

**Original: English****No. ICC-01/14-01/18 OA2****Date: 5 February 2021****THE APPEALS CHAMBER**

Before: Judge Solomy Balungi Bossa, Presiding
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 YEKATOM AND
PATRICE-EDOUARD NGAÏSSONA****Public document****Judgment**

**on the appeal of Mr Alfred Yekatom against the decision of Trial Chamber V of
29 October 2020 entitled ‘Decision on motions on the Scope of the Charges and
the Scope of Evidence at Trial’**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for the Defence
Ms Mylène Dimitri
Mr Thomas Hannis

Legal Representatives of Victims

Mr Abdou Dangabo Moussa
Ms Elisabeth Rabesandratana
Mr Yaré Fall
Ms Marie-Edith Douzima-Lawson
Ms Paolina Massida
Mr Dmytro Suprun

REGISTRY

Registrar
Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Alfred Yekatom against the decision of Trial Chamber V entitled ‘Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial’ of 29 October 2020 (ICC-01/14-01/18-703-Conf; public redacted version: ICC-01/14-01/18-703-Red, dated 30 October 2020 and registered on 2 November 2020),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The ‘Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial’ is confirmed.

REASONS

I. KEY FINDINGS

1. For the purposes of sufficient notice, the charges must set out the exact sub-provision applicable in article 25 of the Statute and the specific form of participation within that sub-provision. The Appeals Chamber further notes that the charges must also give notice to an accused of the material facts associated with his or her particular form of participation. This practice fully comports with the spirit of internationally recognised human rights principles on that matter and takes on board the experience of the *ad hoc* tribunals in their complex proceedings.
2. The question of whether the charges provide sufficient notice of the legal characterisation of the facts should turn on the particular circumstances of the case, taking into account the nature of the charges and the ability of the accused to prepare a meaningful defence. The Appeals Chamber finds it appropriate to follow the approach of the *ad hoc* tribunals in preferring detail about the role of an accused in the charges. In some cases, this may require going beyond the language of the particular forms of

liability enumerated in the Statute. However, the Appeals Chamber finds that there is no rule requiring notice of the legal elements of co-perpetration in all cases.

II. INTRODUCTION

3. Mr Alfred Yekatom stands accused of committing crimes within the jurisdiction of the Court jointly with another and through another person, as well ordering their commission under article 25(3)(a) and (b) of the Statute. Before the opening of Mr Yekatom's joint trial, he filed a motion to dismiss the charges as they relate to his criminal responsibility as a 'co-perpetrator'. He argued that the charges he faces, as confirmed by Pre-Trial Chamber II (the 'Pre-Trial Chamber'), provide insufficient notice of the 'constituent legal elements' of co-perpetration and, furthermore, of the facts that establish those elements. Trial Chamber V (the 'Trial Chamber') rejected Mr Yekatom's request to dismiss, and he now seizes the Appeals Chamber of the same issues.

4. This appeal is grounded in an accused's right to be informed of the 'nature, cause and content' of the charges under article 67(1)(a) of the Statute. Mr Yekatom argues that the scope of his right under this provision, as a person accused of criminal responsibility as a 'co-perpetrator', includes

- a. notice of the legal elements of the confirmed mode of individual criminal responsibility of 'co-perpetration'; and
- b. notice of the 'common plan' and his alleged 'essential contribution', using this specific language, in the section of the charges characterising the relevant facts.

The Appeals Chamber must determine whether the Trial Chamber erred in finding against Mr Yekatom in both respects.

III. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial and Trial Chamber

5. On 11 December 2019, the Pre-Trial Chamber confirmed the charges against Mr Alfred Yekatom (the ‘Confirmation Decision’).¹

6. On 17 March 2020, the case against Mr Yekatom was transferred to the Trial Chamber.²

7. On 22 June 2020, Mr Yekatom filed a motion requesting that the Trial Chamber dismiss the mode of responsibility of co-perpetration confirmed against him and to proceed to try him solely under the mode of responsibility of ordering.³ In support of this request, he argued that the Confirmation Decision had failed to provide adequate notice of the constituent elements of the former mode of responsibility, as well as of the facts underpinning it.⁴

8. On 29 October 2020, the Trial Chamber rejected Mr Yekatom’s request (the ‘Impugned Decision’).⁵ The Trial Chamber found that Mr Yekatom ‘has been sufficiently informed of the modes of liability with he is charged’ as the ‘Confirmation Decision identifies with precision three modes of liability with which Mr Yekatom is charged: (i) co-perpetration, with its variation, indirect co-perpetration; (ii) indirect perpetration; and (iii) ordering’.⁶ Additionally, the Trial Chamber found that Mr Yekatom ‘has been provided with sufficient notice of the facts establishing the

¹ [Public Redacted and Corrected version of “Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona”](#), 14 May 2020, ICC-01/14-01/18-403-Red-Corr (original confidential version registered on 11 December 2019).

² [Transmission to Trial Chamber V of the record of the proceedings, including the Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona](#), 17 March 2020, ICC-01/14-01/18-455; [Decision constituting Trial Chamber V and referring to it the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*](#), 16 March 2020, ICC-01/14-01/18-451.

³ Public redacted version of “Motion to Dismiss Co-Perpetration Mode of Liability”, ICC-01/14-01/18-565-Red (confidential version registered on the same date (ICC-01/14-01/18-565-Conf) (the ‘[Motion to Dismiss Co-Perpetration](#)’), paras 1-2, 48.

⁴ [Motion to Dismiss Co-Perpetration](#), para. 1.

⁵ [Public redacted version of ‘Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial’](#), dated 30 October 2020 and registered on 2 November 2020, ICC-01/14-01/18-703-Red (confidential version registered on 29 October 2020 (ICC-01/14-01/18-703-Conf)), p. 22.

⁶ [Impugned Decision](#), paras 22, 24.

objective elements of co-perpetration’, and that he ‘has been sufficiently informed of the contours of the common plan and the identities of his alleged co-perpetrators’.⁷

9. On 4 November 2020, Mr Yekatom requested leave to appeal the Impugned Decision on two issues.⁸

10. On 13 November 2020, the Trial Chamber granted leave to appeal in respect of the two issues raised by Mr Yekatom, with modifications to the second issue.⁹ The first issue is formulated as follows:

whether the Chamber erred in law when finding that, for the purpose of providing notice, as far as the legal characterisation of the facts is concerned, it is not necessary for the charges to set out the constituent legal elements of the alleged mode of liability under Article 25(3)(a) of the Statute.¹⁰

11. The Trial Chamber rephrased the second issue as follows:

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

B. Proceedings before the Appeals Chamber

12. On 26 November 2020, Mr Yekatom filed his appeal brief (the ‘Appeal Brief’).¹² Mr Yekatom raises two grounds of appeal. The first ground concerns the ‘necessity to set out the constituent elements’ of the mode of responsibility under article 25(3)(a).¹³ The second ground of appeal concerns the ‘necessity to use the applicable terminology when characterising the relevant facts’.¹⁴ Mr Yekatom requests that the Appeals

⁷ [Impugned Decision](#), paras 27, 32.

⁸ [Request for leave to appeal “Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial” \(ICC-01/14-01/18-703-Conf\)](#), ICC-01/14-01/18-713-Conf. (Pursuant to the Decision on the Yekatom Defence Request for Leave to Appeal the Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial, ICC-01/14-01/18-730 (the ‘[Decision Granting Leave to Appeal](#)’), the request was reclassified as public and registered on 16 November 2020 (ICC-01/14-01/18-713)).

⁹ [Decision Granting Leave to Appeal](#), p. 8.

¹⁰ [Decision Granting Leave to Appeal](#), para. 3.

