

**Cour
Pénale
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**International
Criminal
Court**

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No.: **ICC-01/14-01/18**

Date: **4 November 2020**

TRIAL CHAMBER V

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

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF
*THE PROSECUTOR v. ALFRED ROMBHOT YEKATOM***

Confidential

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

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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1. Counsel representing Mr. Alfred Rombhot Yekatom ("Defence") hereby seeks leave to appeal the *Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial* ("Impugned Decision") issued by the Trial Chamber ("Chamber").¹
2. The first appealable issue is whether or not the Chamber erred in law when finding that for the purpose of providing notice, as far as the legal characterisation of the facts is concerned, it is not necessary for the charges to set out the constituent legal elements of the alleged mode of liability under Article 25(3)(a) ("First Issue").²
3. The second appealable issue is whether or not the Chamber erred in fact and in law by reinterpreting the confirmed facts and circumstances *ex post facto*, and reinserting facts not confirmed by the Pre-Trial Chamber such as a common plan ("Second Issue").³
4. Both Issues would significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial. Their immediate resolution by the Appeals Chamber may materially advance the proceedings as well as clarify the practice of the Court and its jurisprudence.

PROCEDURAL BACKGROUND

5. On 11 December 2019, Pre-Trial Chamber II issued its decision confirming the charges ("Confirmation Decision"), where Mr. Yekatom is charged under the modes of liability of:

committing the aforementioned crimes jointly with another or through another under article 25(3)(a) of the Statute; or ordering the commission of the aforementioned crimes under article 25(3)(b) of the Statute.⁴

6. Regarding the alleged common plan, the Confirmation Decision finds:

¹ [ICC-01/14-01/18-703-Conf](#), paras. 18, 24 ; Public redacted version : [ICC-01/14-01/18-703-Red](#).

² Impugned Decision, paras. 18 and 24.

³ Impugned Decision, paras. 27-32.

⁴ [ICC-01/14-01/18-403-Conf-Corr](#), p. 107. Public redacted version: [ICC-01/14-01/18-403-Red-Corr](#).

Being aware of the limited and specific purpose of the confirmation of charges 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.⁵

7. On 22 June 2020, the Defence requested the Chamber to dismiss the mode of liability of co-perpetration confirmed against Mr. Yekatom and to proceed to try him solely under the mode of liability of ordering ("Yekatom Defence Request").⁶

8. On 3 July 2020, the Prosecution⁷ and the Common Legal Representative of the Former Child Soldiers and the Common Legal Representatives of Victims of Other Crimes responded to the Yekatom Defence Request.⁸

9. On 29 October 2020, the Chamber issued its *Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial*.⁹ In rejecting the Yekatom Defence Request, the Chamber finds that:

[F]or 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 underlying 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.¹⁰

10. The Chamber also finds that:

Mr Yekatom Defence's submission that the 'four generic contributions listed at the end of the Confirmation Decision cannot be considered sufficient notice of essential contributions' [has] no merits. It is clear from the operative part of the Confirmation Decision – which contains

⁵ Confirmation Decision, para. 60.

⁶ [ICC-01/14-01/18-565-Conf](#), paras 1, 48; Public redacted version: [ICC-01/14-01/18-565-Red](#).

⁷ [ICC-01/14-01/18-576-Conf](#).

⁸ [ICC-01/14-01/18-577-Conf-Corr](#); Public redacted version: [ICC-01/14-01/18-577-Corr-Red](#).

⁹ [ICC-01/14-01/18-703-Conf](#); Public redacted version: [ICC-01/14-01/18-703-Red](#).

¹⁰ Impugned Decision, para. 18.

numerous cross-references to other parts of the decision – that PTC II's finding in the operative part ought to be read in light of, and together with, the rest of the Confirmation Decision.¹¹

APPLICABLE LAW

11. Article 82(1)(d) provides that:

Either party may appeal [...] [a] decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

12. Regarding the notion of appealable issue, the Appeals Chamber has previously held that:

[A]n appealable issue must be “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one.¹²

SUBMISSIONS

I. Appealable Issues

13. The Defence submits that both Issues constitute appealable issues and are not merely questions over which there is a disagreement or conflicting opinion.

14. Both Issues are constituted by a subject. For the First Issue, the subject is whether notice of a charged mode of liability includes notice of the constituent elements of the corresponding article of the Statute. For the Second Issue, the subject is whether the Trial Chamber could always rectify a major legal defect in a

¹¹ Impugned Decision, para. 33.

¹² *Situation in the Democratic Republic of Congo*, [Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal](#), 13 July 2006, ICC-01/04-168, para. 19.

confirmation decision by restating the confirmed factual details which were not legally characterised.

15. The resolution of such subjects is essential for the purpose of the proceedings and the determination of matters arising in the judicial cause under examination.

16. If granted leave to appeal, the Defence will, for the First Issue: (i) demonstrate the Chamber's erroneous interpretation of the constituent legal elements of the alleged mode(s) of liability that are necessary to provide proper notice under Article 67(1)(a) of the Statute, and (ii) explain why the accused is entitled under the statutory framework of the Court to notice of the material facts underpinning the constitutive elements of co-perpetration.

17. For the Second Issue, the Defence will: (i) demonstrate the Chamber's erroneous approach to a reconstruction of notice, subsequent to the confirmation decision; (ii) explain why a trial chamber cannot restate the details of a decision confirming the charges and then apply its own interpretation of the factual findings and their legal characterisation when faced with major charging defects; (iii) demonstrate that the Chamber acted *ultra vires* by reinserting a common plan that was rejected by the Pre-Trial Chamber and (iv) demonstrate the Chamber's error in restating the detail and determine, *ex post facto*, that Mr. Yekatom's contributions were essential, in contrast to the Pre-Trial Chamber's determination.

