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**International
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APPEALS CHAMBER

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Howard Morrison
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
*THE PROSECUTOR v. ALFRED YEKATOM AND
PATRICE-ÉDOUARD NGAÏSSONA***

Public

**Common Legal Representatives' Joint Response to the
"Yekatom Defence Appeal Brief – Notice of Co-Perpetration",
(ICC-01/14-01/18-742)**

Source: Common Legal Representatives of Victims

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

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I. INTRODUCTION

1. The Common Legal Representative of the Former Child Soldiers and the Common Legal Representatives of the Victims of Other Crimes (jointly the “Common Legal Representatives” or the “CLR/V”) hereby file their joint response to the “Yekatom Defence Appeal Brief – Notice of Co-Perpetration” (the “Appeal Brief”).¹

2. The Common Legal Representatives oppose in whole the two grounds of appeal raised by the Defence of Mr Yekatom and the relief sought. In particular, they submit that the Defence failed to demonstrate that Trial Chamber V (the “Trial Chamber”) erred in 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 modes of liability. The Defence also failed to demonstrate that the Trial Chamber erred in finding that Mr Yekatom was sufficiently informed of the contours of the “common plan” and his alleged “essential contribution” although Pre-Trial Chamber II (the “Pre-Trial Chamber”) had not used this terminology established in the jurisprudence of the Court to characterise the relevant facts. The Common Legal Representatives argue that the “Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona”² (the “Decision Confirming the Charges”) sets out clearly the “facts and circumstances” of the case, presenting a description of the factual allegations and their legal characterisation, thus satisfying the minimum requirements of article 67(1)(a) of the Rome Statute (the “Statute”).

3. The Common Legal Representatives further submit that, even if the Decision Confirming the Charges *by itself* did not provide sufficient notice, it is not the *only* document that must be taken into account when assessing whether the Accused has

¹ See the “Yekatom Defence Appeal Brief – Notice of Co-Perpetration”, [No. ICC-01/14-01/18-742](#), 26 November 2020 (the “Appeal Brief”).

² See the “Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona” (Pre-Trial Chamber II), [No. ICC-01/14-01/18-403-Conf](#), 11 December 2019 (the “Decision Confirming the Charges”). A public redacted version was issued on 20 December 2019 as [No. ICC-01/14-01/18-403-Red](#).

been sufficiently informed of the charges. In the present case, the Prosecution has provided the Defence with the Prosecution's Trial Brief (the "Prosecution's Trial Brief"),³ which is an auxiliary document that serves as notice and contains detailed information about the confirmed charges. It can therefore not be concluded that the Accused has not been informed of the charges against him.

4. If the Appeals Chamber were nonetheless to find that the Decision Confirming the Charges did not provide sufficient notice and that, despite the information provided in the Prosecution's Trial Brief, the Accused's right under article 67(1)(a) of the Statute has been violated, the Common Legal Representatives submit that the relief sought by the Defence is wholly inappropriate as it would not only vitiate the appeal procedure for confirmation decisions, but it would also deprive Victims of their right to the establishment of the truth and the recognition of their victimisation.

II. PROCEDURAL BACKGROUND

5. On 11 December 2019, the Pre-Trial Chamber partially confirmed the charges against Mr Yekatom.⁴

6. On 22 June 2020, the Defence for Mr Yekatom filed a motion requesting the Trial Chamber to dismiss the mode of liability of co-perpetration confirmed against him and to try him solely under the mode of liability of ordering (the "Yekatom Motion").⁵

³ See the "Prosecution's Trial Brief", [No. ICC-01/14-01/18-723-Conf](#), 9 November 2020 (the "Prosecution's Trial Brief").

⁴ See the Decision Confirming the Charges, *supra* note 2.

⁵ See the "Motion to Dismiss Co-Perpetration Mode of Liability", [No. ICC-01/14-01/18-565-Conf](#), 22 June 2020. A public redacted version was issued the same day as [No. ICC-01/14-01/18-565-Red](#).