¹¹ [Decision on the Request for Leave to Appeal](#), para. 14.

¹² [Yekatom Defence Appeal Brief – Notice of Co-Perpetration](#), ICC-01/14-01/18-742.

¹³ [Appeal Brief](#), paras 12-33.

¹⁴ [Appeal Brief](#), paras 34-51.

Chamber reverse the Impugned Decision and dismiss the allegations relating to the mode of responsibility of co-perpetration.¹⁵

13. On 7 December 2020, the Prosecutor¹⁶ and the Legal representatives of victims (the ‘Victims’)¹⁷ filed their responses to the Appeal Brief (the ‘Prosecutor’s Response’ and the ‘Victims’ Response’, respectively). The Prosecutor requests that in the event the Appeals Chamber is unable to decide on this appeal before the commencement of the trial scheduled for 9 February 2021, it informs the parties and participants as much as possible in advance ‘so that appropriate measures may be undertaken’.¹⁸

14. On 4 January 2021, the Appeals Chamber granted Mr Yekatom’s request to file a reply to the Prosecutor’s and Victims’ responses.¹⁹ He filed his reply on 11 January 2021 (‘Mr Yekatom’s Reply’).²⁰

IV. MERITS

A. Relevant part of the Impugned Decision

15. In the Impugned Decision, the Trial Chamber recalled the right of the accused ‘to be informed promptly and in detail of the “nature, cause and content” of the charges’ under article 67(1)(a) of the Statute.²¹ It held that this right entitles the accused to have notice of ‘the facts and circumstances underpinning the charges’ in addition to the ‘legal characterisation of the facts to accord with the crimes under the jurisdiction of the Court and the precise mode(s) of liability under Articles 25 and 28 of the Statute’.²² The Trial Chamber noted that in accordance with regulation 52(c) of the Regulations of the Court,

¹⁵ [Appeal Brief](#), paras 51, 55-56.

¹⁶ [‘Prosecution Response to “Yekatom Defence Appeal Brief – Notice of Co-Perpetration” and request for an expedited decision’](#), ICC-01/14-01/18-756.

¹⁷ [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.

¹⁸ [Prosecutor’s Response](#), paras 4, 40.

¹⁹ [Decision on Mr Yekatom’s request for leave to reply](#), ICC-01/14-01/18-799; [Request for leave to 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 Prosecution Response \[sic\] to “Yekatom Defence Appeal Brief – Notice of Co-Perpetration” and request for an expedited decision”](#), (ICC-01/14-01/18-756), 10 December 2020, ICC-01/14-01/18-763.

²⁰ [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), ICC-01/14-01/18-806.

²¹ [Impugned Decision](#), para. 16.

²² [Impugned Decision](#), para. 16.

the Prosecutor must identify the ‘exact sub-provision and specific mode of liability’ listed under articles 25 or 28 of the Statute.²³

16. With respect to the legal characterisation of the facts, the Trial Chamber was of the view that, for the purpose of providing notice, it was ‘not necessary for the charges to further set out the constituent legal elements underlying the alleged mode(s) of liability’.²⁴ The Trial Chamber found there to be no such requirement as ‘the constituent legal elements are well established in the jurisprudence of the Court’.²⁵

17. The Trial Chamber recalled that the Pre-Trial Chamber found substantial grounds to believe that Mr Yekatom was criminally responsible under, *inter alia*, article 25(3)(a) of the Statute for ‘committing the [alleged] crimes jointly with another or through another’.²⁶ The Trial Chamber noted that the phrase ‘jointly with another or through another’ in article 25(3)(a) of the Statute ‘captures two distinct modes of liability’, namely, ‘(i) co-perpetration (commission of a crime ‘jointly with another’ person); and (ii) indirect perpetration (commission of a crime ‘through another person, regardless of whether that other person is criminally responsible’)’.²⁷ The Trial Chamber also observed that this provision contains a ‘form of co-perpetration known in the jurisprudence of the Court as ‘indirect co-perpetration’’.²⁸

18. The Trial Chamber found that the Confirmation Decision identified ‘with precision’ Mr Yekatom’s alleged participation in the crimes charged: ‘(i) co-perpetration, with its variation, indirect co-perpetration; (ii) indirect perpetration; and (iii) ordering’.²⁹ The Trial Chamber noted that the absence of the constituent elements of these modes of liability in the Confirmation Decision did not result in a ‘lack of notice of the legal characterisation of the facts’.³⁰ It therefore found that Mr Yekatom

²³ [Impugned Decision](#), para. 17.

²⁴ [Impugned Decision](#), para. 18.

²⁵ [Impugned Decision](#), para. 18.

²⁶ [Impugned Decision](#), para. 23.

²⁷ [Impugned Decision](#), para. 23.

²⁸ [Impugned Decision](#), para. 23.

²⁹ [Impugned Decision](#), para. 24.

³⁰ [Impugned Decision](#), para. 24.

was informed of the legal characterisation of the facts regarding the charged modes of liability.³¹

19. The Trial Chamber recalled that it was ‘not bound’ by the Pre-Trial Chamber’s interpretation of the law.³² Nonetheless, it noted that for the preparation of his defence, it was important for Mr Yekatom ‘to have clarity on the Chamber’s understanding of the constituent elements of the confirmed modes of liability’.³³ In the Trial Chamber’s view, there was ‘no reason’ for it ‘to depart’ from the jurisprudence of the Appeals Chamber on the objective elements of co-perpetration.³⁴

20. With respect to the underlying facts and circumstances supporting the modes of responsibility under article 25 of the Statute, the Trial Chamber held the following regarding the requirements of article 67(1)(a) of the Statute that the charges must meet:

[...] the charges must identify with sufficient clarity and detail the factual allegations which support each of the constituent legal elements. The Chamber recalls the Appeals Chamber’s pronouncement that, where an accused is not alleged to have directly carried out the incriminated conduct and is charged for crimes committed on the basis of a common plan, he/she must be provided with detailed information regarding: (i) his/her alleged conduct that gives rise to criminal responsibility, including the contours of the common plan and its implementation as well as the accused’s contribution; (ii) the related mental element; and (iii) the identities of any alleged co-perpetrators.³⁵

21. After reviewing the factual allegations in the Confirmation Decision regarding co-perpetration, the Trial Chamber found that Mr Yekatom had sufficient notice of the ‘facts establishing the objective elements of co-perpetration’ and ‘the contours of the common plan and the identities of his alleged co-perpetrators’.³⁶ The Trial Chamber also noted that, although the accused is entitled to be informed of the identities of his alleged co-perpetrators, ‘it is not necessary that all the alleged co-perpetrators are

³¹ [Impugned Decision](#), para. 37.

³² [Impugned Decision](#), para. 25.

³³ [Impugned Decision](#), para. 26.

³⁴ [Impugned Decision](#), para. 26, referring, *inter alia*, to *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, 1 December 2014 (confidential version was registered on the same date (ICC-01/04-01/06-3121-Conf) (the ‘[Lubanga Appeal Judgment](#)’), paras 7, 445, 469, 473.

³⁵ [Impugned Decision](#), para. 19, referring, *inter alia*, to [Lubanga Appeal Judgment](#), paras 3, 121-123.

