Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/14-01/18**
Date: **17 March 2020**

TRIAL CHAMBER V

Before: **Judge Bertram Schmitt**
Judge Péter Kovács
Judge Chang-ho Chung

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *THE PROSECUTOR v.*
ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA

Public with Public Annex A

Yekatom Defence's Admissibility Challenge—Complementarity

Source: **Defence for Mr. Alfred Rombhot Yekatom**

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. James Stewart
Mr. Kweku Vanderpuye

Counsel for Mr. Yekatom
Me Mylène Dimitri
Mr. Peter Robinson

Counsel for Mr. Ngaïssona
Me Geert-Jan Alexander Knoops

Legal Representatives of Victims
Mr. Dmytro Suprun
Mr. Abdou Dangabo Moussa
Mr. Elisabeth Rabesandratana
Mr. Yaré Fall
Ms. Marie-Edith Douzima-Lawson
Ms. Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants (Participation / Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence
Me Xavier-Jean Keïta

States' Representatives
Embassy of the Central African Republic to Belgium and The Netherlands

Amicus Curiae

REGISTRY

Registrar
Mr. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit
Mr. Nigel Verrill

Detention Section

Victims Participation and Reparations Section

1. Counsel representing Mr. Alfred Rombhot Yekatom ("Defence" and "Mr. Yekatom", respectively) respectfully request, pursuant to Article 19(2)(a) of the Statute, that the Trial Chamber ("Chamber") declare Mr. Yekatom's case inadmissible on the grounds that the Central African Republic ("CAR") authorities are now capable to prosecute him in their own Special Criminal Court ("SCC").[1]

RELEVANT PROCEDURAL HISTORY

2. On 11 November 2018, ICC Pre-Trial Chamber II issued the *Warrant of Arrest for Alfred Yekatom*, alleging that he was part of a common plan with Patrice-Edouard Ngaïssona to target CAR's Muslim population through the commission of crimes.[2]

3. On 17 November 2018, the CAR authorities transferred Mr. Yekatom to the Court.[3]

4. On 19 August 2019, the Office of the Prosecutor ("OTP") issued its *Document Containing the Charges*.[4] Unlike in the *Warrant of Arrest*, Mr. Yekatom is no longer alleged to have been part of the strategic common plan with Ngaïssona, but is instead alleged to have been used as a "tool" by the members of the strategic common plan.[5] The Prosecution described Mr. Yekatom and his group during the hearing on the confirmation of charges as "tools of the strategic common plan."[6]

5. On 11 December 2019, the Pre-Trial Chamber confirmed charges against Mr. Yekatom. He stands charged at the ICC with crimes arising out of six events in the capital, Bangui, and the town of Mbaïki, in nearby Lobaye prefecture:

(1) attacking civilians in Bangui on 5 December 2013;

(2) destroying a mosque in Bangui on 20 December 2013;

[1] A French translation of this pleading is attached as Annex A. The English version is authoritative.
[2] ICC-01/14-01/18-1-Conf-Exp, para. 19. Public redacted version: ICC-01/14-01/18-1-Red.
[3] ICC-01/14-01/18-17-US-Exp-Red, paras 19-24.
[4] ICC-01/14-01/18-282-Conf-AnxB1. Public redacted version: ICC-01/14-01/18-282-AnxB1-Red.
[5] *Id*, para. 2.
[6] Transcript of 11 October 2019: ICC-01/14-01/18-T-011-Red-ENG, p. 11, lns. 22-24. French transcript: ICC-01/14-01/18-T-011-Red-FRA.

(3) killing one person and mistreating others at the Yamwara school in Bangui on 23 December 2013;

(4) displacing civilians from areas of Bangui from 5 December 2013;

(5) displacing civilians from Mbaïki beginning on 6 February 2014;

(6) murdering an individual in Mbaïki on 28 February 2014; and

(7) using and enlisting children in armed conflict.[7]

THE CAR SPECIAL CRIMINAL COURT

6. When, on 30 May 2014, the CAR Government referred the situation in its country to the ICC,[8] President Catherine Samba-Panza stated:

> The Criminal Justice System in the CAR, ravaged by violence and crisis experienced by the country for many years lacks the capacity to effectively conduct the necessary investigations and prosecutions.[9]

7. Likewise, when, on 24 September 2014, the ICC Prosecutor announced the opening of an investigation into the situation in CAR, she noted that:

> While the CAR authorities have made initial efforts to investigate crimes that could fall under the jurisdiction of the Court, existing proceedings remain limited to the preliminary stage and the Office understands that the prosecutors and police generally lack the capacity and security to conduct investigations and apprehend and detain suspects. Considering further the referral of the situation to the ICC Prosecutor by the CAR Government by which the CAR authorities indicated their inability to successfully conduct the necessary investigations and prosecutions, the Office has determined that the potential cases that would likely arise from an investigation into the situation would be admissible.[10]