7. On 3 July 2020, the Prosecution⁶ and the Common Legal Representatives⁷ responded to the Yekatom Motion.
8. On 29 October 2020, the Trial Chamber issued its “Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial”, rejecting the Yekatom Motion (the “Impugned Decision”).⁸
9. On 4 November 2020, the Defence for Mr Yekatom filed its “Request for leave to appeal ‘Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial’” (the “Defence’s Request for Leave to Appeal”).⁹
10. On 9 November 2020, the Prosecution¹⁰ and the Common Legal Representatives¹¹ responded to the Defence’s Request for Leave to Appeal.
11. On the same day, the Prosecution filed its Trial Brief.¹²

⁶ See the “Prosecution response to Mr Yekatom’s ‘Motion to Dismiss Co-Perpetration Mode of Liability’ (ICC-01/14-01/18-565-Red)”, [No. ICC-01/14-01/18-576-Conf](#), 3 July 2020. A public redacted version was issued on 6 July 2020 as [No. ICC-01/14-01/18-576-Red](#).

⁷ See the “Version corrigée de « la Réponse conjointe des Représentants Légaux Communs des Victimes à la ‘Motion to Dismiss Co-Perpetration Mode of Liability’ de la Défense de M. Alfred Rhombot Yekatom (ICC-01/14-01/18-565-Conf) » 3 juillet 2020, ICC-01/14-01/18-577-Conf”, [No. ICC-01/14-01/18-577-Conf-Corr](#), 7 July 2020. A corrected public redacted version was issued on 7 July 2020 as [No. ICC-01/14-01/18-577-Corr-Red](#).

⁸ See the “Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial” (Trial Chamber V), [No. ICC-01/14-01/18-703-Conf](#), 29 October 2020 (the “Impugned Decision”). A public redacted version was issued on 30 October 2020 as [No. ICC-01/14-01/18-703-Red](#).

⁹ See the “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)”, No. ICC-01/14-01/18-713-Conf, 4 November 2020. On 16 November 2020, the submission was reclassified public as [No. ICC-01/14-01/18-713](#).

¹⁰ See the “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)’, No. ICC-01/14-01/18-720-Conf, 9 November 2020. On 16 November 2020, the submission was reclassified public as [No. ICC-01/14-01/18-720](#).

¹¹ See the “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)»”, No. ICC-01/14-01/18-721-Conf, 9 November 2020. On 16 November 2020, the submission was reclassified public as [No. ICC-01/14-01/18-721](#).

¹² See the Prosecution’s Trial Brief, *supra* note 3.

12. On 13 November 2020, the Trial Chamber granted the Defence's Request for Leave to Appeal¹³ and rephrased the two issues identified by the Defence as follows:

- a) 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; and
- b) 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 the Pre-Trial Chamber had not used said terminology established in the jurisprudence of the Court to characterise the relevant facts.¹⁴

13. On 26 November 2020, the Defence filed its Appeal Brief.¹⁵

III. SUBMISSIONS

1. Applicable law

14. In accordance with the applicable jurisprudence, the legal standard for the Appeals Chamber's review of interlocutory decisions is the following:

"[Parties] may raise (i) procedural errors, (ii) errors of fact, or (iii) errors of law, as well as (iv) '[a]ny other ground that affects the fairness or reliability of the proceedings or decision'. [...] [The Appeals Chamber] will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision. [An Impugned Decision] is 'materially affected by an error of law' if the Trial Chamber 'would have rendered a judgment that is substantially different from the decision that was affected by the error, if it had not made the error'. [...] Regarding factual errors, the Appeals

¹³ See the "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" (Trial Chamber V), [No. ICC-01/14-01/18-730](#), 13 November 2020.

¹⁴ *Idem*, Operative Part, p. 8.

¹⁵ See the Appeal Brief, *supra* note 1.

