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**International
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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 *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

Yekatom Defence Appeal Brief – Notice of Co-Perpetration

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. Pursuant to *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* issued on 13 November 2020 by Trial Chamber V,¹ counsel representing Mr. Alfred Rombhot Yekatom (“Defence”) respectfully request the Appeals Chamber to reverse the relevant part of Trial Chamber V’s *Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial* (“Impugned Decision”)² and dismiss the allegations of co-perpetration under Article 25(3)(a) in the confirmed charges.
2. The Defence contends that the Trial Chamber erred when finding that:
 - (i) 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 (“First Issue”); and
 - (ii) Mr. Yekatom was sufficiently informed of the contours of the “common plan” and his alleged “essential contribution” although Pre-Trial Chamber II had not used this terminology established in the jurisprudence of the Court to characterise the relevant facts (“Second Issue”).

PROCEDURAL BACKGROUND

3. 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:

[C]ommitting 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.³

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

¹ [ICC-01/14-01/18-730](#).

² [ICC-01/14-01/18-703-Conf](#). Public redacted version: [ICC-01/14-01/18-703-Red](#).

³ [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.⁴

5. 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”).⁵
6. On 3 July 2020, the Prosecution⁶ 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.⁷
7. On 29 October 2020, the Chamber issued the Impugned Decision. 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.⁸

and 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 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.⁹

8. On 4 November 2020, the Defence sought leave to appeal the Impugned Decision on two issues:

⁴ [Confirmation Decision](#), para. 60.

⁵ [ICC-01/14-01/18-565-Conf](#), paras 1, 48. Public redacted version: [ICC-01/14-01/18-565-Red](#).

⁶ [ICC-01/14-01/18-576-Conf](#). Public redacted version: [ICC-01/14-01/18-576-Red](#).

⁷ [ICC-01/14-01/18-577-Conf-Corr](#). Public redacted version: [ICC-01/14-01/18-577-Corr-Red](#).

⁸ [Impugned Decision](#), para. 18.

⁹ [Impugned Decision](#), para. 33.

- (i) Whether the Chamber erred 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); and
- (ii) Whether the Chamber erred 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.¹⁰

9. On 13 November 2020, the Trial Chamber granted the leave to appeal both issues but reformulated the latter as:

[W]hether the Chamber erred in finding that Mr Yekatom was sufficiently informed of the contours of the “common plan” and his alleged “essential contribution” although PTC II had not used this terminology established in the jurisprudence of the Court to characterise the relevant facts.¹¹

RELEVANT PROVISIONS

Article 25(3)(a) Individual criminal responsibility

In accordance with the Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

Article 67(1)(a) Rights of the accused

In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

Article 83(2)(a) Proceedings on appeal

If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

¹⁰ [ICC-01/14-01/18-713](#).

¹¹ [ICC-01/14-01/18-730](#), para. 14.

- (a) Reverse or amend the decision or sentence; [...]

Rule 158(1) **Judgment on the appeal**

An Appeals Chamber which considers an appeal referred to in this section may confirm, reverse or amend the decision appealed.

STANDARD OF REVIEW

10. The standard of review of the Trial Chamber's alleged errors in finding that the Defence has received sufficient notice is as follows:

The Appeals Chamber will not interfere with the Trial Chamber's exercise of discretion under article 19 (1) of the Statute to determine admissibility, 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.¹²

11. A judgment is "materially affected" 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".¹³

FIRST ISSUE: NECESSITY TO SET OUT THE CONSTITUENT ELEMENTS

12. The Defence submits 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.

I. There is a lack of consistent jurisprudence on the elements of co-perpetration

¹² *Prosecutor v. Ruto et al.*, [Judgement on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application of the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19\(b\) of the Statute"](#), ICC-01/09-01/11-307, 30 August 2011, paras. 89-90 citing *Prosecutor v. Kony et al.*, [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](#), ICC-02/04-01/05-408, 16 September 2009, paras. 38, 47, 80; *Prosecutor v. Gaddafi*, [Judgement on the Appeal of Libya against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi"](#), ICC-01/11-01/11-547-Red, 21 May 2014, para. 146.

