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APPEALS CHAMBER

Before: Judge Chile Eboe-Osuji
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 *PROSECUTOR* v. *ALFRED YEKATOM AND PATRICE-EDOUARD NGAÏSSONA*

Public

**Prosecution Response to "Yekatom Defence Appeal Brief – Notice of Co-Perpetration"
and request for an expedited decision**

Source: Office of the Prosecutor

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INTRODUCTION

1. Yekatom's appeal against Trial Chamber V's decision rejecting his request to dismiss co-perpetration from the charges should be dismissed.¹ Yekatom's two grounds of appeal misunderstand charging under the Court's legal framework.
2. Contrary to Yekatom's first ground, the charges need not set out the constituent elements of the modes of liability in order to provide notice of the legal characterisation of the confirmed facts. Instead, the charges must identify which provisions apply (articles 25(3) and/or 28), the concrete sub-provision and the specific mode or modes. Moreover, Yekatom conflates the charges with the confirmation decision, and the roles of Pre-Trial and Trial Chambers. The Trial Chamber conducting the trial proceedings is not bound by the Pre-Trial Chamber's reasoning and interpretation of the law. In this case, the Trial Chamber has clarified that it will not depart from the Court's consistent jurisprudence on the objective elements of co-perpetration. Hence, Pre-Trial Chamber II's interpretation of co-perpetration in the Confirmation Decision is, at this stage, not pertinent. Yekatom has sufficient notice of the legal characterisation of the charged modes of liability, and clarity as to their interpretation for the purposes of the trial proceedings.
3. Further, Yekatom's second ground misconstrues the manner in which the facts are to be legally characterised: the charges need not follow a specific structure, and the facts need not be expressly linked to the constituent elements of the applicable modes of liability, nor do they need to be characterised using specific terminology developed in the jurisprudence.
4. Yekatom's appeal thus fails, and must be rejected. The Prosecution respectfully requests the Appeals Chamber to expeditiously decide on the appeal before the scheduled 9 February 2021 commencement of the trial.² Should the Appeals Chamber be unable to do so, the Prosecution respectfully requests that the Parties, Participants and the Registry be informed as much in advance as possible, so that logistical and other preparations may be adjusted accordingly.

¹ ICC-01/14-01/18-742 ("[Appeal](#)"); ICC-01/14-01/18-703-Conf (public redacted version: ICC-01/14-01/18-703-Red") ("[Decision](#)").

² ICC-01/14-01/18-589 ("[Trial Commencement Decision](#)"), para. 24.

SUBMISSIONS

5. The Trial Chamber granted Yekatom's leave to appeal the Decision with respect to two confined issues:

- Whether 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 (First Issue);
- Whether 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 PTC II had not used this terminology established in the jurisprudence of the Court to characterise the relevant facts (Second Issue).³

6. Yekatom advances two grounds of appeal which mirror the two issues.⁴ For the reasons described below, the Appeal should be dismissed, and the Decision affirmed. As a preliminary remark, the Prosecution notes that Yekatom's request before the Trial Chamber, and this Appeal, challenge the Confirmation Decision outside the applicable statutory framework. The Confirmation Decision in this case was issued on 11 December 2019; however, Yekatom did not seek leave to appeal it, nor did he request clarification from the Pre-Trial Chamber on any of the issues which he raises in this Appeal. It was only in his request before the Trial Chamber, filed more than six months after the issuance of the Confirmation Decision,⁵ that Yekatom argued that the Pre-Trial Chamber's failure to make findings on the 'constituent elements' of co-perpetration left him unable to defend himself against this mode of liability.⁶

7. Yekatom's failure to raise the matter promptly and before the very Chamber that could have provided him with the clarity he sought, evinces a lack of diligence in raising his

³ ICC-01/14-01/18-730 ("[ALA Decision](#)"), p. 8.

⁴ Yekatom argues that the first ground raises a legal error and the second ground a legal and factual error: [Appeal](#), paras. 12, 34.

⁵ ICC-01/14-01/18-565-Conf (public redacted version: ICC-01/14-01/18-565-Red) ("[Yekatom Request](#)").

⁶ [Yekatom Request](#), paras. 26-28, 32-33, 39, 44-46, 48.

concerns regarding sufficient notice of the charges within the mechanisms set out in the Court's legal framework.⁷

8. Moreover, Yekatom's complaint lies with the Confirmation Decision, which defines the parameters of the trial⁸ and from which his alleged lack of clarity regarding the co-perpetration mode of liability stems.⁹ Yet he appeals the Trial Chamber's decision which found that the charges provided sufficient notice of the modes of liability for which he is charged, and which recalled the relevant factual allegations confirmed by the Pre-Trial Chamber.¹⁰ Yekatom's strategy of appealing this decision, and not the Confirmation Decision, raises doubts as to the admissibility of this appeal and his alleged lack of notice. That said, the Prosecution considers that it is in the interest of the proceedings to obtain appellate certainty on the matters raised in the Appeal, and for this reason does not request its summary dismissal.¹¹ It nonetheless requests the Appeals Chamber to consider the fact that Yekatom remained silent when he had the opportunity to seek clarification or challenge the charges before the Pre-Trial Chamber, and to draw from that the necessary inferences in assessing any prejudice that Yekatom now claims to have suffered.

A. Ground 1: for the purpose of notice the charges need not set out the 'constituent elements' of the modes of liability

9. Yekatom's first ground contends that the 'legal characterisation' of the facts set out in the charges must spell out the 'constituent elements' of the modes of liability to satisfy an accused's right to notice of the charges under article 67(1)(a).¹² Yekatom uses the term 'constituent elements' in describing the requirements (or elements) of co-perpetration

⁷ W.A. Schabas and Y. McDermott, "Article 67" in K. Ambos & O. Triffterer (eds.), *The Rome Statute of the International Criminal Court A Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016) ("Schabas/McDermott in Ambos/Triffterer"), p. 1660, mn. 19 ("[[T]he accused may be expected to show some diligence in seeking information about the charge, for example by insisting upon attendance at the confirmation hearing"), citing ECtHR, *Campbell and Fell v. The United Kingdom*, App. Nos. 7819/77, 7878/77, [Judgment](#), 28 June 1984, para. 96.

⁸ ICC-01/04-01/06-3121-Red ("[Lubanga AJ](#)"), para. 124. See also ICC-01/09-02/11-382-Red ("[Kenyatta & Muthaura Confirmation Decision](#)"), paras. 56-57; ICC-01/05-01/08-3343 ("[Bemba TJ](#)"), para. 32; ICC-01/04-01/07-3436-tENG ("[Katanga TJ](#)"), para. 12.

⁹ See e.g. [Appeal](#), paras. 17-21, 28, 38, 43, 49.

¹⁰ [Decision](#), paras. 24, 37.

¹¹ In granting Yekatom's application for leave to appeal, Trial Chamber V reasoned 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": [ALA Decision](#), para. 8.

¹² [Appeal](#), paras. 12, 29-32.

developed in the Court's jurisprudence.¹³ He posits that this is necessary because there is no consistent jurisprudence on the objective elements of co-perpetration, and that Chambers have inconsistently defined the notions of 'common plan' and 'essential contribution'.¹⁴ In the alternative, Yekatom argues that even if the jurisprudence were consistent, the notice in this case is still insufficient because the Pre-Trial Chamber departed from it.¹⁵

10. Yet Yekatom misunderstands charging under the Court's legal framework. The charges need not set out the 'constituent elements' of the modes of liability (or of the crimes) in order to provide sufficient notice of the 'nature' of the charges.¹⁶ Instead the right to notice as far as the 'legal characterisation' is concerned is satisfied if the charges identify the specific crimes and modes of liability in accordance with the Statute. In this case, Yekatom is charged for "committing the [] crimes jointly with another or through another under article 25(3)(a)" and for "ordering the commission of the [] crimes under article 25(3)(b)". He is therefore charged with co-perpetration (and its variant, indirect co-perpetration) and indirect perpetration under article 25(3)(a), and ordering under article 25(3)(b). Accordingly, he has received adequate notice of the legal characterisation of the charges as far as his criminal responsibility for the crimes is concerned.