Chamber [...] will not interfere with factual findings of the first-instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts. As to the ‘misappreciation of facts’, [the Appeals Chamber] will interfere only in the case where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it’. [...] Accordingly, when a factual error is alleged, the Appeals Chamber will determine whether a reasonable Trial Chamber could have been satisfied beyond reasonable doubt as to the finding in question. The Appeals Chamber will not assess the evidence de novo with a view to determining whether it would have reached the same factual conclusion as the Trial Chamber.”¹⁶

15. Moreover, the Appeals Chamber has held that “as part of the reasons in support of a ground of appeal, an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision”.¹⁷

16. Finally, in respect to the exercise of discretion, the Appeals Chamber has clarified that:

“[It] will not interfere with [a lower] Chamber’s exercise of discretion [...] merely because the Appeals Chamber, if it had the power, might have made a different ruling. [...] The function of the Appeals Chamber [is to review] the exercise of discretion by [a lower] Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with [a lower] Chamber’s exercise of discretion [...], 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. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions [including]: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is

¹⁶ See the “Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction (Appeals Chamber), [No. ICC-01/04-01/06-3121-Red A5](#), 1 December 2014, paras. 16-27. See also, the “Judgment on the appeal of the Defence against the ‘Decision on the admissibility of the case under article 19 (1) of the Statute’ of 10 March 2009” (Appeals Chamber), [No. ICC-02/04-01/05-408 OA3](#), 16 September 2009, paras. 46-48.

¹⁷ See the “Judgment on the appeal of the Defence against the ‘Decision on the admissibility of the case under article 19 (1) of the Statute’ of 10 March 2009”, *supra* note 16, para. 48. See also the “Corrigendum to Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled ‘Decision on the Admissibility and Abuse of Process Challenges’”, (Appeals Chamber), [No. ICC-01/05-01/08-962-Corr OA3](#), 26 October 2010, para. 103.

exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion.”¹⁸

2. Merits of the Grounds of Appeal

a) First Ground of Appeal

17. Under the first ground of appeal, the Defence argues that the Trial 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 modes of liability under article 25(3)(a) of the Statute.¹⁹

18. The Defence further submits in this regard that 1) there is a lack of consistent jurisprudence of the Court on the elements of co-perpetration, 2) the terms “common plan” and “essential contribution” require further definition, and 3) the absence of any ruling on the constituent elements violates Mr Yekatom’s right to be informed. The Common Legal Representatives will respond to each of these points in turn and demonstrate that the Trial Chamber did not err in law in its finding.

1. The Court’s jurisprudence is consistent in its interpretation of the constituent elements of co-perpetration

19. In its Appeal Brief, the Defence argues that “*contrary to the observations in the Impugned Decision, there appears to be a split in the [Court’s] case law on co-perpetration liability*”.²⁰ In support of its argument, the Defence cites an academic article from

¹⁸ See the “Judgment on the appeal of the Defence against the “Decision on the admissibility of the case under article 19 (1) of the Statute” of 10 March 2009, *supra* note 16, paras. 79-80. See also, the “Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the “Decision on Sentence pursuant to Article 76 of the Statute” (Appeals Chamber), [No. ICC-01/04-01/06-3122 A4 A6](#), 1 December 2014, paras. 41-42.

¹⁹ See the Appeal Brief, *supra* note 1, para. 12.

²⁰ *Idem*, para. 14.

2011²¹ that pre-dates all four trial and appeals judgements the Trial Chamber relied on to find that there is an established jurisprudence on co-perpetration before the Court.²²

20. Moreover, the Defence contradicts itself by stating that there *“has been a consistent practice of this Court that the constituent elements of co-perpetration liability as well as the underlying factual allegations are set out in a confirmation decision”*,²³ thereby admitting that there is in fact a consistent jurisprudence on the constituent elements of co-perpetration before the Court.