¹³ *Prosecutor v. Simone Gbagbo*, [Judgement on the Appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's Challenge to the admissibility of the case against Simone Gbagbo"](#), ICC-02/11-01/12-75-Red, 27 May 2015, para. 41.

13. The Trial Chamber erred in finding that the jurisprudence of co-perpetration liability under Article 25(3)(a) is sufficiently consistent at this Court such that a mere reference to “co-perpetration” suffices on its own to provide adequate notice of the constituent elements.
14. *First*, contrary to the observations in the Impugned Decision,¹⁴ there appears to be a split in the case law on co-perpetration liability.¹⁵
15. Mr. Yekatom is allegedly responsible through, *inter alia*, “indirect co-perpetration”,¹⁶ which the Trial Chamber presumes to be a “well-established” form of responsibility.¹⁷ However, there is some degree of diverging views as to the interpretation of indirect co-perpetration and co-perpetration itself.
16. Remarkably, 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.¹⁸ This became more apparent when it referred to the views of Judge Van den Wyngaert, who stated that:

I believe that the concept of “indirect co-perpetration”, as interpreted by Pre-Trial Chamber I, has no place under the Statute as it is currently worded. The concept is based on an expansive interpretation of Article 25(3)(a) of the Statute which is inconsistent with Article 22(2) of the Statute.¹⁹
17. The Confirmation Decision does not contain enough indicia as to what approach is adopted when indirect co-perpetration liability is confirmed against Mr. Yekatom.

¹⁴ [Impugned Decision](#), para. 18.

¹⁵ See Neha Jain, “[The Control Theory of Perpetration in International Criminal Law](#)” (2011) 12 *Chicago Journal of International Law* 159.

¹⁶ See [Confirmation Decision](#), p. 107.

¹⁷ [Impugned Decision](#), para. 23.

¹⁸ *Prosecutor v. Lubanga*, [Judgment on appeal of Mr Thomas Lubanga Dyilo against his conviction](#), ICC-01/04-01/06-3121-Red, 1 December 2014, fn. 863:

Views 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”.

¹⁹ *Prosecutor v. Ngudjolo*, [Judgment pursuant to Article 74 of the Statute Concurring Opinion of Judge Christine Van den Wyngaert](#), ICC-01/04-02/12-4, 18 December 2012, para. 64.

18. *Second*, even if the jurisprudence of the Court is highly consistent, the notice is still insufficient in the *present* case.
19. The Statute did not adopt the *stare decisis* doctrine.²⁰ Article 21(3) only provides for the discretion, as opposed to the obligation, of a chamber to apply the interpretation in previous cases. A chamber equally has the discretion to deviate from past cases.²¹
20. It appears the Pre-Trial Chamber exercised such discretion. The Confirmation Decision casts doubt on the very notion of common plan²² and set out to analyse individual responsibility on an incident-by-incident basis.²³ When the Pre-Trial Chamber questions “the very compatibility of the notion of a common plan with the statutory framework”,²⁴ it would be somewhat quixotic to assume it intended to follow the *Lubanga* formulation word for word or to expect the Defence to take notice on this basis.
21. As such, the recurring formulation of co-perpetration in the past cases simply cannot serve as a sufficient notice of the constituent elements confirmed by the Pre-Trial Chamber in the present case.

II. “Common plan” and “essential contribution” require further definition

²⁰ See William A. Schabas, [The International Criminal Court: A Commentary on the Rome Statute](#) (2nd edn, OUP 2016) 526:

Article 21(2) rejects a rule of *stare decisis*, because it is worded as a permissive and not a mandatory provision.¹³⁰ Nor does the provision explicitly establish any hierarchy in terms of the decisions of the various Chambers of the Court.