8. However, slowly, the situation began to change. On 3 June 2015, following Parliamentary and Constitutional Court approval, President Catherine Samba-Panza signed Organic Law 15/003 creating a Special Criminal Court in the Central African

[7] ICC-01/14-01/18-403-Conf. Public redacted version: ICC-01/14-01/18-403-Red.
[8] ICC-01/14-1-Anx1.
[9] *Id*.
[10] Office of the Prosecutor, "Situation in Central African Republic II, Article 53(1) Report", 24 September 2014, para. 250.

Republic.[11] The SCC has jurisdiction to prosecute, among others, genocide, crimes against humanity and war crimes committed in CAR since 2003.[12] It is composed of both international and CAR judges[13] and an international Prosecutor and Deputy national Prosecutor.[14] This is the first time a hybrid court operates alongside the ICC.[15]

9. The Organic Law further provides:

> When, in application of the Rome Treaty of the International Criminal Court or special agreements binding the Central African State to this international jurisdiction, it is established that the Prosecutor of the International Criminal Court has seized a case which is concurrently under the jurisdiction of the International Criminal Court and the Special Criminal Court, the second relinquishes jurisdiction in favor of the first.[16]

10. The SCC was not fully operational at the time of Mr. Yekatom's arrest in November 2018. The Court had only just held its inaugural session on 22 October 2018.[17]

11. However, now, in 2020, the SCC is working. International and domestic prosecutors and judges are installed in the Court's new premises in Bangui. More than €10 million per annum has been pledged by the United States, European Union, and EU member states. On 23 February 2020, the Prosecutor of the SCC reported that three persons were currently detained at Ngaragba prison in Bangui on behalf of the SCC, seven files had been transmitted by his office to the investigative judges, eight additional files were in the planning phase, and 15 more were part of the roadmap for 2020. The Court's spokesperson added that trials could begin at the end of 2020 or

[11] Organic Law for the Creation, Organisation and Functioning of the Special Criminal Court, 3 June 2015 ("Organic Law").
[12] Organic Law, Article 3.
[13] Organic Law, Articles 11-14.
[14] Organic Law, Article 18.
[15] Patryk I. Labuda, "The Special Criminal Court in the Central African Republic: Failure or Vindication of Complementarity?" (2017) 15 Journal of International Criminal Justice 175, 176.
[16] Organic Law, Article 37.
[17] Ephrem Rugiririza, "Central African Republic: Special Criminal Court gets under way", 22 October 2018.

at the latest in early 2021.[18]

12. While the details of prosecutorial and judicial activity in the investigation stage is not part of the public record for confidentiality reasons, in April 2019, the SCC Prosecutor reported that he had requested national authorities to transfer the dossiers in three localities.[19] Like the OTP's Seleka investigation, which is under wraps unless and until charges are filed, the SCC's investigations are similarly ongoing, but mostly not visible to the public.

13. The SCC does not currently have an active investigation or prosecution against Alfred Yekatom. As CAR President Faustin-Archange Touadéra explained in September 2019:

> Mr. Rombhot was arrested as part of the agreement we have with the ICC. I believe that today the Special Criminal Court has the means to begin its work and achieve its goals.[20]

ARGUMENT

I. Under these Circumstances, the CAR Authorities Should be Given an Opportunity to Open an Investigation and Prosecution

14. Mr. Yekatom agrees that the OTP's investigation was undertaken in the good faith belief that the CAR authorities were unable to prosecute him in the national courts. It also is understandable that the SCC, upon becoming operational, would not open an investigation that would duplicate one already conducted by the ICC. But the admissibility of a case at the ICC is assessed as of the time the complementary challenge is adjudicated.[21] Where the national authorities are now willing and able to prosecute, but cannot do so because the OTP has asserted its primacy over the case,

[18] Radio Ndeke Luka, "Bangui : La CPS rassure à travers un film documentaire", 23 February 2020.
[19] Cour Pénale Spéciale, "Communiqué du Bureau du Procureur Près la Cour Pénale Spéciale", No. 039/CPS/PS/19, 6 August 2019.
[20] Le Monde, "Faustin-Archange Touadéra: 'Les conflits entre la France et la Russie n'ont pas lieu d'être en Centrafrique'", 7 September 2019.
[21] *Prosecutor v. Katanga & Ngudjolo*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, paras. 56, 80; *Prosecutor v. Simone Gbagbo*, Judgement on the Appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's Challenge to the admissibility of the case against Simone Gbagbo", ICC-02/11-01/12-75-Red, 27 May 2015, para. 32.

the Chamber should provide the CAR authorities with the opportunity to begin an investigation and prosecution and then declare the case inadmissible if they do so.

