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

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**APPEALS CHAMBER**

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

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

**Public**

**Yekatom Defence Reply to  
"Common Legal Representatives' Joint Response to the "Yekatom Defence appeal  
Brief – Notice of Co-Perpetration" (ICC-01/14-01/18-742)", (ICC-01/14-01/18-754)  
and  
"Prosecution Response to "Yekatom Defence Appeal Brief – Notice of Co-  
Perpetration" and request for an expedited decision", (ICC-01/14-01/18-756)**

**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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## INTRODUCTION

1. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence” and “Mr. Yekatom”, respectively), respectfully reply to the *Common Legal Representatives’ Joint Response to the “Yekatom Defence appeal Brief – Notice of Co-Perpetration”*<sup>1</sup> (“CLRv’s Response”) and the *Prosecution Response to “Yekatom Defence Appeal Brief – Notice of Co-Perpetration” and request for an expedited decision*<sup>2</sup> (“Prosecution’s Response”), both filed on 7 December 2020.
2. In its Decision issued on 4 January 2021, the Appeals Chamber unanimously granted the Yekatom Defence leave to reply on the following three issues:
  - a. Whether the Prosecution Trial Brief provides curing notice of the constituent elements of Article 25(3)(a);
  - b. Whether the Appeals Chamber should create a self-contained Document Containing the Charges (“DCC”) or amend the Decision on the Confirmation of Charges against Alfred Yekatom and Patrice-Edouard Ngaïssona (“Confirmation Decision”); and
  - c. Whether the Defence should have sought leave to appeal the Confirmation Decision.<sup>3</sup>

## PROCEDURAL BACKGROUND

3. On 13 November 2020, the Trial Chamber granted the Defence leave to appeal the *Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial*.<sup>4</sup>

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<sup>1</sup> [ICC-01/14-01/18-754](#).

<sup>2</sup> [ICC-01/14-01/18-756](#).

<sup>3</sup> [ICC-01/14-01/18-799](#).

<sup>4</sup> [ICC-01/14-01/18-703-Conf](#). Public redacted version: [ICC-01/14-01/18-703-Red](#).

4. On 26 November 2020, the Defence submitted its Appeal Brief<sup>5</sup> to which the Prosecution and the CLRV both responded on the 7 December 2020.<sup>6</sup>
5. On 10 December 2020, the Defence submitted its request for leave to reply (“Request for Leave to Reply”) concerning three issues.<sup>7</sup>
6. The Common Legal Representatives of Victims<sup>8</sup> and the Prosecution<sup>9</sup> both filed their responses on 14 December 2020, requesting the dismissal of the Defence request.
7. On 4 January 2021, the Appeals Chamber issued its Decision granting the Defence leave to file a reply.<sup>10</sup>

## SUBMISSIONS

### **A) First Issue: The Prosecution Trial Brief provides curing notice of the constituent elements of Article 25(3)(a)**

8. The Defence replies to the Prosecution<sup>11</sup> and the CLRV<sup>12</sup> Responses as to whether or not the Prosecution Trial Brief provides curing notice of the constituent elements of Article 25(3)(a). This proposition is not legally tenable for two main reasons.
  - (i) *A Trial Brief is not a statutory notice document*
9. *First*, a Trial Brief is not a statutory notice document. It is adversarial in nature, and has no judicial imprimatur. Under the statutory framework of the Court, the Document Containing the Charges (“DCC”) presents the charges, and the Confirmation Decision confirms them, thus “defining the parameters for trial”.

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<sup>5</sup> [ICC-01/14-01/18-742](#).

<sup>6</sup> [ICC-01/14-01/18-754](#); [ICC-01/14-01-756](#).

<sup>7</sup> [ICC-01/14-01/18-763](#).

<sup>8</sup> [ICC-01/14-01/18-766](#).

<sup>9</sup> [ICC-01/14-01/18-769](#).

<sup>10</sup> [ICC-01/14-01/18-799](#).