²¹ See Gilbert Bitti, “[Article 21 and the Hierarchy of Sources of Law before the ICC](#)” in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Law*, pp. 422-424, in particular:

Recent jurisprudence tends to further demonstrate that Chambers do not feel bound by the jurisprudence of other Chambers. Even more interesting to note, Chambers have deviated from previous jurisprudence either explicitly or implicitly, simply ignoring the jurisprudence of other Chambers. [...] [A] Chamber may totally disregard the jurisprudence of other Chambers, either explaining why it does so or without even uttering a word about previous jurisprudence.

²² [Confirmation Decision](#), para. 60.

²³ [Confirmation Decision](#), para. 57.

²⁴ [Confirmation Decision](#), para. 60.

22. 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.
23. The statutory texts of the Court contain no definition of these terms, whilst their natural linguistic meaning is inadequate for the purpose of providing notice.
24. Besides the formulation of “common plan” that the Pre-Trial Chamber called into question and declined to rule upon, the case law is not uniformed either on whether the “essential contribution” must be to the common plan or to the crimes.
25. In the early cases of the Court, this objective requirement was described as “the co-ordinated essential contribution made by each co-perpetrator resulting in the realisation of the objective elements of the crime”.²⁵ In *Lubanga*, the Trial Chamber placed a greater emphasis on the accused’s contribution in the context of the common plan and assessed the essentiality of his contribution vis-à-vis his exercise of the role and functions assigned to Mr. Lubanga within the plan.²⁶
26. In the subsequent *Ntaganda* and *Katanga* cases, “essential contribution” was not discussed. Instead, the *Katanga* Trial Chamber fell back to the general

²⁵ *Prosecutor v. Lubanga*, [Decision on the confirmation of charges](#), ICC-01/04/01/06-803-tEN, 29 January 2007, para. 346; *Prosecutor v. Katanga and Ngudjolo*, [Decision on the confirmation of charges](#), ICC-01/04-01/07-717, 30 September 2008, para. 524; *Prosecutor v. Abu Garda*, [Decision on the Confirmation of Charges](#), ICC-02/05-02/09-243-Red, 8 February 2010, para. 160. See also *Prosecutor v. Bemba*, [Decision Pursuant to Articles 61\(7\) and \(b\) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo](#), ICC-01/05-01/08-424, 15 June 2009, para. 350; *Prosecutor v. Banda & Jerbo*, [Corrigendum of the “Decision on the Confirmation of Charges”](#), ICC-02/05-03/09-121-Corr-Red, 7 March 2011, paras 128, 136; *Prosecutor v. Ruto et al.*, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), ICC-01/09-01/11-373, 23 January 2012, paras 292, 305; *Prosecutor v. Muthaura et al.*, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), ICC-01/09-02/11-382-Red, 23 January 2012, paras 297, 401; *Prosecutor v. Gbagbo*, [Decision on the confirmation of charges against Laurent Gbagbo](#), ICC-02/11-01/11-656-Red, 12 June 2014, paras 230, 232.

²⁶ *Prosecutor v. Lubanga*, [Public redacted Judgement on the appeal of Mr Lubanga Dyilo against his conviction](#), ICC-01/04-01/06-3121-Red, 1 December 2014, paras 994, 1000, 1001, 1006 and 1018.

requirement that the person “exerts control over the *crime* whose material elements were brought about by one or more persons”.²⁷

27. The Appals Chamber effectively endorsed the interpretation of the essential contribution of the *Lubanga* Trial Chamber²⁸ but, in the same breath, emphasised that this liability “assesses the role of the person in question vis-à-vis the *crime*”.²⁹
28. Whereas the Confirmation Decision contains no finding on whether Mr. Yekatom “had control over the crimes by virtue of his essential contribution within the framework of the common plan and the resulting power to frustrate their commission”, it cannot be said with any certainty that the Pre-Trial Chamber intended to apply the notion of “essential contribution” as the Appeals Chamber expressed it. The Defence cannot be reasonably expected to take notice therefrom.

III. The absence of any ruling on constituent elements violates Mr. Yekatom’s right to be informed

29. Mr. Yekatom has the right to be informed with clarity and precision of the modes of liability that allegedly result in his criminal responsibility.³⁰
30. To safeguard this right, it 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.³¹ Failure to do so

²⁷ *Prosecutor v. Katanga*, [Judgment pursuant to article 74 of the Statute](#), 7 March 2014, ICC-01/14-01/18-3436tENG, para. 1399 (emphasis added).

