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Pénale
Internationale**



**International
Criminal
Court**

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

Date: **22 June 2020**

TRIAL CHAMBER V

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

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

**Public redacted version of “Motion to Dismiss Co-Perpetration Mode of
Liability”, 22 June 2020**

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 move, pursuant to Rule 134 of the Rules of Procedure and Evidence, to dismiss the co-perpetration mode of liability under Article 25(3)(a) because the *Decision on the Confirmation of Charges against Alfred Yekatom and Patrice-Edouard Ngaissona* (“Confirmation Decision”)¹ fails to provide adequate notice of the constituent elements of this mode of liability, and crucially, the facts that establish those elements. The fundamental function of the Pre-Trial Chamber – to establish “substantial grounds to believe” – was not performed with respect to this mode.
2. Since the Confirmation Decision “defines the parameters for trial”, such facts cannot subsequently be provided without exceeding the facts and circumstances of that decision. As developed below, the Pre-Trial Chamber disregarded clear and consistent appellate jurisprudence that mandates such notice. Absent such findings, the unavoidable conclusion is that article 25(3)(a) liability is fatally defective in this case and must be dismissed.

THE CONFIRMATION DECISION

3. On 11 December 2019, Pre-Trial Chamber II issued the Confirmation Decision.²
4. The Confirmation Decision charged Mr. Yekatom under the following modes of liability:
 - (i) committing the aforementioned crimes jointly with another or through another under article 25(3)(a) of the Statute; or

¹ [ICC-01/14-01/18-403-Conf](#). Public redacted version: [ICC-01/14-01/18-403-Red-Corr](#) (“Confirmation Decision”).

² *Id.*

- (ii) ordering the commission of the aforementioned crimes under article 25(3)(b) of the Statute.³

5. The Chamber first set out its approach to the process of confirming the charges. It stated that:

The Chamber believes that it is conceptually and methodologically appropriate to address the issue of the individual criminal responsibility of the suspects by looking at their alleged contributions in respect of each of the charged incidents and at the evidence cited in support of those allegations.⁴

6. The Chamber went on to note that:

The notion of a common plan as a vehicle for imputing individual responsibility for the charged crimes has been a recurrent feature of the cases brought before the Chambers since the Court's early days, in line with the jurisprudence of the ad hoc tribunals. Here, the Prosecutor relies on a variation of this notion, alleging the existence of a 'Strategic' and an 'Operational' common plan as two distinct and complementary aspects of a joint criminal design. 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. The Chamber is mindful of the jurisprudence of the Appeals Chamber to the effect that the common plan may be one of the shapes taken by a criminal agreement and that, despite its apparent ubiquity, the very compatibility of the notion of a common plan with the statutory framework and its usefulness vis-à-vis article 25 of the Statute is far from being a foregone conclusion. Departing from the model of the statutory frameworks of the ad hoc tribunals, the Statute lists in article 25 different modes of liability, thus making it a comprehensive provision, suitable to encompass any and all possible forms and manners of contribution to a crime. Accordingly, the Chamber will assess the evidence in light of the elements of each of the modes of liability listed in that provision.⁵

³ *Id.*, p. 107.

⁴ *Id.*, para. 57.

⁵ *Id.*, para. 60.

7. The Chamber then proceeded to analyse the contextual elements of crimes against humanity and war crimes and make factual and legal findings on those elements.⁶
8. Having found those elements were satisfied, the Chamber then considered the events in the Boeing and Cattin neighborhoods of Bangui. After describing the evidence,⁷ the Chamber concluded that “Yekatom was involved in the preparation of the 5 December 2013 Attack, led his Anti-Balaka elements in this attack and its aftermath, and issued patently illegal instructions.”⁸
9. The Chamber went on to make its findings as to the mode of liability, stating that:

On this basis, the Chamber considers that Yekatom committed the aforementioned crimes jointly with others or through other persons under article 25(3)(a) of the Statute or, in the alternative, ordered the commission of these crimes pursuant to article 25(3)(b) of the Statute. The Chamber is further satisfied that Yekatom’s acts establish that, as the case may be, he (i) fulfils the specific mens rea elements pertaining to the aforementioned crimes; and (ii) had intent and knowledge in relation to these crimes under article 30 of the Statute.⁹

10. Likewise, for the events at the Yanwara School, after describing the evidence,¹⁰ the Chamber concluded that “Yekatom [REDACTED], issued patently illegal instructions to his Anti-Balaka elements, and was present [REDACTED].”¹¹
11. The Chamber went on to make its findings as to the mode of liability, stating that:

On this basis, the Chamber considers that Yekatom committed the aforementioned crimes jointly with others or through other persons under

⁶ *Id.*, paras. 61-74.