³⁶ [Impugned Decision](#), paras 27, 32. See also paras 28-31, 37.

identified [;] rather, their identities must be stated ‘to the extent possible’ and known to the Prosecution’.³⁷

22. With respect to Mr Yekatom’s contribution, the Trial Chamber observed that the operative part of the Confirmation Decision contained ‘numerous cross-references to other parts of the decision’ and therefore, must ‘be read in light of, and together with, the rest of the Confirmation Decision’.³⁸ After reviewing the factual allegations regarding his contribution, the Trial Chamber found that Mr Yekatom had been ‘informed of his alleged contribution’.³⁹ It further found that the ‘charges equally need not set out the accused’s alleged contribution in relation to each alleged crime or incident’.⁴⁰

B. Submissions of the parties and participants

I. Mr Yekatom’s submissions

23. Under his first ground of appeal, Mr Yekatom submits that the Trial Chamber erred in finding that the jurisprudence on co-perpetration under article 25(3)(a) of the Statute is ‘sufficiently consistent’ to provide ‘adequate notice of the constituent elements’.⁴¹ Mr Yekatom argues that even if the jurisprudence on the elements of co-perpetration is consistent, the Confirmation Decision provides insufficient notice on the constituent elements confirmed in this case.⁴²

24. Mr Yekatom argues further that contrary to the Trial Chamber’s view, the terms ‘common plan’ and ‘essential contribution’ require further definition in order to provide sufficient notice, and that the ‘case law is not uniformed [*sic*] either on whether the “essential contribution” must be to the common plan or to the crimes’.⁴³ Mr Yekatom adds that it is not clear whether the Pre-Trial Chamber ‘intended to apply the notion of “essential contribution” as the Appeals Chamber expressed it’ in the *Lubanga* Appeal Judgment.⁴⁴ Finally, Mr Yekatom avers that given the lack of clarity regarding the

³⁷ [Impugned Decision](#), fn. 57 (emphasis in original omitted).

³⁸ [Impugned Decision](#), para. 33.

³⁹ [Impugned Decision](#), paras. 34-35.

⁴⁰ [Impugned Decision](#), para. 36.

⁴¹ [Appeal Brief](#), para. 13.

⁴² [Appeal Brief](#), paras 18-21.

⁴³ [Appeal Brief](#), paras 22-24.

⁴⁴ [Appeal Brief](#), para. 28.

‘specific constituent elements of the mode of co-perpetration’, this ‘substantially’ affects the preparation of his defence, such as the assessment of ‘whether certain alibi evidence would assist with his defence’.⁴⁵

25. Under his second ground of appeal, Mr Yekatom submits that the Trial Chamber erred in ‘finding that the factual allegations need not be explicitly tied to the legal findings’.⁴⁶ Referring to the Appeals Chamber’s jurisprudence, he argues that an accused must be informed in detail of, ‘*inter alia*, “the contours of the common plan and its implementation as well as the accused [*sic*] contribution”’.⁴⁷ Mr Yekatom avers that the Confirmation Decision is devoid of ‘any findings on what the common plan is alleged to be, whether there was one or more common plan or agreement, or which individual criminal act was committed under which common plan’.⁴⁸ He argues that ‘the fundamentals of the common plan’ should be ‘clearly set out in a confirmation decision’ in order to provide an accused with proper notice.⁴⁹

26. Mr Yekatom contends that as an appropriate analogy to his case, the ICTY requires that specific language be used for the pleading of joint criminal enterprise.⁵⁰ He argues that this level of detail required at the ICTY should also apply to the mode of co-perpetration under article 25(3)(a) of the Statute in order to guarantee adequate notice of this mode of responsibility.⁵¹

27. Mr Yekatom argues further that the Trial Chamber’s reference to factual findings that related to ‘circumstantial information’, was ‘misplaced and unreliable’ and failed to provide sufficient notice of the common plan.⁵² In addition, he avers that it was ‘unreasonable to infer that the Pre-Trial Chamber intended to confirm [the alleged] political plan as [*sic*] “common plan”’.⁵³ Mr Yekatom adds that the Pre-Trial Chamber failed to find that his alleged contribution was ‘essential’.⁵⁴

⁴⁵ [Appeal Brief](#), para. 31 (emphasis in original omitted).

⁴⁶ [Appeal Brief](#), para. 35. *See also* para. 50.

⁴⁷ [Appeal Brief](#), para. 36, referring to [Lubanga Appeal Judgment](#), para. 123.

⁴⁸ [Appeal Brief](#), para. 37.

⁴⁹ [Appeal Brief](#), para. 37.

⁵⁰ [Appeal Brief](#), para. 39.

⁵¹ [Appeal Brief](#), para. 41.

⁵² [Appeal Brief](#), paras 45-46.

⁵³ [Appeal Brief](#), para. 47.

⁵⁴ [Appeal Brief](#), para. 48.

2. *The Prosecutor's submissions*

28. In respect of the first ground of appeal, the Prosecutor submits that ‘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’.⁵⁵ She avers that (i) Mr Yekatom confuses the purpose of the confirmation process;⁵⁶ (ii) he was adequately informed of the nature of the charges;⁵⁷ (iii) he has the necessary information to adequately prepare his defence;⁵⁸ and (iv) ‘[t]he jurisprudence on co-perpetration under article 25(3)(a) is consistent’.⁵⁹

29. In respect of the second ground of appeal, the Prosecutor submits that (i) Mr Yekatom ‘misconstrues the manner in which the facts must be legally characterised’;⁶⁰ (ii) ‘there is no requirement as to how charges must be structured’;⁶¹ (iii) other documents besides the charges and the confirmation decision can provide sufficient notice to the accused;⁶² (iv) since the charges were ‘clear as to the facts and circumstances and their legal characterisation’, the Pre-Trial Chamber did not need ‘to use specific terminology for co-perpetration in the Confirmation Decision’;⁶³ and (v) Mr Yekatom’s ‘reference to the pleading of joint criminal enterprise in the ICTY is inapposite’.⁶⁴

30. Finally, with respect to the material impact of the alleged errors, the Prosecutor argues that if the Appeals Chamber were to find an error, the Appeals Chamber could either amend the Confirmation Decision or itself cure any identified ‘defects of notice and/or reasoning’.⁶⁵ Alternatively, the Prosecutor argues that the Appeals Chamber ‘could produce – or order the Trial Chamber to produce – a self-contained version of the charges’.⁶⁶

⁵⁵ [Prosecutor's Response](#), paras 2, 9-25.

⁵⁶ [Prosecutor's Response](#), paras 10-11.

⁵⁷ [Prosecutor's Response](#), paras 12-18.

⁵⁸ [Prosecutor's Response](#), paras 19-23.

⁵⁹ [Prosecutor's Response](#), paras 24-25.

⁶⁰ [Prosecutor's Response](#), paras 3, 29.

⁶¹ [Prosecutor's Response](#), paras 3, 30-31.

⁶² [Prosecutor's Response](#), para. 32.

⁶³ [Prosecutor's Response](#), paras 3, 33-34.

⁶⁴ [Prosecutor's Response](#), para. 35.

⁶⁵ [Prosecutor's Response](#), para. 39.

⁶⁶ [Prosecutor's Response](#), para. 39.

3. *The Victims' observations*

31. The Victims argue that there is consistency in the jurisprudence on the interpretation of the legal elements of co-perpetration.⁶⁷ They aver that ‘the terms “common plan” and “essential contribution” do not require further definition’, as the Confirmation Decision satisfies all of the requirements under article 67(1)(a) of the Statute.⁶⁸ The Victims add that Mr Yekatom’s right to proper notice was not violated as auxiliary documents can provide ‘further clarity and precision’ on his criminal responsibility.⁶⁹

32. The Victims further argue that ‘Mr Yekatom is sufficiently informed of the “contours” of the “common plan” and his alleged “essential contribution”’.⁷⁰ They aver that specific language is not required when pleading co-perpetration responsibility.⁷¹ They add that the lack of specific terminology in the Confirmation Decision ‘does not preclude the interpretation of how the facts are legally characterised’.⁷²

4. *Mr Yekatom's reply*

33. Mr Yekatom replies that the Prosecutor’s trial brief cannot be considered in the determination of whether notice of the constituent elements of the modes of criminal responsibility is provided because (i) a trial brief is not a statutory notice document; and (ii) it cannot circumvent the notice provisions in the Statute and Regulations of the Court.⁷³

34. Furthermore, Mr Yekatom argues that the Prosecutor’s suggestion that the Appeals Chamber may create a self-contained document containing the charges or amend the Confirmation Decision should be rejected because there is no statutory basis for this suggestion.⁷⁴

⁶⁷ [Victims' Response](#), paras 19-25.