²⁸ *Prosecutor v. Lubanga*, [Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction](#), ICC-01/01-01/06-3121-Red, 1 December 2014, para. 469, finding that “a co-perpetration is one who makes, within the framework of a common plan, an essential contribution with the resulting power to frustrate the commission of the crime”.

²⁹ *Prosecutor v. Lubanga*, [Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction](#), ICC-01/01-01/06-3121-Red, 1 December 2014, para. 469 (emphasis added).

³⁰ Article 61(7)(a) of the Statute. See Yekatom Defence Request, paras. 16-19 and the authorities cited therein.

³¹ See, e.g., *Prosecutor v. Lubanga*, [Decision on the confirmation of charges](#), ICC-01/04-01/06-803-tEN, 14 May 2007, pp. 156-157; *Prosecutor v. Ntaganda*, [Decision pursuant to article 61\(7\)\(a\) and \(b\) of the Rome Statute on the charges of the Prosecutor against Bosco Ntaganda](#), ICC-01/04-02/06-309, 9 June 2014, para 97; *Prosecutor v. Blé Goudé*, [Decision on the Confirmation of Charges against Charles Blé Goudé](#), 11 December 2014, ICC-02/11-02/11, para. 158; *Prosecutor v. Gbagbo*, [Decision on the confirmation of charges against Laurent Gbagbo](#),

would, as the Appeals Chamber found in *Bemba*, result in a fundamentally defective charging document that impermissibly violates the accused's right to a fair trial.³²

31. The trial against Mr. Yekatom will start in less than three months. However, the preparation of his defence is substantially affected by the ambiguity surrounding the *specific* constituent elements of the mode of co-perpetration that Mr. Yekatom is charged with in this *particular* case.³³ This includes, for example, an effective assessment of whether certain alibi evidence would assist with his defence and therefore is preferable to advance, or which line of investigation is viable and relevant to challenge the essentiality of Mr. Yekatom's alleged contribution.

32. The error in the Impugned Decision exacerbates the profound prejudice. It must be rectified now.

IV. The error materially affected the Impugned Decision

33. The impact of the error on the Impugned Decision is self-evident. The Trial Chamber based its findings on the explicit statement that it is *not* necessary to set out the legal constituent element of co-perpetration.³⁴ Had the error not affected the Impugned Decision, the Trial Chamber would not have reached the same conclusion.

ICC-02/11-01/11-656-Red, 12 June 2014, para 230; *Prosecutor v. Ongwen*, [Decision on the Confirmation of Charges against Dominic Ongwen](#), ICC-02/04-01/15, 23 March 2016, para. 70; *Prosecutor v. Al Mahdi*, [Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi](#), ICC-01/12-01/15, 24 March 2016, para. 58, subparagraph 2.

³² *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"](#), ICC-01/05-01/08-3636-Red, 8 June 2018, paras. 186, 188-189.

³³ See *Prosecutor v. Ongwen*, [Judgment on the Appeal of Mr. Dominic Ongwen against Trial Chamber IX's "Decision on Defence Motions alleging Defects in the Confirmation Decision"](#), ICC-02/04-01/15-1562, 17 July 2019, para. 69, noting a strong link between the right to be informed and the right to prepare one's defence.

³⁴ [Impugned Decision](#), para. 24.

SECOND ISSUE: NECESSITY TO USE THE APPLICABLE TERMINOLOGY WHEN CHARACTERISING THE RELEVANT FACTS

34. The Defence submits 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 Pre-Trial Chamber II had not used this terminology established in the jurisprudence of the Court to characterise the relevant facts.