11. Moreover, Yekatom conflates confirmation decisions with 'charges', and confuses the roles of the Pre-Trial and Trial Chambers. A confirmation decision describes the parameters of the charges, but also includes the Pre-Trial Chamber's reasoning, including its interpretation of the law and supporting jurisprudence. Although a Trial Chamber is bound by the charges, it is not bound by a Pre-Trial Chamber's reasoning, nor by its interpretation of the crimes and the modes of liability confirmed. In this case, the Trial Chamber has confirmed that it will apply the Court's consistent jurisprudence on co-perpetration. Hence, since all relevant facts and circumstances have been confirmed the Pre-Trial Chamber's

¹³ [Yekatom Request](#), para. 22 ("The constituent objective elements of co-perpetration were set out in some detail in the *Bemba et al.* trial judgment"); [Appeal](#), p.5 ("There is a lack of consistent jurisprudence on the elements of co-perpetration"). Yekatom solely challenges the objective elements of co-perpetration, but not the subjective elements.

¹⁴ [Appeal](#), paras. 13-17, 22-28.

¹⁵ [Appeal](#), paras. 18-21.

¹⁶ The 'nature' of a charge has been referred to as "the precise legal qualification of the offence", while 'cause' has been described as "the facts underlying it". See *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T, [Judgement and Sentence](#), 25 February 2004, para. 29. The Rome Statute also refers to 'content'; yet commentators have suggested that there may be no meaningful distinction between 'cause' and 'content', "except perhaps a message of exhaustivity", and that "this provision must be taken in combination with the very thorough disclosure requirements that are imposed upon the Prosecutor": W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: OUP, 2016) ("Schabas"), p. 1029; Schabas/McDermott in Ambos/Triffterer, p. 1660, mn. 20.

interpretation of co-perpetration is irrelevant for the purposes of trial. In addition, the Trial Chamber has provided the clarity that Yekatom claimed was needed to prepare his defence. Accordingly, Yekatom's first ground must be dismissed.

i. Yekatom has received adequate notice of the nature of the charges

- a. *For the purposes of providing notice the charges need not set out the 'constituent elements' of a mode of liability*

12. The Court's legal framework does not require the charges to set out the 'constituent elements' of a mode of liability in order to provide sufficient notice.¹⁷ The charges must include: (a) the facts and circumstances that provide sufficient legal and factual basis to bring the person to trial; and (b) the legal characterisations of those facts by reference to the precise crimes and modes of liability.¹⁸ This is consistent with regulation 52(b) and (c) of the Regulations of the Court which require the Prosecutor to set out in the Document Containing the Charges ("DCC"):

(b) A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court;

(c) A legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.¹⁹

¹⁷ *Contra* [Appeal](#), para. 12.

¹⁸ See [Decision](#), para. 16 (and authorities cited in fn. 28, such as ICC-01/04-02/06-450 ("[Ntaganda UDCC Decision](#)"), para. 37 (stating that "charges" include a description of the relevant 'facts and circumstances', as well as a legal characterisation of the facts"); ICC-01/04-01/07-1547-tENG ("[Katanga Summary of Charges Decision](#)"), para. 10 (noting that a 'charge' encompasses "a legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 of the Statute and the precise form of participation under articles 25 and 28 of the Statute"); ICC-01/04-01/06-2842 ("[Lubanga TJ](#)"), para. 2; ICC-02/11-01/11-325 ("[Gbagbo Confirmation Date Decision](#)"), paras. 25, 29; ECtHR, *Penev v. Bulgaria*, App. No. 20494/04, [Judgment](#), 7 January 2010, paras. 33-34, 42; ECtHR, *Pélissier and Sassi v. France*, App. No. 25444/94, [Judgment](#), 25 March 1999, paras. 51-52; see also [Katanga TJ](#), para. 1485 ("From article 74(2) of the Statute and regulation 52 of the Regulations of the Court taken together, a "charge" must be understood as: - a statement of the facts and circumstances [...]; and - a legal characterisation of the facts, which must accord both with the crimes [...] and the precise form of participation therein under articles 25 and 28 of the Statute"). See also Regulation 52 of the [Regulations of the Court](#); ICC-01/04-01/06-2069-Anx1 ("[Lubanga Regulation 55\(2\) Notice Decision, Judge Fulford Minority Opinion](#)"), para. 11 ("[R]egulation 52 describes what constitutes a criminal charge for the purpose of trials before the ICC [...]); ICC-01/09-01/11-475 ("[Ruto & Sang Charges Order](#)"), para. 9 (indicating that under Regulation 52, a charge should consist of a statement of the facts and a legal characterisation of the facts).

¹⁹ See also rule 121(3) of the [Rules of Procedure and Evidence](#) ("The Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing") and article

13. With respect to the legal characterisation of the facts concerning individual criminal responsibility, the charges must identify (i) which of articles 25(3) or 28 apply; (ii) the relevant sub-provision; and (iii) the applicable mode or modes in the relevant sub-provision.²⁰ However, the charges need not set out the Chamber's interpretation of the objective and subjective elements of *all* applicable modes of liability. Otherwise, the charges would become a very lengthy academic exercise, which would defeat their practical purpose of informing an accused person of the Prosecution's case against him or her.²¹ This logic applies to both the charges initially set out in the Prosecutor's DCC²² and to those subsequently confirmed by the Pre-Trial Chamber in the confirmation decision.²³

14. The Appeals Chamber has confirmed that the 'constituent elements' of the modes of liability need not be pleaded in the charges. In the *Bemba et al.* case, the Appeals Chamber dismissed Arido's claim that he had received inadequate notice of the confirmed mode of liability (direct perpetration) because, *inter alia*, the confirmation decision did not set out its constitutive elements or the underlying factual allegations.²⁴ With respect to the legal

74(2) of the [Rome Statute](#) ("[...]The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. [...]").

²⁰ [Decision](#), para. 17; see also ICC-01/04-01/07-3363 ("[Katanga Regulation 55 AD](#)"), para. 100 ("under article 67(1)(a) of the Statute, the accused is entitled to be informed of the "nature, cause and content" of the charges, which includes both the factual allegations and their legal characterisation"); [Gbagbo Confirmation Date Decision](#), para. 29 ("As recalled above, together with a clear identification of the material facts underlying the charge, a "charge" also includes the legal characterisation of such material facts. In this regard, the Chamber notes that regulation 52 of the Regulations specifies that the DCC shall include "[a] legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28". With respect to the legal characterisation of the facts as subsumed within a form of individual criminal responsibility under article 25(3) or 28 of the Statute, the Prosecutor shall identify the form or forms of individual criminal responsibility which would accord to the set of material facts alleged"); see also ECtHR, *Mattoccia v. Italy*, App. No. 23969/94, [Judgment](#), 25 July 2000, para. 59; ECtHR, *Penev v. Bulgaria*, App. No. 20494/04, [Judgment](#), 7 January 2010, paras. 33, 42 (article 6 (3) (a) of the ECtHR affords the defendant the right to be informed not only of the "cause" of the accusation, that is, the acts he is alleged to have committed and on which the accusation is based, but also of the "nature" of the accusation, that is, the *legal characterisation* given to those acts).