15. This approach of "qualified deference" was first advanced by Carsten Stahn, Director of the Grotius Centre of Legal Studies in The Hague and Professor of International Criminal Justice at Leiden University. Recognising the difficulties that authorities in post-conflict societies face in rebuilding their prosecutorial and judicial systems, Stahn advocates that ICC judges, when faced with a complementarity challenge, should "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."[22]

A. The Complementarity Principle

16. The International Criminal Court was built to be a court of last resort. Its founders emphasised in its Statute's Preamble that "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions."[23] This principle was repeated in Article 1 of the Statute.[24]

17. As explained by William A. Schabas and Mohamed El Zeidy:

> [T]he underlying idea was to give preference to the role of domestic courts and solve any possible conflict of jurisdiction at both levels through a sort of admissibility procedure, which aimed at filtering the cases to be dealt with before the international forum.[25]

18. On the occasion of his swearing-in as Prosecutor, Luis Moreno-Ocampo remarked:

> The effectiveness of the International Criminal Court should not be measured

[22] Carsten Stahn, "Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference?" in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP 2015) 228 ("Stahn, 'Qualified Deference'"), 254.
[23] Rome Statute, Preamble tenth paragraph.
[24] Rome Statute, Article 1: The Court "shall be complementary to national criminal jurisdictions".
[25] William A. Schabas and Mohamed M. El Zeidy, "Article 17, Issues of admissibility" in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court, A Commentary* (3rd edn, Beck Hart Nomos 2016) ("Schabas & El Zeidy, 'Article 17: Issues of Admissibility'"), 784.

> by the number of cases that reach it. On the contrary, complementarity implies that the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.[26]

19. This statement highlights that the OTP's objective is not to "compete" with States for jurisdiction but to help ensure that the most serious international crimes do not go unpunished and thereby to put an end to impunity. The complementarity regime serves as a mechanism to encourage and facilitate the compliance of States with their primary responsibility to investigate and prosecute core crimes.[27] The ICC is designed to be a catalyst, not an obstacle, to domestic justice.

20. Under the complementarity principle, States have the primary responsibility to exercise criminal jurisdiction. The ICC does not replace but complements them in that respect.[28] The "intention was for such a court to operate in cases where there was no prospect of persons, who had been accused of the crimes listed in the Statute being duly tried in national courts".[29]

21. Besides the political motivation for preserving State sovereignty, national prosecutions were favoured because they can deliver the best justice for the lowest cost. As one scholar has written:

> [F]or both practical and normative reasons, it is generally agreed that the best response to mass-atrocity crimes is a resort to domestic courts. As a practical matter, domestic courts will have easier access to evidence and witnesses, and the judiciary will have a better understanding of the cultural context that may have contributed to the atrocities. As for normative considerations, domestic courts enjoy the features that hybrid tribunals attempt to appropriate—that is, local ownership of and participation in the judicial process, which enhances

---

[26] Ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court, Statement made by Mr. Luis Moreno-Ocampo, 16 June 2003, p. 3.
[27] Office of the Prosecutor, "Informal expert paper: The principle of complementarity in practice", January 2003, para. 2.
[28] *Prosecutor v. Ruto et al.*, Judgement on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application of the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(b) of the Statute, ICC-01/09-01/11-307, 30 August 2011, para. 37.
[29] Preparatory Committee on the Establishment of an International Criminal Court, "Summary of the proceedings of the preparatory committee during the period 25 March-12 April 1996", UN Doc. A/AC.249/1, 7 May 1996, para. 110.

> legitimacy and can result in "culturally adapted justice."
>
> […]
>
> Hybrid tribunals are physically located closer to where atrocities occurred; the resulting proximity equates to easier access to evidence and witnesses, and results in speedier, more efficient trials.[30]

22. Article 17, which has been described as "one of the cornerstones of the ICC Statute",[31] implements the complementarity principle. As Schabas and El Zeidy explain:

> [T]he concerns of States with respect to their sovereign interests in criminal justice were at the forefront of the negotiations from the earliest stages. Article 17 provides for inbuilt safeguards that preserve national interests and judicial integrity on the domestic level. This pivotal article was essential for the Statute to be marketable in Rome.[32]

23. Canadian diplomat John Holmes has noted that:

> Throughout the negotiating process, States made clear that the most effective and viable system to bring perpetrators of serious crimes to justice was one which must be based on national procedures complemented by an international court. […] The success in Rome is due in no small measure to the delicate balance developed for the complementarity regime. […] It remains clear to those most active throughout the negotiations that any shift in the balance struck in Rome would likely have unravelled support for the principle of complementarity and, by extension, the Statute itself.[33]

