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TRIAL CHAMBER V

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA**

**Public
with public Annex 1,
confidential, *ex parte* Annexes 2 and 3, only available to the Ngaïssona Defence, and
confidential redacted versions of Annexes 2 and 3**

Ngaïssona Defence Written Submissions on Potential Sentencing

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. INTRODUCTION

1. On 18 July 2024, Trial Chamber V ('Chamber') issued the "Decision on the Sentencing Procedure and Amended Directions on the Conduct of the Proceedings".¹ The Defence for Patrice-Edouard Ngaïssona ('Defence') hereby presents its written submissions on potential sentencing in accordance with the Chamber's decision, consisting of six sections: (1) preliminary considerations for potential sentencing submissions made prior to the issuing of the Article 74 judgment, (2) Mr Ngaïssona's alleged marginal participation and intent in the charged crimes; (3) Mr Ngaïssona's underlying acts and conduct, which is the same across all counts (4) the partial factual overlap underlying the realization of several crimes (5) Mr Ngaïssona's individual circumstances, which merit diminishing his potential sentence, and (6) the lack of aggravating circumstances in Mr Ngaïssona's case.
2. When considered together, these six sections show that in weighing the relevant factors under Article 78(1) of the Rome Statute ('Statute') and Rule 145 of the Rules of Procedure and Evidence ('Rules'), Mr Ngaïssona's maximum potential sentence should be time served in detention.² Only such a potential sentence would be proportionate to both Mr Ngaïssona's minimal degree of alleged participation and intent and the powerful mitigating circumstances in his case. The issue of whether a fine pursuant to Article 77 of the Statute should be imposed is not addressed in these submissions because Mr Ngaïssona's indigency makes any such penalty impractical.³

II. CONFIDENTIALITY

3. Pursuant to Regulation 23bis(1) of the Regulations of the Court, Annexes 2 and 3 are classified as confidential *ex parte*, only available to the Ngaïssona Defence and the Chamber, given they contain private information, namely the names, kinship, and ages of Mr Ngaïssona's close family members. Confidential redacted versions of Annexes 2 and 3 are filed simultaneously.

¹ ICC-01/14-01/18-2600.

² Under Article 78(2) the Chamber shall deduct the time previously spent in detention in accordance with an order of the Court. Mr Ngaïssona was arrested on 12 December 2018 by the French authorities pursuant to Pre-Trial Chamber II's arrest warrant. Therefore, the time deducted from the sentence for time served should begin to run from 12 December 2018. CAR-OTP-2122-5994, at 5994. While this document is not in evidence, the date of Mr Ngaïssona's arrest is not contested by the parties.

³ *The Prosecutor v. Ongwen*, Sentence, [ICC-02/04-01/15-1819-Red](#) ('Ongwen Sentencing Decision'), para. 397; *The Prosecutor v. Ntaganda*, Sentencing Judgment, [ICC-01/04-02/06-2442](#) ('Ntaganda Sentencing Decision'), para. 247.

III. SUBMISSIONS

A. Preliminary Considerations

4. The Defence provides the following preliminary observations. First, since submissions on potential sentencing necessarily entail considerations of the accused's guilt, the Defence reiterates its position regarding the charges. As reflected in the Defence Closing Brief, the Prosecution's case against Mr Ngaïssona is patently insufficient to sustain a conviction.⁴ The submissions that follow are based on the eventuality that the Chamber would convict Mr Ngaïssona of some or all the charged crimes. This eventuality should never be interpreted as an admission by the Defence as to Mr Ngaïssona's responsibility for the crimes. Moreover, the present submissions should only be considered in the event the Chamber convicts Mr Ngaïssona. Second, without the benefit of the Chamber's factual findings, the Defence must base the present submissions on the Confirmation Decision,⁵ as it is the document which outlines the facts and circumstances of the present case.⁶ Third, while mindful that sentencing is an individualized exercise⁷ the Defence refers to other cases at the Court as they provide guidance on how trial chambers have analyzed certain facts under the factors listed in Rule 145 of the Rules. These references may assist the Chamber in safeguarding the sentencing process from arbitrariness. Specifically, individuals convicted of similar crimes, yet with significantly different levels of participation and intent should not receive similar sentences.

B. Mr Ngaïssona's alleged marginal participation and intent in the charged crimes

5. Under Article 78(1), the Chamber must consider the gravity of the crime and the individual circumstances of Mr Ngaïssona in its determination of a potential sentence. The gravity of the crime serves as the touchstone of sentencing.⁸ It is assessed under two elements: (1) the gravity of the acts committed and (2) the nature and degree of the convicted person's

⁴ Ngaïssona Defence Closing Brief, ICC-01/14-01/18-2736-Conf-AnxA-Corr.

⁵ Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona, ICC-01/14-01/18-403-Corr-Red ('Confirmation Decision').

⁶ *The Prosecutor v. Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction [ICC-01/04-01/06-3121-Red](#), para. 124 ("Appeals Chamber underlines at the outset that, given the Court's statutory framework and the respective roles of the Prosecutor and the Pre-Trial Chamber in the confirmation process, there can be no doubt that the decision on the confirmation of the charges defines the parameters of the charges at trial").

⁷ *The Prosecutor v. Bemba et al.*, Decision on Sentence pursuant to Article 76 of the Statute [ICC-01/05-01/13-2123-Corr](#) ('Bemba et al. Sentencing Decision'), para. 38; *The Prosecutor v. Al Mahdi*, Judgment and Sentence, [ICC-01/12-01/15-171](#), para. 107. The Bemba et al. Sentencing Decision was overturned on appeal for different reasons.