21. Furthermore, the Defence avers that *“when the Appeals Chamber discussed this mode in Lubanga, the language appears to suggest that it does not consider ‘indirect co-perpetration’ to be an actual form of liability”* and that this became more apparent when it referred to the views of Judge Van den Wyngaert.²⁴ The CLRV argue that it is far-fetched to conclude from the Appeals Chamber’s simple statement that *“[v]iews have also been expressed in the Court’s jurisprudence that article 25(3)(a) of the Statute provides for a fourth form of commission liability, whereby a perpetrator may commit a crime jointly with another person, where that other person commits the crime ‘through [yet] another person’”*²⁵ that it does not consider “indirect co-perpetration” to be an actual form of liability. Moreover, the reference to Judge Van den Wyngaert’s opinion is in no way an endorsement, but a simple reference to a differing view, as explicitly mentioned in the footnote quoting said finding.²⁶

²¹Idem, fn. 15 citing JAIN (N.), *“The Control Theory of Perpetration in International Criminal Law”*, *Chicago Journal of International Law*, vol. 12, 2011, p. 159.

²² See the Impugned Decision, *supra* note 8, fn. 42 citing the “Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction”, *supra* note 16, paras. 7, 445, 469, 473; the “Judgment” (Trial Chamber VI), [No. ICC-01/04-02/06-2359](#), 8 July 2019, paras. 773-774, 779-780; the “Judgment pursuant to Article 74 of the Statute” (Trial Chamber VII), [No. ICC-01/05-01/13-1989-Red](#), 19 October 2016, paras. 64-65, 68-69; the “Judgment pursuant to Article 74 of the Statute” (Trial Chamber I), [No. ICC-01/04-01/06-2842](#), 14 March 2012, paras. 980-981, 999.

²³ See the Appeal Brief, *supra* note 1, para. 30.

²⁴ Idem, para. 16.

²⁵ See the “Judgment on appeal of Mr Thomas Lubanga Dyilo against his conviction”, *supra* note 16, fn. 863.

²⁶ Ibid.

22. It should also be noted that since the Appeals Chamber's judgment in the *Lubanga* case, various chambers of the Court have recognised indirect co-perpetration as a mode of liability under the Statute.

23. Indeed, Trial Chamber VI in the *Ntaganda* case has explained that *"the concept of indirect co-perpetration entails a form of co-perpetration where the common plan is executed through other persons, who function as a tool of all of the co-perpetrators."*²⁷

24. Pre-Trial Chamber II in the *Ongwen* case has found that:

*"[t]he expression 'indirect co-perpetration', while not appearing in the Statute, has been used in the jurisprudence of the Court conventionally to refer to situations in which a person commits a crime 'jointly with' someone else and 'through' someone else within the meaning of article 25(3)(a) of the Statute, and which is a particular form of co-perpetration. In general, co-perpetration (i.e. commission of a crime 'jointly with another') describes the situation in which two or more persons work together in the commission of the crime so that the sum of their co-ordinated individual contributions results in the realisation of the objective elements of a crime."*²⁸

25. The Common Legal Representatives therefore submit that the Defence's argument that there is a lack of consistent jurisprudence on co-perpetration is inapposite and actually contrary to the Court's practice as it currently stands.

2. The terms "common plan" and "essential contribution" do not require further definition

26. In its Appeal Brief, the Defence argues that the *"Trial Chamber erred in implying that the terms 'common plan' and 'essential contribution' need no further definition in order for the Defence to be sufficiently informed"*.²⁹

27. In this regard, Trial Chamber VII in the *Bemba et al.* case held that a confirmation decision satisfied *"the minimum requirements of Article 67(1)(a) of the Statute"* when it clearly set out *"the 'facts and circumstances' of the case for the accused, presenting a*

²⁷ See the "Judgment", *supra* note 22, para. 772.

²⁸ See the "Decision on the confirmation of charges against Dominic Ongwen" (Pre-Trial Chamber II), [No. ICC-02/04-01/15-422-Red](#), 23 March 2016, para. 38.

²⁹ See the Appeal Brief, *supra* note 1, para. 22.

description of the factual allegations and their legal characterization".³⁰ With respect to the legal characterisation of the facts as subsumed within a form of individual criminal responsibility under article 25(3) of the Statute, various chambers have held that it is sufficient for the Prosecution to identify the form or forms of individual criminal responsibility which would accord to the set of material facts alleged in the charging document.³¹ The Common Legal Representatives argue that the same threshold applies to confirmation decisions, as there is no reason to request a greater degree of specificity from a pre-trial chamber than from the Prosecution in this context.

