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**International
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PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Presiding
Judge Tomoko Akane
Judge Sergio Gerardo Ugalde Godínez

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

THE PROSECUTOR V. MAXIME JEOFFROY ELI MOKOM GAWAKA

Public

Public Redacted Version of “Defence response to “Prosecution’s Additional Submissions following the Confirmation of Charges Hearing””, ICC-01/14-01/22-274-Conf, 13 October 2023

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

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I. INTRODUCTION

1. The case against Mr Mokom becomes weaker with every review conducted by the Prosecution. Having first indicated in 2018 that it would charge Mr Mokom as a direct perpetrator,¹ this has now fallen away. The number of crime sites was reduced from 9 to 2.² The temporal scope was reduced by eight months, and the charged crimes reduced in number.³
2. The Prosecution presented this reduced case at the confirmation hearing. Having now again reviewed its evidence,⁴ the case has deflated much further. The Prosecution entirely re-framed its **intent** case, focusing now on three specific factors not in the Document Containing the Charges ('DCC').⁵ As for Mr Mokom's **contribution**, the Prosecution is focusing on "a narrower set of contributions" than presented at the hearing.⁶ Considered in totality, Mr Mokom's contribution was "to the overall strengthening of the Anti-Balaka as a fighting force and to their morale".⁷
3. What is the impact of this disappearing case on whether it should go to trial? The evidence presented during the confirmation phase represents the Prosecution case at its highest. This evidence has not yet been challenged through cross-examination or with evidence gathered during Defence investigations. It has not been weighed against the testimony of Defence witnesses or undermined by expert analysis of Facebook or phone attributions. The Prosecution case must be able to stand, alone, and support a decision to advance to trial.
4. As shown below, the Prosecution has failed to identify reliable and consistent evidence from which the Pre-Trial Chamber could find substantial grounds to believe Mr Mokom has committed the crimes charged. There is a large volume of evidence that is inconsistent with every aspect of the Prosecution's theory,⁸ confirmed by its own concessions that key insiders provide inconsistent evidence.⁹ The exculpatory evidence offers an alternate theory, and a more nuanced picture than the limited presentation from the Prosecution: a case where the overriding plan was to liberate the Central African Republic from the criminals destroying it, and where

¹ [ICC-01/14-01/22-2-Red2](#), paras.15, 18, 20.

² Bangui; Bossangoa; Lobaye Prefecture; Yaloké; Gaga; Bossemptélé; Boda; Carnot; Berbérati.

³ [ICC-01/14-01/22-2-Red2](#), pp.36-37; [ICC-01/14-01/22-174-Conf-AnxA](#), paras.8, 20, 46.

⁴ See, e.g. [ICC-01/14-01/22-269-Conf](#) ('Prosecution Submissions'), paras.11-12, 46-52.

⁵ [Prosecution Submissions](#), paras.46-49.

⁶ [Prosecution Submissions](#), para.11.

⁷ [Prosecution Submissions](#), para.37.

⁸ [ICC-01/14-01/22-260-Conf](#), para.19; [ICC-01/14-01/22-260-Conf-AnxA](#); [ICC-01/14-01/22-260-Conf-AnxB](#).

⁹ See [Prosecution Submissions](#), fn.64.

those liberators were driven by ancestral beliefs rather than the desire to harm their fellow citizens, a case where some opportunists took advantage of the vacuum to commit some crimes.

5. In the end, even when shielded from a Defence attack, and reduced to the most remote modes of responsibility, the Prosecution case against Mr Mokom does not stand. A black hole remains: the Prosecution still cannot offer an intelligible link between Mr Mokom's alleged contributions to any of the charged crimes. These charges should not be confirmed, and Mr Mokom should be immediately released.¹⁰

II. SUBMISSIONS

A. CONTRIBUTION

6. In the DCC, the Prosecution initially relied on five factors demonstrating Mr Mokom's contribution to the charges, in 47(a)-(e). The Prosecution reviewed its evidence and is now "focusing" on a "narrower set of contributions" in 47(b), (c), (d). These narrower contributions do not include that Mr Mokom "(a) participated in planning the implementation of the Common Purpose", or was "(e) supporting, promoting and endorsing the crimes of the Anti-Balaka". The Prosecution has now abandoned the very precise and detailed allegation that Mr Mokom funded the Anti-Balaka,¹¹ largely based on **P-2232**'s contested evidence,¹² without offering any explanation as to why this witness should no longer be believed on such serious allegation but trusted on other, central allegations, such as the battle of Ndjo for example. The infamous notebook¹³ has also been put aside.

7. The Prosecution asks the Pre-Trial Chamber to consider these narrower contributions "in particular".¹⁴ The status of the other contributions which did not make the narrower list, is not addressed. Nor is the status of all the supporting evidence in Annex C1 which was said to support the allegations which did not make the narrower list. In the absence of any suggestion to the opposite from the Prosecution, the Defence submits that the Pre-Trial Chamber cannot safely rely on any alleged contributions which have not been included within the narrower Prosecution focus. They should simply be considered as abandoned.

¹⁰ Pursuant to Regulation 23bis(1) of the Regulations of the Court, this filing is confidential, as it references confidential information. A public redacted version will be filed in due course.

¹¹ [Prosecution Submissions](#), para.34.

¹² CAR-OTP-2090-0561 paras. 63-73; CAR-OTP-00000899, 50:23-51:12, 66:1-68:8, 69:23-25.

¹³ [ICC-01/14-01/22-T-008-CONF-ENG ET](#), 24:15-25:2; 43:10-46:23.

¹⁴ [Prosecution Submissions](#), para.11.