24. Kevin Jon Heller puts it more bluntly: "[T]he ICC Statute would never have been adopted had Article 17 not treated the Court's right to preempt a national proceeding as an 'exceptional power' to be used sparingly and only as a last resort."[34]

25. Article 17 provides, in pertinent part, that:

---

[30] Daimeon Dean Shanks, "From aspirational to prescriptive capacity building: Post-conflict states, rule of law, and hybrid international justice" (2019) University of Colorado Law Review 1195, 1200-01 and 1214.
[31] *Prosecutor v. Lubanga*, Decision on the Practices of Witness Familiarisation and Witness Proofing, ICC-01/04-01/06-679, 8 November 2006, para. 34, fn. 38.
[32] Schabas & El Zeidy, "Article 17: Issues of Admissibility", 786.
[33] John T. Holmes, 'The Principle of Complementarity' in Roy S. Lee (ed.), *The International Criminal Court and the Making of the Rome Statue: Issues, Negotiations, and Results* (Kluwer 1999) 41, 73-74.
[34] Kevin Jon Heller, "Radical Complementarity" (2016) 14 Journal of International Criminal Justice 637, 639.

> 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
>
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

B. The Active Investigation or Prosecution Requirement

26. In the *Katanga* case, the Appeals Chamber held that if a State is not investigating or prosecuting the case at the time the complementarity challenge is being examined, its willingness or ability to do so is irrelevant. "Inaction on the part of a State having jurisdiction […] renders a case admissible before the Court."[35]

27. The Appeals Chamber has since followed this "inactivity test" in decisions on subsequent complementarity challenges.[36] While the "inactivity test" has been criticised as insufficiently encouraging State capacity,[37] the "qualified deference" approach does not require this Chamber to depart from it, but to "adjust its application more closely to the context in which the ICC operates".[38]

C. ICC Primacy in the CAR Organic Law

28. Faced with a decimated judicial system, in 2015 the CAR authorities awarded, in their Organic Law on the establishment, organisation and functioning of the Special Criminal Court, primacy to the OTP to decide who to investigate and prosecute.[39]

---

[35] *Prosecutor v. Katanga & Ngudjolo*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, para. 78.
[36] *Prosecutor v. Ruto et al.*, Judgement on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application of the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(b) of the Statute, ICC-01/09-01/11-307, 30 August 2011, para. 44; *Prosecutor v. Simone Gbagbo*, Judgement on the Appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's Challenge to the admissibility of the case against Simone Gbagbo", ICC-02/11-01/12-75-Red, 27 May 2015, para. 59; *Prosecutor v. Gaddafi*, Judgment of the Appeal of Libya against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi", ICC-01/11-01/11-547-Red, 21 May 2014, para. 213.
[37] Padraig McAuliffe, "Bad Analogy: Why the Divergent Institutional Imperatives of the ad hoc Tribunals and the ICC Make the Lessons of Rule 11*bis* Inapplicable to the ICC's Complementarity Regime" (2014) 11 International Organizations Law Review 345, 416-17.
[38] Stahn, "Qualified Deference", 254, fn. 146.
[39] Organic Law, Article 37.

29. Scholars have pointed out that Article 37 does not respect the complementarity principle. Sarah Nimigan has written that Article 37 "contradicts the idea of the ICC being a court of last resort"[40] and Patryk Labuda states that Article 37 is "irreconcilable with even the widest interpretations of complementarity."[41]

30. Article 37 applies when the OTP has seized a case. While the OTP has the authority and ability to choose the targets of its investigation, the decision on the ultimate admissibility of a case at the ICC rests with the Judges. As Labuda has written:

> [I]f a Central African national or the state authorities contest the admissibility of a case before the ICC, the ICC's judges should—subject to Article 17's legal criteria—find such a case inadmissible and entrust the suspect to the Central African authorities.
>
> This result may seem counterintuitive, but the ICC's judges are bound only by the ICC Statute and international law, not the SCC law or any other national legislation.[42]

31. Therefore, if the Chamber decides that the case is inadmissible at the ICC, it could remove the impediment to an investigation and prosecution of Mr. Yekatom by the SCC imposed by Article 37.

D. The Case for Providing the Authorities an Opportunity to Act

32. There are presently no active investigations or prosecutions of Mr. Yekatom at the SCC for the events for which he is being prosecuted at the ICC. There are two reasons for this. First, at the time the ICC opened its investigation in 2014, the SCC did not exist. Second, by the time the SCC did exist, and was capable of investigating Mr. Yekatom, Article 37 of its Organic Law, which gives the OTP primacy over individual cases, precluded it from doing so.