I. Sufficient notice requires clear legal characterisation of the facts

35. The Trial Chamber erred in finding that the factual allegations need not be explicitly tied to the legal findings.

36. A sufficient notice requires that the accused not only be informed of the factual allegations against him, but also be aware of “the basic outline of the legal framework against which those facts will be determined”.³⁵ In the context of modes of liability, this means the accused is entitled to be provided with notice of the facts upon which his criminal liability is found to stand.³⁶ For co-perpetration liability, the Appeals Chamber held that the accused must be provided with detailed information regarding, *inter alia*, “the contours of the common plan and its implementation as well as the accused contribution”.³⁷

37. When divorced from the factual allegations, “common plan” is an impermissibly abstract notion to base a criminal trial on. The Confirmation Decision does not include any findings on what the plan is alleged to be, whether there was one or more common plan or agreement, or which

³⁵ *Prosecutor v. Lubanga*, [Judgment pursuant to Article 74 of the Statute: Separate Opinion of Judge Adrian Fulford](#), ICC-01/04-01/06-2842, 14 March 2012, pp. 605-606, para. 20.

³⁶ *Prosecutor v. Bemba*, [Bemba. Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”](#), ICC-01/05-01/08-3636-Red, 8 June 2018, para. 186.

³⁷ *Prosecutor v. Lubanga*, [Public redacted Judgement on the appeal of Mr Lubanga Dyilo against his conviction](#), ICC-01/04-01/06-3121-Red, 1 December 2014, para. 123.

individual criminal act was committed under which common plan.³⁸ The uncertainty around the fundamentals of the common plan prevents any reader – the Defence or the Trial Chamber – to *definitively* ascertain³⁹ several relevant points, including: (1) amongst whom each common plan was supposedly shared; (2) how each common plan was purportedly implemented; (3) what kind of contribution is said to qualify as essential; (4) who the fungible tools in the hands of an indirect perpetrator was; (5) whether the accused had knowledge of the co-perpetrator’s identity and mental state; and, more specifically, (6) whether they acted with a shared intent.⁴⁰ These, in turn, affects the Chamber’s ability to determine whether the plan involve a “critical element of criminality”,⁴¹ and Mr. Yekatom’s ability to prepare his defence against it. All of the above should have been clearly set out in a confirmation decision in order for the accused to be sufficiently informed.⁴²

38. Whereas a confirmation decision sets the binding factual and legal parameters of the trial,⁴³ the detachment of confirmed mode of liability from the factual allegations incapacitates any findings on whether the accused’s acts and conduct render him or her liable *as charged*.

II. Specific language is needed when pleading co-perpetration liability

39. The terms “common plan” and “essential contribution” are not part of the statutory framework of the Court. In fact, even the term “co-perpetration” is extrapolated from, as opposed to explicitly provided in, Article 25(3)(a). To assess whether sufficient notice is provided, the “specific language”

³⁸ [Impugned Decision](#), para. 24.

³⁹ See, *infra*, section III.

⁴⁰ See, *infra*, section III.

⁴¹ *Prosecutor v. Bemba et al.*, [Public Redacted Version of Judgment pursuant to Article 74 of the Statute Public Redacted Version of Judgment pursuant to Article 74 of the Statute](#), ICC-01/05-01/13-1989-Red, 19 October 2016, para. 67; *Prosecutor v. Lubanga*, [Public redacted Judgement on the appeal of Mr Lubanga Dyilo against his conviction](#), ICC-01/04-01/06-3121-Red, 1 December 2014, para. 442, referring to *Prosecutor v. Lubanga*, [Judgment pursuant to Article 74 of the Statute](#), ICC-01/04-01/06-2842, 14 March 2012, para. 984.

⁴² *Prosecutor v. Lubanga*, [Public redacted Judgement on the appeal of Mr Lubanga Dyilo against his conviction](#), ICC-01/04-01/06-3121-Red, 1 December 2014, para. 123.

⁴³ [Impugned Decision](#), paras. 15-16 citing Rule 122(3)-(6) of the Rules.

requirement in the pleading of joint criminal enterprise (“JCE”) established at the ICTY is an appropriate analogy.