1. Legal requirements

8. For **aiding and abetting**, the Prosecution says “it is sufficient that the person provides assistance to the commission of the crime” and that “[it] is not required that the assistance has a *substantial effect* on the commission of the crime, nor that it meets any specific threshold or be anyhow qualified”.¹⁵

9. The Defence has not submitted that a *substantial effect* is required, notwithstanding the controversy surrounding the shift in the caselaw.¹⁶ Regardless, it is not the case that any assistance whatsoever can give rise to aiding and abetting liability. The cases cited by the Prosecution, show that “the assistance must have been ‘causal’, in the sense of having had an effect on the commission of the offence”, and that the Appeals Chamber “considers that the *actus reus* under Article 25(3)(c) is certainly fulfilled when the person’s assistance in the commission of the crime facilitates or furthers the commission of the crimes”.¹⁷

10. Importantly, the Prosecution only cites to paragraph 93 of the *Bemba et al.* Judgement, which says that Article 25(3)(c) “does not require the meeting of any specific threshold”. However, paragraph 94 goes on to specify that the “assistance must have furthered, advanced or facilitated the commission of such offence”, and any assistance that is not causal does not fall within the ambit of Article 25(3)(c).

11. Reinforcing these statements, in *Yekatom & Ngaïssona*, again not cited by the Prosecution, the Pre-Trial Chamber held that not just any contribution would give rise to aiding and abetting liability, finding that “once again, the evidence tendered by the Prosecutor is general in nature and does not allow the Chamber to establish, to the required threshold, that Mr Ngaïssona contributed specifically to the alleged crimes committed by the Anti-Balaka in the charged locations mentioned above.”¹⁸ It cannot be that any contribution whatsoever to the Anti-Balaka, with no qualification, can give rise to aiding and abetting liability.¹⁹

¹⁵ [Prosecution Submissions](#), para.13.

¹⁶ [ICC-01/14-01/22-T-008-CONF-ENG ET](#), 6:17-23, 41:19-25; [ICC-01/14-01/22-270-Conf](#), (‘Defence Submissions’) para.51; Kai Ambos, *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (4th edition, Beck, Nomos, Hart, 2022) (‘Ambos’), 1222-1223; See also Antonio Cassese et al. (Eds.); *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2000), 800.

¹⁷ [Prosecution Submissions](#), fn.16, citing [ICC-01/05-01/13-2275-Red](#), paras.1326-1327; [ICC-02/11-02/11-186](#), para.167: “in essence what is required for this form of responsibility is that the person provides assistance to the commission of the crime”.

¹⁸ [ICC-01/14-01/18-403-Corr-Red](#), para.176. See also para.223.

¹⁹ Ambos, 1223: “to omit any threshold would be difficult to reconcile with the gravity threshold in Article 17(1)(a) ICC Statute for it is predicated on the assumption that only cases of a certain gravity are prosecuted”.

12. The Prosecution then relies on *Bemba et al.* to assert that “the contribution does not have to directly assist the commission of crimes”. It states that: “[t]herefore, whether the weapons provided by Mr Mokom to the Anti-Balaka were actually used to commit the crimes charged **is immaterial**, provided that Mr Mokom’s overall contribution assisted, directly or indirectly, the commission of such crimes.”²⁰ No citation is offered for this second statement. The Prosecution has charged Mr Mokom on the basis that he “provided funds, weapons, medication, and ammunition”, which “contributed to the charged crimes.”²¹ No evidence has ever been produced showing that the alleged contributions made **any** contribution to the charged crimes, regardless of the level of contribution. That evidence does not exist. As such, the Prosecution is now saying it is immaterial whether these contributions were used to commit crimes, as long as Mr Mokom’s **overall contribution** assisted.

13. Even on the Prosecution’s own reading of the law, whether weapons allegedly provided by Mr Mokom were used by the Anti-Balaka to commit the charged crimes, is **undoubtedly material** to whether Mr Mokom contributed to these crimes. In *Yekatom & Ngaïssona*, the Pre-Trial Chamber refused to confirm charges where “the evidence presented by the Prosecutor does not allow the Chamber to trace Mr Ngaïssona’s financial contribution, or otherwise, to the Anti-Balaka groups operating in those locations.”²² The Appeals Chamber is clear; although assistance can be rendered to an intermediary, the Prosecution must still establish “as a factual matter, that [the contribution] assisted the commission or attempted commission of a crime”.²³

14. As such, Mr Mokom’s contribution(s) must assist in the commission or attempted commission of the 20 charged crimes in this case. In making this determination, whether the specific charged contributions gave any assistance is **undoubtedly material**. That the Prosecution does not seem able to demonstrate how Mr Mokom’s alleged contributions assisted, directly or indirectly, in the commission of the charged crimes, does not make such assistance “immaterial”. On the contrary, this confirms the Prosecution’s inability to prove its case, regardless of whether these contributions are assessed separately, or as part of an “overall” contribution.

15. For **common purpose liability**, again, the Prosecution submits that the suspect’s contribution need not “meet any specific threshold”. The Prosecution rejects the standard set

²⁰ [Prosecution Submissions](#), para.14.

²¹ [ICC-01/14-01/22-174-Conf-AnxA](#), para.47.

²² [ICC-01/14-01/18-403-Corr-Red](#), para.176. *See also* para.223.