<sup>11</sup> [ICC-01/14-01/18-756](#), para. 32.

<sup>12</sup> [ICC-01/14-01/18-754](#), paras. 30-33 and 49-51.

No other document is foreseen in the Statute or the Rules to provide – or modify – notice to the Accused. The Trial Chamber is bound by the factual description of the charges, as determined by the Pre-Trial Chamber in the Confirmation Decision”.<sup>13</sup>

10. A Trial Brief merely sets out the Prosecutor’s case theory together with the supporting evidence. While a Trial Brief can be of assistance to the accused and serves as an effective trial management tool, it cannot replace the Confirmation Decision which is the only document post-confirmation that serves as the authoritative statement of the charges.<sup>14</sup> A Trial Brief cannot undermine “the authority of the confirmation decision as setting out the facts and circumstances described in the charges on which the trial proceeds”.<sup>15</sup>
11. The Prosecution itself emphasized this point in the introduction of its Trial Brief specifying that the primary charging instrument is the Decision on the Confirmation of Charges and that the Trial Brief is a complementary document that does not intend to limit its prospective submissions.<sup>16</sup>

(ii) A Trial Brief cannot circumvent notice provisions in the Statute and Regulations

12. *Second*, a Trial Brief submitted post-confirmation cannot circumvent the clear requirements of Regulation 52(c) of the RoC and Article 67(1)(a), which, require notice of the legal characterization of the facts. In the Defence’s submission, such legal characterization notice should necessarily include the constituent elements of the charged mode of liability to be specified and linked to the confirmed facts and circumstances. The Pre-Trial Chamber failed to do this

<sup>13</sup> *Prosecutor v. Bemba et al.*, [Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”](#), ICC-01/05-01/13-2275-Red, 8 March 2018, paras.196.

<sup>14</sup> *Ibid*, para.196.

<sup>15</sup> *Ibid*, para.199.

<sup>16</sup> [ICC-01/14-01/18-723-Conf](#), para. 2.

with regard to Yekatom's article 25(3)(a) liability. The Prosecution now seeks to perform the functions of the Pre-Trial Chamber in a Trial Brief. It has no vested legal power to do so.

13. While auxiliary documents have been held to provide additional notice of crimes that *were* properly confirmed,<sup>17</sup> there is no precedent for an auxiliary document curing notice of constituent elements of the charged modes of liability that were either *rejected, not confirmed or otherwise completely absent* from the Confirmation Decision. To accept the latter would be to permit the Prosecution to circumvent the confirmation process. The Defence submits that the constituent elements of the charged mode of liability are not bare legal elements that can be taken for granted. Not only must they be stated, but the confirmation process must ensure those elements are present in the facts. This marriage of constituent elements and confirmed facts did not occur in the Confirmation Decision.
14. As such, the Defence submits that a Trial Brief cannot cure defects as fundamental as non-confirmed variants of article 25(3)(a) liability<sup>18</sup> and non-confirmed constituent elements, such as the common plan, co-perpetrators and essential contribution. If this is to be permitted, the prejudice caused by such an exercise would be significant, as the aforementioned notice provisions designed to protect the accused are made redundant by such an approach.
15. Any auxiliary document must stay within the parameters of the Confirmed Decision.<sup>19</sup> Therefore, a Trial Brief cannot re-introduce distinct forms of article

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<sup>17</sup> *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, paras. 112-114, (*"Bemba AJ"*).

<sup>18</sup> Namely, direct perpetration ('as an individual'), co-perpetration ('jointly with another') or indirect perpetration ('through another person'). See Kai Ambos, 'Article 25 – Individual criminal responsibility', in Otto Triffterer & Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Beck Hart Nomos 2016), p. 987.

<sup>19</sup> Otto Triffterer, Alejandro Kiss, 'Article 74 – Requirements for the decision', in Otto Triffterer & Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Beck Hart Nomos 2016), pp. 1845-1846.