⁷ *Id.*, paras. 83-92.

⁸ *Id.*, para. 98.

⁹ *Id.*, para. 99.

¹⁰ *Id.*, paras. 113-17.

¹¹ *Id.*, para. 124.

article 25(3)(a) of the Statute or, in the alternative, ordered the commission of these crimes pursuant to article 25(3)(b) of the Statute. The Chamber is further satisfied that Yekatom's acts establish that, as the case may be, he (i) fulfils the specific mens rea elements pertaining to the aforementioned crimes; and (ii) had intent and knowledge in relation to these crimes under article 30 of the Statute.¹²

12. For the events on the PK9-Mbaiki axis, after describing the evidence,¹³ the Chamber concluded that:

Following the 5 December 2013 Attack and its aftermath, in January 2014, Yekatom's Anti-Balaka group advanced through and took over numerous villages in the Lobaye Prefecture and set up various checkpoints in the region. During this timeframe, Anti-Balaka members threatened or harassed Muslims in the region. The Chamber has found above that the Muslim individuals in Cattin and Boeing were displaced. Yekatom's Anti-Balaka group continued this pattern of crimes and threats in the Lobaye Prefecture, where many Muslims fled their villages in fear; nearly all Muslims in Mbaiki were evacuated by Chadian forces. Subsequently, a group of individuals, including members of the Anti-Balaka, killed Djido Saleh, one of the few remaining Muslims in Mbaiki. Accordingly, the Chamber considers that the actions of the Anti-Balaka constituted a continuation of its targeting of the Muslim population in retribution for the crimes and abuses committed by the Seleka, based on their religious or ethnic affiliation. Furthermore, the evidence demonstrates that Yekatom was present in the areas under his control during the relevant time period, and that he was in control of the established checkpoints.¹⁴

13. The Chamber went on to make its findings as to the mode of liability, stating that:

On this basis, the Chamber considers that Yekatom committed the aforementioned crimes jointly with others or through other persons under article 25(3)(a) of the Statute. The Chamber is further satisfied that Yekatom's acts establish that, as the case may be, he (i) fulfils the specific mens rea elements pertaining to the aforementioned crimes; and (ii) had

¹² *Id.*, para. 125.

¹³ *Id.*, paras. 129-37.

¹⁴ *Id.*, para. 139.

intent and knowledge in relation to these crimes under article 30 of the Statute.¹⁵

14. Finally, as to the charges of conscripting and using child soldiers, after describing the evidence,¹⁶ the Chamber concluded that:

[...] children under the age of 15 years were enlisted in the ranks of the Anti-Balaka, including groups under Yekatom's command and in locations where he was present, and that they *inter alia* participated in hostilities. While some of these children have eventually been demobilised, the Chamber considers that the objective elements of the war crime of conscripting and/or enlisting children under the age of 15 years into armed groups and using them to participate actively in hostilities (article 8(2)(e)(vii) of the Statute) (paragraphs 144 to 152) are sufficiently established by the evidence.

Yekatom was aware of the presence of children, including those under 15 years of age, among his Anti-Balaka elements, since, *inter alia*, (i) newly enlisted children were introduced to him as the chief; (ii) he directly saw the children among his ranks when inspecting his elements; and (iii) he directly saw [REDACTED] when visiting them. Also, Yekatom directly contributed to the perpetration of the alleged crime by, for instance, (i) using children, including those under 15 years of age to assist him at the camp bases; (ii) giving orders for children to be stationed at barriers and checkpoints; and (iii) giving orders for children to actively participate in hostilities, including in the 5 December 2013 Attack on Bangui.¹⁷

15. The Chamber went on to make its findings as to the mode of liability, stating that:

On this basis, the Chamber considers that Yekatom committed the aforementioned crimes jointly with others or through other persons under article 25(3)(a) of the Statute or, in the alternative, ordered the commission of these crimes pursuant to article 25(3)(b) of the Statute. The Chamber is further satisfied that Yekatom's acts establish that, as the case may be, he (i) fulfils the specific *mens rea* elements pertaining to the aforementioned

¹⁵ *Id.*, para. 140.