²³ [Prosecution Submissions](#), fn.20, citing [ICC-01/05-01/13-2275-Red](#), paras.1329-1330.

in *Katanga* and in *Mbarushimana*, which required that the contribution to the commission of the crimes be *significant*, and endorses what it calls the “latest approach” and “more recent and consistent jurisprudence” of the Court.²⁴

16. Of the cases said to comprise the “more recent” jurisprudence, *Ongwen* and *Al Mahdi* held that an accused’s contribution need not be significant.²⁵ The Prosecution also cites to *Ntaganda*, and to *Blé Goudé*,²⁶ which did not specify the level of contribution required. In *Ruto et al.*, not cited by the Prosecution, the Pre-Trial Chamber said that the contribution “is satisfied by a less than ‘substantial’ contribution”, but did not define what it should be.²⁷ Academic commentaries endorse the “significant” standard as being “beyond any reasonable doubt”,²⁸ and a “valid interpretation” which “best fits with the phrasing of the other *actus reus* criteria”.²⁹

17. Regardless of the term, the jurisprudence is consistent on the need for a **causal effect** between the contribution and the crime: the suspect’s contribution must influence, or have a bearing on, if and how the crime is committed, and minimal contributions from a suspect “should be exempted from criminal responsibility”.³⁰ The Prosecution cites to *Al-Hassan* which held that while the contribution need not be significant, the contribution must be such as to influence the commission of the crime. In other words, if the suspect’s conduct does not have a **causal effect** on the commission of the crimes, the conduct cannot be qualified as a “contribution” within the meaning of Article 25(3)(d).³¹

18. In *Al-Hassan*, adopting this requirement of a “causal effect” between the contribution and the charged crimes, the Pre-Trial Chamber considered that Mr Al-Hassan contributed to the crimes by, for example, inflicting lashes as part of punishment; participating in mistreatment; participating in arrests and detention; and drafting the Islamic Police reports on civil and criminal cases, which all demonstrated the importance of his role³² and his direct proximity to, and participation in the charged crimes. This contribution was found to have a causal effect on their commission, so that he contributed to the charged crimes within the

²⁴ [Prosecution Submissions](#), para.15.

²⁵ [ICC-02/04-01/15-422-Red](#), para.44; [ICC-01/12-01/15-84-Red](#), para.27.

²⁶ [Prosecution Submissions](#), fn 24, citing: [ICC-01/04-02/06-309](#), para.158; [ICC-02/11-02/11-186](#), para.172.

²⁷ [ICC-01/09-01/11-373](#), para.354.

²⁸ Kai Ambos, *The Law and Practice of the International Criminal Court*, 2015, p.601; Randle C. DeFalco, Contextualizing Actus Reus under Article 25(3)(d) of the ICC Statute: Thresholds of Contribution, *Journal of International Criminal Justice*, 2013, p.730.

²⁹ Marjolein Cupido, *Modes of Liability in International Criminal Law*, 2019, pp.319, 327.

³⁰ Kai Ambos, *The Law and Practice of the International Criminal Court*, 2015, p.600.

³¹ [ICC-01/12-01/18-461-Corr-Red](#), para.948.

³² [ICC-01/12-01/18-461-Corr-Red](#), paras.963-964.

meaning of Article 25(3)(d).³³ There is no equivalence here; the link between Mr Mokom's alleged acts and the crimes has never been shown.

19. The Prosecution then asserts that “under Article 25(3)(d) there is no need to establish that the contribution had a direct impact on a specific charged crime” and that “the contribution must be assessed with respect to the type of crime (for example murder, or destruction of property) and not with respect to each criminal incident.”³⁴ The Prosecution says that this standard is “*Contra Defence oral submissions, T-008, p. 12, l. 3-9*”.³⁵ This is an error; these lines do not relate to either the relevant contribution, or Article 25(3)(d). The Defence submitted that the contribution under Article 25(3)(d) needed to be “not just to the group generally, but to the charged crimes”.³⁶ The Prosecution and Defence are therefore aligned.

20. Where the parties do diverge, concerns the Prosecution's burden to establish that Mr Mokom's alleged contribution under Article 25(3)(d) had an effect on each of the charged crimes. In *Al-Hassan*, the Pre-Trial Chamber held that it was required to examine the contribution made by the suspect to “each crime”, being each crime included in the common purpose, torture, cruel treatment, etc. Not to each criminal act constituting the crimes, but to each of the charged crimes.³⁷ In *Katanga*, the Trial Chamber was clear; “the accused will not be considered responsible for all of the crimes which form part of the common purpose, **but only for those to whose commission he or she contributed**.”³⁸ Mr Mokom's alleged contribution must be assessed crime by crime, one by one. The Prosecution has not even attempted this exercise. It has never submitted how Mr Mokom's alleged contributions, individually or overall, have had a causal effect on rape. Or had a causal effect on murder. Or on persecution. This evidence does not exist, which makes the case impossible to confirm.

2. Organisation and Coordination

21. The framing of the case is important: “Mr Mokom participated in the organisation and coordination of the Anti-Balaka in particular **by deploying fighters from Zongo** to participate in the attacks and by providing strategic advice ahead of the charged attacks”.³⁹

³³ *Ibid*, para.967.

³⁴ [Prosecution Submissions](#), para.16.

³⁵ [Prosecution Submissions](#), para.16, fn.25.

³⁶ [ICC-01/14-01/22-T-008-CONF-ENG](#), 16:18-19.

³⁷ [ICC-01/12-01/18-461-Corr-Red](#), para.950.

³⁸ [ICC-01/04-01/07-3436-tENG](#), paras.1619, 1632.

³⁹ [Prosecution Submissions](#), para.17.

22. The Prosecution relies on **P-0446**, a “direct participant” in the 5 December operation, who “understood” that it was Mr Mokom who was the overall coordinator of that operation. However, contrary to the Prosecution submissions, **P-0446** did not “[hold] firm on this point during his interview”.⁴⁰ In the extract cited, **P-0446** explains that it was in fact Andjilo, Konaté and some officials who dispatched the groups.⁴¹ **P-0446** also said that the targets were given by Andjilo and Konaté.⁴² When read in totality, this evidence does not help the Prosecution.