²¹ [Ruto & Sang Charges Order](#), para. 8; [Onqwen, T-6](#), 19:20-21; ICC-01/04-01/10-465-Red ("[Mbarushimana Confirmation Decision](#)"), para. 112; ICC-01/04-01/06-2205 ("[Lubanga Regulation 55 AD](#)"), fn. 163; ICC-01/05-01/08-424 ("[Bemba Confirmation Decision](#)"), para. 208; [2019 ICC Chambers Practice Manual](#), para. 38. See also [ICTY Practice Manual](#), p. 35, para. 3.

²² The Prosecution is responsible for pleading the charges: [2019 ICC Chambers Practice Manual](#), para. 38; [Ruto & Sang Charges Order](#), para. 4; [Lubanga Regulation 55 AD](#), para. 94; ICC-01/05-01/13-992-Anx-Corr ("[Bemba et al. Updated DCC Judge Eboe-Osuji Partly Dissenting Opinion](#)"), para. 92.

²³ The Chambers Practice Manual recommends that a confirmation decision reproduces verbatim the charges in the Prosecutor's DCC as confirmed by the PTC: [2019 ICC Chambers Practice Manual](#), para. 61; see also para. 64 (stating that the PTC cannot alter the factual parameters of the charges and can only make the necessary adaptations to reflect the PTC's findings).

²⁴ See e.g. ICC-01/05-01/13-2145-Corr-Red ("[Arido's Appeal](#)"), paras. 34-35, 57-59; see also ICC-01/05-01/13-1904-Corr-Red2 ("[Arido's Closing Brief](#)"), paras. 58-73. The Prosecution had charged Arido as a direct or indirect co-perpetrator but the Pre-Trial Chamber confirmed the charges as a direct perpetrator and found that "[p]erpetration is subsumed under the mode of liability of co-perpetration": ICC-01/05-01/13-749 ("[Bemba et al. Confirmation Decision](#)"), para. 33.

characterisation of the mode of liability, the Appeals Chamber noted that the confirmation decision characterised Arido's role as a direct perpetrator.²⁵ Thus, the accused's right to notice with respect to the "nature" of the charges was satisfied by reference to the confirmed mode of liability (direct perpetration).²⁶

15. In the *Lubanga* Confirmation Decision, Pre-Trial Chamber I dismissed a similar argument and held that the DCC did not need to articulate the Prosecutor's "legal understanding of the various modes of liability and the alleged crimes".²⁷

16. In sum, for the purpose of providing notice, the charges do not need to include the 'constituent elements' of the modes of liability.

b. Yekatom has adequate notice of the legal characterisation of the charges

17. The charges in this case have been legally characterised in accordance with the Court's legal framework, and Yekatom has received adequate notice of the applicable modes of liability. The Confirmation Decision confirms Yekatom's individual criminal responsibility for "committing the [] crimes *jointly with another or through another* under article 25(3)(a) of the Statute", and for "ordering the commission of the [] crimes under article 25(3)(b)",²⁸ thereby identifying article 25, its relevant sub-provision, and the specific mode/s of liability contained therein. As Chambers have consistently held,²⁹ and as the Trial Chamber confirmed

²⁵ ICC-01/05-01/13-2275-Red ("[Bemba et al. AJ](#)"), para. 185, citing [Bemba et al. Confirmation Decision](#), para. 96.

²⁶ [Bemba et al. AJ](#), para. 185 citing [Bemba et al. Confirmation Decision](#), para. 96; see also [Bemba et al. AJ](#), para. 186 (where the Appeals Chamber considered Arido's request for information regarding the constitutive elements of direct perpetration to relate to 'obtaining clarity' and not objections to lack of notice); see [Decision](#), fn. 30.

²⁷ ICC-01/04-01/06-803 ("[Lubanga Confirmation Decision](#)"), para. 151 ("the Defence takes issue with the Prosecution for not sufficiently articulating the points of law underpinning certain parts of its Document Containing the Charges. However, *the Prosecution is under no obligation to articulate in the Document Containing the Charges its legal understanding of the various modes of liability and the alleged crimes*. That the Prosecution was not inclined to overly articulate this point in the Document Containing the Charges is not prejudicial to the rights of the Defence, since the various crimes charged and the mode of liability contemplated are clearly articulated") (emphasis added).

²⁸ ICC-01/14-01/18-403-Conf-Corr (public redacted version: ICC-01/14-01/18-403-Red-Corr) ("[Confirmation Decision](#)"), p. 103, paras. 99, 125, 140, 155 (emphasis added).

²⁹ [Decision](#), para. 23 (fns. 36-37 citing ICC-01/05-01/13-1989-Red ("[Bemba et al. TJ](#)"), para. 56; ICC-01/04-02/06-2359 ("[Ntaganda TJ](#)"), para. 772; ICC-02/04-01/15-422-Red ("[Onqwen Confirmation Decision](#)"), para. 38); see also K. Ambos, "Article 25" in Ambos/Triffterer, pp. 987-1001 (listing within art 25(3)(a): direct perpetration, co-perpetration, indirect perpetration and indirect co-perpetration); Schabas, pp. 568-569 ("According to the case law of the Court, perpetration within the meaning of article 25(3)(a) covers three categories of offenders: those who physically commit the crime (commission of the crime in person or direct perpetration); those who control the will of the physical perpetrators (commission through another person or indirect perpetration); and those who control the offence because of essential tasks assigned to them (commission of the crime jointly, or co-perpetration)", 572 ("By combining 'co-perpetration' using the 'control

in this case, commission ‘jointly with another or through another’ encapsulates co-perpetration (and its variant, indirect co-perpetration) and indirect perpetration.³⁰ In her Trial Brief, the Prosecutor has further confirmed that she will present her case against Yekatom in accordance with those modes.³¹ There can accordingly be no doubt as to the legal characterisation of the facts concerning Yekatom’s criminal responsibility.³²

18. In conclusion, Yekatom’s first ground of appeal must be dismissed, and the Appeals Chamber need not decide on the remainder of Yekatom’s arguments in this ground. Nonetheless, in order to correct Yekatom’s assertions, the Prosecution further submits that (i) Yekatom has all the required information to adequately prepare his defence; and (ii) the Court’s jurisprudence on co-perpetration is consistent.

ii. Yekatom has the information necessary to adequately prepare his defence

19. In arguing that he cannot adequately prepare his defence because the charges do not include the ‘constitutive elements’ of co-perpetration,³³ Yekatom conflates the charges with the confirmation decision, and confuses the different roles of Pre-Trial and Trial Chambers.³⁴ Although a confirmation decision defines the parameters of the charges,³⁵ it also includes a Pre-Trial Chamber’s reasoning in support of its conclusion that there is sufficient evidence to commit the suspected person to trial.³⁶ In that context, a Pre-Trial Chamber may set out its

over the crime’ thesis and indirect perpetration, judges at the Court have created a hybrid form of liability known as ‘indirect co-perpetration’”).

³⁰ [Decision](#), paras. 23-24. See also [Onqwen Confirmation Decision](#), paras. 38-39.

³¹ ICC-01/14-01/18-723-Conf (“Trial Brief”), paras. 328-388; see also paras. 392-410; 444-456; 462-479, 483-494. Cf. *Prosecutor v. Krnojelac*, IT-97-25-A, [Judgement](#), 17 September 2003, para. 138; *Prosecutor v. Kvočka et al.*, IT-98-30-1-A, [Judgement](#), 28 February 2005, para. 43; *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, [Judgement](#), 7 July 2005, para. 163. At the ICTY and ICTR, Chambers found that when the Prosecution charges “commission” of a crime, it must specify whether this means physical commission or participation in a joint criminal enterprise (“JCE”), or both, and which type/s of JCE. However, if the indictment did not use this term, the Appeals Chamber considered whether the accused person had received timely, clear and consistent notice of the type of JCE through, for example, the Prosecution’s trial brief.

³² In fact Yekatom does not allege lack of notice regarding the mode of liability for which he is charged; rather, he argues he has insufficient notice of the ‘constituent objective elements’ of co-perpetration. See [Yekatom Request](#), pp. 7-8; [Appeal](#), paras. 12, 30-31.