⁶⁸ [Victims' Response](#), paras 26-29.

⁶⁹ [Victims' Response](#), paras 30-34.

⁷⁰ [Victims' Response](#), paras 36-39.

⁷¹ [Victims' Response](#), paras 40-43.

⁷² [Victims' Response](#), paras 44-47.

⁷³ [Mr Yekatom's Reply](#), paras 8-19.

⁷⁴ [Mr Yekatom's Reply](#), paras 20-26.

35. Finally, Mr Yekatom takes issue with the argument that he should have sought leave to appeal the Confirmation Decision because, he submits, the motion to dismiss the mode of liability of co-perpetration was filed in time and with a proper legal basis.⁷⁵

C. Determination by the Appeals Chamber

1. First ground of appeal

36. At the heart of the issues raised under Mr Yekatom's first ground of appeal is the precise scope of an accused person's right to be informed of the legal characterisation of the factual allegations against him or her. Regulation 52(c) of the Regulations of the Court requires that the document containing the charges, filed pursuant to article 61(3)(a) of the Statute, 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'.⁷⁶ The parties and participants do not dispute that this provision requires clear identification of both the relevant sub-provision in articles 25 and 28 of the Statute and the applicable mode or modes under that sub-provision (for example, 'jointly with another [...] person' under article 25(3)(a) of the Statute).⁷⁷ However, beyond this point of agreement, the parties and participants diverge. Mr Yekatom's position suggests that in order to comply with his right to a fair trial, the Regulations of the Court must be read expansively so as to also mandate that the charges include notice of the legal elements of individual criminal responsibility, in this case 'co-perpetration'.

37. At the outset, the Appeals Chamber finds that a literal reading of the text in regulation 52(c) of the Regulations of the Court would militate against Mr Yekatom's position. This provision requires that the document containing the charges provide a 'legal characterisation of the facts to accord [...] with [...] the precise form of

⁷⁵ [Mr Yekatom's Reply](#), paras 27-30.

⁷⁶ Regulation 52 of the Regulations of the Court reads as follows:

Regulation 52

Document containing the charges

The document containing the charges referred to in article 61 shall include:

- (a) the full name of the person and any other relevant identifying information;
- (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 with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.

⁷⁷ [Appeal Brief](#), para. 29; [Prosecutor's Response](#), para. 13; [Victims' Response](#), para. 25.

participation *under* articles 25 and 28'.⁷⁸ The Appeals Chamber finds that the use of the word 'under' indicates a requirement only that the legal characterisation given must directly relate to the text found in the relevant provisions and sub-provisions, and not to other sources for further elaboration. However, Mr Yekatom further suggests that, in addition to the charging document submitted by the Prosecutor, his right to notice of the charges compels a pre-trial chamber to spell out the legal elements of the confirmed modes of liability in its decision confirming the charges.⁷⁹ He submits that the Confirmation Decision in this case 'does not contain enough indicia as to what approach is adopted when indirect co-perpetration liability is confirmed against [him]'.⁸⁰ In calling into question the approach taken by the Pre-Trial Chamber in this case, Mr Yekatom invokes his right to a fair trial, and more particularly his right to notice of the charges, and to prepare his defence accordingly, under article 67(1)(a) of the Statute. As the Court's legal texts do not define the precise scope of this statutory guarantee, the Appeals Chamber must turn to international human rights law for interpretation.⁸¹

38. The language of the right to notice of the charges under article 67(1)(a) of the Statute is as follows:

1. In the determination of any charge, the accused shall be entitled 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.

It is this provision that ultimately governs the scope and extent of the notice provided in the charges confirmed after a hearing under article 61 of the Statute. Moreover, article 64(8)(a) of the Statute requires that, at the commencement of the trial, the trial chamber satisfy itself that the accused 'understands the nature of the charges'.⁸² The language relating to the 'nature' of the charges has its origin in both the International Covenant on Civil and Political Rights and regional human rights conventions, which have been interpreted in a way that requires that a person facing criminal charges be

⁷⁸ Emphasis added.

⁷⁹ [Appeal Brief](#), paras 29-31.

⁸⁰ [Appeal Brief](#), para. 17.

⁸¹ Article 21(3) of the Statute provides that the application and interpretation of the sources of law in article 21 of the Statute must be consistent with internationally recognised human rights.

⁸² *See also* rule 121(3) of the Rules of Procedure and Evidence (the 'Rules'); article 61(3)(a) of the Statute.

informed not only of the *cause* of the charges – that is, the *acts* he or she is alleged to have committed – but also the *nature* of the charges, or the *legal characterisation* given to the acts in question.⁸³ This information, in addition, should be ‘detailed’.⁸⁴ But beyond this, the human rights jurisprudence does not particularise what level of ‘detail’ must be provided in the legal characterisation of the facts. Rather, the jurisprudence indicates that the requisite level of detail varies depending on the particular circumstances of each case. Ultimately, the courts have taken a case-by-case approach, ensuring that the information provided in each case is adequate so as to enable the accused to prepare his or her defence accordingly.⁸⁵

39. The Appeals Chamber considers that such a case-by-case approach is also appropriate in the proceedings before the Court. In this particular appeal, the Appeals Chamber is presented with the question of what may be sufficient notice when the charges include co-perpetration. The Appeals Chamber notes that this Court’s jurisdiction over crimes committed indirectly and collectively has given rise to a body of jurisprudence interpreting and elaborating upon the various forms of participation provided for under article 25 of the Statute. The question remains as to whether the nature of the Court and the crimes under its jurisdiction compels a broad interpretation of what constitutes the ‘legal characterisation’ of the facts, so as to include all of the legal elements associated with a particular form of responsibility.

⁸³ See European Court of Human Rights (the ‘ECtHR’), First Section, *Mattoccia v. Italy*, Judgment, 25 July 2000, application no. 23969/94 ([‘Mattoccia Judgment’](#)), para. 59; Third Section, *Ayçoban and others v. Turkey*, Judgment, 22 December 2005, application nos 42208/02, 43491/02, 43495/02 ([‘Ayçoban and others Judgment’](#)), para. 21. See also Inter-American Court of Human Rights (the ‘IACtHR’), *Barreto Leiva v. Venezuela*, [Judgment](#), 17 November 2009, Series No. 206, para. 28, holding that ‘the State must notify the accused not only of the charges against him, that is, the crimes or offenses he is charged with, but also of the reasons for them, and the evidence for such charges and the legal definition of the facts’.

⁸⁴ See ECtHR, Grand Chamber, *Pélissier and Sassi v. France*, [Judgment](#), 25 March 1999, application no. 25444/94, para. 51; [Mattoccia Judgment](#), para. 59; Second Section, *Dallos v. Hungary*, [Judgment](#), 1 March 2001, application no. 29082/95, para. 47; First Section, *Sadak and others v. Turkey (No. 1)*, [Judgment](#), 17 July 2001, applications nos 29900/96, 29901/96, 29902/96, 29903/96, para. 48; Third Section, *Sipavičius v. Lithuania*, [Judgment](#), 21 February 2002, application no. 49093/99, para. 27; First Section, *I.H. and others v. Austria*, Judgment, 20 April 2006, application no. 42780/98 ([‘I.H. and others v. Austria Judgment’](#)), para. 30.

