before the Court, this can be understood as a voluntary relinquishment of jurisdiction and division of labour between the Court and the SCC to put an end to impunity as a *factual* matter. As the Appeals Chamber has observed: “there may be merit in the argument that the sovereign decision of a State to relinquish its jurisdiction in favour of the Court may well be seen as complying with the ‘duty to exercise [its] criminal jurisdiction’, as envisaged in the sixth paragraph of the Preamble”.¹⁰¹

48. Finally, although it has primacy, the SCC does not appear to have exclusive jurisdiction with respect to the CAR ordinary courts regarding serious violations of international human rights and humanitarian law; rather it has concurrent jurisdiction.¹⁰² Hence, to the extent that the SCC could not investigate and prosecute Yekatom due to article 37 of its Organic Law, if the CAR authorities had wanted to investigate or prosecute Yekatom, this provision would not preclude an ordinary court in the CAR from doing so, and the CAR from challenging the exercise of the Court’s jurisdiction on that basis.

E. Any purported error did not materially affect the Decision

49. The Trial Chamber did not err in not requesting observations from the CAR authorities. But even if, *arguendo*, it had erred, such error had no material impact on the Decision.¹⁰³ For procedural errors, the Appeals Chamber has held that to show impact on a decision, “in the

⁹⁹ See *cf.* [Labuda P.](#), *The Special Criminal Court in the Central African Republic: Failure or Vindication of Complementarity?* *Journal of International Criminal Justice* (15) 1, pp. 175-206 (“[Labuda](#)”) at p. 194 (“If a Central African national or the Central African authorities choose to contest the validity of this clause before the SCC or the Central African Constitutional Court, Article 37 should be found in contravention of international law”).

¹⁰⁰ See *cf.* [Bemba et al. AJ](#), paras. 288. The Appeals Chamber found that according to article 69(8) of the Statute, Chambers at this Court are precluded from ruling on the interpretation and application of national law for the purposes of an article 69(7) determination. This bar also forbids the Court “from ruling on whether, and under which particular requirements, the performance of a particular investigative activity is allowed by national law of the relevant State”. This “unequivocal bar” and “categorical [...] prohibition” was a deliberate choice of the drafters: see [Bemba et al. AJ](#), paras. 286-287, 327. Notwithstanding the above, the Majority found that Chambers can still take into account, “in certain circumstances, issues of compliance with national law in the collection of evidence as a factual matter potentially relevant to the understanding of the relevant factual background”: see para. 296.

¹⁰¹ [Katanga Admissibility AD](#), para. 85.

¹⁰² [Labuda](#), pp. 191 (“the drafters sensibly decided not to vest the SCC with exclusive jurisdiction over serious violations of international human rights and humanitarian law”), 192. See also art. 3 [SCC Organic Law](#) (“[...] En cas de conflit de compétence avec une autre juridiction nationale, la Cour Pénale Spéciale a la primauté pour enquêter, instruire et juger les crimes et délits connexes qui relèvent de sa compétence[...]”).

¹⁰³ *Contra* [Appeal](#), paras. 85-87.

absence of the error ‘the judgment would have substantially differed from the one rendered’¹⁰⁴. This is a case-specific determination which, at times, may entail some prognostic assessment of different degree.¹⁰⁵

50. Yekatom has not demonstrated that had the CAR authorities been requested to provide observations, the Decision would have been (or even that it would likely have been) substantially different.¹⁰⁶ For the reasons already considered by the Chamber, it is unlikely that the CAR authorities would have asserted that they were investigating Yekatom for substantially the same case as that at the ICC or that they intended to challenge the admissibility of the case against him before the Court.¹⁰⁷ Hence, even if observations had been requested the Chamber would have (or likely would have) still found the case to be admissible and rejected Yekatom’s request for a “Sequential Approach”.¹⁰⁸ Yekatom does not demonstrate otherwise.¹⁰⁹

51. Nor has the Registry’s belated notification to the CAR authorities materially affected the decision, as explained above.¹¹⁰ If the CAR authorities had been formally notified *and* if they had decided to make representations, the Decision would not have been (or would likely not have been) substantially different. However, if the Appeals Chamber considers it necessary, it could promptly instruct the Registry to inform the CAR authorities of the chronology of events—if the Registry has not done so already—and provide a short time limit for the CAR authorities to indicate their position regarding the belated notification and any prejudice suffered. Should the CAR authorities still wish to make representations on the

¹⁰⁴ [Lubanga AJ](#), para. 20; [Ngudjolo AJ](#), para. 21; [Bemba et al. AJ](#), para. 99. See also [Bemba Judge Eboe-Osuji Sep. Op.](#), para. 81 (“An error will qualify as *material* if it reasonably compels the view of *likelihood* that the Trial Chamber might have rendered a substantially different judgment [...]; or if the appellate court *could not be sure* that the trial court would have rendered the same judgment had the error not occurred”).

¹⁰⁵ See e.g. [DRC Arrest Warrant AD](#), para. 84 (assuming *arguendo* that had the PTC not granted the arrest warrant for reasons other than inadmissibility, the article 58 decision would have been substantially different); see also [Bemba Judge Eboe-Osuji Sep. Op.](#), para. 81.

¹⁰⁶ [Contra Appeal](#), paras. 85-87.

¹⁰⁷ [Decision](#), paras. 19-20, 25.

¹⁰⁸ See similarly [Gbagbo Jurisdiction AD](#), paras. 44-45 (although the Appeals Chamber found that the Pre-Trial Chamber erred in not issuing a separate decision permitting the Parties to respond to the Government of Côte d’Ivoire’s observations, it found that this procedural error did not materially affect the Decision because “Mr Gbagbo did not explain how the Pre-Trial Chamber’s decision on the Jurisdictional Challenge would have been substantially different without this error, such as by referring to arguments that he would have made in response to Côte d’Ivoire’s submissions and that could have led to a different decision. In the absence of such submissions, the Appeals Chamber will not address the matter any further”).

¹⁰⁹ [Appeal](#), para. 87 (“it cannot be said how the Trial Chamber would have decided the admissibility challenge had it not made the procedural error of failing to seek observations from CAR authorities”).

¹¹⁰ See *above* para. 22.

Request which may be capable of materially affecting the Decision, the Appeals Chamber may decide to remand the matter to the Trial Chamber for a new determination.

CONCLUSION

52. For the reasons above, the Prosecution respectfully requests the Appeals Chamber to dismiss Yekatom's Appeal and to confirm the Decision.



Fatou Bensouda, Prosecutor

Dated this 10th day of June 2020
At The Hague, The Netherlands