23. No order came from Mr Mokom, who played no part in the deployment of fighters for the attacks.⁴³ Contrary to what is argued by the Prosecution, **P-0966**, **P-1339**, **P-1521** and **P-2269** have all explained that Mr Mokom had either no contact with the Anti-Balaka on the ground, was not taking decisions, or was simply absent from the picture, before and on 5 December 2013.⁴⁴ This is also corroborated by **P-1858**, **P-2841**, **P-0876**, **P-1951** and **P-0965**.⁴⁵ They all testified that Mr Mokom was not the one taking decisions, or giving orders, or had even barely heard of him.

24. This makes sense. On 5 December, the Anti-Balaka had well-known communication obstacles.⁴⁶ That Mr Mokom could coordinate attacks of various groups with no links to each other,⁴⁷ through an unreliable network, using unreliable communications, and with no personal knowledge of, or relationship with, the Anti-Balaka on the ground, is objectively not credible. In addition to the Defence oral submissions,⁴⁸ the Facebook evidence also shows that Mr

⁴⁰ [Prosecution Submissions](#), fn.29.

⁴¹ CAR-OTP-2059-1672-R01, ll.772-783.

⁴² [Redacted], CAR-OTP-2059-1696-R01, ll.66-99; CAR-OTP-00000934, 45:15-24. **P-0446** also [Redacted], CAR-OTP-2059-1602-R01, ll.552-584; CAR-OTP-2105-0402-R01, ll.924-926.

⁴³ See [Prosecution Submissions](#), paras.18-19, 21-24. **P-0889** testifies that Anti-Balaka stayed in touch with Mr Mokom because he gave them phone credits. Mr Mokom’s actions were to motivate Anti-Balaka to go to Bangui, and give them each other phone numbers, but they would take their own decision: *e.g.* [Redacted], CAR-OTP-2122-7962-R01, ll.159-190, ll.589-602, ll.651-664, CAR-OTP-00001068-R01, 19:12-22, 20:22-27, 21:11-22:7; **Andjilo never listened to Mr Mokom, nor did he have any leader**, **P-0966**, CAR-OTP-00001127, 41:23-42:10, **P-1521**, CAR-OTP-2046-0603, paras.54, 56, CAR-OTP-00000909, 53:9-23, CAR-OTP-00000911, 70:20-24; [Redacted], CAR-OTP-2057-0428. **P-1172**, CAR-OTP-2082-1058-R01, paras.34, 36: [Redacted]; **P-0884** stated that the groups that came to Bangui came spontaneously, from different places, each organized their own demonstrations. No one was directing them. Mr Mokom only called him to tell him that he was in contact with such and such a person, CAR-OTP-2072-1541-R01, ll.1006-1014, ll.1200-1213, CAR-OTP-00001058-R01, 15:8-16:7.

⁴⁴ **P-1339**, CAR-OTP-00000972, 85:3-20; **P-1521**, CAR-OTP-00000909, 40:15-25; **P-0966**, CAR-OTP-2031-0241-R01, paras.59-67.

⁴⁵ **P-1858**, CAR-OTP-00001043, 31:17-32:3; **P-2841**, CAR-OTP-2127-4238-R01, para.105; **P-0876**, CAR-OTP-2042-4970-R01, ll.887-904; CAR-OTP-2046-0249-R01, ll.382-413; **P-1951**, CAR-OTP-2092-0201-R01, ll.851-875; and **P-0965**, CAR-OTP-2046-0182-R01, ll.150-186, CAR-OTP-2046-0195-R01, ll.502-513.

⁴⁶ **P-0446**: CAR-OTP-00001117, 22:17-24; CAR-OTP-2059-1567-R01, ll.85-111; [Defence Submissions](#), para.26.

⁴⁷ [Defence Submissions](#), para.26 referring specifically to **P-0876**, CAR-OTP-00000919, 13:1-18; 74:10-17 and **P-0446**, CAR-OTP-2059-1586-R01, ll.301-305.

⁴⁸ [ICC-01/14-01/22-T-007-CONF-ENG ET](#), 44:22-47:15.

Mokom had no knowledge of the position of the Anti-Balaka or the leaders, was not kept apprised of events on the ground, and was not in contact with the people the Prosecution alleges were leading the 5 December attacks.⁴⁹ No messages were sent from Mr Mokom's alleged Facebook account between 18 November and 9 December 2013.⁵⁰

25. About Gobéré, the Prosecution cites to Mr Mokom's own words, who said that people went to Gobéré thanks to traditional means.⁵¹ It also relies on **P-0966**, **P-1521** and **P-2269** who either did not mention Gobéré, or did not testify to any involvement of Mr Mokom in the gathering.⁵² The weight of evidence shows people spontaneously gathered in Gobéré,⁵³ that they were told by fetish sellers,⁵⁴ and there were no leaders, each forming their own groups.⁵⁵

26. That Mr Mokom supported the Anti-Balaka **after** the charged 5 December attacks, by galvanising the zone commanders, touring the bases, or keeping in contact with Kema⁵⁶ is not incriminating *per se*.⁵⁷ The Prosecution cites **P-1719**'s evidence, which provides no temporal scope, but seems to relate to **before** 5 December.⁵⁸ **P-0884**'s evidence concerns Mr Mokom asking Anti-Balaka to participate in meetings.⁵⁹ None of the documentary evidence is incriminating.⁶⁰ Mr Mokom's actions promoted good conduct; checking with ComZones and telling them not to attack the population, sensitising them to disarmament, and setting up a military police and ID badges.⁶¹

3. Endorsing the crimes

⁴⁹ The reference at fn.30 is not correct. See OTP-2066-3003, at 3071: [Redacted]; CAR-OTP-2102-7677 at 7679, [Redacted]. See also CAR-OTP-2103-4149 at 4155 [Redacted] and CAR-OTP-2101-5511 [Redacted].