⁸⁵ See ECtHR, [Mattoccia Judgment](#), para. 60; [Ayçoban and others Judgment](#), para. 21, holding that ‘the information about the nature and cause of the accusation must be adequate to enable the accused to prepare his defence accordingly’.

40. The Appeals Chamber observes that the Statutes of the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR') also mirrored the human rights principles in guaranteeing the accused prompt and detailed information of the nature and cause of the charges, in recognition of the right to a fair trial and the right to an effective defence.⁸⁶ This guarantee entails notice of the 'legal classification' of the alleged facts.⁸⁷ In the early days of the *ad hoc* tribunals, trial chambers found that it was unnecessary to set out the precise legal elements of the crimes charged for the purpose of notifying the accused of the nature of the charges. Rather, it was considered sufficient for the indictment to contain the statutory provisions that supported the crimes and mode of responsibility charged.⁸⁸ Nevertheless, as the forms of criminal responsibility available under the Statutes of the ICTY and ICTR were listed only in broad categories, this position evolved as chambers continued to see litigation regarding the particulars of an accused's alleged role in the crimes.⁸⁹

41. Article 7(1) of the ICTY Statute and article 6(1) of the ICTR Statute list the modes of individual criminal responsibility as follows:

⁸⁶ Article 21(4)(a) of the ICTY Statute; article 20(4)(a) of the ICTR Statute.

⁸⁷ See ICTY, Trial Chamber, *The Prosecutor v. Zoran Kupreškić et al.*, [Judgement](#), 14 January 2000, IT-95-16-T, para. 725: '[...] the accused is entitled to know the specifics of the charges against him, namely the facts of which he is accused and the legal classification of these facts. In particular, as far as this legal element is concerned, he must be put in a position to know the legal ingredients of the offence charged'. See also ICTR, Trial Chamber III, *The Prosecutor v. André Ntagerura et al.*, [Judgement and Sentence](#), 25 February 2004, ICTR-99-46-T, para. 29: '[w]hile neither this Tribunal nor the International Criminal Tribunal for the Former Yugoslavia has previously defined or made a distinction between the nature and the cause of the charges, the Chamber understands that the *nature of the charge* refers to the precise legal qualification of the offence, and the *cause of the charge* refers to the facts underlying it'. (Emphasis in original).

⁸⁸ R. Dixon, K. A. Khan, *Archbold International Criminal Courts: Practice, Procedure & Evidence* (Sweet & Maxwell, 4th ed., 2013), section 6-83, referring to ICTY, Trial Chamber, *The Prosecutor v. Zejnil Delalić et al.*, [Decision on Motion by the Accused Hazim Delić Based on Defects in the Form of the Indictment](#), 15 November 1996, IT-96-21-T, para. 21; Trial Chamber, *The Prosecutor v. Miroslav Kvočka et al.*, [Decision on Defence Preliminary Motions on Form of Indictment](#), 12 April 1999, IT-98-30/1, para. 36; ICTR, Trial Chamber III, *The Prosecutor v. Édouard Karemera et al.*, [Decision on the Preliminary Defence Motion to Dismiss the Amended Indictment for Defects in Form](#), 7 April 2004, ICTR-98-44-T, paras 6-7.

⁸⁹ See W. Jordash and J. Coughlan, 'The Right to be Informed of the Nature and Cause of the Charges: A Potentially Formidable Jurisprudential Legacy', p. 300 *et seq.* in S. Darcy, J. Powderly (eds) *Judicial Creativity at the International Criminal Tribunals* (Oxford University Press, 2010) ('W. Jordash and J. Coughlan Article').

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of [crimes under the tribunal's jurisdiction], shall be individually responsible for the crime.

Although 'commission' was set out under this provision, the tribunals' case law developed this concept, acknowledging that 'commission' could occur in concert with others, or in a 'joint criminal enterprise' as first defined in the judgment of the ICTY Appeals Chamber in the *Tadić* case, along with its three distinct forms: basic, systemic, and extended.⁹⁰ As the jurisprudence evolved, the concept of joint criminal enterprise and its three forms was further developed.⁹¹ In light of these developments, which clarified that liability for commission pursuant to article 7(1) of the ICTY Statute could cover a broad range of situations, the ICTY Appeals Chamber found that it was not enough to make 'broad reference to Article 7(1) of the Statute' in an indictment. Critically, when it was alleged that a person had participated by 'commission', an indictment should specifically allege that accused persons had participated in that manner and, where applicable, that they did so in a particular form of joint criminal enterprise.⁹² However, the appeals jurisprudence of the *ad hoc* tribunals is equivocal as to whether the expression of this principle was more an exhortation than an obligation. In some cases, aspects of an indictment were found to be defective,⁹³ while in others it was only 'desirable' or 'preferable' for an indictment alleging an accused's responsibility as a participant in a 'joint criminal enterprise' to refer to the particular form of joint participation alleged.⁹⁴

42. Though relevant to this appeal, the Appeals Chamber must consider this jurisprudence in its context. As noted above, the relevant provisions of the Statutes of

⁹⁰ This legal concept appeared for the first time in ICTY, Appeals Chamber, *The Prosecutor v. Duško Tadić*, [Judgement](#), 15 July 1999, IT-94-1-A, paras 185-229.

⁹¹ See ICTY, Appeals Chamber, *The Prosecutor v. Milorad Krnojević*, [Judgement](#), 17 September 2003, IT-97-25-A ('[Krnojević Appeals Judgment](#)'), paras 28-32; ICTY, Appeals Chamber, *The Prosecutor v. Mitar Vasiljević*, [Judgement](#), 25 February 2004, IT-98-32-A, paras 94-101, 103-111; Appeals Chamber, *The Prosecutor v. Miroslav Kvočka et al.*, [Judgement](#), 28 February 2005, IT-98-30/1-A ('[Kvočka Appeal Judgment](#)'), paras 79-99; ICTR, Appeals Chamber, *André Rwamakuba v. The Prosecutor*, [Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide](#), 22 October 2004, ICTR-98-44-AR72.4, paras 10-25; ICTR, Appeals Chamber, *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, [Judgement](#), 13 December 2004, ICTR-96-10-A and ICTR-96-17-A, paras 463-468.

⁹² [Krnojević Appeal Judgment](#), para. 138; [Kvočka Appeal Judgment](#), paras 28-29.

⁹³ See e.g., [Kvočka Appeal Judgment](#), paras 41-42.

⁹⁴ See [Krnojević Appeals Judgment](#), para. 138; ICTY, Appeals Chamber, *The Prosecutor v. Zejnil Delalić et al.* (the 'Celebici case'), [Judgement](#), 20 February 2001, IT-96-21-A ('[Delalić et al. Appeal Judgment](#)'), paras 350-351.

the ICTY and ICTR contained only broad categories with little detail about the nature of participation. And prior to the appeal judgment in the case of *The Prosecutor v. Zoran Kupreškić et al.* in 2001, the ICTY Prosecutor had adopted a practice of referring to article 7(1) generally, without specifying which of the enumerated forms of participation were applicable to the alleged facts of the indictment.⁹⁵ It is in this context that the jurisprudence set out above on the right to notice of the charges arose, coupled with the evolution in the forms of joint participation first recognised in the *ad hoc* tribunals. Therefore, the Appeals Chamber finds that the practice at those tribunals can serve as guidance only in a general sense. That is, it provides the clear direction that greater specificity in a charging document is desirable, including in respect of the legal classification. Moreover, the practice at those tribunals demonstrates that, ultimately, the sufficiency of the allegations in the charges will be evaluated based upon whether they are ‘clear and precise, in the way they are spelt out and with respect to their factual and legal constituent elements, so as to enable the Accused to fully understand the nature and cause of the charges brought against him’.⁹⁶

43. Turning to this Court, the Appeals Chamber notes that, when the language of article 25(3) of the Statute was discussed, the drafters aimed to create a comprehensive provision, classifying in detail the prohibited forms of criminal participation.⁹⁷ It

⁹⁵ See e.g., ICTY, Trial Chamber, *The Prosecutor v. Momcilo Krajisnik*, [Decision Concerning Preliminary Motion on the Form of the Indictment](#), 1 August 2000, IT-00-39-T, paras 2, 5, 10. See also W. Jordash and J. Coughlan Article, pp. 296-300.