³³ [Appeal](#), para. 31.

³⁴ [Appeal](#), para. 30 (arguing that it has been a consistent practice to set out the constituent elements of co-perpetration liability and the factual allegations in the confirmation decision).

³⁵ See [2019 ICC Chambers Practice Manual](#), paras. 57, 62; [Lubanga AJ](#), para. 124; [Ntaganda TJ](#), para. 37. See also [Bemba et al. AJ](#), para. 196; ICC-01/05-01/13-992 (“[Bemba et al. Auxiliary Documents Decision](#)”), para. 15; ICC-01/05-01/08-935 (“[Bemba Second DCC Decision](#)”), para. 12; ICC-01/09-01/11-522 (“[Ruto & Sang Updated DCC Decision](#)”), paras. 13, 18; [Bemba TJ](#), para. 32; ICC-01/05-01/08-836 (“[Bemba First DCC Decision](#)”), para. 37; ICC-01/04-01/07-1547-tENG (“[Katanga Summary of Charges Decision](#)”), paras. 22-23.

³⁶ [Statute](#), article 61(7); [2019 ICC Chambers Practice Manual](#), para. 60 (“[...] in the confirmation decision the charges confirmed by the Pre-Trial Chamber must be distinguished from the Chamber’s reasoning in support of its findings”).

understanding of the crimes and the modes of liability and refer to relevant jurisprudence.³⁷ However, only the *charges* are binding on the Trial Chamber.³⁸ Accordingly, a Trial Chamber is not bound by the Pre-Trial Chamber's reasoning and assessment of the facts and evidence,³⁹ nor by its interpretation of the law.⁴⁰ Thus, while a Trial Chamber cannot go beyond the facts and circumstances of the confirmed charges⁴¹ and must apply the crimes and the modes confirmed (unless it triggers regulation 55 to apply a different crime or mode),⁴² it may interpret these legal concepts differently from the Pre-Trial Chamber.⁴³ This is an ordinary interpretative judicial function which does not require resort to regulation 55.

20. Because of this distinction between the charges and the Pre-Trial Chamber's reasoning, the Chambers Practice Manual recommends that a confirmation decision should clearly separate the charges from the non-binding parts of the Confirmation Decision.⁴⁴ In this case, the Pre-Trial Chamber did not follow the Practice Manual. The Confirmation Decision does

³⁷ Compare [Ongwen Confirmation Decision](#), paras. 37-44 (addressing, among others, the Defence's challenge to indirect co-perpetration) with pp. 71-104 (confirmed charges); ICC-01/12-01/15-84-Red ("Al Mahdi Confirmation Decision"), paras. 21-27 with pp. 22-27 (confirmed charges).

³⁸ [2019 ICC Chambers Practice Manual](#), para. 62 ("The binding effect of the confirmation decision is attached only to the charges and their formulation as reflected in the operative part of decision. No such effect is attached to the reasoning provided by the Pre-Trial Chamber to explain its final determination (narrative of events, analysis of evidence, reference to subsidiary facts, etc.)").

³⁹ ICC-01/12-01/18-608-Red-tENG ("Al Hassan Charges Procedure Decision"), para. 46 ("While the Trial Chamber is barred under article 74(2) of the Statute from exceeding the 'facts and circumstances described in the charges', it may nonetheless 'evaluate them differently'"); see also para. 47; [2019 ICC Chambers Practice Manual](#), para. 62.

⁴⁰ [Decision](#), para. 25 ("The Chamber recalls further that, in any case, it is not bound by PTC II's interpretation of the law. The Chamber is only bound by the 'facts and circumstances' described in the Confirmation Decision"); and authorities cited in fn. 40; see also ICC-02/04-01/15-428 ("Ongwen Charges ALA Decision"), para. 31 ("the Defence can raise at trial the matter of the proper interpretation of article 25(3)(c) of the Statute as the Trial Chamber is not legally bound to follow the Chamber's interpretation in the Confirmation Decision"); ICC-01/12-01/18-498-Red2 ("Al Hassan Charges ALA Decision"), paras. 36-37 ("La Chambre note qu'en outre[...] ces questions [d'interprétation du droit] pourront faire l'objet d'un nouveau débat devant la Chambre de première instance, qui n'est pas liée par les qualifications juridiques de la Chambre, et qui procédera à sa propre évaluation de la preuve"); see also [Lubanga TJ](#), paras. 1008-1013 (where the Trial Chamber departed from the Pre-Trial Chamber's endorsement of *dolus eventualis*).

⁴¹ See [Statute](#), article 74(2); [Ntaganda TJ](#), para. 37; [2019 ICC Chambers Practice Manual](#), paras. 58 and 62. See also [Decision](#), para. 25.

⁴² [RoC](#), regulation 55(1) ("In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges"). See also [Katanga Regulation 55 AD](#), paras. 87, 100; [Lubanga Regulation 55 AD](#), paras. 77, 84.

⁴³ The Prosecutor is not required to present all her evidence for confirmation. Hence a Trial Chamber will consider additional evidence and enter findings to a higher standard than at confirmation (*i.e.* beyond reasonable doubt): [Al Hassan Charges Procedure Decision](#), para. 46; see similarly ICC-01/05-01/08-1386 ("Bemba Admission Evidence AD"), para. 80; ICC-01/04-01/10-514 ("Mbarushimana Confirmation AD"), paras. 47-48.

⁴⁴ [2019 ICC Chambers Practice Manual](#), para. 65 ("It is fundamental that the structure of the confirmation decision makes clear the distinction between the Chamber's reasoning, on the one hand, and the Chamber's disposition as to the material facts and circumstances described in the charges and their legal characterisation as confirmed, on the other hand"); see also para. 66. The previous version of the Chambers Practice Manual contained the same recommendation: [2017 ICC Chambers Practice Manual](#), p. 17.

not include a self-contained section setting out the charges; instead, the operative part cross-references to other parts of the Confirmation Decision.⁴⁵ Despite the structural choices made by the Pre-Trial Chamber, the charges need not set out the ‘constituent elements’ of the modes of liability.

21. Further, whether a confirmation decision must contain a Pre-Trial Chamber’s interpretation of the applicable law is case-specific. No provision requires it.⁴⁶ The necessity to do so depends on the circumstances of each case, and falls within a Chamber’s obligation to provide a reasoned decision.⁴⁷ For example, it may be particularly appropriate if there is no or limited jurisprudence on a particular crime or mode of liability,⁴⁸ or if the Chamber provides compelling reasons to depart from consistent jurisprudence,⁴⁹ or if the Defence has challenged the compatibility of a particular crime or mode of liability with the Statute.⁵⁰

22. As noted, the Appeals Chamber need not rule on the sufficiency of the reasoning of the Confirmation Decision in this case.⁵¹ The charges are sufficiently specific and clear, both with respect to the factual allegations and their legal characterisation.⁵² Nor does Yekatom challenge the Pre-Trial Chamber’s legal characterisation of his conduct as a co-perpetrator. Instead he argues that he does not have enough information about the *Pre-Trial Chamber’s*

⁴⁵ [Confirmation Decision](#), para. 241; see [Decision](#), para. 33.

⁴⁶ See [Statute](#), article 61(7) (requiring the Pre-Trial Chamber to “determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged”); see also [Mbarushimana Confirmation AD](#), para. 47 (“the confirmation of charges hearing is not an end in itself but rather serves the [limited] purpose of filtering out those cases and charges for which the evidence is insufficient to justify a trial”); see similarly [Ongwen Confirmation Decision](#), para. 14; ICC-01/12-01/18-461-Corr-Red (“[Al Hassan Confirmation Decision](#)”), para. 42.