28. The Decision Confirming the Charges satisfies all these requirements: it presents a detailed description of the factual allegations and it clearly identifies the corresponding forms of individual criminal responsibility. What the Defence is requesting in the present case goes well beyond these requirements and finds no support in the Court's jurisprudence.

29. It is important to remark here, that even if the Pre-Trial Chamber had given an explicit interpretation of "common plan" and "essential contribution", the Trial Chamber would not be bound by said Chamber's interpretation of the law.³² Indeed, as the Trial Chamber recalled in the Impugned Decision, it is only bound by the "facts and circumstances" described in the Decision Confirming the Charges.³³

³⁰ See the "Decision on the Submission of Auxiliary Documents" (Trial Chamber VII), [No. ICC-01/05-01/13-992](#), 10 June 2015, para. 19.

³¹ See the "Decision on the date of the confirmation of charges hearing and proceedings leading thereto" (Pre-Trial Chamber I), [No. ICC-02/11-01/11-325](#), 14 December 2012, para. 29. See also, the "Decision on the 'Defence request to amend the document containing the charges for lack of specificity'" (Pre-Trial Chamber II), [No. ICC-02/11-02/11-143](#), 1 September 2014, paras. 7-9.

³² See article 21(2) of the Statute, which provides that "[t]he Court *may* apply principles and rules of law as interpreted in its previous decisions" (emphasis added).

³³ See the Impugned Decision, *supra* note 8, para. 25. See also, the "Decision on the Prosecution's Application for Notice to be given pursuant to Regulation 55(2) on Mr Yekatom's Individual Criminal Responsibility" (Trial Chamber V), [No. ICC-01/14-01/18-542](#), 2 June 2020, para. 9 and corresponding references; the "Decision on the Filing of a Summary of the Charges by the Prosecutor" (Trial Chamber II), [No. ICC-01/04-01/07-1547-tENG](#), 21 October 2009, paras 21-25; and the "Decision on the Applicable Procedure following the Prosecutor's Filing of Her Request for Corrections and Amendments of the Decision to Confirm the Charges" (Pre-Trial Chamber I), [No. ICC-01/12-01/18-608-Red-tENG](#), 21 February 2020, paras. 45-47.

3. Mr Yekatom's right to be informed has not been violated

30. The Common Legal Representatives submit that, although the Decision Confirming the Charges defines the parameters of the charges for trial,³⁴ it is not the *only* document that contains information on the charges. In this regard, the Appeals Chamber underlined that *“all documents that were designed to provide information about the charges, including auxiliary documents, must be considered to determine whether an accused was informed in sufficient detail of the charges”*.³⁵

31. According to the jurisprudence of the Court, and other international tribunals, documents which may serve as notice include the (original, updated, or amended) document containing the charges, in-depth analysis chart, pre-trial brief, opening statements, list of witnesses, witness statements, and/or witness summaries.³⁶

32. The Common Legal Representatives aver that the Prosecution's Trial Brief is an “auxiliary document” which provides further clarity and precision on Mr Yekatom's individual responsibility³⁷ and which must be taken into account when assessing whether the Accused's right to be informed pursuant to article 67(1)(a) of the Statute has been violated. As if foreseeing the current situation, the Appeals Chamber has held that *“where submissions by the Prosecutor made in advance of the trial hearings related to the factual allegations provide additional detail, this can be taken into account when*

³⁴ See the the “Judgment on appeal of Mr Thomas Lubanga Dyilo against his conviction”, *supra* note 16, para. 124.

³⁵ *Idem*, para. 128.