25(3)(a) perpetration that were not discussed in the Confirmation Decision, much less can it belatedly include their objective elements such as the common plan and the essential contribution(s) of the accused and co-perpetrators.<sup>20</sup>

16. More generally, however, if the Prosecution and CLRV are correct in their submissions that the Defence is not entitled to notice of the constituent elements of the mode the Prosecution charges<sup>21</sup> – a quite remarkable submission in the context of international criminal proceedings – there would be no need to plead the common plan and essential contribution in the DCC and 15 years of jurisprudence that has developed the constituent elements of article 25(3)(a) is legally irrelevant. However, linking the constituent elements of the pleaded mode with the confirmed facts is an essential part of providing notice to the accused during the confirmation stage. It is not optional.
17. The Prosecution and CLRV's position on this issue ignores clear appellate jurisprudence with regard to notice of the constituent elements of the charged mode of liability. The *Lubanga* Appeals Chamber stated that the "contours of the common plan as well as the accused's contribution" must be provided.<sup>22</sup> The Defence submits that such notice should be conveyed *in line with the statutory framework*. A Trial Brief does not form part of this. More pertinent to the instance case, however, is the *Bemba* Appeal Judgment. One of the constituent elements of command responsibility of article 28 is the failure to take measures to prevent, repress or punish the crimes. On this element, the Appeals Chamber stated that "the accused person must be informed of the factual allegations on the basis of which the Prosecutor seeks to establish this

<sup>20</sup> *Prosecutor v. Bemba et al*, [Judgment pursuant to Article 74 of the Statute](#), ICC-01/05-01/13-1989-Red, 19 October 2016, para. 64.

<sup>21</sup> [ICC-01/14-01/18-756](#), paras. 12 to 16; [ICC-01/14-01/18-754](#), paras. 27-28.

<sup>22</sup> *Prosecutor v. Lubanga*, [Judgement on the appeal of Mr Thomas Lubanga Dyilo against his conviction](#), ICC-01/04-01/06-3121-Red, 1 December 2014, para. 123.

element.” Because Mr. Bemba was not provided factual notice of this constituent element, it led to his acquittal.<sup>23</sup>

18. An analogous, but even more deficient scenario, exists in the present case with regard to the constituent elements of article 25(3)(a) liability. Mr. Yekatom does not benefit from notice of *any* constituent element, not to mention the absence of “factual allegations on the basis of which the Prosecutor seeks to establish this element.” No common plan, no co-perpetrators, no essential contribution, are *clearly set out* in the authoritative Confirmation Decision. Applying the Appeals Chamber’s approach in *Bemba* to the instant case, the only conclusion is that article 25(3)(a) notice is so irreparably deficient, that no Trial Brief can rescue the situation without upending the carefully negotiated statutory framework of the Court.
19. Lastly, the Trial Brief was not part of the trial record at the time of the impugned decision.<sup>24</sup> Given that the Trial Brief was not available to the Trial Chamber at all, it would be iniquitous for it to now prove dispositive of the very issues certified for appeal by the Trial Chamber.

**B) Second Issue: The Appeals Chamber should create a self-contained DCC or amend the Confirmation Decision**

20. The Defence hereby replies to the Prosecution’s Response as to whether or not the Appeals Chamber should create a self-contained DCC or amend the Confirmation Decision.<sup>25</sup> This proposition is also untenable for two main reasons.

- (i) *New self-contained charging documents have no statutory basis*

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<sup>23</sup> [Bemba AJ](#), paras. 186-88.

<sup>24</sup> The impugned decision was rendered on 29 October 2020, while the Trial Brief was filed on 10 November 2020.

<sup>25</sup> [ICC-01/14-01/18-756](#), paras. 38-39.



21. *First*, a newly updated self-contained charging document is without legal foundation in the Statute, and would usurp the powers and role of the Pre-Trial Chamber *alone* to confirm the facts and circumstances, including their legal characterization. Such a document would ignore the statutory framework and cannot legally set the parameters for trial.