⁴⁷ ICC-01/04-01/06-773 (“[Lubanga First Redactions AD](#)”), para. 20 (“The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the respective Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion”).

⁴⁸ [Lubanga Confirmation Decision](#), paras. 322-367; Cf. [Decision](#), para. 18.

⁴⁹ Consistently with the jurisprudence of the ad hoc tribunals the ICC Appeals Chamber has found that it would only depart from previous jurisprudence if it has ‘convincing reasons to do so’: ICC-02/11-01/15-172 (“[Gbagbo Victims Participation Decision](#)”), para. 14 (finding that “while the Appeals Chamber has discretion to depart from its previous jurisprudence, it will not readily do so, given the need to ensure predictability of the law and the fairness of adjudication to foster public reliance on its decisions” and referring to ICC-01/05-01/08-566 (“[Bemba Victims Participation AD Reasons](#)”), para. 16 where the Appeals Chamber found that “absent ‘convincing reasons’ it will not depart from its previous decisions”). See also *Prosecutor v. Aleksovski*, IT-95-14/1-A, [Judgement](#), 24 March 2000, paras. 107-108.

⁵⁰ See e.g. ICC-01/04-01/07-717 (“[Katanga & Ngudjolo Confirmation Decision](#)”), para. 474; ICC-01/09-01/11-373 (“[Ruto & Sang Confirmation Decision](#)”), para. 286; [Ongwen Confirmation Decision](#), para. 37. Neither Yekatom nor Ngaïssona challenged the notion of co-perpetration in the confirmation hearing.

⁵¹ See *above*, para. 18.

⁵² See *above*, para. 17; see also ICC-01/14-01/18-585 (“[Additional Details Decision](#)”), para. 34 (where the Trial Chamber found that Yekatom had received adequate notice with respect to the charges of murder in the context of the attack on Bangui, and the recruitment and use of children under 15 years in hostilities).

interpretation of co-perpetration.⁵³ However, the Pre-Trial Chamber's interpretation is not relevant at this stage since the Trial Chamber (now the competent chamber) is not bound by its reasoning.⁵⁴ Moreover, the Trial Chamber has clarified that:

it sees no reason to depart from the existing jurisprudence of the Court, and note[d], in particular, the jurisprudence of the Appeals Chamber, regarding the objective elements of co-perpetration.⁵⁵

23. Accordingly, Yekatom has sufficient clarity to adequately prepare his defence for the purposes of trial.⁵⁶

iii. The jurisprudence on co-perpetration under article 25(3)(a) is consistent

24. Yekatom does not accurately present the Court's jurisprudence on the objective elements of co-perpetration and ignores the facts of his case.⁵⁷ The notion of 'common plan' simply means, and has been interchangeably used to convey, an 'agreement' in the context of the commission of a crime.⁵⁸ According to the Court's jurisprudence, such an agreement must have a critical element of criminality but could also be directed at the commission of the crimes;⁵⁹ it can be express or implied, previously arranged or extemporaneously arise.⁶⁰ In Yekatom's case the agreement(s) alleged are objectively criminal and their goal, as described in the Confirmation Decision, was precisely to perpetrate the charged crimes. Accordingly, any theoretical discussion on whether a common plan must be wholly criminal or need only have an element of criminality simply does not arise. Yekatom also misunderstands the definition and assessment of an 'essential contribution', as articulated in the Court's jurisprudence.⁶¹ While the co-perpetrators' contributions must have a causal effect on the

⁵³ See above, para. 9.

⁵⁴ [Appeal](#), para. 20.

⁵⁵ [Decision](#), para. 26.

⁵⁶ *Contra* [Appeal](#), paras. 29-31. This approach is fully consistent with Judge Fulford's separate opinion in *Lubanga* Trial Judgment, where he expressed his reservations to the Pre-Trial Chamber's interpretation of co-perpetration but he still applied it in the final judgment. Judge Fulford considered it unfair to change the interpretation of article 25(3)(a) at the end of the trial without warning the parties that the Chamber may apply a different test: [Lubanga TJ](#), Judge Fulford Separate Opinion, paras. 2-3, 19-21. However, Trial Chamber V will not depart from the existing jurisprudence, and has clarified this before the start of the trial. Yekatom therefore knows which are the constituent elements of co-perpetration and can prepare his defence accordingly.

⁵⁷ *Contra* [Appeal](#), paras. 18-28.

⁵⁸ *Contra* [Appeal](#), paras. 22-23. See e.g. [Katanga & Ngudjolo Confirmation Decision](#), para. 522; [Lubanga Confirmation Decision](#), para. 343; [Lubanga TJ](#), paras. 980-981; [Bemba et al. TJ](#), para. 65; see also E. van Sliedregt and L. Yanev in J. de Hemptinne, R. Roth, E. van Sliedregt (ed.), *Modes of Liability in International Criminal Law* (Cambridge: CUP, 2019), p. 96 ("The terms 'common plan' and 'agreement' do not differ in their legal meaning and have been used interchangeably, as synonyms").

⁵⁹ [Lubanga AJ](#), para. 446; [Ntaganda TJ](#), para. 776; [Bemba et al. TJ](#), para. 67.

⁶⁰ [Lubanga AJ](#), para. 445; [Ntaganda TJ](#), para. 775; [Bemba et al. TJ](#), para. 66.

⁶¹ [Appeal](#), paras. 25-27.

crime (*i.e.* without the contributions, the crime could not have been committed or would have been committed in a significantly different way),⁶² the contributions can be at the different stages of the common plan, including at the planning or preparation stage.⁶³ This is why the role and tasks assigned to a co-perpetrator in the framework of the common plan are important considerations in assessing the essentiality of the contributions.⁶⁴

25. The Court's jurisprudence on the objective elements of co-perpetration is largely consistent. Although Yekatom argued otherwise before the Trial Chamber,⁶⁵ he now submits that the jurisprudence is not consistent.⁶⁶ However, he provides no substantiation and merely cites (without explanation) a 2011 academic publication and the concurring opinion of Judge Van den Wyngaert in the *Ngudjolo* trial judgment.⁶⁷ In any event, the jurisprudence on the objective elements of co-perpetration has been largely consistent since Pre-Trial Chamber I endorsed the 'control over the crime theory' in the *Lubanga* Confirmation Decision in early 2007.⁶⁸ Likewise, since the *Katanga* Confirmation Decision was issued in September 2008,⁶⁹ numerous Chambers have relied on the variant form of indirect co-perpetration.⁷⁰ Thus, while

⁶² [Bemba et al. AJ](#), para. 820.

⁶³ [Bemba et al. AJ](#), paras. 810, 819; [Lubanga AJ](#), paras. 469, 473. Moreover, a Trial Chamber may find that a co-perpetrator has made an essential contribution based on the cumulative effect of his/her conduct (his/her activities "taken as a whole" and considered "in conjunction with the other co-perpetrators"): [Bemba et al. AJ](#), para. 812.

⁶⁴ *Contra* [Appeal](#), paras. 25-27 (fns. 25-29). Moreover, the [Ntaganda Confirmation Decision](#) (ICC-01/04-02/06-309, paras. 108-117) and [Ntaganda TJ](#) (paras. 780, 852-857) discussed, and entered findings, on Ntaganda's essential contribution. Katanga was convicted under article 25(3)(d), and [Katanga TJ](#), para. 1399 defined indirect perpetration.

⁶⁵ [Yekatom Request](#), paras. 23 ("largely consistent"), 24 ("consistent line of jurisprudence").

⁶⁶ [Appeal](#), paras. 13-17.