⁵⁰ Contrary to [Prosecution Submissions](#), [Redacted].

⁵¹ [ICC-01/14-01/22-T-006-CONF-ENG ET](#), 39:9-15.

⁵² See, as cited by the Prosecution, **P-0966**, CAR-OTP-00001127, pp.32-35, CAR-OTP-00000950, pp.42, 50: no mention of Gobéré; and **P-1521**, CAR-OTP-2046-0603-R01 at 0609, p.35 and **P-2269**, CAR-OTP-2111-0336-R01 at 0344, paras.58, 77, 157: no mention of Mr Mokom.

⁵³ **P-1521**, CAR-OTP-00000911, 57:21-23; **P-2232**, CAR-OTP-2090-0561-R01, para.60; **P-2841**, CAR-OTP-2127-4238-R01, para.28.

⁵⁴ See **P-0966**, CAR-OTP-2031-0241, paras.22-25, 30.

⁵⁵ **P-0884**, CAR-OTP-2072-1849, ll.705-708, 730-733; **P-2269**, CAR-OTP-2111-0336-R01, paras.46-51; **P-1521**, CAR-OTP-00000911, 67:20-70:1. See also [Defence Submissions](#), paras.8 *et seq*.

⁵⁶ [Prosecution Submissions](#), para.28.

⁵⁷ [ICC-01/14-01/22-T-008-CONF-ENG ET](#), 41:12-42:18; [Defence Submissions](#), para.46. See also, concerning Kema, [Defence Submissions](#), para.24.

⁵⁸ [Prosecutions Submissions](#), para.28, fn.51 citing **P-1719**: CAR-OTP-2062-0039-R01 at 0046, paras.41-42.

⁵⁹ [Prosecution Submissions](#), para.28, fn.51 citing **P-0884**: CAR-OTP-2072-1739-R01, ll.479-611.

⁶⁰ [Prosecution Submissions](#), para.28, fn.51 citing CAR-OTP-2025-0380; CAR-OTP-2035-0061.

⁶¹ The Defence refers to its [submissions](#) on these points, paras.32-37. See also *infra* para.31, fn.72 concerning the Prosecution's allegations about detainees at [Prosecution Submissions](#), para. 29.

27. Instead of citing to specific evidence in support, the Prosecution states “**the evidence in DCC Annex C.1 (rows 150-163)**, shows that Mr Mokom maintained a close relationship with and supported Anti-Balaka leaders including main protagonists of the December attacks, and sought to prevent the arrest or otherwise free members detained in Bangui”.⁶² From this, it is alleged that it can be **inferred** that Mr Mokom promoted and endorsed the alleged crimes.

28. Annex C1 stops at Row 160, not 163.⁶³ Much of the evidence in these 11 rows is completely or largely irrelevant, and does not support the allegation.⁶⁴ Row 151, for example, cites to [Redacted].⁶⁵

29. Further, the framing of the evidence underlying this allegation is too vague, indeterminate and general⁶⁶ to allow the Pre-Trial Chamber to safely draw the **inferences** that the Prosecution suggests. The first proposition is that “Mr Mokom maintained a close relationship with and supported Anti-Balaka leaders including main protagonists of the December attacks on Bangui and Bossangoa”. To support an inference that these relationships meant that Mr Mokom promoted and endorsed crimes, the Prosecution must demonstrate that: (i) Mr Mokom had a relationship with (unspecified) Anti-Balaka leaders; (ii) the Anti-Balaka leaders that Mr Mokom had a relationship with committed crimes; and (iii) the relationship between Mr Mokom and the Anti-Balaka leaders was sufficiently ‘close’ for him to have known about the alleged crimes and been able to stop them.

30. The Prosecution has failed to specify who the individuals are, and the crimes they are alleged to have committed. This makes it impossible for the Pre-Trial Chamber to identify the underlying evidence necessary to draw the inferences required. In the more than 80 items in “Rows 150-163”, there is evidence of Mr Mokom’s contacts with various Anti-Balaka members and commanders, and evidence of alleged crimes being committed by Anti-Balaka members. What is missing, is the link. There is nothing demonstrating Mr Mokom’s ‘closeness’ with any of these people, and his knowledge that they may have been committing crimes. Simply identifying those who were in proximity to Mr Mokom at various points during or after

⁶² [Prosecution Submissions](#), para.36 (emphasis added).

⁶³ See [Annex C1](#), pp.50-55.

⁶⁴ Additional examples include: Row 151: **P-1858**, CAR-OTP-2063-0050-R01, at 0067-0068, para.112. Row 157: **P-0889**, CAR-OTP-2122-7653-R01, at 7668, ll.549-553 and at 7679 ll.1002-1018; **P-1858**, CAR-OTP-2063-0050-R01, at 0062, para.74; at 0070, para.117(11). Row 160: **P-0889**, CAR-OTP-00000952, p.40, ll.5-25; **P-0287**, CAR-OTP-00000858, 14:10-15:4; **P-1074**, CAR-OTP-2023-2114 (minutes 02.06-05.56).

⁶⁵ CAR-OTP-2099-0165-R01, at 0193-0194, para.149.

⁶⁶ [ICC-02/05-01/20-433](#), para.51; [ICC-01/14-01/18-403-Red-Corr](#), paras.192, 201, 204, 237; [ICC-01/04-01/10-465-Red](#), para.263; [ICC-01/05-01/08-424](#), paras.387, 392, 394, 396, 400.

the conflict,⁶⁷ or that individuals were on lists of Anti-Balaka alongside Mr Mokom,⁶⁸ or that crimes were committed by someone in the Anti-Balaka⁶⁹ is not sufficient.