22. In *Bemba et al*, the Trial Chamber rejected such an approach as lacking any basis in the Statute:

“Article 61(7)(a) of the Statute stipulates that the accused is committed to a Trial Chamber 'on the charges *as confirmed*' (emphasis added). This entails that the Pre-Trial Chamber's decision under Article 61(7)(a) of the Statute constitutes the authoritative document informing the accused of the charges 'as confirmed'. The Statute does not foresee the submission of a new charging document by the Prosecution post-confirmation. To the contrary, a DCC is only explicitly foreseen at the confirmation stage, but not at trial. This conclusion is further supported by the fact that the Court's legal instruments lack any provision related to the submission, timing and content of a charging document at the trial stage, equivalent to those applicable at the confirmation stage.”<sup>26</sup>

23. The *Al-Hassan* example of a self-contained charging document relied upon by the Prosecution is not accessible to the Defence (as it is a confidential annex), but is briefly described in the Conduct of Proceedings Decision in that case.<sup>27</sup> In any event, this legally doubtful action did not receive appellate scrutiny in those proceedings. However, the Appeals Chamber has already rejected such an approach. In *Bemba et al*, the Appeals Chamber stated that:

[The] Trial Chamber did not have the “option” to request the Prosecutor to “update” the charges as confirmed by the Pre-Trial Chamber. While the trial chamber may exercise pre-trial functions that are “capable of application” in trial proceedings, this power does not encompass functions that are exclusively assigned to the pre-trial chamber”. [...] Prosecutor can only amend the charges with the permission of the Pre-Trial Chamber. [...] An

<sup>26</sup> *Prosecutor v. Bemba et al.*, [Decision on the Submission of Auxiliary Documents](#), ICC-01/05-01/13-992, 10 June 2015, para. 11.

<sup>27</sup> *Prosecutor v. Al Hassan*, [Decision on the conduct of proceedings](#), ICC-01/12-01/18-789, 6 May 2020, paras. 12-13.

“updated” document containing the charges is “neither appropriate nor compatible with the procedural regime set out in the Statute as it undermines the authority of the decision on confirmation of charges to serve as the operative document for the trial.”<sup>28</sup>

(ii) Amending the Confirmation Decision has no statutory basis

24. *Second*, directly amending the Confirmation Decision has no statutory basis. Article 61(9) of the Statute makes clear that any amendment of the charges requires the permission of the Pre-Trial Chamber. It is the only body “competent to decide on the definition of the charges for which the person is prosecuted at trial.”<sup>29</sup> Thus, the remedies sought by the Prosecution are not only unlawful, they are misdirected.
25. In this regard, the Prosecution's reference to article 83(1) as a remedial avenue to amend the Confirmation Decision is not correct.<sup>30</sup> This provision gives the Appeals Chamber the powers of the *Trial* Chamber, *not* the Pre-Trial Chamber, the only competent body to approve amendments to the charges.<sup>31</sup> Moreover, by its plain wording, article 83(1) does not apply to appeals under article 82(1)(d), such as this one.<sup>32</sup> While rule 149 does give the Appeals Chamber the powers of the Pre-Trial Chamber with regard to the “governance of proceedings and the submission of evidence”, it is submitted that for the Appeals Chamber to directly amend the Confirmation Decision would usurp the role and powers of the Pre-Trial Chamber alone to confirm the charges and

<sup>28</sup> *Prosecutor v. Bemba et al.*, [Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”](#), ICC-01/05-01/13-2275-Red, 8 March 2018, para.197.

<sup>29</sup> *Prosecutor v. Bemba et al.*, [Decision on the Submission of Auxiliary Documents](#), ICC-01/05-01/13-992, 10 June 2015, para. 13.

<sup>30</sup> [ICC-01/14-01/18-756](#), para. 39, fn. 118.

<sup>31</sup> Article 83(1) reads: “For the purposes of proceedings under article 81 and this article, the Appeals Chamber shall have all the **powers of the Trial Chamber**.” (emphasis added).