⁹⁶ ICTR, Trial Chamber II, *The Prosecutor v. Édouard Karemera*, [Decision on the Defence Motion, pursuant to Rule 72 of Rules of Procedure and Evidence, Pertaining to, inter alia, Lack of Jurisdiction and Defects in the Form of the Indictment](#), 25 April 2001, ICTR-98-44-T, para. 16.

⁹⁷ L. N. Sadat and J. M. Jolly, ‘Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25’s Rorschach Blot’, in *Leiden Journal of International Law* 27(3) (Cambridge University Press, 2014), p. 774: ‘[a]rticle 25 sets out a more comprehensive and detailed framework of liability than predecessor instruments and was the result of lengthy negotiations [...] the final version [of article 25] draws on various sources of national criminal law, including, but not limited to, German law and international treaty provisions’; G. Werle, ‘Individual Criminal Responsibility in Article 25 ICC Statute’, in *Journal of International Criminal Justice* 5 (Oxford University Press, 2007), p. 956: ‘[a]rticle 25 of the ICC Statute now regulates individual criminal responsibility in detail’. As to paragraph (3) of article 25, the author highlights that ‘[s]ection 3(a)-(d) affirms existing modes of participation in international criminal law, while cautiously rephrasing and supplementing them. However, the most important difference between prior legal frameworks and Article 25(3) ICC Statute lies not in the redefinition of the scope of individual responsibility but in systematizing modes of participation. Unlike the statutes of the ad hoc Tribunals, Article 25(3) ICC Statute does not simply enumerate the different modes of participation, but also classifies them’; A. Eser, ‘Individual Criminal Responsibility Mental Elements, Mistake of fact and Mistake of Law’, in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Volume I (Oxford University Press, 2002), p. 768: ‘[t]he title of Article 25 raises greater hope than it is, in the end, able to fulfil. At first glance it gives the impression that this article contained all essential requirements for the criminal responsibility of an

contains forms of participation that are more particularised than their counterparts in the Statutes of the ICTY and ICTR. This is evident in the fact that article 25(3)(a) of the Statute specifies that the person commits a crime individually, jointly with another person, or through another person. The Appeals Chamber concurs with the Trial Chamber that for the purposes of sufficient notice, the charges must set out the exact sub-provision applicable in article 25 of the Statute and the specific form of participation within that sub-provision.⁹⁸ The Appeals Chamber further notes that, as discussed below under Mr Yekatom's second ground of appeal, the charges must also give notice to an accused of the material facts associated with his or her particular form of participation. This practice fully comports with the spirit of internationally recognised human rights principles on that matter and takes on board the experience of the *ad hoc* tribunals in their complex proceedings.

44. Ultimately, the question of whether the charges provide sufficient notice of the legal characterisation of the facts should turn on the particular circumstances of the case, taking into account the nature of the charges and the ability of the accused to prepare a meaningful defence. The Appeals Chamber finds it appropriate to follow the approach of the *ad hoc* tribunals in preferring detail about the role of an accused in the charges. In some cases, this may require going beyond the language of the particular forms of responsibility enumerated in the Statute. However, the Appeals Chamber finds that there is no rule requiring notice of the legal elements of co-perpetration in all cases. Therefore, the Appeals Chamber finds Mr Yekatom's argument that, as a matter of law, the failure to set out the 'constituent elements of co-perpetration liability' in a confirmation decision results in a 'defective charging document' and violates an accused's right to a fair trial to be unpersuasive.⁹⁹

45. In addition to the argument that the right to be informed includes notice of the legal elements of the modes of criminal liability, Mr Yekatom argues that the charges in this case must set out the legal elements of co-perpetration because without it the law

individual and, furthermore, it may enable the delimitation of individual from other forms of responsibility, such as that of the State. At a closer look, however, it appears that Article 25 merely regulates in detail the various forms of perpetration of and participation in an international crime (paragraph 3(a)-(e) and attempts thereof (paragraph 3(f)).

⁹⁸ [Impugned Decision](#), para. 17.

⁹⁹ [Appeal Brief](#), para. 30.

is unclear. First, he argues that the Impugned Decision merely contains a reference to the ‘existing jurisprudence of the Court’ on the subject without more.¹⁰⁰ Mr Yekatom then challenges the notion of ‘indirect co-perpetration’, arguing that there are ‘diverging views’.¹⁰¹ Finally, he argues that the Confirmation Decision is unclear as to whether the Pre-Trial Chamber intended to follow ‘the *Lubanga* formulation’ as expressed in the jurisprudence of the Appeals Chamber, and he cannot reasonably be expected to take notice on that basis.¹⁰²

46. The Appeals Chamber reiterates its finding above that, as a matter of law, procedural fairness does not necessarily require that the legal elements of the modes of criminal responsibility be listed in the charges. Furthermore, the Appeals Chamber finds that Mr Yekatom’s arguments represent a misunderstanding of the purpose of the confirmation proceeding under the Statute. As both the Pre-Trial Chamber and Trial Chamber have stated,¹⁰³ the findings in a confirmation decision about the constituent legal elements of a crime, if any, serve a limited purpose. In particular, these findings are not binding on a trial chamber. Regardless of the views about the legal elements of an offence that may be expressed in a decision confirming the charges, the task of a trial chamber is always to interpret and apply the sources of law as codified in article 21 of the Statute. This core judicial function must not be fettered before the trial begins.

47. The Appeals Chamber recalls the observation of the European Court of Human Rights that, ‘[h]owever clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation’.¹⁰⁴ Here, the Appeals Chamber finds that, should the issue of the interpretation of the legal elements of article 25(3)(a) of the Statute again arise in this case and the parties present their views thereon, the Trial Chamber will adopt the interpretation it considers to be correct while ensuring that such an interpretation is reasonably foreseeable and

¹⁰⁰ [Appeal Brief](#), para. 13.

¹⁰¹ [Appeal Brief](#), paras 15-16.

¹⁰² [Appeal Brief](#), para. 20.

¹⁰³ [Confirmation Decision](#), para. 19; [Impugned Decision](#), para. 25.

¹⁰⁴ ECtHR, Chamber, *S.W. v. the United Kingdom*, [Judgment](#), 22 November 1995, application no. 20166/92, para. 36. *See also* Chamber, *C.R. v. the United Kingdom*, [Judgment](#), 22 November 1995, application no. 20190/92, para. 34; *K.-H. W. v. Germany*, [Judgment](#), application no. 37201/97, 22 March 2001, para. 85.

consistent with the essence of the language in the Statute.¹⁰⁵ Therefore, the Appeals Chamber finds that the purported legal ‘certainty’ that Mr Yekatom seeks stems from a misunderstanding of the judicial process and his arguments in this regard are rejected.

