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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***

Confidential

**Prosecution Response to Mr Yekatom's "Request for leave to appeal 'Decision on
Motions on the Scope of the Charges and the Scope of the Evidence at Trial' (ICC-
01/14-01/18-703-Conf)"**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Mr James Stewart

Mr Kweku Vanderpuye

Counsel for Alfred Yekatom

Ms Mylène Dimitri

Mr Thomas Hannis

Counsel for Patrice-Edouard Ngaïssona

Mr Geert-Jan Alexander Knoops

Legal Representatives of Victims

Abdou Dangabo Moussa

Elisabeth Rabesandratana

Yaré Fall

Marie-Edith Douzima-Lawson

Paolina Massidda

Dmytro Suprun

Unrepresented Victims

Legal Representatives of Applicants

Unrepresented Applicants

(Participation/Reparation)

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

Other

**Victims Participation and Reparations
Section**

I. INTRODUCTION

1. YEKATOM's request for leave to appeal the "Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial" should be rejected. The Request fails as it does not meet the criteria under article 82(1)(d).¹

2. Although the First Issue (whether notice of a charged mode of liability includes notice of its constituent elements) arises from the Decision, it does not meet any of the remaining article 82(1)(d) criteria. Consistent with regulation 52 of the Regulations of the Court, the charges must include a statement of facts which provides a sufficient legal and factual basis to bring the person to trial, and its legal characterisation, including the specific mode of liability under articles 25 and 28. The Court's legal framework does not require the charges to set out the constituent elements of the modes in accordance with the Pre-Trial Chamber's legal interpretation of them. Moreover, the Trial Chamber—which is not bound by the Pre-Trial Chamber's legal interpretation—has provided its understanding of the objective elements of co-perpetration for the purposes of trial. Accordingly, YEKATOM has clarity with respect to the constituent elements of co-perpetration. He can adequately prepare his defence.

3. The Second issue (regarding the Trial Chamber's purported reinsertion of non-confirmed facts) does not arise from the Decision. YEKATOM misrepresents the Confirmation Decision (where the Pre-Trial Chamber identified the modes of liability with which YEKATOM is charged) and the Decision (where the Trial Chamber did not reinsert non-confirmed facts). In addition, the Second Issue does not meet the remaining criteria of article 82(1)(d) of the Statute.

II. CONFIDENTIALITY

4. Pursuant to regulation 23bis(2) of the Regulations of the Court ("Regulations"), this Response is classified as 'confidential' since it responds to a document with the same level of confidentiality. The Response can be re-classified to public once the Request is re-classified.²

¹ ICC-01/14-01/18-713-Conf ("Request") and ICC-01/14-01/18-703-Red ("Decision").

² Mr Yekatom filed his Request confidentially because the Decision is 'confidential'. He requested reclassification as public: Request, para. 28.

III. SUBMISSIONS

5. YEKATOM identifies two issues for which he seeks leave to appeal:

- The First Issue is “whether or not the Chamber erred in law when finding that for the purpose of providing notice, as far as the legal characterisation of the facts is concerned, it is not necessary for the charges to set out the constituent legal elements of the alleged mode of liability under Article 25(3)(a)”.³ The subject constituting the issue is “whether notice of a charged mode of liability includes notice of the constituent elements of the corresponding article of the Statute”.⁴
- The Second Issue is “whether or not the Chamber erred in fact and in law by reinterpreting the confirmed facts and circumstances *ex post facto*, and reinserting facts not confirmed by the Pre-Trial Chamber such as a common plan”.⁵ The subject constituting the issue is “whether the Trial Chamber could always rectify a major legal defect in a confirmation decision by restating the confirmed factual details which were not legally characterised”.⁶

6. None of these issues meets the criteria for leave to appeal under article 82(1)(d) of the Statute for the reasons explained below.

A. The First Issue does not meet the criteria under article 82(1)(d)

7. The First Issue arises from the Decision. The Trial Chamber did not consider it “necessary for the charges to further set out the constituent legal elements underlying the alleged mode(s) of liability”.⁷ According to the Chamber, an accused person must receive notice of: (i) the facts and circumstances underpinning the charges and (ii) the legal characterisation of the facts to accord with the crimes under the Court’s jurisdiction, and the specific mode/s of liability (and exact sub-provision) under articles 25 and 28.⁸

³ [Request](#), para. 2.

⁴ [Request](#), para. 14.