³⁶ See the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” (Pre-Trial Chamber II), [No. ICC-01/09-01/11-373](#), 23 January 2012, para. 98 ; the “Decision on the confirmation of charges” (Pre-Trial Chamber I), [No. ICC-01/04-01/10-465-Red](#), 16 December 2011, para. 84; the “Decision on the Three Defences' Requests Regarding the Prosecution's Amended Charging Document” (Pre-Trial Chamber I), [No. ICC-01/04-01/07-648](#), 25 June 2008, para. 25; and the “Decision on the confirmation of charges” (Pre-Trial Chamber I), [No. ICC-01/04-01/06-803-tEN](#), 29 January 2007, para. 150. See also ICTR, *Nzabonimana*, Case No. ICTR-98-44D-A, [Judgment](#) (Appeals Chamber), 29 September 2014, para. 261; ICTY, Case No. IT-05-87/1-A, *Dordević*, [Judgment](#) (Appeals Chamber), 27 January 2014, paras. 574, 577 and 682; SCSL, *Sesay et al.*, Case SCSL-04-15-A, [Judgment](#) (Appeals Chamber), 26 October 200p, paras. 126 and 167.

³⁷ See the “Prosecution's Trial Brief”, *supra* note 3, paras. 321-388.

determining whether the accused's right to be informed in detail of the charges has been violated".³⁸

33. Indeed, the Prosecution's Trial Brief provides the legal basis for each mode of liability alleged against Mr Yekatom, followed by an analysis of his contributions to the confirmed crimes, and then concludes with the evidence relevant to Mr Yekatom's intent and knowledge.³⁹ Given the additional information provided by the Trial Brief, the CLRV contend that Mr Yekatom's right to be informed in detail of the charges has not been violated.

34. In conclusion, the Common Legal Representatives submit that the Defence has failed to demonstrate that the Trial 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.

b) Second Ground of Appeal

35. Under the second ground of appeal, the Defence argues that the Trial Chamber erred in fact and in law when finding that Mr Yekatom was sufficiently informed of the "contours" of the "common plan" and his alleged "essential contribution" although the Pre-Trial Chamber had not used this terminology -established in the jurisprudence of the Court - to characterise the relevant facts.⁴⁰ It further submits that 1) sufficient notice requires clear legal characterisation of the facts, 2) specific language is needed when pleading co-perpetration liability, and 3) the absence of terminology precludes any reliable interpretation of how the facts are legally characterised. The Common Legal Representatives will respond to each of these points in turn and demonstrate that the Trial Chamber did not err in its finding.

³⁸ See the "Judgment on appeal of Mr Thomas Lubanga Dyilo against his conviction", *supra* note 16, para. 130.

³⁹ See the "Prosecution's Trial Brief", *supra* note 3, para. 328.

⁴⁰ See the Appeal Brief, *supra* note 1, para. 34.

1. Mr Yekatom is sufficiently informed of the “contours” of the “common plan” and his alleged “essential contribution”

36. In the Appeal Brief, the Defence contends that the Trial Chamber erred in “finding that the factual allegations need not be explicitly tied to the legal findings”.⁴¹ The CLRV submit that this is a gross mischaracterisation of the Trial Chamber’s conclusions. Indeed, in the Impugned Decision, the Trial Chamber highlighted exactly what the contours of the common plan are and the identities of Mr Yekatom’s alleged co-perpetrators, based on the Pre-Trial Chamber’s findings in the Decision Confirming the Charges.⁴²

37. The Common Legal Representatives argue that the Pre-Trial Chamber did in fact assess the evidence in light of the elements of each of the modes of liability listed in article 25 of the Statute.⁴³ Therefore, they contend that the Defence’s arguments do not reveal a discernible error and constitute no more than mere disagreements with the Trial Chamber’s assessment of the relevant facts. This should however not be equated to a lack of notice of the charges.

38. In the Appeal Brief, the Defence refutes the Trial Chamber’s interpretation of a number of factual findings of the Pre-Trial Chamber.⁴⁴ Without commenting on the merit of the Defence’s arguments, the CLRV observe that these matters should be debated at trial, and not in an interlocutory appeal before the Appeals Chamber.