48. Mr Yekatom also claims that there is an established practice in past cases that chambers’ decisions confirming the charges provided some of the elements of ‘co-perpetration’, including the requirement of a ‘common plan’, ‘essential contribution’, and other legal elements.¹⁰⁶ The Appeals Chamber has reviewed the decisions referred to by Mr Yekatom and observes a broad spectrum in the way that chambers express the confirmed modes of liability. At one end of the spectrum, there are decisions that mention the term ‘co-perpetrator’ when referring to the confirmed mode of liability,¹⁰⁷ while at the other end there are decisions that merely track the language of the Statute.¹⁰⁸

49. The Appeals Chamber notes that confirmation decisions contained more extensive discussions of the legal elements of the modes of responsibility in particular in circumstances where a party had specifically contested some aspect of the legal interpretation of a mode of responsibility during the confirmation hearing.¹⁰⁹ The Appeals Chamber considers that indeed, if a legal issue has been the subject of significant debate during the confirmation proceedings, the pre-trial chamber may be

¹⁰⁵ See e.g., ECtHR, Fifth Section, *Jorgić v. Germany*, [Judgment](#), 12 July 2007, application no. 74613/01, paras 101, 114.

¹⁰⁶ [Appeal Brief](#), paras 25, 30.

¹⁰⁷ See e.g., Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, [Decision on the confirmation of charges](#), ICC-01/04-01/06-803-tEN, 14 May 2007 (original French version registered on 29 January 2007 (ICC-01/04/01/06-803)) ([‘Lubanga Confirmation Decision’](#)), para. 410, p. 156; Pre-Trial Chamber II, *The Prosecutor v. Francis Kirimi Muthaura et al.*, [Decision on the Confirmation of charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), 26 January 2012, ICC-01/09-02/11-382-Red, (confidential version registered on 23 January 2012 (ICC-01/09-02/11-382-Conf)), para. 428.

¹⁰⁸ See e.g., Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Decision on the confirmation of charges](#), dated 30 September 2008 and registered on 1 October 2008, ICC-01/04-01/07-717, paras 573-581; Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, [Decision on the confirmation of charges against Laurent Gbagbo](#), 12 June 2014, ICC-02/11-01/11-656-Red, paras 266, 278. See also Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Decision on the Three Defences’ Requests Regarding the Prosecution’s Amended Charging Document](#), 25 June 2008, ICC-01/04-01/07-648, para. 21, quoting [Lubanga Confirmation Decision](#), para. 151: ‘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’.

¹⁰⁹ See e.g., Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, [Decision on the Confirmation of charges against Dominic Ongwen](#), 23 March 2016, ICC-02/04-01/15-422-Red, (confidential version registered on the same date, (ICC-02/04-01/15-422-Conf)), paras 37-41; Pre-Trial Chamber II, *The Prosecutor v. William Samoei 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 353-354.

¹⁰⁹ [Appeal Brief](#), para. 31.

well advised to address it in the confirmation decision. However, in this case, the Pre-Trial Chamber took a different approach, and as the Appeals Chamber has determined above, there is no error, *per se*, in omitting the constituent elements of the modes of responsibility in a decision confirming the charges. This is true particularly here, where Mr Yekatom did not raise any objections to the form of the charges in his submissions under rule 122(3) of the Rules in relation to the proceedings at the confirmation hearing.¹¹⁰

50. Finally, Mr Yekatom submits that the preparation of his defence is adversely affected by the ‘ambiguity’ surrounding the constituent elements of co-perpetration.¹¹¹ The Appeals Chamber is not persuaded by this argument. As noted in the Impugned Decision, the modes of responsibility confirmed by the Pre-Trial Chamber are set out in the Confirmation Decision, that is, articles 25(3)(a) and (b) of the Statute, as well as the particular forms of commission alleged under article 25(3)(a) of the Statute, that is, commission ‘jointly with another or through another person’.¹¹² The Appeals Chamber has already determined that there is no legal requirement that a person charged with particular forms of commission under article 25(3)(a) of the Statute must also be informed of the legal elements of those forms of commission that a chamber will employ during the trial. Any judicial pronouncement by the Pre-Trial Chamber before the trial has commenced cannot be taken to prejudge the Trial Chamber’s later interpretation of the applicable statutory provisions and it is therefore not necessary to the preparation of Mr Yekatom’s defence.

51. Based upon the foregoing, the Appeals Chamber finds that the Trial Chamber did not err in finding that the accused’s right to be informed does not include notice of the legal constituent elements of the modes of responsibility as charged. Therefore, Mr Yekatom’s first ground of appeal is rejected.

¹¹⁰ See [Notice of Observations Pursuant to Rule 122\(3\)](#), 16 September 2019, ICC-01/14-01/18-347; [Confirmation Decision](#), para. 40. See also Transcript of hearing, 11 October 2019, ICC-01/14-01/18-T-011-Red-ENG, p. 49, line 24 to p. 57, line 23.

¹¹¹ [Appeal Brief](#), para. 31.

¹¹² [Impugned Decision](#), para. 23, referring to [Confirmation Decision](#), paras 99, 125, 140, 155, p. 103.

2. *Second ground of appeal*

52. The Appeals Chamber notes that the crux of Mr Yekatom's argument under his second ground of appeal is that the Trial Chamber erred in concluding that Mr Yekatom has sufficient notice of the factual allegations against him concerning the 'common plan' and his contribution thereto, despite the fact that the Pre-Trial Chamber did not explicitly use specific language to that effect in the Confirmation Decision. The Appeals Chamber understands that this ground does not challenge the sufficiency of the facts underpinning the finding that there were substantial grounds for committing Mr Yekatom to trial. Rather, the Appeals Chamber understands this ground of appeal to challenge how the material facts were organised in the Confirmation Decision so as to provide notice of the charges. That is, Mr Yekatom alleges that his right to be informed has been violated because, as they were presented in the Confirmation Decision, the factual allegations (i) were not linked to the confirmed mode of responsibility of co-perpetration;¹¹³ and (ii) were not explicitly labelled with the terms 'common plan' and 'essential contribution'.¹¹⁴

53. Rule 121(3) of the Rules requires that the Prosecutor provide a document with a 'detailed description of the charges' in advance of the confirmation hearing under article 61 of the Statute. In particular, regulation 52 of the Regulations of the Court requires that the document containing the charges include:

- (a) The full name of the person and any other relevant identifying information;
- (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 with both the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.

Regulation 53 of the Regulations of the Court provides that the pre-trial chamber's written decision confirming the charges must, in turn, set out its findings on each of the charges.¹¹⁵

¹¹³ [Appeal Brief](#), paras 35, 38, 45.

¹¹⁴ [Appeal Brief](#), paras 42, 49.

¹¹⁵ *See also* Chambers Practice Manual, updated on 29 November 2019, containing at paragraph 66(vii) a section on the structure of a confirmation decision. It states that the operative part should be written as

54. The Appeals Chamber finds that the statutory provisions portray important normative requirements about the content of the document containing the charges and the subsequent confirmation decision. As a whole, the document containing the charges should provide a ‘detailed description of the charges’.¹¹⁶ Moreover, it must assist an accused in his or her understanding of the ‘nature, cause and content of the charges’ so as to ensure that he or she receives a fair trial.¹¹⁷ The statement of facts must provide a ‘sufficient legal and factual basis to bring the person or persons to trial’, and the legal characterisation of facts must identify the form of participation with ‘precision’.¹¹⁸ However, whether the details provided in the document containing the charges constitute sufficient notice to an accused will depend upon the particular circumstances of the case.¹¹⁹ Importantly, the right to be informed does not impose any special formal requirement as to the manner in which an accused is to be informed of the nature and cause of the charges against him or her.¹²⁰

55. Turning to the present case, the Appeals Chamber observes that the Confirmation Decision, in the operative part setting out the charges as confirmed, does not provide a complete description of the facts and circumstances linked to the confirmed charges and modes of responsibility.¹²¹ To the contrary, the Confirmation Decision relies on internal cross-references and external references to the document containing the charges to set the parameters of the charges.¹²² The Appeals Chamber further notes that,

follows: ‘[t]he operative part, the only part of the confirmation decision which is binding on the Trial Chamber. In a decision confirming the charges the operative part shall reproduce *verbatim* the charges presented by the Prosecutor that are confirmed by the Pre-Trial Chamber (both the material facts and circumstances described in the charges confirmed and the confirmed legal characterisation(s)). No footnote or cross-reference shall be added. The operative part should also include the Pre-Trial Chamber’s decision on any procedural objections or observations addressed before the determination of the merits’. (Emphasis in original).