¹⁶ *Id.*, paras. 144-52.

¹⁷ *Id.*, paras. 153-54.

crimes; and (ii) had intent and knowledge in relation to these crimes under article 30 of the Statute.¹⁸

RELEVANT PROVISIONS

Article 25(3)(a)—Individual criminal responsibility

3. In accordance with this 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—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;
- (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

Rule 134—Motions relating to the trial proceedings

1. 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. Any request from the Prosecutor or the defence shall be in writing and, unless the request is for an ex parte procedure, served on the other party. For all requests other than those submitted for an ex parte procedure, the other party shall have the opportunity to file a response.

¹⁸ *Id.*, para. 155.

2. At the commencement of the trial, the Trial Chamber shall ask the Prosecutor and the defence whether they have any objections or observations concerning the conduct of the proceedings which have arisen since the confirmation hearings. Such objections or observations may not be raised or made again on a subsequent occasion in the trial proceedings, without leave of the Trial Chamber in this proceeding.

3. After 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 issues that arise during the course of the trial.

ARGUMENT

A. The Accused is Entitled to Notice of the Material Facts Underpinning the Constituent Elements of Co-Perpetration

16. Article 67(1)(a) of the Statute provides the accused with the right to be informed in detail of the nature, cause and content of the charge. Article 67(1)(b) guarantees the right to have adequate time and facilities for the preparation of his defence. The Appeals Chamber has noted that there is a strong link between the right to be informed in detail of the nature, cause and content of the charges and the right to prepare one's defence.¹⁹
17. According to the drafters, "the Statute goes further than the ICCPR and the other human rights models by requiring that this information also include the 'content' of the charge".²⁰ It was the "desire of the Rome Conference that the Prosecutor ensure that the accused is not taken by surprise during the proceedings, and that he or she benefits from a level of information going well beyond the thresholds set by domestic justice systems and endorsed by international human rights tribunals as being acceptable".²¹

¹⁹ *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"](#), 17 July 2019, ICC-02/04-01/15-1562, para. 69 ("*Ongwen Appeal Decision*").

²⁰ See William A. Schabas & Yvonne McDermott, '[Article 67 – Rights of the accused](#)', in Otto Triffterer & Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Beck Hart Nomos 2016), p. 1660.

²¹ *Id.*

18. The Appeals Chamber in the *Lubanga* case held that:

In order to be able to prepare an effective defence, 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, **the accused must be provided with detailed information regarding:** (i) 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** (ii) **the related mental element;** and (iii) **the identities of any alleged co-perpetrators.** With respect to the underlying criminal acts and the victims thereof, the Appeals Chamber considers that the Prosecutor must provide details as to the date and location of the underlying acts and identify the alleged victims to the greatest degree of specificity possible in the circumstances. In the view of the Appeals Chamber, the underlying criminal acts form an integral part of the charges against the accused, and sufficiently detailed information must be provided in order for the accused person to effectively defend him or herself against them.²²

19. In the *Bemba* case, the Appeals Chamber found it “axiomatic that an accused person be informed promptly and in detail of the nature, cause and content of a charge” before the start of the trial.²³

20. In that case, where one of the constituent elements of command responsibility was the failure to take measures to prevent or punish the crimes, the accused was entitled to be provided with notice of the facts upon which it was concluded that he failed to prevent or punish. Where he was not provided notice that his liability for failure to prevent or punish could be based on his failure to redeploy his troops, his conviction was reversed.²⁴

B. The Confirmation Decision Fails to Provide Notice of the Constituent Objective Elements of Co-Perpetration

²² *Prosecutor v. Lubanga*, [Public redacted Judgement on the appeal of Mr Lubanga Dyilo against his conviction](#), 1 December 2014, ICC-01/04-01/06-3121-Red, para. 123 (emphasis added) (“*Lubanga Appeals Judgment*”).

²³ *Prosecutor v. Bemba*, [Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute](#), 8 June 2018, ICC-01/05-01/08-3636-Red, para. 186 (“*Bemba AJ*”).

²⁴ *Id.*, paras. 186-88.

