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**No. ICC-01/14-01/18
Date: 13 November 2020**

TRIAL CHAMBER V

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

**Decision on the Yekatom Defence Request for Leave to Appeal the Decision on
Motions on the Scope of the Charges and the Scope of the Evidence at Trial**

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

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TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Article 82(1)(d) of the Rome Statute (the ‘Statute’) issues this ‘Decision on the Yekatom Defence Request for Leave to Appeal the Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial’.

I. Procedural history and submissions

1. On 22 June 2020, the Yekatom Defence (the ‘Defence’) filed a motion requesting the Chamber to dismiss the mode of liability of co-perpetration confirmed against Mr Yekatom, arguing that the decision on the confirmation of the charges (the ‘Confirmation Decision’) failed to provide adequate notice of (i) the constituent (objective) elements of co-perpetration and (ii) the facts that establish those elements.¹
2. On 29 October 2020, the Chamber rejected the motion (the ‘Impugned Decision’).² The Chamber found that: (i) in order for the accused to receive adequate notice of the modes of liability alleged against them, said modes of liability must be precisely identified, but their constituent legal elements need not be set out, especially when they are well established in the jurisprudence of the Court;³ and (ii) the Confirmation Decision provides Mr Yekatom with sufficient notice of the facts establishing the objective elements of co-perpetration.⁴
3. On 4 November 2020, the Defence requested leave to appeal the Impugned Decision, pursuant to Article 82(1)(d) of the Statute, on two issues (the ‘Request’):

¹ Motion to Dismiss Co-Perpetration Mode of Liability, ICC-01/14-01/18-565-Conf (public redacted version notified the same day, ICC-01/14-01/18-565-Red), paras 1, 21-43, 48.

² Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial, ICC-01/14-01/18-703-Conf (public redacted version notified on 2 November 2020, ICC-01/14-01/18-703-Red), p. 22

³ Impugned Decision, ICC-01/14-01/18-703-Red, paras 17-18, 24.

⁴ Impugned Decision, ICC-01/14-01/18-703-Red, paras 27, 37.

- i. whether 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) of the Statute (the ‘First Issue’); and
 - ii. whether the Chamber erred in fact and in law by reinterpreting the confirmed facts and circumstances *ex post facto* and reinserting facts not confirmed by Pre-Trial Chamber II (the ‘PTC II’), such as a common plan (the ‘Second Issue’).⁵
4. On 9 November 2020, the Office of the Prosecutor (the ‘Prosecution’)⁶ and the Common Legal Representative of the Former Child Soldiers and the Common Legal Representatives of Victims of Other Crimes (jointly, the CLRV)⁷ responded to the Request, submitting that it should be rejected as it does not meet the criteria of Article 82(1)(d) of the Statute (the ‘Prosecution Response’ and the ‘CLRV Response’, respectively).

II. Analysis

5. The Chamber recalls the applicable law governing requests for leave to appeal under Article 82(1)(d) of the Statute, as previously set out by the Chamber.⁸

A. First Issue

6. The Chamber finds, for the reasons that follow, that the First Issue meets the requirements of Article 82(1)(d) of the Statute.
7. First, the Chamber is satisfied that the First Issue constitutes an appealable issue arising from the Impugned Decision. It is not a mere disagreement with the

⁵ 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), ICC-01/14-01/18-713-Conf, paras 1-3, 29.

⁶ 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)”. ICC-01/14-01/18-720-Conf, paras 1, 21.

⁷ Réponse conjointe des Représentants Légaux Communs des Victimes à la « Request for leave to appeal Decision on Motions on the scope of the Charges and the Scope of the Evidence at Trial (ICC-01/14-01/18-713-Conf) », ICC-01/14-01/18-721-Conf. paras 8, 27.

⁸ Decision on the Ngaïssona Defence Request for Leave to Appeal the Decision on Restrictions on Contacts and Communications, 22 May 2020, ICC-01/14-01/18-525, paras 15-21.

Impugned Decision, but raises a discrete legal question, namely whether in order for the accused to receive adequate notice of the modes of liability alleged against him, he must be informed of the constituent elements of said modes of liability. The Chamber's finding that it was not necessary for the accused to be informed of the legal elements underlying the modes of liability – especially when those elements are well established in the jurisprudence of the Court – was at the heart of its determination that Mr Yekatom had received sufficient notice of the charges against him.⁹ Therefore, the resolution of this issue is essential for the determination of the matter raised by Mr Yekatom.