39. In any case, the Common Legal Representatives aver that, the fact that the Pre-Trial Chamber did not expressly define Mr Yekatom’s contributions as “essential”, is not determinative. What *is* determinative is that the Pre-Trial Chamber has set out how the Accused’s conduct falls under article 25(3)(a) of the Statute.

⁴¹ *Idem*, para. 35.

⁴² See the Impugned Decision, *supra* note 8, paras. 28-32.

⁴³ See the Decision Confirming the Charges, *supra* note 2, para. 60.

⁴⁴ See the Appeal Brief, *supra* note 1, paras. 46-48.

2. No specific language is needed when pleading co-perpetration liability

40. The Defence argues that to assess whether sufficient notice has been provided, a “specific language” in the charging document in relation to the mode of co-perpetration is necessary.⁴⁵

41. However, contrary to what the Defence alleges, for the purposes of informing the Accused of the nature, cause and content of the charges, no specific language is required when pleading co-perpetration liability. Indeed, the ICTR Appeals Chamber in the *Gacumbitsi* case has explained that:

*“[t]he question is not whether particular words have been used, but whether an accused has been meaningfully ‘informed of the nature of the charges’ so as to be able to prepare an effective defence.”*⁴⁶

42. In a similar vein, the Chambers’ Practice Manual states that:

*“the required specificity of the charges depends on the nature of the case, including the degree of the immediate involvement of the suspect in the acts fulfilling the material elements of the crimes, and no threshold of specificity of the charges can be established in abstracto. What the Pre-Trial Chamber must verify is that the charges enable the suspect to identify the historical event(s) at issue and the criminal conduct alleged, in order to defend him or herself.”*⁴⁷

43. The CLRV submit that the Decision Confirming the Charges sufficiently enables Mr Yekatom to identify the historical events at issue and the criminal conduct alleged in order to defend himself, without the need to use specific language.

⁴⁵ *Idem*, paras. 39-42.

⁴⁶ See ICTR, *Gacumbitsi*, Case No. ICTR-2001-64-A, [Judgment](#) (Appeals Chamber), 7 July 2006, para. 165, referring to *Ntakirutimana and Ntakirutimana*, Cases ICTR-96-10-A and ICTR-96-17-A, [Judgement](#) (Appeals Chamber), 13 December 2004, para. 470. See also ICTY, *Popović et al.*, Case No. IT-05-88-A, [Judgment](#) (Appeals Chamber), 30 January 2015, para. 65.

⁴⁷ See the [Chambers’ Practice Manual](#), 2019, para. 38 (emphasis added).

3. The absence of specific wording in the Decision Confirming the Charges does not preclude the interpretation of how the facts are legally characterised

44. According to the Defence, “without the terminology ‘common plan’ and ‘essential contribution’ explicitly applied when legally characterising the factual allegations, the Defence is neither able to take notice from the text of the Confirmation Decision on its own, or to ascertain whether the Trial Chamber exceeded the confirmed parameters that the Pre-Trial Chamber intended to set”.⁴⁸

45. As argued above, the Decision Confirming the Charges is not the only document that should be taken into account when assessing whether the Accused has been sufficiently informed pursuant to article 67(1)(a) of the Statute.⁴⁹ The CLRV, therefore, contend that, contrary to what the Defence alleges, notice of the charges is not dependent on “*the text of the Confirmation Decision on its own*”.⁵⁰

46. Furthermore, the Pre-Trial Chamber sets the parameters for the scope of the facts and circumstances described in the charges,⁵¹ not the legal interpretation of the constituent elements. As also argued above, the Trial Chamber is not bound by any interpretations of the law by the Pre-Trial Chamber.⁵²

47. In conclusion, the Common Legal Representatives aver that the Defence has not shown that the Trial Chamber erred in finding that Mr Yekatom was sufficiently informed of the contours of the “common plan” and his alleged “essential contribution”, although the Pre-Trial Chamber had not used said terminology - established in the jurisprudence of the Court - to characterise the relevant facts.

⁴⁸ See the Appeal Brief, *supra* note 1, para. 49 (emphasis added).