21. Article 25(3)(a) includes three distinct forms of perpetration: direct or immediate perpetration ('as an individual'), co-perpetration ('jointly with another') and perpetration by means ('through another person').²⁵ What distinguishes co-perpetration from the other forms in Article 25(3)(a) is that it is carried out through an agreement or common plan with other persons.
22. The constituent objective elements of co-perpetration were set out in some detail in the *Bemba et al.* trial judgment.²⁶ The objective elements are that: (i) there was a common plan between at least two persons, and (ii) the contribution of the co-perpetrators was essential.²⁷ The common plan must involve a "critical element of criminality" and it must be "virtually certain" that "implementation of the common plan will lead to the commission of the charged offences."²⁸
23. The *Bemba et al* Trial Chamber also explained that the "essential contribution" requirement involves "a normative assessment of the role and activities of the accused person in the specific circumstances of the case, taking into account the division of tasks" and a determination that the accused exercised control over the offence(s) by virtue of his or her essential contribution.²⁹ Article 25(3)(a) jurisprudence has been largely consistent in its articulation of the objective elements. When faced with this mode, no Pre-Trial Chamber has confirmed it without specifying the constituent objective elements, and the facts underpinning them.
24. Yet, in the Confirmation Decision, the Pre-Trial Chamber disregarded this consistent line of jurisprudence. Instead, it cast doubt on the very notion of

²⁵ 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.

²⁶ As first established in the *Lubanga Appeals Judgment*, paras, 445 *et seq.*

²⁷ *Prosecutor v. Bemba et al*, [Judgment pursuant to Article 74 of the Statute](#), 19 October 2016, ICC-01/05-01/13-1989-Red, para. 64.

²⁸ *Id.*, at para. 67.

²⁹ *Id.*, at para. 69. This formulation was later repeated in *Prosecutor v. Ntaganda*, [Judgment](#), 8 July 2019, ICC-01/04-02/06-2359, paras. 773-77.

common plan,³⁰ set out to analyse individual responsibility on an incident-by-incident basis,³¹ and made no findings on the contours of the common plan (or any other form of agreement) for any of the incidents.

25. The Pre-Trial Chamber also failed to make any findings that the contribution of Mr. Yekatom to any of the incidents was essential and failed to identify the alleged co-perpetrators. In the paragraphs relating to Mr. Yekatom's criminal responsibility,³² not a single name other than his is mentioned.
26. Logically, therefore, the factual absence of any *one* of these constituent elements of article 25(3)(a) should automatically lead to its dismissal. Yet *none* of them are present in the Confirmation Decision.
27. While it questioned the efficacy of the common plan element,³³ the Pre-Trial Chamber never provided its own definition of co-perpetration. Nor did it set forth the elements of co-perpetration, even though it acknowledged that the Prosecution had relied upon a variation of it.
28. It is not clear whether the Pre-Trial Chamber found that the elements of co-perpetration even required a common plan. Its failure to make findings on the constituent elements of co-perpetration leaves the Defence unable to defend against this mode of liability when it does not know if a common plan is alleged, the alleged objective of any such common plan, the essential contributions of Mr. Yekatom, or the identity of the alleged co-perpetrators.
29. This Confirmation Decision stands in marked contrast to other confirmation decisions in which co-perpetration was charged. See, for example, the *Ble Goude* case:

³⁰ [Confirmation Decision](#), para. 60. Public redacted version: [ICC-01/14-01/18-403-Red-Corr.](#)

³¹ *Id.*, para. 57.

³² *Id.* at paras. 98-100; 124-26; 139-41; 154-56.

³³ [Confirmation Decision](#), para. 60. Public redacted version: [ICC-01/14-01/18-403-Red-Corr.](#)

“The Chamber finds that Charles Blé Goudé, together with Laurent Gbagbo, Simone Gbagbo and other members of the inner circle, agreed to keep Laurent Gbagbo in power at any cost, including through the use of force against civilians, and conceived a plan to this effect (“common plan”).³⁴

30. While the Confirmation Decision found that there were some 3,000 elements in Mr. Yekatom’s group,³⁵ it never specified the scope of membership in the common plan or named the co-perpetrators. If the physical perpetrators are part of the common plan, and thus qualify as co-perpetrators themselves, this would be a common plan of unprecedented breadth.

31. As Kai Ambos has written:

Co-perpetration is characterized by a functional division of the criminal tasks between the different (at least two) co-perpetrators, who are normally interrelated by a common plan or agreement. Every co-perpetrator fulfils a certain task which contributes to the commission of the crime and without which the commission would not be possible. The common plan or agreement forms the basis of a reciprocal or mutual attribution of the different contributions holding every co-perpetrator responsible for the whole crime.³⁶

32. For such a large group of people, who are structurally and geographically remote from each other, to share the intent to jointly implement a common plan with each of them making an essential contribution to the common plan, without which the plan would have collapsed, defies common sense. The defence is simply without notice as to the contours of the common plan and unable to defend against such an undefined mode of liability.³⁷

³⁴ *Prosecutor v. Ble Goude*, [Decision on the Confirmation of Charges against Charles Ble Goude](#), 11 December 2014, ICC-02/11-02/11-186, para. 138.