8. Second, the Chamber is satisfied that the First Issue significantly affects the fair and expeditious conduct of the proceedings. The Chamber recalls in this regard that it is of utmost importance to resolve issues related to the interpretation of the Confirmation Decision and to do so, as far as possible, early on in the trial proceedings, in order for the accused and all parties and participants to be able to properly prepare for trial, to streamline the proceedings and to avoid recurring litigation on these issues.¹⁰
9. Third, the Chamber is satisfied that an immediate resolution by the Appeals Chamber may materially advance the proceedings, by removing any doubts as to the correctness of the Impugned Decision.
10. In light of the above, the Chamber grants the Defence leave to appeal the First Issue.

B. Second Issue

11. At the outset, the Chamber recalls that it has the power to determine not only whether the Impugned Decision may be appealed, but also to what extent.¹¹ In accordance with its discretionary power to reformulate appealable issues, the Chamber finds it necessary to rephrase the Second Issue.

⁹ Impugned Decision, ICC-01/14-01/18-703-Red, paras 17-18, 24.

¹⁰ Transcript of hearing, 9 July 2020, ICC-01/14-01/18-T-012-ENG, p. 63, lines 12-22.

¹¹ Appeals Chamber, *The Prosecutor v. Laurent Gbagbo*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute', 16 December 2013, ICC-02/11-01/11-572 (OA5), para. 63.

12. According to the Defence, the Chamber erred in fact and in law by reinterpreting the confirmed facts and circumstances *ex post facto* and reinserting facts not confirmed by PTC II, such as a common plan.¹² The Defence submits that this raises the question of whether a trial chamber can ‘rectify a major legal defect in a confirmation decision by restating the confirmed factual details which were not legally characterised’.¹³
13. The Defence mischaracterises the Impugned Decision on two points in stating that the Chamber (i) reinserted facts not confirmed by PTC II and (ii) rectified defects in the Confirmation Decision. First, the Defence’s assertion that the Chamber reinserted facts not confirmed by PTC II is misplaced. In the Impugned Decision, the Chamber referred to the facts *as set out in the Confirmation Decision*.¹⁴ Its conclusion that Mr Yekatom had been sufficiently informed of the facts establishing the objective elements of co-perpetration was based entirely and exclusively on the facts as confirmed by PTC II. Second, the Chamber made no finding that the Confirmation Decision was deficient and it did not rectify any defects in the charges. To the contrary, it found that the Defence had mischaracterised the Confirmation Decision in arguing that it failed to provide notice of the facts establishing the elements of co-perpetration.¹⁵
14. Thus, the question that arises from the Impugned Decision is not whether the Chamber erred by reinserting facts or rectifying defects in the Confirmation Decision, but rather:

whether it erred in finding that Mr Yekatom was sufficiently informed of the contours of the ‘common plan’ and his alleged ‘essential contribution’, although PTC II had not used this terminology established in the jurisprudence of the Court to characterise the relevant facts.

¹² Request, ICC-01/14-01/18-713-Conf, paras 3, 17.

¹³ Request, ICC-01/14-01/18-713-Conf, para. 14.

¹⁴ Impugned Decision, ICC-01/14-01/18-703-Red, paras 28-35; *see also* para. 10.

¹⁵ Impugned Decision, ICC-01/14-01/18-703-Red, para. 27.

15. The Chamber finds that the Second Issue, as reformulated above, meets the requirements of Article 82(1)(d) of the Statute.
16. The Second Issue constitutes an appealable issue and is more than a mere disagreement with the Impugned Decision. Its resolution is essential to determine whether Mr Yekatom was sufficiently informed of the contours of the ‘common plan’ and his alleged ‘essential contribution’. Further, for the same reasons as provided in relation to the First Issue, the Chamber is satisfied that the Second Issue significantly affects the fair and expeditious conduct of the proceedings and that an immediate resolution by the Appeals Chambers may materially advance the proceedings.
17. In light of the above, the Chamber grants the Defence leave to appeal the Second Issue, as reformulated above.

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS leave to appeal in respect of the First Issue, namely:

whether 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(s) of liability;

GRANTS leave to appeal in respect of the Second Issue, as reformulated, namely:

whether the Chamber erred in finding that Mr Yekatom was sufficiently informed of the contours of the ‘common plan’ and his alleged ‘essential contribution’ although PTC II had not used this terminology established in the jurisprudence of the Court to characterise the relevant facts; and

ORDERS the Registry to reclassify the Request, ICC-01/14-01/18-713-Conf, the Prosecution Response, ICC-01/14-01/18-720-Conf, and the CLRV Response, ICC-01/14-01/18-721-Conf, as public.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt
Presiding Judge



Judge Péter Kovács



Judge Chang-ho Chung

Dated 13 November 2020

At The Hague, The Netherlands