⁵ [Request](#), para. 3.

⁶ [Request](#), para. 14.

⁷ [Decision](#), para. 18; *see also* para. 24.

⁸ [Decision](#), paras. 16-17.

8. Notwithstanding, YEKATOM does not demonstrate how the First Issue significantly affects the fair and expeditious conduct of the proceedings, the outcome of the trial or how an immediate resolution by the Appeals Chamber would materially advance the proceedings.⁹

9. *First*, as established by the jurisprudence of the Court, the correctness of a decision is irrelevant to an application for leave to appeal under article 82(1)(d). Hence, although the Trial Chamber correctly held that the Court's legal framework does not require the charges to set out the constituent elements underlying the alleged modes of liability liability and that this does not amount to lack of notice,¹⁰ this question is irrelevant to resolve the present Request. The sole question is whether the issue meets the criteria under article 82(1).¹¹

10. *Second*, a Trial Chamber is not bound by a Pre-Trial Chamber's understanding of the law (or assessment of the evidence) set out in the Confirmation Decision; instead, a Trial Chamber is bound by the "facts and circumstances" described in the Confirmation Decision.¹² Thus, even if a Trial Chamber does not endorse a Pre-Trial Chamber's legal interpretation of a mode of liability or a crime, the charges are not defective and nor can it be said that the accused person received insufficient notice of them. In this case, the Confirmation Decision clearly set out that YEKATOM is charged with the modes of liability under article 25(3)(a) (committing the crime jointly with another or through another) and article 25(3)(b) (ordering).¹³ Further, in the Decision the Trial Chamber expressly endorsed the well-established jurisprudence regarding the objective elements of co-perpetration.¹⁴ Accordingly, YEKATOM has clarity with respect to the constituent elements of co-perpetration for the purposes of trial. YEKATOM's Request ignores the import of the Decision.

11. *Third*, the authorities cited by YEKATOM are inapposite and do not demonstrate that the First Issue significantly affects the fairness or expeditiousness of the proceedings. In particular:

⁹ YEKATOM addresses the three criteria under the first prong of article 82(1)(d) together and does not clearly identify which arguments relate to each criterion.

¹⁰ [Decision](#), paras. 18, 24.

¹¹ [ICC-02/04-01/05-20-US-Exp](#), para. 22. Unsealed pursuant to decision [ICC-02/04-01/05-52](#).

¹² [Decision](#), fns. 39-40.

¹³ [Confirmation Decision](#), p. 103 (holding that YEKATOM is criminally responsible under the following modes of liability: (i) committing the aforementioned crimes jointly with another or through another under article 25(3)(a) of the Statute; or (ii) ordering the commission of the aforementioned crimes under article 25(3)(b) of the Statute).

¹⁴ [Decision](#), para. 26 (fn. 42).

- Even though it relates to the accused's right to 'notice', the First Issue does not significantly affect the fairness and expeditiousness of the proceedings. ICC Chambers have consistently held that the article 82(1)(d) criteria are not necessarily met because the purported issues involve important areas of law.¹⁵ Moreover, the Trial Chamber has never found that the charges in this case are defective.¹⁶
- In his partially dissenting Opinion to the *Ongwen* Confirmation Decision, Judge Perrin de Brichambaut disagreed with the Majority's analysis of the evidence, which he deemed to be "cursory", and the structure of the Confirmation Decision.¹⁷
- In *Ongwen*, the facts underlying the Trial Chamber's decision to grant leave to appeal differed from this case; while the *Ongwen* Trial Chamber declined to rule on the merits of the belated Defence's challenges to the specificity of the charges,¹⁸ this Trial Chamber has ruled on YEKATOM's motion to dismiss co-perpetration and provided its interpretation of co-perpetration.

12. *Fourth*, YEKATOM's submission that "the Chamber has the authority to opt out submitted materials at its discretion" is unclear and incorrect.¹⁹ YEKATOM has the necessary information to advise the Trial Chamber as to the relevance, probative value and weight of the evidence.

13. *Finally*, the Parties can "focus on the required material elements of the charged modes of liability".²⁰ Indeed, the Confirmation Decision identifies the modes of liability with which YEKATOM is charged.²¹ Moreover, the Decision explains the Trial Chamber's understanding of the objective elements of co-perpetration.²² YEKATOM does not

¹⁵ See e.g. [ICC-02/11-01/15-42](#), para.14; [ICC-01/09-01/11-817](#), para. 16.