---

[40] Sarah Nimigan, "The Malabo Protocol, the ICC, and the Idea of 'Regional Complementarity'" (2019) 1 Journal of International Criminal Justice 1, 16.
[41] Patryk I. Labuda, "The Special Criminal Court in the Central African Republic: Failure or Vindication of Complementarity?" (2017) 15 Journal of International Criminal Justice 175, 193.
[42] *Id*, 194.

33. As a result, the "inactivity test" is not currently satisfied.

34. This is the "complementarity conundrum" identified by noted human rights lawyer Payam Akhavan:

> [T]he ICC clock tends to run too fast for states emerging from mass atrocities. Once a case commences at The Hague, local justice must race to exercise jurisdiction before global justice reaches the finishing line […] Global and local justice run on different schedules, however. They not only occupy differing time zones, one ahead of the other, but also differing conceptions of time. The ICC often arrives on the scene as the ambulance and trauma surgeon, while a national system, as next of kin, must nurse the patient back to health at home in a prolonged convalescence. It is said that justice delayed is justice denied, but it is also said that time heals all wounds. Striking the right balance between time and justice is at the root of an effective system of complementarity.[43]

35. Akhavan recommends that:

> In light of the complementarity principle, it would be reasonable to suggest that in a rapidly evolving post-conflict situation, the ICC should avoid a rush to judgment. National courts should be given a fair opportunity to exercise jurisdiction […] In making such determinations, it would seem that the overriding imperative should be to give effect to the object and purpose of the Rome Statute; namely, to confer primacy to national jurisdictions by making complementarity a practical reality.[44]

36. A group of scholars studying the role of the ICC and the African Union has also concluded that:

> Justice demands that post-conflict societies be given more time and resources to satisfy these admissibility conditions in terms of institutional capacity building, as part of a wider post-conflict transformation process […] The ICC, on its own part, must look beyond the mere letters of Article 17, encapsulating the elements of complementarity and venture into the spirit of the overall requirement of justice in every case.[45]

---

[43] Payam Akhavan, "Complementarity Conundrums: The ICC Clock in Transitional Times" (2016) 14 Journal of International Criminal Justice 1043, 1044.
[44] *Id*, 1047-48.
[45] Sascha Dominik Dov Bachmann and Eda Luke Nwibo, "Pull and Push' – Implementing the Complementarity Principle of the Rome Statute of the ICC within the African Union: Opportunities and Challenges" (2018) 43 Brooklyn Journal of International Law 457, 488, 538.

37. This is the problem to which Stahn's "qualified deference" approach is addressed. He explains that the "inactivity test" has the "disturbing side effect" of disadvantaging less developed States, who will inevitably find it more difficult to satisfy the test in the "race for time" created by admissibility proceedings at the ICC.[46]

E. The "Qualified Deference" Approach in this Case

38. Mr. Yekatom requests the Chamber to, by an interim order, invite written submissions from the Central African Republic authorities on the question of whether, notwithstanding the OTP's invocation of Article 37, it would be willing and able to investigate and prosecute his case if given the opportunity to do so. Chambers in all the other cases in which a suspect has brought an admissibility challenge have sought and accepted submissions from States in admissibility proceedings.[47]

39. If the answer is yes, the Chamber should give the CAR authorities a fixed period of time to open an investigation and/or commence a prosecution of Mr. Yekatom. During that time, the OTP could share the results of its investigation with the SCC to enable it to act expeditiously. If the SCC is able to act within that time frame, the case can be declared inadmissible and Mr. Yekatom can be transferred to the jurisdiction of the SCC.

40. If, later, the investigation and prosecution does not go forward at the SCC as planned, the OTP can seek to bring the case back to the ICC under Article 19(10), which provides that "[i]f the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which

[46] Stahn, "Qualified Deference", 240.
[47] See, e.g., *Prosecutor v. Katanga & Ngudjolo*, Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire (article 19 du Statut), ICC-01/04-01/07-1213, 16 June 2009, para. 5. English version available: ICC-01/04-01/07-1216-tENG; *Prosecutor v. Bemba*, Decision on the Admissibility and the Abuse of Process Challenges, ICC-01/05-01/08-802, 24 June 2010, para. 24; *Prosecutor v. Gbagbo*, Decision on the "Demande d'autorisation de la République de Côte d'Ivoire aux fins de déposer des observations sur la requête relative à la recevabilité de l'affaire en vertu des articles 19 et 17 du Statut déposée par l'équipe de la défense de M. Laurent Gbagbo", ICC-02/11-01/11-418, 14 March 2013.

the case had previously been found inadmissible under article 17".