31. The Prosecution then claims that Mr Mokom “sought to prevent the arrest or to otherwise free members of the group that were detained in Bangui”. There is only a handful of relevant evidence cited, the majority of which comes from **P-2232**, for whom the Defence has previously raised issues.⁷⁰ **P-2232**’s evidence of Mr Mokom’s alleged involvement in freeing prisoners from Ngaragba⁷¹ is contradicted by the evidence of one of the witnesses who was allegedly freed. [Redacted].⁷² The only other evidence is from **P-0884**, regarding a separate incident, noting Mr Ngaïssona organised the release of Andjilo from prison, without mentioning Mr Mokom.⁷³ Even viewed in totality, there is insufficient evidence to support the inferences that Mr Mokom promoted and endorsed the alleged crimes by being involved in freeing prisoners. Importantly, there are further examples of Mr Mokom’s efforts to promote peace in Rows 150 to 160, which make this conclusion even more difficult to reach.⁷⁴

32. The Prosecution concludes by asserting that the Mr Mokom’s contributions, considered in their totality, assisted the charged crimes as they “contributed **overall to the strengthening** of the Anti-Balaka as a fighting force and to their **morale**”.⁷⁵ This again, constitutes a new “re-focus” on the question of contribution. The problem is: no evidence is cited. No witnesses speak about Mr Mokom boosting morale, or building a better fighting force. More important, there is no explanation of how increased morale contributed to murder or rape. The Defence could just as easily assert that troops with better morale are less likely to commit crimes.

4. The Perpetrators of the crimes

33. The DCC says “the Anti-Balaka” shared a common purpose, without nuance.⁷⁶ The Prosecution now says that it “does not suggest that every single Anti-Balaka in the CAR shared the common purpose”, relying on *Katanga* to say that there can be members of the group who

⁶⁷ See, e.g., the citation to CDR-[Annex C2](#), paras.15-17, in Row 151 of [Annex C1](#).

⁶⁸ See sources cited in Row 158 of [Annex C1](#).

⁶⁹ See, e.g., **P-2232**, CAR-OTP-2090-0561-R01, para.183; **P-0954**, CAR-OTP-2048-0171-R01, para.47; **P-0808**, CAR-OTP-2093-0010-R01, para.48; **P-1074**, CAR-OTP-2094-0228-R01, para.80; CAR-OTP-2030-0431, 0431.

⁷⁰ [ICC-01/14-01/22-T-007-CONF-ENG ET](#), 38:1-14, 39:2-40:5, 40:15-18, 41:11-43:25, 48:21-51:25.

⁷¹ CAR-OTP-00000901, 33:1-36:4.

⁷² CAR-OTP-00000936, 50:5-52:18; P-2232 is also contradicted by **P-0405**, at CAR-D34-00000094-R01, paras. 30-31.

⁷³ CAR-OTP-2072-1814-R01, ll.126-180.

⁷⁴ See, e.g., Row 151: **P-0808**, CAR-OTP-2093-0010-R01, paras.87-88; Row 153: CAR-OTP-2001-6437 at 6494.

⁷⁵ [Prosecution submissions](#), para.37.

⁷⁶ [ICC-01/14-01/22-174-Conf-AnxA](#), para.4.

did not commit crimes.⁷⁷ But, in *Katanga*, the group in question was “Ngiti combatants and commanders of Walendu-Bindi *collectivité*”, who shared a common purpose to “attack the village of Bogoro so as to wipe out from that place not only the UPC troops but also, and, first and foremost, the Hema civilians present.”⁷⁸ There was no confusion about perpetrator identity, nor evidence of members being religiously opposed to crimes, and carrying out lawful military actions against a murderous invading force during the same period, or criminals pretending to be part of the *collectivité* in order to carry out crimes.

34. In this case, the Prosecution now accepts that not all Anti-Balaka were committing crimes. But, it then fails to take the next step, and say how the Pre-Trial Chamber can find that Mr Mokom’s contributions were to the “bad” Anti-Balaka and not the “good”. Particularly when the Prosecution’s own PEXO designations point to a huge amount of evidence of real Anti-Balaka being opposed to crimes, and of opportunistic criminals posing as fake Anti-Balaka taking advantage of the situation to commit crimes. The Prosecution says that “the common purpose is shared by those members of the group who (directly or indirectly) committed the charged crimes”.⁷⁹ It is impermissibly circular to argue that the common purpose is shared by those Anti-Balaka who committed the crimes, and the Anti-Balaka who committed the crimes are those who shared the common purpose. If that were accepted, a fake Anti-Balaka who committed a crime on 5 December, for example, would adhere to the common purpose at the moment of the crime, regardless of having no link whatsoever with the Anti-Balaka, let alone Mr Mokom. This is not a clear-cut case of the Ngiti combatants of Walendu-Bindi *collectivité*, committing a one-day attack. This evidence is more complicated, and the Prosecution does not give the Pre-Trial Chamber a path to address it.

35. The victim evidence relied on does not assist. Most witnesses cited identify perpetrators as being Anti-Balaka, solely because the alleged victims were Muslims/Arabs. The victim witnesses fail to explain how they were able to discern that the perpetrators were Anti-Balaka; some acknowledge the difficulty of distinguishing real Anti-Balaka from fake elements or Seleka.⁸⁰ **P-2462** said that [Redacted]⁸¹, conflating rebels and potential perpetrators. **P-2462**

⁷⁷ [Prosecution submissions](#), para.7.

⁷⁸ [ICC-01/04-01/07-3436-tENG](#), paras.1654, 1668-1669.

