Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/14-01/18**
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TRIAL CHAMBER V

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

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

Public

Prosecution's Response to the "Yekatom Defence's Admissibility Challenge – Complementarity"

Source: **Office of the Prosecutor**

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I. INTRODUCTION

1. Trial Chamber V ("Chamber") should reject the *Yekatom Defence's Admissibly Challenge – Complementarity* ("Defence Challenge").[1] *First*, the case against YEKATOM is admissible as a matter of fact and law. *Second*, the Defence Challenge effectively amounts to a request for the Chamber to *defer* its proper exercise of jurisdiction in favour of "promoting" a theoretical and presently non-existent investigation or prosecution of his alleged crimes in the Central African Republic ("CAR").[2]

2. YEKATOM's concession that "there are presently no active investigations or prosecutions […]" of a case in a State with jurisdiction,[3] is fatal to his article 17 challenge. Article 17(1) is unambiguous, in that "the Court shall determine that a case is inadmissible where: (a) [t]he case *is being* investigated or prosecuted by a State which has jurisdiction over it …"[4] Thus, the test, under the first prong of the complementarity assessment is not whether another forum could, in theory, deal with the same case; it is whether there is a forum that is actually and currently investigating or prosecuting it. Or, as the Appeals Chamber states, "[i]naction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court …"[5] This ends the inquiry.

3. YEKATOM's invitation to the Chamber to reinterpret the Court's established jurisprudence or to depart from it on the basis of policy recommendations of academics and bloggers is unfounded, unpersuasive, and should be rejected outright.

[1] ICC-01/14-01/18-456.
[2] Defence Challenge, para. 64.
[3] Defence Challenge, para. 32.
[4] Article 17(1), Rome Statute (emphasis added).
[5] ICC-01/04-01/07-1497, paras. 2, 78.

II. SUBMISSIONS

A. The Defence Challenge fails under article 17(1)

a. Policy arguments do not supplant the plain language of the Statute

4. Article 17(1)'s test for inadmissibility is clear and unambiguous. A case is only inadmissible when a State with jurisdiction is presently investigating or prosecuting the same matter. The use of the present tense in article 17(1)(a), "[t]he case *is being* investigated or prosecuted …", is the basis for the applicable test.[6] For the Chamber to find the case inadmissible, "the question is not merely a question of 'investigation' in the abstract, but is whether the same case is being investigated by both the Court and a national jurisdiction."[7]

5. As noted, YEKATOM concedes that there are no active investigations or prosecutions in a State with jurisdiction over the crimes alleged against him in this case.[8] This is also inherent in his argument that "CAR authorities *should be given an opportunity to open* an investigation and prosecution."[9] The Defence's proposed complex system of back and forth negotiations between the Court and CAR authorities imposing timelines on their opening an investigation and prosecution, only to "bring the case back to the ICC" if his proposed plan fails,[10] is misguided and well-outside the very discrete inquiry before the Chamber.

[6] *See* ICC-01/04-01/07-1497, para. 75.
[7] ICC-01/09-01/11-307, para. 37; ICC-01/09-02/11-274, para. 36
[8] Defence Challenge, para. 32.
[9] ICC-01/14-01/18-456, Argument, Section I (emphasis added).
[10] Defence Challenge, paras. 38-40.

6. Fairly summarised, the Defence Challenge amounts to nothing more than a policy recommendation as to what YEKATOM would like to see happen in this case, irrespective of what the Court's law dictates must happen in the absence of any current investigation or prosecution of his crimes elsewhere. The analysis under the plain terms of article 17(1) per the Appeals Chamber[11] is straightforward. On this basis, the Defence Challenge is meritless and should be dismissed.

7. YEKATOM's resort to numerous academic and blogging sources which advance policy preferences as to how complementarity should operate under the Statute[12] are unavailing. Many of these sources generally articulate the "underlying idea" of complementarity, or are generic and neutral to his arguments.[13] Although some commentators provide intuitive and interesting ideas about how complementarity should operate, none persuasively alter the balanced formulation of article 17(1) that the drafters established at Rome, or the resultant legal test.

8. The Prosecution notes with some concern YEKATOM's referral to opinions in support of the Defence Challenge which further advance misleading and uninformed claims. For instance, the Defence Challenge cites to and relies on the following assertion, "[i]f 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." It is unclear whether, if ever, the Yekatom Defence attempted to verify this false claim. However, the Chamber should not countenance a Party's reliance on unsubstantiated, uninformed, and speculative

[11] ICC-01/04-01/07-1497; ICC-01/09-01/11-307; ICC-01/09-02/11-274; ICC-01/11-01/11-547-Red.
[12] *See e.g.* Defence Challenge, paras. 17, 22- 24, 30, and 34- 36.
[13] Defence Challenge, para. 17.

ponderings of a blogger casting (incorrect) aspersions against another Party's actions or motives. Such a practice should not be accepted.

b. Object and Purpose of the Statute

9. The interpretation of article 17(1) that the Defence Challenge advances is irreconcilable with its plain wording and contrary to the Statute.

10. YEKATOM's contention that, as a "lower level commander", he is being singled out for prosecution at the ICC and that the object and purpose of the Statute compel his transfer back to the CAR to submit to an as yet non-existent investigation and prosecution,[14] is confused and incorrect.