⁶⁷ [Appeal](#), paras. 14,16. Moreover, the article cited does not support Yekatom's proposition since it assesses German criminal law, recalls the ICTY jurisprudence on JCE and only refers to *Lubanga* and *Katanga* confirmation decisions

⁶⁸ See *e.g.* [Lubanga Confirmation Decision](#), paras. 330-348; [Katanga & Ngudjolo Confirmation Decision](#), paras. 519-526; ICC-02/05-02/09-243-Red ("Abu Garda Confirmation Decision"), para. 160; [Bemba Confirmation Decision](#), para. 350; ICC-02/05-03/09-121-Corr-Red ("[Banda & Jerbo Confirmation Decision](#)"), paras. 128-149; [Al Hassan Confirmation Decision](#), paras. 796-808; [Ntaganda Confirmation Decision](#), para. 104.

⁶⁹ [Katanga & Ngudjolo Confirmation Decision](#), paras. 488-539.

⁷⁰ [Ruto & Sang Confirmation Decision](#), paras. 290-292; [Kenyatta & Muthaura Confirmation Decision](#), para. 297; [Ntaganda Confirmation Decision](#), paras. 104; [Gbagbo Confirmation Decision](#), para. 230 (fn. 538); [Ongwen Confirmation Decision](#), paras. 38-41; see also [Al Hassan Confirmation Decision](#), paras. 809-814. See [Ntaganda TJ](#), para. 772 (noting that "indirect co-perpetration in this case should not be seen as a stand-alone mode of liability, but as a particular form of co-perpetration, which is compatible with the wording of the Statute"); Ambos in Ambos/Triffterer, 'Article 25', p. 997, mn. 14 (explaining that "indirect co-perpetration [...] does not constitute a new (fourth) mode of attribution, but is only the result of the 'factual coincidence of two recognized forms of perpetration [co-perpetration and indirect perpetration]'. Consequently, this form of perpetration easily fits into subpara.(a)"). *Contra* [Appeal](#), para. 16. Yekatom selectively quotes footnote 863 of the [Lubanga AJ](#) and incorrectly argues that the Appeals Chamber did not consider indirect co-perpetration to be an actual form of liability; as is apparent from its reliance on Judge Van den Wyngaert's opinion. To the contrary, the Appeals Chamber cited with approval the [Katanga & Ngudjolo Confirmation Decision](#) and [Ruto & Sang Confirmation Decision](#) (which had endorsed indirect co-perpetration), and noted that Judge Van den Wyngaert had expressed "a different view on this matter".

in 2012 Judge Fulford expressed reservations to certain aspects of the ‘control over the crime’ theory,⁷¹ and Judge Van den Wyngaert disagreed with the application of indirect co-perpetration in the *Katanga & Ngudjolo* case,⁷² the fact remains that no Chamber has departed from the notion of co-perpetration and its objective elements. Significantly, the Appeals Chamber has expressly confirmed it.⁷³

26. In conclusion, for the reasons set out above Yekatom’s first ground of appeal should be dismissed.

B. Ground 2: Yekatom was sufficiently informed of the facts supporting co-perpetration and specific terminology was not required

27. Yekatom claims that the Trial Chamber erred in finding that he was sufficiently informed of the contours of the ‘common plan’ and his alleged essential contribution.⁷⁴ He misconstrues the manner in which the facts must be set out in the charges: the facts do not need to be expressly linked to the constituent elements of the applicable modes of liability, nor do they need to be characterised using specific terminology developed in the jurisprudence (such as “common plan” and “essential contribution”). The charges in this case provide sufficient notice of the legal characterisation of the facts amounting to co-perpetration,⁷⁵ and in any event, Yekatom has received subsequent information providing further notice of this.⁷⁶

28. As a preliminary matter, the Prosecution emphasises that Yekatom’s second ground of appeal does not relate to whether or not the factual allegations concerning co-perpetration

⁷¹ [Lubanga TJ](#), Judge Fulford Separate Opinion. Judge Fulford disagreed with the requirement that the contribution be essential (para. 17) but did not disagree with the notion of common plan or agreement (para. 15: “This self-evidently necessitates a sufficient meeting of minds, by way of an agreement, common plan or joint understanding”).

⁷² ICC-01/04-02/12-4 (“[Ngudjolo TJ](#), Judge Van den Wyngaert”), para. 64 (stating that “the concept of “indirect coperpetration”, as interpreted by Pre-Trial Chamber I, has no place under the Statute as it is currently worded”) (emphasis added); but see para. 62 (where Judge Van den Wyngaert accepted indirect co-perpetration through one person/organisation: “I accept that different forms of criminal responsibility under the Statute may be combined, as long as all the elements of each form are proven. Accordingly, when A and B commit a crime through C by jointly subjugating the latter’s will, I would have no problem in holding A and B jointly responsible for C’s behaviour (Article 25(3)(a) second plus third alternative)”). Judge Van den Wyngaert disagreed with indirect co-perpetration as defined in *Katanga & Ngudjolo* case where two persons (Katanga and Ngudjolo) used their respective organisations (FNI and FPRJ), rather than two persons using one organisation (i.e. the *Ntaganda* and *Ongwen* cases).

⁷³ [Lubanga AJ](#), paras. 445-451; 469-473; [Bemba et al. AJ](#), paras. 818-820; see also [Bemba et al. TJ](#), para. 64.

⁷⁴ [Appeal](#), para. 34.

⁷⁵ *Contra* [Appeal](#), paras. 34-49.

⁷⁶ See below para. 32.

were confirmed.⁷⁷ The Trial Chamber has confirmed that the Confirmation Decision provided sufficient notice of the facts establishing the objective elements of co-perpetration.⁷⁸ Instead, the second ground of appeal concerns whether the Trial Chamber was correct to conclude that certain facts in the Confirmation Decision corresponded to a “common plan” and “essential contribution”, when the Pre-Trial Chamber did not itself use that terminology to describe them. In the instances where Yekatom suggests that the Confirmation Decision does not include the factual findings relevant to establishing co-perpetration, those arguments should be summarily dismissed.⁷⁹ And, for the reasons that follow, he otherwise has not demonstrated any error in the Trial Chamber’s conclusion that he received adequate notice of the facts underlying the objective elements of co-perpetration. His second ground of appeal should be dismissed.

29. *First*, Yekatom misconstrues the manner in which the facts must be legally characterised.⁸⁰ He contends that the facts must be explicitly tied to the elements of co-perpetration, including “the contours of the common plan and its implementation as well as the accused’s contribution”.⁸¹ However, this level of detail in the legal characterisation of the facts is not required, as the Trial Chamber rightly found.⁸² Rather, as noted above, sufficient notice of the legal characterisation of the facts concerning individual criminal responsibility requires that the charges identify (i) which of articles 25(3) and/or 28 apply; (ii) their relevant sub-provisions; and (iii) the applicable mode or modes of liability in the relevant sub-provisions.⁸³ As explained above, the charges have been legally characterised in such a manner in this case.⁸⁴

⁷⁷ While the second ground as originally framed by Yekatom contained that allegation, the Trial Chamber found that Yekatom had mischaracterised the Decision, and reframed the second issue as such: “whether [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 PTC II had not used this terminology established in the jurisprudence of the Court to characterize the relevant facts”: [ALA Decision](#), para. 14.

⁷⁸ [Decision](#), paras. 27-37; [ALA Decision](#), para. 13 (stating that “[i]ts 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”).

⁷⁹ *Contra* [Appeal](#), paras. 37, 43. Thus, the second ground of appeal raises a legal or procedural error.

⁸⁰ *Contra* [Appeal](#), paras. 35-38.

⁸¹ [Appeal](#), para. 36.

⁸² [Decision](#), para. 18 (“The Chamber considers 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 further set out the constituent legal elements underling the alleged mode(s) of liability. This is even more so where the constituent legal elements are well established in the jurisprudence of the Court. Thereby, the Chamber considers that the accused receives sufficient notice when the precise mode of liability with which he/she is charged is identified.”).

⁸³ *See above* paras. 12-13; [Decision](#), para. 17.