II. Fairness and Expeditiousness of the Proceedings and Trial Outcome

18. Both Issues concern, at their cores, the matter of notice given by the Confirmation Decision. The right to a prompt, adequate, and sufficiently clear notice is enshrined in Article 67(1)(a) and (b) of the Statute. It is indispensable for a fair and expeditious trial.

19. As the authoritative charging document upon which Mr. Yekatom's criminal responsibility will rest, the Confirmation Decision is the source of notice and the

basis on which Mr. Yekatom prepares for his defence.

20. As put by the Appeals Chamber of the ICTR:

[T]he scope, content and clarity of a [charging document] are factors that can significantly affect the fairness and expeditious conduct of the proceedings or the outcome of the trial. [...] There is no doubt that a defective [charging document] will significantly affect the fairness and expeditious conduct of the proceedings or the outcome of the trial.¹³

21. This view is also echoed by Trial Chamber IX in the *Ongwen* case,¹⁴ by Judge Perrin de Brichambaut,¹⁵ and more specifically on the notice of modes of liability, by the Appeals Chamber of the *Ndindiliyimana et al.* before the ICTR.¹⁶

22. The Defence concurs with the Prosecution that “the Appeals Chamber should definitively settle the issues [...] before the trial proceeds”.¹⁷

23. Concretely, whether or not the accused needs be informed of the legal elements of the alleged mode(s) of liability is particularly relevant when the submission system is adopted for evidence processing, such is the case of *Yekatom & Ngaïssona*. In this system, the Chamber has the authority to opt out submitted materials at its discretion. If the notice issue is clarified and settled prior to the start

¹³ *Prosecutor v. Uwinkindi*, ICTR-01-75-PT, [Decision on Defence Application for Certification to Appeal Decision on preliminary Motion alleging Defects in the Form of the Amended Indictment](#), 28 March 2011, paras. 7-8.

¹⁴ *Prosecutor v. Ongwen*, [Decision on Defence Request for Leave to Appeal a Decision on Motions Alleging Defects in the Confirmation Decision](#), ICC-02/04-01/15-1493, 1 April 2019, para. 14:

The challenges to the formulation of the Confirmation Decision and the jurisdiction of the Court have the potential to considerably influence the charged crimes.

¹⁵ *Prosecutor v. Ongwen*, [Partially dissenting opinion of Judge Marc Perrin de Brichambaut](#), ICC-02/04-01/15-428-Anx-tENG, 14 September 2016, para. 29:

The fair conduct of the trial is seriously affected in the instant case because the weakness of the reasoning set out in the Bench's own decision restricts the rights of the defence. The way in which the Decision on the confirmation of charges was drafted does not provide the Defence with details of what evidence was relied on or how the Chamber defined the crimes. The principle of equality of arms is violated since the Defence is not in a situation to examine the legal and factual bases for the Bench's Decision on the confirmation of charges. The outcome of the trial may well be affected.

¹⁶ *Prosecutor v. Ndindiliyimana et al.*, ICTR-00-56-A, [Appeals Judgment](#), 11 February 2014, paras. 237-241, 254.

¹⁷ [ICC-01/14-01/18-576-Conf](#), para. 30.

of the trial, the Defence would be able to better advise the Chamber as to the relevance, the probative value as well as the appropriate weight and, in turn, which evidence ought to be opted out.

24. The same holds true for the Second Issue. The Impugned Decision restated a series of facts confirmed by the Pre-Trial Chamber. But they received no legal characterisation by either the Confirmation Decision or the Impugned Decision, although the latter appears to imply that these factual elements are meant to give contour of the common plan or criminal agreement and list the members thereof. The contradiction between the Pre-Trial Chamber's decision not to confirm any common plan or criminal agreement¹⁸ and the Impugned Decision's *ex post facto* conclusion that "essential contribution" can be extrapolated from the Confirmation Decision¹⁹ leaves the Defence hamstrung in advising the Chamber as to the evidence assessment and consequently, negatively impacts the effectiveness and expeditiousness of the proceedings.

III. Materially Advance of the Proceedings

25. The Defence submits that the immediate resolution of both Issues by the Appeals Chamber will materially advance the proceedings.

26. The subject matters underlying both Issues are directly linked to the fundamental rights of Mr. Yekatom to a fair trial under Article 67(1)(a) and (b). It is "axiomatic that an accused person be informed promptly and in detail of the nature, cause and content of a charge" before the start of the trial.²⁰ As such, the Issues must be adjudicated at the earliest opportunity before any prejudice materialises.

27. Immediate resolution of the Issues by the Appeals Chamber will materially advance the proceedings by allowing the trial against Mr. Yekatom to be conducted

¹⁸ Confirmation Decision, paras. 60 100, 126, 141, 156.

¹⁹ Impugned Decision, para. 33.

²⁰ *Prosecutor v. Bemba*, [Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute"](#), 8 June 2018, ICC-01/05-01/08-3636-Red, para. 186

on a sound base. The Appeals Chamber's involvement will not unduly delay the proceedings. Rather, it will allow the parties to focus on the required material elements of the charged modes of liability in the course of the trial.

CONFIDENTIALITY

28. The present request is filed on a confidential basis corresponding to the classification of the Impugned Decision. The Defence requests it be reclassified as public.

RELIEF SOUGHT

29. In light of the above, the Defence respectfully requests the Chamber to:

GRANT this request for leave to appeal both Issues.

RESPECTFULLY SUBMITTED ON THIS 4th DAY OF NOVEMBER 2020



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