41. This would be complementarity at its best. The OTP could share the results of its investigation with the SCC and even, if it chose to do so, share its expertise by seconding personnel to the SCC to assist in the prosecution, or to be admitted as an observer to the investigations by the SCC. This would not only allow for a national jurisdiction to prosecute its own nationals but would promote capacity building for future cases through the sharing of information and expertise.[48]

42. An expert group within the OTP concluded that:

> To exchange information and evidence to facilitate a national investigation or prosecution will generally be consistent with the Prosecutor's mandate. This conclusion is reinforced by Article 93(10) of the Statute, which contemplates ICC assistance to national investigations and prosecutions.[49]

43. This case is perfectly suited for such an approach. The existence of the SCC, a hybrid court with national and international staff working side-by-side, funded by international donors, will ensure that the goal of defeating impunity is achieved in this case. The nature of the case against Mr. Yekatom, a lower level commander, not a member of a strategic common plan to take power in CAR, charged with seven events during a short time frame over a limited geographical area close to the seat of the court, will ensure that the case can be efficiently prosecuted at the national level.

44. Prosecution of Mr. Yekatom at the SCC will also avoid "vertical impunity", which the ICC Assembly of States Parties has identified as occurring when vertical gaps occur within a situation, "between those most responsible brought before the

---

[48] Emilie Hunter, "Establishing the Legal Basis for Capacity Building by the ICC" in Morten Bergsmo (ed.), *Active Complementarity: Legal Information Transfer* (TOAEP 2011), 73:

> Capacity building, where it strengthens national capacity to fulfil its obligations and responsibilities under the Statute, serves to strengthen the ICC's own operation as well as increase State compliance.

[49] Office of the Prosecutor, "Informal expert paper: The principle of complementarity in practice", January 2003, para. 10. Article 93(10) provides that:

> The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.

Court and other perpetrators who are not".[50] Since it is envisioned that all the zone commanders at the level of Mr. Yekatom will be prosecuted in the national courts,[51] the singling out of Mr. Yekatom for prosecution at the ICC is an anomaly in need of correction.

45. This approach would be consonant with the object and purpose of Article 17. Schabas and El Zeidy conclude that:

> It is clear from the drafting history that the sophisticated admissibility regime created by the Rome Statute seeks to balance the supranational power entrusted to the Court with the power of national jurisdictions in such a way as to ensure States that "they would remain master over their own judicial proceedings" as long as they do not *allow* perpetrators of serious crimes to go unpunished. Article 17, as it stands, is drafted in a manner which aims at achieving this delicate result.[52]

46. Indeed, a treaty should be interpreted "in the light of its object and purpose",[53] especially when it is the constituent instrument of an international organisation.[54]

47. Complementarity in cases like Mr. Yekatom's were achieved at the ICTY and ICTR through Rule 11*bis* of their Rules of Procedure and Evidence.[55] In their commentary on the Rome Statute, Schabas and El Zeidy noted that these Rules "actually created a filtering system more akin to an admissibility mechanism which guaranteed that not every case that came or was already before the tribunal would be dealt with."[56]

---

[50] ICC Assembly of States Parties, "Report of the Bureau on Stocktaking: Taking stock of the principle of complementarity: bridging the impunity gap", ICC-ASP/8/51, 18 March 2010, para. 14.
[51] The courts of the Central African Republic have already prosecuted four zone commanders, and sentenced three to life imprisonment and the other to 20 years imprisonment. See, *infra*, para. 51.
[52] Schabas & El Zeidy, "Article 17: Issues of Admissibility", 793.
[53] Vienna Convention on the Law of Treaties, Article 31(1).
[54] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion*, ICJ Reports 1996, p. 12, para 19.
[55] The ICTY transferred the cases of 13 persons, most to the War Crimes Chambers of the Court of Bosnia and Herzegovina, resulting in the creation and capacity-building of that institution. The ICTR transferred five cases, three to Rwanda, resulting in the abolition of the death penalty and implementation of enhanced procedures and facilities that have improved the delivery of justice in Rwanda to all of its citizens. Padraig McAuliffe, "Bad Analogy: Why the Divergent Institutional Imperatives of the ad hoc Tribunals and the ICC Make the Lessons of Rule 11*bis* Inapplicable to the ICC's Complementarity Regime" (2014) 11 International Organizations Law Review 345, 400-13.
[56] Schabas & El Zeidy, "Article 17: Issues of Admissibility", 785.