⁷⁹ [Prosecution submissions](#), para.7.

⁸⁰ Also confirmed by insiders: **P-0446**, CAR-OTP-00001117, 45:24-46:24; **P-0884**, CAR-OTP-00001101, 5:24-6:8, 10:14-23; **P-0808**, CAR-OTP-00001107, 6:7-8:10, 14:3-25; **P-0876**, CAR-OTP-00000919, 37:23-38:3.

⁸¹ **P-2462**: CAR-OTP-00000895, 30:18-31:3.

conceded that both Seleka and Anti-Balaka elements wore *gris-gris*,⁸² but other victim witnesses identify “Anti-Balaka” on the basis that the perpetrators were armed, had *gris-gris*, military clothes or plaited hair.⁸³ The Prosecution relies on **P-1528** who saw “through the hole in the compound wall” four armed men around a dead body and a crowd of locals encouraging alleged Anti-Balaka.⁸⁴ This is insufficient to draw any safe conclusions about the perpetrators. This victim witness evidence was not “ignored” by the Defence, as the Prosecution submits.⁸⁵ It was rightly considered as not probative.

B. MENS REA

36. Following the confirmation hearing, the Prosecution has entirely changed its case:

DCC (para. 59)	Prosecution Submissions (paras.46-49)
[Redacted]	First, Mr Mokom’s connections, role and activity [...] required him to be in constant contact (which he was) with Anti-Balaka ComZones on the ground as well as Anti-Balaka leaders who then became members of the National Coordination. This gave him an inside role that allowed him access to information and strategic planning.
[Redacted]	Second, it was common knowledge that <u>many Anti-Balaka fighters</u> and their leaders were motivated by vengeance and hatred. They did not distinguish between Seleka and Muslim civilians. Anti-Balaka attacks did not only target Seleka positions and elements, but routinely resulted in Muslim civilian casualties and destruction of property.
[Redacted]	Third, when Mr Mokom relocated to Bangui, he was in close proximity to the crimes as they were happening. Despite this awareness, Mr Mokom continued to support the Anti-Balaka to make it stronger and more effective .

37. Gone is the planning and implementation of the common plan. Gone is the central core of the prior case: the return of Bozizé to power. Gone is this central purpose being shared by

⁸² **P-2462**: CAR-OTP-00000895, 40:4-17, *see also* **P-2462**: CAR-OTP-00000893, 40:8-13; CAR-OTP-00000895, 38:11-13; *see also* **P-2049**: CAR-OTP-00001124, 12:4-6.

⁸³ **P-1528**: CAR-OTP-2048-0757-R01, para.32; **P-2131**: CAR-OTP-2109-0093-R01, para.30; **P-2658**: CAR-OTP-00000954, 26:17-20; **P-2327**: CAR-OTP-2100-1921-R01, para.27; **P-2049**: CAR-OTP-2088-2173-R01, paras.24, 63, 97, CAR-OTP-00001124, 11:15-20-6; **P-2324**: CAR-OTP-2100-2002-R01, para.49.

⁸⁴ **P-1528**: CAR-OTP-00001031, 29:22-30:22.

⁸⁵ [Prosecution submissions](#), para.39.

both the Anti-Balaka and Bozizé's inner circle. Gone is Mr Mokom's knowledge of these shared views. Gone is Mr Mokom's awareness of the propensity and/or intention of the Anti-Balaka elements to commit crimes. Gone is Mr Mokom's approval and acceptance of crimes.

38. The prior Defence submissions have been wasted, in significant part, arguing against a case that the Prosecution has now abandoned. This is what the Pre-Trial Chamber sought to avoid when it ordered the Prosecution to provide the Defence with "the necessary particulars that comprise the elements of the crimes" with "a sufficiently specific and exhaustive presentation and description".⁸⁶ As regards the written pleadings, the Pre-Trial Chamber was clear that "submissions regarding issues not raised at the hearing will be set aside by the Chamber".⁸⁷ This new *mens rea* case was not raised by the Prosecution at the hearing. The Prosecution frames this monumental shift in its case, as a change in focus. But, this new "focus" also places the Defence and Pre-Trial Chamber in an impossible position. Again, what happens to that part of the Prosecution case that does not fall inside the new "focus"? Take, for example, the allegation that Mr Mokom appointed Anti-Balaka members who had publicly expressed hatred or intolerance towards the Muslim population to key positions.⁸⁸ Putting aside that there is no credible evidence in support, what is the status of that allegation? Is the Defence required to defend against it? What does the Prosecution case now actually consist of?

39. For example, the Prosecution now says: "Mr Mokom therefore possessed at least the required *mens rea* under Article 25(3)(d)(ii)".⁸⁹ A marked shift away from aiding and abetting. One of the three new "focuses", is that "**when Mr Mokom relocated to Bangui**, he was in close proximity to the crimes as they were happening".⁹⁰ Mr Mokom relocated in February 2014.⁹¹ As such, the Prosecution is only able to link his proximity to alleged crimes two months after 5 December 2013. Intent must be proven to have existed at the time of the alleged *actus reus*, not months later. By framing Mr Mokom's intent in terms of his return to Bangui, the Prosecution's case is unsupported for the critical period of the charges.

⁸⁶ [ICC-01/14-01/22-62](#), paras.34-36.

⁸⁷ [ICC-01/14-01/22-T-008-CONF-ENG ET](#), 49:18-19.

⁸⁸ [ICC-01/14-01/22-174-Conf-AnxA](#), para.62.

⁸⁹ [Prosecution Submissions](#), para.50.

⁹⁰ [Prosecution Submissions](#), para.49.

⁹¹ [ICC-01/14-01/22-174-Conf-AnxC1](#), row 4.