³⁵ [Confirmation Decision](#), para. 65. Public redacted version: [ICC-01/14-01/18-403-Red-Corr.](#)

³⁶ 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. 988.

³⁷ In *Bemba*, the Appeals Chamber found that although the deployment of troops to the CAR from the DRC was mentioned in the confirmation decision in the context of establishing the accused’s effective control, this did not provide adequate notice in the context of the necessary and reasonable measures taken ([Bemba AJ](#), para. 187). Likewise, the Chamber’s findings in the Confirmation Decision in our case as to the chapeaux elements of crimes against humanity and war crimes cannot be used to provide adequate notice of the contours of the common plan.

33. The failure to identify the co-perpetrators also makes understanding the charges impossible. The concept of co-perpetration based on joint control over the crime is rooted in the principle of the division of essential tasks for the purpose of committing a crime between two or more persons acting in a concerted manner. Hence, although none of the participants has overall control over the offence because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task.³⁸ It is essential to know who these people are.
34. In any event, the “incident-by-incident approach” adopted by the Pre-Trial Chamber would, by its applied logic, have necessitated that a common plan/agreement, essential contribution and the identity of the co-perpetrators be stated (and therefore confirmed) for *each* incident. Yet, *none* of these facts are contained in the Confirmation Decision for *any incident*.
35. The four generic contributions listed at the end of the Confirmation Decision³⁹ cannot be considered sufficient notice of essential contributions in the context of the concerted “incident-by-incident” approach of the Chamber. Moreover, when offered two overarching common plans in the Document Containing the Charges (“DCC”), the Pre-Trial Chamber chose to exclude them both from the Confirmation Decision. They cannot now form part of the trial. In other words: the common plans were *not confirmed*.
36. The Confirmation Decision has already come in for academic criticism for its failure to provide sufficient details concerning the mode of liability under Article 25(3)(a).

³⁸ *Prosecutor v. Lubanga*, [Decision on the Confirmation of Charges](#), 29 January 2007, ICC-01/04-01/06-803-tEN, para. 342.

³⁹ [Confirmation Decision](#), p. 103. Public redacted version: [ICC-01/14-01/18-403-Red-Corr](#).

37. Paul Bradfield, who teaches at the Limerick University Law School in Ireland, has written that:

Where article 25(3)(a) is confirmed for a particular incident, it is extremely hard to discern what other form of criminal “agreement” the Chamber considers to be present, as no express findings are made in this regard.

[W]hether it be a common plan, a criminal agreement, or some other form of meeting of the minds, the “contours” of article 25(3)(a) notice must be clearly conveyed to the accused, first through the DCC, and then confirmed in the confirmation decision. In the present case, the Prosecution had endeavoured to do so in the DCC, and in copious detail. But the confirmation decision leaves a cloud of ambiguity that the parties will now struggle to navigate through, as they proceed towards the Trial Chamber.⁴⁰

38. Marjolein Cupido and Lachezar Yaney, who teach at VU University in Amsterdam, have written that:

{T}he Pre-Trial Chamber neglected to set out the elements of co-perpetration in a structured way. However, even when a judgment does not contain a separate section that defines the theoretical framework of a mode of liability, one could normally still distil its legal elements from the judges’ analysis of the accused’s responsibility for the charged crimes. Unfortunately, in this case, the Pre-Trial Chamber’s application of co-perpetration to the facts of the case is just as cryptic and open to guesswork as its interpretation of Article 25(3)(a). There is no factual analysis per legal element of co-perpetration, no reasoning as to the type and level of cooperation between a group of identified co-perpetrators, scarce, if any, explanation on the threshold of the accused’s contribution, and no analysis of what offences the alleged co-perpetrators agreed and intended to commit jointly.⁴¹

39. This lack of notice prejudices Mr. Yekatom in understanding the case that he has to meet and in preparing his defence. For example, was the alleged displacement of Muslims from Mbaïki (Counts 24 and 25) part of a common

⁴⁰ P. Bradfield, [Alternative Charges and Modes of Liability in the Latest CAR case at the ICC—Trouble Ahead?](#), EJIL Talk, 21 January 2020.