11. Despite YEKATOM's self-serving minimisation of his role and characterisation of his command of 3,000 Anti-Balaka elements as "low level," his views on the notion of complementarity are unavailing. Finding a case inadmissible on the basis of a theoretical possibility that a domestic jurisdiction may eventually investigate and prosecute the crimes risks impunity, rather than combats it. This is why the International Criminal Court was established in the first place. The Appeals Chamber expressed this view in the context of a similar admissibility challenge by the accused in The Prosecutor v. Katanga case:[15]

> "The aim of the Rome Statute is "to put an end to impunity" and to ensure that "the most serious crimes of concern to the international community as a whole must not go unpunished". This object and purpose of the Statute would come to naught were the said interpretation of

[14] Defence Challenge, paras. 43-48.
[15] ICC-01/04-01/07-1497, para. 79 (citations omitted).

> article 17(1) of the Statute as proposed by the Appellant to prevail. It would result in a situation where, despite the inaction of a State, a case would be inadmissible before the Court, unless that State is unwilling or unable to open investigations. 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. Thus, a potentially large number of cases would not be prosecuted by domestic jurisdictions or by the International Criminal Court. Impunity would persist unchecked and thousands of victims would be denied justice".

12. Applying the plain text and purposeful interpretation of the Statute established in the Court's jurisprudence requires the Chamber to reject the Defence Challenge.

B. Domestically created impediments to investigation and prosecution

13. YEKATOM's argument that article 37 of the Organic Law for the Creation, Organisation and Function of the Special Criminal Court ("SCC")[16] creates an impediment to his investigation and prosecution in the CAR and occasions the authorities' inaction only underscores why his case *is* admissible before the ICC. YEKATOM's contention that article 37 is inconsistent with the Statute is irrelevant. It is the *factual* circumstance of the absence of a current investigation or prosecution of the crimes alleged here that is dispositive.

14. Article 37 provides that:

> « *Lorsqu'en application du Traité de Rome de la Cour Pénale Internationale ou des accords particuliers liant l'Etat centrafricain à cette juridiction internationale, il est*

[16] Organic Law for the Creation, Organisation and Function of the Special Criminal Court, 3 June 2015("Organic Law").

> *établi que le Procureur de la Cour Pénale Internationale s'est saisi d'un cas entrant concurremment dans la compétence de la Cour Pénale Internationale et de la Cour Pénale Spéciale, la seconde se dessaisit au profit de la première ».*

15. Article 37 of the Organic Law's deference to the ICC (in the circumstances of concurrent jurisdiction), appears to constitute a legislative impediment to the SCC's exercise of jurisdiction over cases currently being investigated and prosecuted at the ICC. Article 37 appears to divest the SCC of competence in concurrent ICC cases. The complementarity assessment under the Statute is determined on the basis of a State's willingness and ability — *factually*, article 37 is a national legislative expression of the former and an actual and dispositive impediment to the latter.

16. The Court should be cautious in passing judgment on the adoption of domestic law by the CAR authorities or in the application of a State's national law. The Chamber has neither the duty nor the obligation to assess the validity of CAR's national legislation. This is well beyond the inquiry necessary or required to determine admissibility.

17. While the Prosecution acknowledges the apparent difference on issues of concurrent jurisdiction between Article 37 of the Organic Law and article 17, the adoption and implementation of the Organic Law constitutes a sovereign prerogative of CAR.

18. Indeed, unlike other parts of the Statute which require the adoption of specific implementing legislation to give it effect in domestic legal systems (such as article 70(4), Part 9, and article 109), the provisions of article 17 represent rights which States enjoy under the Statute and of which they may avail themselves. If a State does not wish to avail itself of

that right and instead decides to relinquish its jurisdiction in favour of the ICC in certain cases, as the Appeals Chamber has held, this is also a State's sovereign prerogative:

> "The Appeals Chamber is not persuaded by the argument of the Appellant that it would be to negate the obligation of States to prosecute crimes if they were allowed to relinquish domestic jurisdiction in favour of the International Criminal Court. The Appeals Chamber acknowledges that States have a duty to exercise their criminal jurisdiction over international crimes. The Chamber must nevertheless stress that the complementarity principle, as enshrined in the Statute, strikes a balance between safeguarding the primacy of domestic proceedings vis-à-vis the International Criminal 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 or cannot investigate and, where necessary, prosecute, the International Criminal Court must be able to step in. Moreover, 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".[17]

19. As the Appeals Chamber emphasised in that case, whatever policy preferences there may be, the ICC cannot force a State that has chosen to relinquish its jurisdiction to take on a case in place of the Court. Complementarity, in this sense, does not create an onus on States to prove to the Court that they are genuinely unwilling or unable, or to explain their inaction. To the contrary, the onus is on the Court to satisfy itself that the relevant State's prerogatives to exercise its criminal jurisdiction have not been unduly curtailed. And while the complementarity regime also serves to ensure certain rights of a defendant, in particular the right not to be tried twice for the same conduct pursuant to articles 17(1)(c) and 20(3),

[17] ICC-01/04-01/07-1497, para. 85 (citations omitted). The Appeals Chamber went on to add "[b]e this as it may, however, the Appeals Chamber is mindful that the Court, acting under the relevant provisions of the Statute and depending on the circumstances of each case, may decide not to act upon a State's relinquishment of jurisdiction in favour of the Court", citing to article 17 (1) (c) and (d), article 19(1), and article 53 of the Statute.

this cannot translate into an Accused's right to elect the forum before which they prefer to be tried.

20. Additionally, 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. In such an eventuality, it might well be appropriate for the Court to consider whether a State's domestic law, freely adopted, could interfere with its statutory rights under an international treaty. That conflict does not arise here, since the CAR authorities have made no such assertion in this case. Nor, may YEKATOM advance such a claim on the CAR government's behalf.

III. RELIEF SOUGHT

21. For the above reasons, the Prosecution requests the Chamber to reject the Defence Challenge.

Fatou Bensouda, Prosecutor

Dated this 30th day of March 2020
At The Hague, The Netherlands