40. Despite its ubiquity, the phrase JCE is not a stipulated mode of liability in the ICTY Statute. It is a means of “committing”⁴⁴ accepted as practice. As such, when this specific mode is relied upon, the following material facts must be pleaded in order for an accused to fully understand the acts he is allegedly responsible for:

- (i) the nature and purpose of the enterprise;
- (ii) the period over which the enterprise is said to have existed;
- (iii) the identity of the participants in the enterprise; and
- (iv) the nature of the accused’s participation in the enterprise. Failure to do so would result in a defective indictment.⁴⁵

41. The Defence submits that the level of details on par with what is required for JCE is necessary for adequate notice of co-perpetration liability at this Court. To some extent, this view is echoed by the Trial Chamber’s finding that “in order to meet the requirement of Article 67(1)(a) of the Statutes, the charges must identify with sufficient clarity and detail the factual allegations which support each of the constituent legal element”.⁴⁶

42. Nevertheless, the Trial Chamber failed to hold the Confirmation Decision to this test. Without any specific language used in the charging document in relation to the accepted practice of the mode of co-perpetration, Mr. Yekatom is incapacitated to fully understand the acts he is purportedly responsible for.

III. The absence of terminology precludes any reliable interpretation of how the facts are characterised legally

⁴⁴ Article 7(1) of the [ICTY Statute](#).

⁴⁵ *Prosecutor v. Simić*, [Appeal Judgment](#), Case No. IT-95-9-A, 28 November 2006, paras. 21-23. See also *Prosecutor v. Lukić & Lukić*, [Decision on Prosecution Motion Seeking Leave to Amend the Second Amended Indictment and on Prosecution Motion to Include UN Security Council Resolution 1820 \(2008\) as Additional Supporting Material to Proposed Third Amended Indictment as Well as on Milan Lukić’s Request for Reconsideration or Certification of the Pre-Trial Judge’s Order of 19 June 2018](#), Case No. IT-98-32/1-PT, 8 July 2008, para. 39.

⁴⁶ [Impugned Decision](#), para. 19.

43. As the noted in the Impugned Decision, the Confirmation Decision did not legally characterise any facts for the confirmed modes of liability.⁴⁷
44. In its attempt to illustrate the notice of “common plan” and “essential contribution” the Defence is provided with by the Confirmation Decision, the Trial Chamber alluded to a series of factual findings of the Pre-Trial Chamber.⁴⁸
45. It is unclear whether the Trial Chamber correctly identified the facts that the Pre-Trial Chamber intended to marry with the mode of liability of co-perpetration. There are indications that such interpretation is misplaced and unreliable. As a result, Mr. Yekatom still suffers the prejudice of an insufficient notice.
46. *First*, many factual findings alluded to were made *not* in the context of Mr. Yekatom’s – or Mr. Ngaïssona’s – criminal responsibility. Rather, they relate to the chapeau elements of the alleged war crimes and crimes against humanity,⁴⁹ and the background of the conflicts outside the period of relevance.⁵⁰ To take notice of “common plan” from this circumstantial information would be to take these findings out of their context.
47. *Second*, not all the plans referred to are inherently criminal. Such is the case of the political manoeuvres planned by François Bozizé and his associates.⁵¹ Without any indication of its criminality, it would be unreasonable to infer that the Pre-Trial Chamber intended to confirm this political plan as “common plan”.

⁴⁷ [Impugned Decision](#), para. 24.

⁴⁸ [Impugned Decision](#), para. 28-31.

⁴⁹ [Impugned Decision](#), para. 28, fn. 44, citing [Confirmation Decision](#), paras. 62 (in section “Contextual element – Factual findings”) and 79 (in section “Bangui (including Cattin) and Boeing – Factual findings – The events preceding the 5 December 2013 Attack”).

⁵⁰ [Impugned Decision](#), para. 28, fns. 45-50 citing [Confirmation Decision](#), paras. 80, 81, 83, 84 and 85 (in section “Bangui (including Cattin) and Boeing – Factual findings – The events preceding the 5 December 2013 Attack”).

⁵¹ Referred to in [Impugned Decision](#), para. 28. See [ICC-01/14-01/18-T-011-RED-ENG](#), p. 10, ln. 20-p. 11, ln. 16.