⁴¹ M. Cupido and L. Yaney, [A, Schrodinger’s Cat? Moment for Co-Perpetration Liability? The Yekatom and Ngaissona Decision on the Confirmation of Charges](#), EJIL Talk, 8 May 2020.

plan to displace Muslims? Or was it a “virtual certainty” that followed in the ordinary course of events from a plan to attack the Muslim civilian population? And who were the alleged co-perpetrators of this crime?

40. As another example, was the alleged murder of Deputy Mayor Djido Saleh (Counts 26 and 27) part of a common plan to attack the Muslim civilian population? What was Mr. Yekatom’s essential contributions such that he had control over this crime? And who were the alleged co-perpetrators of this crime?
41. Finally, was there a common plan to recruit and use child soldiers (Count 29)? What was Mr. Yekatom’s essential contributions such that he had control over this crime? And who were the alleged co-perpetrators?
42. The table below illustrates the lack of findings on these constituent elements:

Article 25(3)(a) incidents in the Confirmation Decision

<u>Incident</u>	<u>Objective Elements of Co-Perpetration</u>		
	<u>Common Plan/Agreement</u>	<u>Co-perpetrators</u>	<u>Essential Contribution</u>
Yamwara	No finding present	No finding present	No finding present
PK9-Mbaiki axis	No finding present	No finding present	No finding present
Child soldiers	No finding present	No finding present	No finding present

43. Similar uncertainties exist concerning the other charges as well. But the answers are not found in the Confirmation Decision.

C. The Only Viable Remedy is Dismissal of the Co-Perpetration Mode of Liability

44. While the Appeals Chamber has held that notice could be provided in other ancillary documents provided prior to the trial,⁴² or through the application of Regulation 55, the Confirmation Decision defines the parameters of the charges and any additional notice cannot exceed the facts and circumstances described in the Confirmation Decision.⁴³
45. Therefore, under these circumstances, it is not possible for the Prosecution to cure the defective notice provided by the Confirmation Decision by repeating facts from the DCC that would support constituent elements of co-perpetration in its Pre-Trial Brief (a non-statutory document) and which were, in any event, *deliberately excluded* from the Confirmation Decision.⁴⁴ Moreover, any argument that the Defence should have sought leave to appeal the Confirmation Decision does not deprive the Defence of its right to have the critical issue of defective charges resolved before the commencement of trial, pursuant to rule 134(1) of the Rules.⁴⁵ Article 67(1) notice is not a right that ends at the confirmation stage – it is fundamental to the trial itself.
46. The seminal *Lubanga* Appeals Judgement affirmed the constituent elements of co-perpetration liability, and what legal *and* factual notice must be provided to the accused. The *Bemba* Appeals Judgement further re-affirmed the importance of factual notice of the constituent elements of the charged mode of liability. The Pre-Trial Chamber, without justification or any alternative, disregarded and failed to apply the law in both respects. Consequently, it

⁴² [Lubanga Appeals Judgment](#), para. 124.

⁴³ [Prosecutor v. Lubanga, Judgment on the Appeals of Mr. Lubanga Dyilo and the Prosecution 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, para. 91.

⁴⁴ That is why this motion has been filed separately from, and seeks a different remedy than, the [Motion for Additional Details](#) (ICC-01/14-01/18-554-Red), where the identity of victims for charged incidents can be provided without exceeding the facts and circumstances of the Confirmation Decision.

⁴⁵ [Ongwen Appeal Decision](#), para. 142.

renders article 25(3)(a) legally and factually defective beyond repair. The only remedy for the insufficient findings of the Pre-Trial Chamber is dismissal of the co-perpetration mode of liability.

CONFIDENTIALITY

47. This Motion is classified as confidential because it quotes and refers to confidential information developed in the Document Containing the Charges and the Decision on the Confirmation of Charges. A public redacted version of this Motion is being filed simultaneously.

CONCLUSION

48. For the above reasons, the Trial Chamber is respectfully requested to dismiss the allegations of co-perpetration under Article 25(3)(a) in the Confirmation Decision and proceed to try Mr. Yekatom solely on the mode of liability of "ordering" the crimes under Article 25(3)(b).

RESPECTFULLY SUBMITTED ON THIS 22nd DAY OF JUNE 2020



Me Mylène Dimitri
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