48. While the ICC has no equivalent of Rule 11*bis* in its Statute or Rules, the Chamber can achieve the same results under Article 17 by giving the CAR authorities the opportunity to comply with the requirement of that Article that there be an active investigation or prosecution of Mr. Yekatom for the same conduct as charged at the ICC.

49. It would indeed be ironic if a court established to promote complementarity could achieve less of it than the *ad hoc* Tribunals given primary jurisdiction, for which complementarity was an incidental achievement. For that reason, a patient approach to Article 17's active investigation or prosecution requirement is required.

50. The people of the Central African Republic have a long history of struggling for justice despite poverty and corruption. The former President of CAR, Jean-Bedel Bokassa, was tried "in a sweltering courtroom […] in painstaking detail [over four months] at a rate of four sessions a week, broadcast in their entirety on national radio and television".[57] Another former President, Andre Kolingba, was tried by the CAR courts in 2002.[58]

51. CAR courts have prosecuted four Anti-Balaka zone commanders. The former Anti-Balaka commander Rodrigue Ngaibona, alias General Andjilo, was prosecuted by national courts in 2015 and sentenced to life imprisonment in January 2018.[59] His brother, Dieudonne Ngaibona, and Fulbert Bondo were also sentenced to life imprisonment in a separate case in November 2018.[60] Urbain Sammy aka Bawa was sentenced to 20 years in prison in December 2018.[61]

52. As recently as last month, a national court in CAR convicted 32 Anti-Balaka

[57] Associate Press, "For three months, the trial of former Emperor Bokassa I has heard hu", 22 March 1987.
[58] The judgment can be found at CAR-D29-0001-0051.
[59] Agence Centrafricaine de Presse, "L'ex-chef anti-balaka Rodrigue Ngaïbona alias 'Général Andjilo' condamné aux travaux forcés à perpétuité", 22 January 2018. The meticulous 328-page case file can be found at CAR-OTP-2032-0179.
[60] Radio Ndeke Luka, "RCA : Deux chefs Antibalaka condamnés aux travaux forcés à perpétuité", 28 November 2018.
[61] Atlantic Federation of African Press Agencies, "L'ex-chef des milices anti Balaka Urbain Sammy alias Bawa condamné à 20 ans de travaux forcés", 11 December 2018.

members of crimes in the area of Bangassou, and sentenced 5 Anti-Balaka to life imprisonment.[62] This prosecution was recognised and lauded by the international community. A press release issued by the United Nations Peacekeeping Mission, MINUSCA, stated that:

> The verdict pronounced by the Bangui Court of Appeal testifies to the will of the Central African State, through the judiciary, to fight against impunity in CAR. The Bangui Forum in 2015 underlined how important it is for the populations, especially the victims, to know that they have not been forgotten. This step, which gradually ends a cycle of impunity to reopen the era of accountability and justice for all violence committed, is essential for the country to move towards effective reconciliation.[63]

53. National courts have also prosecuted members of the ex-Seleka. In 2015, two ex-Seleka were convicted of criminal association, murder, torture, and cruel and inhuman treatment, and sentenced to 10 years of hard labour.[64] Also in 2015, three ex-Seleka were convicted of criminal association and sentenced to 10 years hard labour.[65] Eight ex-Seleka were convicted in August 2018 and sentenced to 5 years in prison.[66] Recently, in 2019, Seleka commander, Colonel Abdoulaye Alkali-Said, was prosecuted and convicted before the national courts and sentenced to 6 years in prison.[67] CAR authorities have also recently sought the extradition of ex-Seleka commander Abdoulaye Miskine from Chad.[68]

54. Giving the CAR authorities every opportunity to investigate and prosecute Mr. Yekatom, in addition to recognising these achievements, will empower the CAR to continue to pursue justice. Professor Phil Clark, after a detailed study of the impact of the ICC in Africa, has concluded that the ICC's "insistence on its own

---

[62] Al Jazeera, "Five CAR militia leaders get life terms for war crimes", 7 February 2020.
[63] MINUSCA, "La MINUSCA salue le verdict du procès des violences au sud-est de la RCA en 2017 ayant causé la mort de nombreux civils et de 10 casques bleus", 7 February 2020.
[64] The judgment can be found at CAR-D29-0001-0001.
[65] The judgment can be found at CAR-D29-0001-0073.
[66] Radio Ndeke Luka, "1ère Session criminelle 2018 : 8 accusés ex-Séléka et Antiblaka condamnés à 5 ans de prison ferme", 4 August 2018.
[67] Agence centrafricaine de presse, "La Cour criminelle condamne Alkali-Saïd Abdoulaye à six ans d'emprisonnement", 24 September 2019.
[68] Agence France Presse, "C. African rebel chief held in Chad, says government", 20 November 2019.

superiority over domestic responses to mass atrocity and its failure to live up to its own principle of complementarity" has resulted in "the weakening of relations between the ICC and domestic courts, with lasting consequences for the reform of national judiciaries in several of the African situations within the ICC's purview."[69]

55. The fact that Mr. Yekatom has already been transferred to the ICC should serve as no impediment. One commentator has stated that "the Prosecutor should consider deferring back to States cases in respect of which the OTP has already opened proceedings if justified by a change in circumstances and the interests of justice so that the ICC has free resources to deal with cases that States are truly incapable of prosecuting or unwilling to undertake."[70] That is the case here.