48. *Third*, the Pre-Trial Chamber did define the “essentiality” of Mr. Ngaïssona’s alleged contribution.⁵² But strikingly, the same is absent for Mr. Yekatom. The silence appears to indicate that the Pre-Trial Chamber did not find Mr. Yekatom’s contribution “essential”. This interpretation, albeit probable, does not square with the conclusion that Mr. Yekatom could be liable for the alleged crimes as a co-perpetrator who has made his essential contribution.
49. As demonstrated above, 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.

IV. The error materially affected the Impugned Decision

50. For the reasons expressed above, the Trial Chamber committed a mixed error of fact and law in finding that the terminology of “common plan” and “essential contribution” in the Confirmation Decision was not necessary when legally characterising the factual allegations. This error materially affected its conclusion that Mr. Yekatom received sufficient notice therefore it could proceed with trial.
51. Had the Trial Chamber not been affected by this error, it would have dismissed the mode of liability of co-perpetration.

REVERSAL OF THE IMPUGNED DECISION

52. As demonstrated above, the Impugned Decision would have been substantially different had it not been affected by the errors.⁵³ On this basis,⁵⁴ the Defence

⁵² See, e.g., [Confirmation Decision](#), para. 103.

⁵³ *Situation in the Democratic Republic of Congo, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”*, ICC-01/04-169, 13 July 2006, para. 83.

requests that the Appeals Chamber to reverse the Impugned Decision and directly dismiss the allegations of co-perpetration in the Confirmed Decision pursuant to Rule 158(1) of the Rules. This would allow the Trial Chamber to proceed to try Mr. Yekatom with solely on the mode of liability of “ordering” the crimes under Article 25(3)(b).

53. The appellant deference is not explicitly stipulated in the legal framework of the Court for interlocutory appeals. The Appeals Chamber has the discretion to decide whether to remand a matter to a lower chamber.⁵⁵ When it chooses to do so, the lower chamber usually is better placed to make the necessary factual determination given their familiarity with the evidence.⁵⁶
54. This is not the case for the present matter. Insofar as what is required of to rule on the matter is concerned, the Appeals Chamber and the Trial Chamber have the very same knowledge, namely that of the Confirmation Decision.
55. Therefore, it is in the interest of an efficient administration of justice that the Appeals Chamber reverses the decision directly.

⁵⁴ *Prosecutor v. Kony et al.*, [Judgment on the appeals of the Defence against the decisions entitled “Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06” of Pre-Trial Chamber II](#), ICC-02/04-179, 23 February 2009, para. 40; *Prosecutor v. Lubanga*, [Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the release of Thomas Lubanga Dyilo”](#), 21 October 2008, ICC-01/04-01/06-1487, para. 44; *Prosecutor v. Katanga & Ngudjolo*, [Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case](#), ICC-01/04-01/07-1497, 25 September 2009, para. 38.

⁵⁵ See Neto D C B Waite, [“An Inquiry into the ICC Appeals Chamber’s Exercise of the Power of Remand”](#) (2010) 9:2 *Law and Practice of International Courts and Tribunals* 313, pp. 314-315 and 320.

⁵⁶ Neto D C B Waite, [“An Inquiry into the ICC Appeals Chamber’s Exercise of the Power of Remand”](#) (2010) 9:2 *Law and Practice of International Courts and Tribunals* 313, p. 318:

This review reveals that the Appeals Chamber will remand: (1) when the Chamber below has failed to complete its review or failed to consider all the relevant facts before reaching a decision; (2) when the Appeals Chamber’s decision did not conclusively determine the issue before the Chamber below; (3) where the Chamber below has daily control of the case and full awareness of the complete factual background; and (4) where the Appeals Chamber is of the view that the substance of the matter should be considered by the Chamber below.

CONCLUSION

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

REVERSE the Impugned Decision in the relevant parts; and

DISMISS the allegation of co-perpetration under Article 25(3)(a) in the Confirmation Decision.

RESPECTFULLY SUBMITTED ON THIS 26TH DAY OF NOVEMBER 2020



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