40. The Prosecution emphasises that this is not a “should have known” case,⁹² but then inexplicably gives five incorrect citations that have nothing to do with *mens rea*.⁹³ **P-0884**’s cited evidence, is hearsay evidence of Mr Mokom “referring to himself as a commander [...] **he informed me** that he was the one organising the fighting in the provinces”.⁹⁴ **P-0884**’s other evidence suggests that [Redacted].⁹⁵ **P-2232**’s evidence includes his statement about crimes that “the Coordination could not do anything about it, it could only observe that the damage was being done”,⁹⁶ and ignores his later evidence about the Coordination setting up a military police precisely to stop crimes.⁹⁷ **P-0446**’s relevant evidence is limited to leaders being aware of crimes, and the Coordination discussing excesses;⁹⁸ nothing about Mr Mokom. The media article cited, presumably considered by the Prosecution as being most probative of its case, should be read in full. The Prosecution cherry-picks two phrases, [Redacted].⁹⁹ The article says: [Redacted]. The man is not identified as Anti-Balaka. The Prosecution relies on **P-1719**’s (an Anti-Balaka) hearsay evidence of [Redacted].¹⁰⁰ He has no direct knowledge of this killing. At its highest, **P-1719**’s evidence is [Redacted].¹⁰¹ So, condemnation of crimes, and measure being taken to address them.

41. When viewed together, the Prosecution’s evidence of Mr Mokom’s alleged *mens rea* is devoid of any temporal connection with the charged crimes.¹⁰² The allegations are also undermined by reliance on unreliable witnesses: the Defence has repeatedly highlighted the credibility issues of **P-2232**, issues which are only addressed by the Prosecution by including a ‘but’ in footnote 88 to reflect his inconsistent testimony. Furthermore, **P-1074** is the sole witness to allege that Mr Mokom [Redacted], despite this statement allegedly being made in a public meeting.¹⁰³ **P-1074** also [Redacted].

⁹² [Prosecution Submissions](#), para.52.

⁹³ [Prosecution Submissions](#), at fn.79, citing [ICC-01/14-01/22-T-006-CONF-ENG ET](#), 86:4-7; at fn.80, citing [ICC-01/14-01/22-T-008-CONF-ENG ET](#), 21:11-16; at fn.81, citing [ICC-01/14-01/22-T-008-CONF-ENG ET](#), 3:23-24; and at fn.82, citing [ICC-01/14-01/22-T-006-CONF-ENG ET](#), 68:8, 87:18-20.

⁹⁴ [Prosecution Submissions](#), para.53, fn.84, citing **P-0884**, CAR-OTP-00001097, 40-41.

⁹⁵ [Defence Submissions](#), at para.16, citing CAR-OTP-2072-1541-R01, ll.1006-1014; at para.19, citing: CAR-OTP-2080-1678-R01, ll.1428-1469; *See also* CAR-OTP-2072-1541-R01, ll. 805-832.

⁹⁶ [Prosecution Submissions](#), para.53, fn.84, citing **P-2232**, CAR-OTP-0000901, 27-28.

⁹⁷ [Defence Submissions](#), para.36, fn.124, citing CAR-OTP-2090-0561-R01, paras.269-271.

⁹⁸ [Prosecution Submissions](#), para.53, fn.84, citing **P-0446**, CAR-OTP-00000936, p.5.

⁹⁹ [Prosecution Submissions](#), para.53, fn.84, CAR-OTP-2001-4118.

¹⁰⁰ [Prosecution Submissions](#), para.57, fn.100, citing CAR-OTP-2062-0039-R01, para.83.

¹⁰¹ [Prosecution Submissions](#), para.53, fn.85, citing **P-1719**, CAR-OTP-2062-0039, para.83.

¹⁰² [Prosecution Submissions](#), para.53, citing to evidence of Mr Mokom’s words months before and months after the charged crimes.

¹⁰³ **P-0310**, the mayor of the 4th arrondissement, knew Mr Mokom to be one of the leaders of the Anti-Balaka but never confirmed the words attributed to Mr Mokom by **P-1074**.

42. The Prosecution states that Mr Mokom was not “a man of peace” and relies [Redacted].¹⁰⁴ Annex C2 of the DCC says [Redacted].¹⁰⁵ The Prosecution speculates as to Mr Mokom’s *mens rea* by selecting evidence alleging that Anti-Balaka had a thirst for revenge,¹⁰⁶ but does not address evidence stating that real Anti-Balaka sought restoration of peace and not revenge.¹⁰⁷ Even if Mr Mokom was aware of all crimes committed by alleged Anti-Balaka, the Prosecution never addresses the evidence of his intent to seek reconciliation in the country and seek to bring order and discipline to the movement,¹⁰⁸ or how the Pre-Trial Chamber is supposed to reconcile it.

Respectfully submitted,



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Monday, January 29, 2024

¹⁰⁴ [Prosecution Submissions](#), para.54, fn.91.

¹⁰⁵ [Annex C2](#), para.27.

¹⁰⁶ [Prosecution Submissions](#), para.56, fn.95.

¹⁰⁷ *E.g.* **P-0446**, CAR-OTP-0000115, 92:16-23; **P-0876**, CAR-OTP-00000923, 15:1-7; **P-2269**, CAR-OTP-2111-0336-R01, paras.43-44; **P-0307**, CAR-OTP-2005-0281-R01, at 0285; **P-0808**, CAR-OTP-00001103, 32:12-17.

¹⁰⁸ *See, e.g.* **P-2841**, CAR-D34-00000004-R01, 12, 13, 15. Evidence demonstrates Mr Mokom’s pro-peace actions: [Defence Submissions](#), paras.33-39. *Contra* [Prosecution Submissions](#), paras.55, 57.