⁸⁴ *See above* para. 17.

30. *Second*, there is no requirement as to how charges must be structured,⁸⁵ nor does Yekatom cite any authority supporting his contention that the charges must expressly link the facts to the constituent legal elements of the modes of liability. The authorities that he cites are inapposite, confirming only that an accused person must be informed of the factual basis on which the Prosecution alleges his or her mode of liability is established.⁸⁶ What matters is that the charges are clear and unambiguous as to the facts and the precise mode of responsibility alleged.⁸⁷ This requirement is met in this case, as the Trial Chamber confirmed.⁸⁸

31. Nor was the Trial Chamber precluded from assessing the facts and circumstances in the Confirmation Decision to conclude that Yekatom had received sufficient notice of the facts underlying the common plan and his essential contribution, regardless of how those facts were organised in the Confirmation Decision and its lack of specific terminology.⁸⁹ The Trial Chamber has a “broad discretion to interpret the facts” and is entitled to “draw out the ‘facts and circumstances’ of the charges, as it considers appropriate, from the decision of the Pre-Trial Chamber in its totality, while respecting the Pre-Trial Chamber’s findings as to the scope of the charges”.⁹⁰ Accordingly, while the Pre-Trial Chamber assessed Yekatom’s contributions in respect of each charged incident⁹¹ and not through the lens of a common plan,⁹² the Trial Chamber did not err in construing the same facts and circumstances to find

⁸⁵ [2019 ICC Chambers Practice Manual](#), para. 38 (stating, albeit in the context of the Prosecutor, that “[t]he Pre-Trial Chamber shall bear in mind that the decision on what to charge, as well as how the charges shall be formulated, is fully within the responsibility of the Prosecutor”).

⁸⁶ [Appeal](#), para. 36, fns. 35-36. The Appeals Chamber in *Bemba* stated that an accused person charged under the mode of liability of command responsibility must be informed of the factual allegations on which the Prosecutor seeks to establish their failure to take all necessary and reasonable measures within his or her power to prevent or repress the crimes’ commission or to submit the matter to the competent authorities for investigation and prosecution: ICC-01/05-01/08-3636-Red (“*Bemba AJ*”), para. 186. In *Lubanga*, the Appeals Chamber set out the factual allegations that must be pleaded in respect of co-perpetration: [Lubanga AJ](#), para. 123. In the *Lubanga* Trial Judgment, Judge Fulford stated in his separate opinion that the accused needs to be aware of the factual allegations against him and “the basic outline of the legal framework against which those facts will be determined”: ICC-01/04-01/06-2842 (“*Lubanga TJ*, Judge Fulford Separate Opinion”), para. 20.

⁸⁷ [2019 ICC Chambers Practice Manual](#), para. 59 (stating that the “charges presented by the Prosecutor and those finally confirmed by the Pre-Trial Chamber [must be] clear and unambiguous [...]”).

⁸⁸ [Decision](#), para. 27 (finding that “Mr Yetakom has been provided with sufficient notice of the facts establishing the objective elements of co-perpetration”).

⁸⁹ *Contra* [Appeal](#), paras. 44-47.

⁹⁰ ICC-01/12-01/18-789-AnxA (“*Al Hassan Conduct of Proceedings Directions*”), paras. 9-10. See also [2019 ICC Chambers Practice Manual](#), para. 58 (“The description of the facts and circumstances in the charges as confirmed by the Pre-Trial Chamber is binding on the Trial Chamber”).

⁹¹ [Confirmation Decision](#), paras. 86-92, 98-99 (re the 5 December 2013 Attack); 113-117, 124-125 (re Yamwara School); 129-137, 139-140 (re the PK9-Mbaiki Axis); 145-152, 154-155 (re child soldiers).

⁹² [Confirmation Decision](#), paras. 56-57 (stating that it considered it “conceptually and methodologically appropriate to assess the issue of the individual criminal responsibility of the suspects by looking at their alleged contributions in respect of each of the charged incidents and at the evidence cited in support of those allegations”), 60 (stating that “[b]eing aware of the limited and specific purpose of the confirmation of charges

that they equally provide sufficient notice of the facts underlying the objective elements of co-perpetration, including through a common plan.⁹³ This was a permissible instance of the Trial Chamber appreciating and organising the properly noticed facts and circumstances in the charges differently to the Pre-Trial Chamber.⁹⁴

32. *Third*, the charges and the confirmation decision are not the *only* instruments that provide notice to the accused as to the nature, cause and content of the charges under article 67(1)(a). Further information regarding the Prosecution's case theory can be provided in the Prosecution's trial brief, and is relevant to determining whether the accused has received sufficient notice.⁹⁵ In this case, the Prosecution has further demonstrated in its Trial Brief how the confirmed facts satisfy the constituent elements of co-perpetration, explicitly addressing the matters identified by the Trial Chamber as being relevant to establishing co-perpetration.⁹⁶ The Trial Brief identifies: (i) Yekatom's alleged conduct that gives rise to criminal responsibility, including the contours of the agreement(s) pursuant to which the crimes were carried out,⁹⁷ its implementation⁹⁸ and his essential contribution;⁹⁹ (ii) the related mental element;¹⁰⁰ and (iii) the identities of any alleged co-perpetrators.¹⁰¹

33. *Fourth*, the Pre-Trial Chamber was not required to use specific terminology for co-perpetration in the Confirmation Decision,¹⁰² given that the charges were clear as to the facts and circumstances and their legal characterisation.¹⁰³ The absence of specific terminology in the charges in other cases has not hindered the accused from receiving proper notice. For

stage of the proceedings, the Chamber does not consider it necessary or appropriate, for the purposes of the present decision, to determine or otherwise address the extent to which either the notion of a common plan, or its specific variation used in this case, are compatible with the statutory framework").

⁹³ [Decision](#), paras. 27-37.

⁹⁴ [Al Hassan Conduct of Proceedings Directions](#), para. 10 ("[...] [A]lthough the Trial Chamber cannot go beyond the facts and circumstances described in the charges, it may nevertheless appreciate them differently").

⁹⁵ [Additional Details Decision](#), para. 34 (finding that "the charges in relation to the matters raised in the Motion provide the accused with adequate notice under Article 67(1)(a) of the Statute. Further details underlying the charges may, depending on the circumstances, be contained in other auxiliary documents, such as the Trial Brief."); [Lubanga AJ](#), para. 124; [Ntaganda TJ](#), para. 37; Schabas/McDermott in Ambos/Triffterer, p. 1660, mn. 20 ("[I]n the ICC Statute this provision must be taken in combination with the very thorough disclosure requirements that are imposed upon the Prosecutor. Taken as a whole, these provisions indicate the desire of the Rome Conference that the Prosecutor ensure that the accused is not taken by surprise during the proceedings, and that he or she benefits from a level of information going well beyond the thresholds set by domestic justice systems and endorsed by international human rights tribunals as being acceptable").

⁹⁶ [Decision](#), para. 19, citing [Lubanga AJ](#), para. 123. *Contra* [Appeal](#), para. 37.

⁹⁷ Trial Brief, paras. 6-7, 379, 389.

⁹⁸ Trial Brief, paras. 389-390, 392-409, 444-455, 462-478, 483-493.

⁹⁹ Trial Brief, paras. 355-378.

¹⁰⁰ Trial Brief, paras. 379-388, 410, 456, 479, 494.

¹⁰¹ Trial Brief, paras. 86, 322, 356-357, 363, 379.

¹⁰² *Contra* [Appeal](#), paras. 39-42.