⁴⁹ See *supra* para. 30.

⁵⁰ See the Appeal Brief, *supra* note 1, para. 49.

⁵¹ See article 74(2) of the Statute.

⁵² See *supra* para. 29.

c) *Relief sought*

48. Apart from the reversal of the Impugned Decision, the Defence is seeking the direct dismissal of the allegations of co-perpetration in the Decision Confirming the Charges pursuant to rule 158(1) of the Rules.⁵³ In the event the Appeals Chamber were to grant the Defence's appeal, the Common Legal Representatives submit that a dismissal of a mode of liability would be an inappropriate remedy to a breach of article 67(1)(a) of the Statute.

49. The CLRV contend that, logically, a way to remedy a lack of information would be to provide the missing information, rather than dismissing the entire mode of liability. As the mode of liability is important in order to fully recognise the harm suffered by the Victims, a dismissal of the mode of co-perpetration would deprive them of their right to the establishment of the truth and the recognition of their victimisation.

50. In this regard, the CLRV note that it has been the practice of Trial Chambers to instruct the Prosecution to provide a post-confirmation document containing the charges,⁵⁴ for example, to ensure that there is complete understanding of the "statement of facts" underlying the charges confirmed⁵⁵ or when the confirmation decision did not provide a readily accessible statement of the facts underlying each charge.⁵⁶

⁵³ See the Appeal Brief, *supra* note 1, para. 52.

⁵⁴ See the "Order for the prosecution to file an updated document containing the charges" (Trial Chamber V), [No. ICC-01/09-01/11-439](#), 5 July 2012, para. 6. See also, the "Order for the prosecution to file an amended document containing the charges" (Trial Chamber I), [No. ICC-01/04-01/06-1548](#), 9 December 2008; the "Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges" (Trial Chamber III), [No. ICC-01/05-01/08-836](#), 20 July 2010 (notified on 21 July 2010); and the "Decision on the Filing of a Summary of the Charges by the Prosecutor" (Trial Chamber II), [No. ICC-01/04-01/07-1547-tENG](#), 21 October 2009 (notified on 29 October 2009) directing the Prosecution to prepare a Summary of the charges.

⁵⁵ See the "Order for the prosecution to file an amended document containing the charges", *supra* note 54, paras. 12-13.

⁵⁶ See the "Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges", *supra* note 54, para. 30.

51. However, the Common Legal Representatives submit that in this case the Prosecution's Trial Brief, which is a document that may serve as notice, already contains clear and detailed information about Mr Yekatom's individual criminal responsibility. Therefore, no further information is required to be provided to the Defence at this stage.

52. Finally, dismissing co-perpetration as a mode of liability, would essentially overturn a finding of the Pre-Trial Chamber, while the Defence elected not to appeal the Decision Confirming the Charges. This course of action cannot stand. As the Common Legal Representatives have argued previously,⁵⁷ if the Defence wanted a dismissal of this mode of liability, it should have gone through the proper procedural channels and appealed the Decision Confirming the Charges when it had the opportunity to do so.⁵⁸

⁵⁷ See the "Version corrigée de « la Réponse conjointe des Représentants Légaux Communs des Victimes à la 'Motion to Dismiss Co-Perpetration Mode of Liability' de la Défense de M. Alfred Rhombot Yekatom (ICC-01/14-01/18-565-Conf) » 3 juillet 2020, ICC-01/14-01/18-577-Conf", *supra* note 7, paras. 13-14.

⁵⁸ *Ibid.*

IV. CONCLUSION

53. For the foregoing reasons, the Common Legal Representatives respectfully request the Appeals Chamber to dismiss the Defence's Appeal in its entirety.

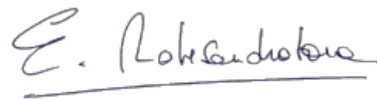


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Dated this 7th day of December 2020

At The Hague (The Netherlands), Bangui (Central African Republic), La Rochelle (France) and Saint Louis (Senegal)