¹¹⁶ See rule 121(3) of the Rules. See also [Lubanga Appeal Judgment](#), para. 121, quoting Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55\(2\) of the Regulations of the Court”](#), 8 December 2009, ICC-01/04-01/06-2205 (OA15/OA16), fn. 163.

¹¹⁷ Article 67(1)(a) of the Statute.

¹¹⁸ Regulation 52 (b) and (c) of the Regulations of the Court.

¹¹⁹ See *supra* paras 38-39. See also ECtHR, [Mattoccia Judgment](#), para. 60.

¹²⁰ See ECtHR, [I.H. and others v. Austria Judgment](#), para. 31.

¹²¹ See [Confirmation Decision](#), pp. 104-107.

¹²² See [Confirmation Decision](#), pp. 104-107.

in the operative part, the Confirmation Decision contains only a brief itemisation of Mr Yekatom's contribution to the confirmed crimes:

- (i) structuring, training and equipping his Anti-Balaka elements;
- (ii) preparing the Anti-Balaka attacks and advances, and participating and leading his group in the execution of these attacks and advances;
- (iii) issuing orders to Anti-Balaka members, including patently illegal instructions; and
- (iv) conscripting and/or enlisting children under the age of fifteen years into his group and using them to assist him in the camp-bases, giving orders for them to be stationed at barriers and checkpoints as well as to actively participate in hostilities.¹²³

The Confirmation Decision also confirms that Mr Yekatom is alleged to have committed the crimes 'jointly with another or through another' under article 25(3)(a) of the Statute.¹²⁴

56. The Appeals Chamber finds that, on its own, the description above is insufficient to provide adequate notice and to assist Mr Yekatom in the preparation of his defence. However, the Appeals Chamber finds that all of the listed contributions confirmed in the operative part of the Confirmation Decision largely correspond to the factual findings discussed in the findings section of that decision and to the sections of the document containing the charges dedicated to the individual criminal responsibility of Mr Yekatom.¹²⁵ As to the latter, these sections of the Document Containing the Charges provide precise details about Mr Yekatom's alleged role, including the alleged 'Operational Common Plan' and 'Common Purpose' and Mr Yekatom's contribution thereto. The Appeals Chamber also notes that the Trial Chamber examined the Confirmation Decision as a whole and determined that it contains factual findings that directly relate to Mr Yekatom's contribution to a common plan.¹²⁶

¹²³ [Confirmation Decision](#), p. 107.

¹²⁴ [Confirmation Decision](#), p. 107.

¹²⁵ Document Containing the Charges, 18 September 2019, ICC-01/14-01/18-282-AnxB1-Red (confidential version registered on 19 August 2019 (ICC-01/14-01/18-282-Conf-AnxB1)) (the '[Document Containing the Charges](#)'), paras 185-233.

¹²⁶ [Impugned Decision](#), paras 28-31, 33-34.

57. The Appeals Chamber emphasises that it is not called upon here to determine whether Mr Yekatom has sufficient notice of all of the material facts underpinning the charges. Rather, the issue presented is a narrower one. Mr Yekatom submits that he lacks sufficient notice because the confirmed mode of responsibility of co-perpetration in the Confirmation Decision was not expressly linked to the alleged facts.¹²⁷ For the reasons stated above, when considering the Confirmation Decision as a whole together with the relevant parts of the Document Containing the Charges, the Appeals Chamber cannot agree with Mr Yekatom and his arguments in this regard are rejected.

58. Furthermore, the Appeals Chamber is not persuaded that the Confirmation Decision provides insufficient notice to Mr Yekatom on the basis that it does not employ certain terminology in describing his role in the alleged crimes. Indeed, the Appeals Chamber recalls that criminal responsibility under article 25(3)(a) of the Statute can take a number of forms and, where it is alleged that an accused committed a crime ‘jointly with another [...] person’, it has to be established that two or more individuals worked together in the commission of the crime. This requires an agreement between these perpetrators leading to the commission of one or more crimes under the jurisdiction of the Court.¹²⁸ For example, in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, this agreement took the form of a ‘common plan’ and it was labelled as such.¹²⁹

59. For the purposes of sufficient notice of the charges, where the charges allege that a person committed a crime as a ‘co-perpetrator’ on the basis of a ‘common plan’, the Appeals Chamber has held, *inter alia*, that ‘the accused must be provided with detailed information regarding [...] his or her alleged conduct that gives rise to criminal responsibility, including the contours of the common plan and its implementation as well as the accused’s contribution’.¹³⁰

60. However, the Appeals Chamber notes that there is no formal requirement that certain terminology be used in a charging document aside from the language of the Statute. Indeed, the Appeals Chamber recalls that the particular term used in a charging

¹²⁷ [Appeal Brief](#), para. 38.

¹²⁸ [Lubanga Appeal Judgment](#), para. 445.

¹²⁹ [Lubanga Appeal Judgment](#), para. 445.

¹³⁰ [Lubanga Appeal Judgment](#), para. 123.

document to describe a person's joint participation may vary from case to case.¹³¹ Here, the Appeals Chamber observes that the Prosecutor has used the words 'Operational Common Plan' and 'Common Purpose', as well as the more conventional terms 'common plan' and 'essential contribution' in describing Mr Yekatom's alleged role under article 25(3)(a) of the Statute.¹³² The Appeals Chamber finds that it is irrelevant that the Pre-Trial Chamber did not also use this specific terminology in the Confirmation Decision. The argument that this inherently vitiates proper notice to Mr Yekatom favours form over substance, and the Appeals Chamber finds it to be unpersuasive.

61. Finally, the Appeals Chamber is not persuaded by Mr Yekatom's references to the practice of the ICTY regarding indictments alleging joint criminal enterprise. As explained above under Mr Yekatom's first ground of appeal, the jurisprudence regarding this form of responsibility does not apply to the mode provided under article 25(3)(a) of the Statute. While it may assist in demonstrating that clarity and detail is preferable in a charging document, generally, it does not create binding precedent as to the language that must be used to describe an accused's conduct when charges are brought under the statutory provisions of this Court.

62. Therefore, the Appeals Chamber rejects Mr Yekatom's second ground of appeal.

V. APPROPRIATE RELIEF

63. In an appeal pursuant to article 82(1)(d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158(1) of the Rules). In the present case it is appropriate to confirm the Impugned Decision.

Done in both English and French, the English version being authoritative.

¹³¹ See *The Prosecutor v. Jean-Pierre Bemba Gombo 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 (confidential version registered on the same date (ICC-01/05-01/13-2275-Conf), para. 136.

¹³² [Document Containing the Charges](#), paras 186-189.



Judge Solomy Balungi Bossa
Presiding

Dated this 5th day of February 2021

At The Hague, The Netherlands