¹⁶ *Contra* [Request](#), para. 20. YEKATOM erroneously attributes to the ICTR Appeals Chamber the decision selectively quoted in paragraph 20. Instead, according to the authority identified in fn. 13, the decision was rendered by Trial Chamber III.

¹⁷ [Judge Perrin de Brichambaut Partially Dissenting Opinion](#), paras. 13, 26; *contra* [Request](#), para. 21.

¹⁸ [Ongwen ALA Decision](#), paras. 11-14; *contra* [Request](#), para. 21.

¹⁹ *Contra* [Request](#), para. 23.

²⁰ *Contra* [Request](#), para. 27.

²¹ [Confirmation Decision](#), p. 103.

²² [Decision](#), para. 26.

demonstrate how the intervention of the Appeals Chamber would materially advance the proceedings in this case.²³

14. Accordingly, YEKATOM's request to grant leave to appeal the First Issue should be dismissed.

B. The Second Issue does not meet the criterial under article 82(1)(d)

15. The Second Issue does not arise from the Decision because YEKATOM misrepresents the Confirmation Decision and the Decision.

16. *First*, the Trial Chamber did not re-insert facts (or a 'common plan') which were not confirmed by the Pre-Trial Chamber.²⁴ Instead, the Trial Chamber held that YEKATOM had mischaracterised the Confirmation Decision and found that he had been provided with sufficient notice of the facts establishing the objective elements of co-perpetration.²⁵ To substantiate its conclusion, the Trial Chamber referred to the *facts confirmed by the Pre-Trial Chamber* in the Confirmation Decision.²⁶ It did not reinsert non-confirmed facts.

17. *Second*, the Pre-Trial Chamber legally characterised the facts that the Trial Chamber recalled in the Decision.²⁷ Indeed, the Pre-Trial Chamber found that those facts satisfied the requirements of the modes of liability under article 25(3)(a) (committing the crime jointly with another or through another) and article 25(3)(b) (ordering).²⁸

18. *Third* and as noted, a Trial Chamber is not bound by a Pre-Trial Chamber's legal interpretation. Although YEKATOM does not dispute that Chambers have such powers, he argues that *this* Trial Chamber cannot exercise them because the charges have a "major legal defect".²⁹ Yet, the Confirmation Decision is not defective and neither the Court's legal framework nor the jurisprudence supports his assertion.

²³ *Contra* [Request](#), para. 27.

²⁴ *Contra* [Request](#), paras. 2, 17.

²⁵ [Decision](#), para. 27.

²⁶ [Decision](#), paras. 27-36.

²⁷ *Contra* [Request](#), para. 17.

²⁸ [Confirmation Decision](#), p. 103.

²⁹ [Request](#), para. 17.

19. In addition, the Second Issue does not meet any of the remaining criteria under article 82(1)(d). YEKATOM is not “hamstrung in advising the Chamber as to the evidence assessment”.³⁰ As noted, the Confirmation Decision identifies the modes of liability with which YEKATOM is charged.³¹ Further, the Trial Chamber has clarified that it sees no reason to depart from the Court’s well-established jurisprudence regarding the objective elements of co-perpetration.³² YEKATOM can prepare his defence accordingly.

20. Finally, in responding to his motion, the Prosecution requested the Trial Chamber (and eventually the Appeals Chamber) to definitely resolve the issues raised by YEKATOM.³³ In the Decision, the Trial Chamber has resolved these issues, and has provided the requested clarity with respect to its understanding of the objective elements of co-perpetration for the purposes of the trial. Further, since YEKATOM has not discharged his burden to demonstrate that the criteria under article 82(1)(d) are met, his Request should be rejected. However, if the Trial Chamber were to take a contrary view and find—in the exercise of its discretion in article 82(1)(d)³⁴—that the requirements are met, it could grant the Request.

IV. CONCLUSION

21. For the foregoing reasons, since YEKATOM has not demonstrated that the criteria under article 82(1)(d) are met, his Request should be rejected.



James Stewart, Deputy Prosecutor

Dated this 9th day of November 2020
At The Hague, The Netherlands

³⁰ *Contra* [Request](#), para. 24; *see also* para. 27.

³¹ [Confirmation Decision](#), p. 103.

³² [Decision](#), para. 26.

³³ [Prosecution Response](#), para. 30, cited in [Request](#), para. 22.

³⁴ [Bemba Second SAJ](#), para. 27.