56. When analysing the problems that have arisen between the ICC and African Union, other scholars concluded that "the ICC should be more cooperative with States who indeed are making genuine efforts to investigate and prosecute crimes, regardless of whether the case is already pending before it."[71]

57. And William Burke-White, who served as a Visiting Scholar in the OTP has written:

> The admissibility limitations in the Rome Statute do not, however, bar the Prosecutor from encouraging presently inactive national judiciaries to prosecute such crimes. Admittedly, should the OTP be successful in encouraging national prosecutions, the particular case in question might well become inadmissible before the ICC under Article 17. That result, however, would be ideal in that the crime in question would, in fact, be prosecuted and impunity avoided.[72]

58. Patryk Labuda has asked:

---

[69] Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (CUP 2018), 300-01.
[70] Patrícia Pinto Soares, "Positive Complementarity and the Law Enforcement Network: Drawing Lessons from the Ad Hoc Tribunals Completion Strategy" (2013) 46(3) Israel Law Review 319, 336.
[71] Sascha Dominik Dov Bachmann and Eda Luke Nwibo, "Pull and Push' – Implementing the Complementarity Principle of the Rome Statute of the ICC within the African Union: Opportunities and Challenges" (2018) 43 Brooklyn Journal of International Law 457, 483.
[72] William W. Burke-White, "Implementing a Policy of Positive Complementarity in the Rome System of Justice" (2008) 19 Criminal Law Forum 59, 65.

> Can it credibly be argued that the ICC should prosecute Yekatom given that the international community has just poured millions of dollars into a new hybrid court that is supposed to bring perpetrators to justice in CAR?

and has concluded that:

> Indeed, if CAR or Yekatom bring a complementarity challenge under Article 19 of the Statute, the ICC's judges should, in theory, declare the case inadmissible. In other words, Yekatom would be sent back to CAR and that should be the end of the matter as far as the ICC is concerned.
>
> In fact, the reality is more complex. First, the arrest warrant (para. 5) suggests that the ICC's judges will fall back on the Court's unpersuasive 'inaction' standard to justify the Court's exercise of jurisdiction in this case. If she hasn't already, the ICC Prosecutor is probably busy persuading the SCC Special Prosecutor, Toussaint Muntazini, that he does not *really* need to prosecute Yekatom in Bangui. Hence, if a complementarity challenge is brought, it would probably be argued that there is no domestic case, meaning CAR is 'inactive' and so the ICC is allowed to step in. This is disingenuous at best […][73]

59. The "qualified deference" approach will change all that, while at the same time not scuttling the "inactivity" test, which arises from the plain language of Article 17. It is the best solution to the problems that have been identified with the current complementarity regime.

II. The Chamber Should Take a 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.

[73] Patryk I. Labuda, "At Long Last: The International Criminal Court Strikes in the Central African Republic", Opinio Juris Blog, 18 November 2019. Although Mr. Labuda posits that Mr. Yekatom's parliamentary immunity may pose an impediment to an SCC prosecution, Mr. Yekatom would be willing to request Parliament to waive that immunity under Article 67 of the CAR Constitution if his admissibility challenge is sustained.

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

64. This is an opportunity for the Court to shine. It can give effect to the principle of complementarity while promoting a fledgling hybrid court in a country desperately in need of justice. It can demonstrate that the Court can be an ally, not a competitor, to domestic justice systems in Africa and elsewhere, and a partner, not a dictator, in the fight against impunity. It will also allow Mr. Yekatom to return to his community and to be tried by a court that includes judges who speak his language, understand his culture, and know the context in which the events occurred.

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

RESPECTFULLY SUBMITTED ON THIS 17TH DAY OF MARCH 2020[74]

Me Mylène Dimitri
Lead Counsel for Mr. Yekatom

Peter Robinson
Associate Counsel for Mr. Yekatom

The Hague, the Netherlands

[74] The assistance of Legal Interns Eva Daniel, Pia Savart, Justine Bernatchez, Mitterrand Muntu and Legal Consultant Alexandra Chabaud to the research of this motion is gratefully acknowledged.