¹⁰³ See *above* paras. 17, 28.

example, in *Bemba et al.*, the Confirmation Decision confirmed Bemba, Kilolo and Mangenda's liability as co-perpetrators under article 25(3)(a)¹⁰⁴ without using the terms "common plan"¹⁰⁵ or "essential contributions". The Appeals Chamber found that while the Confirmation Decision did not use these "term[s] of art", the accused nonetheless had sufficient notice of co-perpetration.¹⁰⁶ In *Gbagbo and Ongwen*, the Pre-Trial Chambers did not define the Accused's contributions as "essential" in the charges, despite also confirming their liability as co-perpetrators under article 25(3)(a).¹⁰⁷

34. Moreover, the fact that the Pre-Trial Chamber declined to confirm Ngaïssona's liability under article 25(3)(a) because his contributions were not "essential", but did not use that language when assessing Yekatom's contributions does not signify that Yekatom's contributions were not essential.¹⁰⁸ To the contrary. If it had also not found Yekatom's contributions to be essential, it stands to reason that it would similarly *not* have confirmed Yekatom's charges under article 25(3)(a).

35. Finally, Yekatom's reference to the pleading of joint criminal enterprise in the ICTY is inapposite.¹⁰⁹ The factual allegations that must be pleaded in respect of co-perpetration in this Court were set out in *Lubanga*, as recalled by the Trial Chamber in this case.¹¹⁰ The Trial Chamber confirmed that Yekatom has been notified of the relevant allegations, and this is not an issue arising in this Appeal.¹¹¹ Yekatom has shown no error in the Trial Chamber's findings.

36. For the reasons set out above, Yekatom's second ground of appeal should be dismissed.

C. Impact of the purported errors, and possible remedies

37. The Trial Chamber did not err in this case. However, if the Appeals Chamber were to find that the Trial Chamber erred on one or both issues, this would materially affect the

¹⁰⁴ [Bemba et al. Confirmation Decision](#), p. 47, para. (a)(i) (Bemba); p. 48, para. (a)(ii) (Kilolo); p. 49, para. (a)(iii) (Mangenda).

¹⁰⁵ [Bemba et al. Confirmation Decision](#), paras. 51-52.

¹⁰⁶ [Bemba et al. AJ](#), paras. 134-136.

¹⁰⁷ ICC-02/11-01/11-656-Red ("Gbagbo Confirmation Decision"), para. 232, pp. 128-130; [Ongwen Confirmation Decision](#), pp. 72-73 (paras. 9-13).

¹⁰⁸ [Confirmation Decision](#), para. 103 (The Pre-Trial Chamber declined to confirm Ngaïssona's liability under article 25(3)(a) for the 5 December 2013 attack as "the evidence [did] not allow the Chamber to conclude that Ngaïssona was in control of the crime or, stated differently, that his contribution was essential to the point that the crimes would not have been committed without his individual contribution".) *Contra* [Appeal](#), para. 48.

¹⁰⁹ *Contra* [Appeal](#), paras. 40-41.

¹¹⁰ ¹¹⁰ [Decision](#), para. 19, citing [Lubanga AJ](#), paras. 3, 123.

¹¹¹ [Decision](#), para. 37.

relevant findings in the Decision.¹¹² Moreover, the first ground of appeal may potentially affect all confirmed modes of liability for both Accused, since the charges in the confirmation decision do not set out their constituent elements either. Yet, this should not result in reversal of the overall outcome of the Trial Chamber's Decision and in particular to a dismissal of co-perpetration, or of the other modes of liability.¹¹³

38. Even if the Trial Chamber had agreed with Yekatom's arguments that the charges and/or the Confirmation Decision had some defects, it could have taken other remedial measures rather than dismissing co-perpetration as a charged mode of liability. For example, since the trial has not started, the Trial Chamber could have instructed the Prosecution to request the Pre-Trial Chamber to amend the charges.¹¹⁴ Or, as Trial Chamber X did in the *Al Hassan* case, the Trial Chamber could itself have produced a self-contained version of the charges by extracting the facts and circumstances for each incident from the Confirmation Decision and placing them under headings listing the objective elements of co-perpetration.¹¹⁵

39. The Appeals Chamber may likewise order remedies other than the drastic remedy of striking co-perpetration from the charges.¹¹⁶ Reversing the Trial Chamber's Decision as a whole and striking co-perpetration from the charges at this stage of the proceedings (before the start of the trial) would be a wholly disproportionate measure. It would not properly balance all relevant interests at stake, including the Court's duty to establish the truth and the rights of the victims.¹¹⁷ Other measures would be more appropriate. For example, since the trial has not commenced, the Appeals Chamber could simply amend the Confirmation Decision on its own and correct any defects of notice and/or reasoning that it may identify.¹¹⁸

¹¹² [Appeal](#), paras. 33, 50.

¹¹³ [Appeal](#), para. 51.

¹¹⁴ Article 61(9) ("After the charges are confirmed and before the trial has begun, the Prosecution may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges").

¹¹⁵ [Al Hassan Conduct of Proceedings Directions](#), paras. 12-13. Like in the present case, the confirmation decision in *Al Hassan* did not follow the structure suggested by the Chambers Practice Manual, and did not contain a self-standing operative part setting out the charges in full: [Al Hassan Conduct of Proceedings Directions](#), para. 6 (fn. 8). In *Al Hassan*, Trial Chamber X did not find the charges to be defective; it produced the self-contained set of charges to facilitate the reading of the charges under article 64(8)(a).

¹¹⁶ *Contra* [Appeal](#), para. 56.

¹¹⁷ *Cf. Prosecutor v. Uwinkindi*, ICTR-01-75-AR72(C), [Decision on Defence Appeal against the Decision Denying Motion Alleging Defects in the Indictment](#), 16 November 2011, paras.13, 60. Since the defects were identified before the start of the trial, the Appeals Chamber ordered the Trial Chamber "to direct the Prosecution to file a corrected indictment in conformity with the Appeals Chamber's findings [in the instant decision]".

¹¹⁸ Article 83(1) of the [Rome Statute](#) and rule 149 of the [Rules of Procedure and Evidence](#) give the Appeals Chamber the same powers as the Pre-Trial and Trial Chamber *mutatis mutandis* to exercise its statutory functions. Consistent with the above, the ICC Appeals Chamber has relied on article 83(1) in deciding on disclosure requests (ICC-01/04-01/06-3017 ("[Lubanga RFA Disclosure AD](#)"), para. 9), on the admission of

Alternatively, it could produce—or order the Trial Chamber to produce—a self-contained version of the charges which sets out the facts and circumstances and places them under headings listing the objective elements of the mode of liability.

D. Request for an expedited decision

40. The Prosecution respectfully requests the Appeals Chamber to issue its decision before the start of the trial scheduled on 9 February 2021, so that the trial can commence with certainty as to the interpretation of the charges, and thus avoid further litigation. Alternatively, if it is not possible to issue a decision before this date, the Prosecution respectfully requests the Appeals Chamber to inform the Parties, Participants, and the Registry as soon as this is known, so that appropriate measures may be undertaken.

CONCLUSION AND RELIEF SOUGHT

41. For the foregoing reasons the Prosecution respectfully requests the Appeals Chamber to dismiss Yekatom’s Appeal and affirm the Decision. The Prosecution further requests that the Appeals Chamber issue its decision on the Appeal before 9 February 2021, or if this is not possible, to inform the Parties, Participants and the Registry sufficiently in advance before the start of the trial.



James Stewart, Deputy Prosecutor

Dated this 7th day of December 2020

At The Hague, The Netherlands

evidence on appeal ([Lubanga AJ](#), para. 54), and on addressing matters related to final appeals (ICC-01/04-02/12-158 (“[Ngudjolo Order](#)”), para. 19), including on the conditional release of acquitted persons (ICC-02/11-01/15-1251-Red (“[Gbagbo & Blé Goudé Conditional Release AD](#)”), para. 53). It has authorised the opening of an investigation after finding that the PTC erred, but made all requisite findings (ICC-02/17-138 (“[Afghanistan AD](#)”), para. 54).