<sup>32</sup> “Article 83 para. 1, which provides that ‘the Appeals Chamber shall have all the powers of the Trial Chamber’, **does not apply to appeals under article 82**, leaving the powers of the Appeals Chamber under this article to be governed solely by the Rules.” (emphasis added). Volker Nerlich, ‘Article 82 – Appeals against other decisions’, in Otto Triffterer & Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Beck Hart Nomos 2016), p.1195.

set the parameters for trial. It is not credible that the drafters of the Rules had in mind such a drastic power that would permit the circumvention of the core function of the Pre-Trial Chamber.

26. In any event, the relevant rule governing amendments of the charges (which the Prosecution submits the Appeals Chamber can apply *mutatis mutandis*), rule 128, requires from the Prosecution a formal written request to amend the charges, and to submit written observations in support of such a request.<sup>33</sup> Neither have been made. The Prosecution has therefore not been diligent in offering this as a credible solution. Moreover, under article 61(9) of the Statute, this remedial avenue would also require a fresh confirmation hearing to litigate and confirm any proposed amendments. Doing that now, on the eve of trial, would violate Mr. Yekatom's right to a fair and expeditious trial.

**C) Third Issue: The Defence should have sought leave to appeal the Confirmation Decision**

27. The CLRV's submissions<sup>34</sup> and the Prosecution Responses<sup>35</sup> that the Defence should have sought leave to appeal the Confirmation Decision is untenable for two reasons.
28. *First*, the Defence Motion was timely filed in line with the procedural regime laid down by the Trial Chamber. On 16 July 2020, the Trial Chamber issued its *Decision Setting the Commencement Date of the Trial* in which it set a deadline for all motions which require resolution prior to the commencement of trial to 11 January 2021.<sup>36</sup> The Defence filed the initial motion before this deadline was even set, on 22 June 2020.<sup>37</sup>

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<sup>33</sup> Rule 128(1) and (2).

<sup>34</sup> [ICC-01/14-01/18-754](#), paras. 4, 52;

<sup>35</sup> [ICC-01/14-01/18-756](#), paras. 6-11.

<sup>36</sup> [ICC-01/14-01/18-589](#), para. 21.

<sup>37</sup> [ICC-01/14-01/15-565](#); Public redacted version: [ICC-01/14-01/18-565-Red.](#)

29. The Appeals Chamber in *Ongwen* underlined that there are permissible moments when the Defence can raise objections in relation to the formulation of the charges: firstly, following the filing of the document containing the charges, and secondly, when the Trial Chamber sets a deadline for the parties to file any motions which required resolution prior to the commencement of the trial.<sup>38</sup> Moreover, the Appeals Chamber did not state it was mandatory to appeal the Confirmation Decision in order to raise any issues relating to the formulation of the charges at trial.
30. *Second*, and notwithstanding the above, the legal nature of the Defence Motion is clearly permitted by Rule 134(1) of the Rules.<sup>39</sup> This was confirmed by the Appeals Chamber in *Ongwen*.<sup>40</sup> The Trial Chamber correctly deemed the motion admissible by ruling on the merits in the impugned decision before certifying leave to appeal. The admissibility of this appeal is therefore without question.

## CONCLUSION

31. In light of the above arguments, the Defence respectfully requests the Appeals Chamber to dismiss the Prosecution's and the Common Legal Representative of Victims' submissions concerning the three identified issues.

**RESPECTFULLY SUBMITTED ON THIS 11<sup>th</sup> DAY OF JANUARY 2021**



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<sup>38</sup> *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 ('*Ongwen Appeal Decision*'), para. 16.

<sup>39</sup> Rule 134 reads: "Prior to the commencement of the trial, the Trial Chamber on its own motion, or at the request of the Prosecutor or the defence, may rule on any issue concerning the conduct of the proceedings".

<sup>40</sup> [Ongwen Appeal Decision](#), paras. 126-127. The Appeals Chamber also stated that Rule 134(2) may be applicable to the present scenario.