⁸ *The Prosecutor v. Al Hassan*, Sentencing Judgment, [ICC-01/12-01/18-2662](#) ('Al Hassan Sentencing Decision'), para. 20.

participation in the crime in question.⁹ Mr Ngaïssona faces conviction for 31 counts, but he was never directly involved in any of them, be it in their planning or execution. For this reason, the charges were confirmed under accessorial forms of responsibility.¹⁰

6. The Appeals Chamber has held that “a person who is found to commit a crime him- or herself bears more blameworthiness than a person who contributes to the crime of another person or persons”.¹¹ In the *Bemba et al.* case, the Appeals Chamber overturned Mr Kilolo’s and Mr Bemba’s sentences because their accessorial responsibility should not have resulted in automatic reduced sentences.¹² However, the circumstances of that case were truly unique. In *Bemba et al.*, the Chamber could not have found that Mr Kilolo and Mr Bemba were guilty as principals under Article 70(1)(a) since the offense relates to giving false testimony as a witness in a case before the Court. Their participation could only have been found to be accessorial.
7. Here, unlike in *Bemba et al.*, the Prosecution alleged Mr Ngaïssona was responsible as a principal perpetrator.¹³ Pre-Trial Chamber II refused to confirm the charges under this mode of liability because his degree of participation in the alleged crimes was found to be significantly less.¹⁴ If Mr Ngaïssona is convicted, the facts and circumstances of the charges show Mr Ngaïssona’s minimal blameworthiness both in terms of his participation and degree of intent for the reasons that follow below.

i) Mr Ngaïssona was not directly involved in any of the charged crimes

8. There is no evidence showing Mr. Ngaïssona’s direct involvement in any of the crimes. Mr Ngaïssona’s remoteness from the crimes is significant in the context of accessorial liability. In *Ntaganda*, the degree of participation and intent were found to be high despite Mr Ntaganda’s absence during the Second Operation where the majority of the crimes were

⁹ *The Prosecutor v. Katanga*, Decision on Sentence pursuant to article 76 of the Statute, [ICC-01/04-01/07-3484-tENG-Corr](#) (‘Katanga Sentencing Decision’), para. 43.

¹⁰ Confirmation Decision, para. 103 (“Specifically, the evidence does not allow the Chamber to conclude that Ngaïssona was in control of the crimes or, stated differently, that his contribution was essential to the point that the crimes would not have been committed without his individual contribution.”).

¹¹ *The Prosecutor v. Bemba et al.*, Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Decision on Sentence pursuant to Article 76 of the Statute”, [ICC-01/05-01/13-2276-Red](#), para. 59.

¹² *Ibid.*, paras 58, 61.

¹³ In its Pre-Trial Brief, the Prosecution even requested that the Chamber recharacterize the charges under Regulation 55(2) of the Regulations of the Court and charge Mr Ngaïssona as a principal. ICC-01/14-01/18-723-Conf, para. 10, footnote 12.

¹⁴ Confirmation Decision, para. 104.

committed.¹⁵ Trial Chamber VI reasoned that both the First Operation, in which Mr Ntaganda directly participated and the Second Operation, during which he was absent were part of the same common plan.¹⁶ Here, Mr Ngaïssona is not alleged to be part of a common plan, such that he controlled the crimes and determined their course. Unlike *Ntaganda*, Mr Ngaïssona's absence at the crime scenes is significant since mutual attribution of the acts committed by other individuals to Mr Ngaïssona is not possible.

9. The Prosecution has presented no evidence suggesting that Mr Ngaïssona directly participated in, oversaw, had contemporaneous awareness or approved of the charged crimes. The allegations regarding instructions,¹⁷ if proven, were wholly unrelated to the commission of crimes against the Muslim civilian population. Moreover, there is no evidence showing the tangible effect these instructions had on the alleged Yekatom group's and the Bossangoa group's actions on the 5 December attack and its aftermath. Therefore, Mr Ngaïssona's potential contribution toward an organizational criminal policy or criminal common purpose was neither important nor vital.¹⁸
10. On 5 December 2013, Mr Ngaïssona was in Douala, Cameroon preparing for his upcoming trip scheduled on 7 December to Marrakech, Morocco, where the FIFA Club World Cup was held.¹⁹ It is not even alleged that on the day of the 5 December attacks Mr Ngaïssona was in contact with the alleged Yekatom group or the Bossangoa group. Similarly, during the time of the alleged crimes at Yamwara school base, Mr Ngaïssona was spending Christmas in France with his family in Paris, France, and no contact is alleged to have taken place with the alleged Yekatom group.²⁰ While Mr Ngaïssona was National Coordinator for at least part of the duration of the crimes occurring on the PK9-Mbaïki axis, it has not been alleged he was personally involved in them. The Prosecution has not presented any evidence that Mr Ngaïssona would have had any direct contact with Mr Yekatom's group between 10 January and end of February 2014, or that he would have provided instructions, encouragement or any other material support to this group.²¹

¹⁵ Ntaganda Sentencing Decision, paras 35-36.

¹⁶ Ibid.

¹⁷ Prosecution Closing Brief, ICC-01/14-01/18-2738-Conf, paras 109, 111, 201-203, 206, 250, 253, 266, 286.

¹⁸ *Contra* Al Hassan Sentencing Decision, para. 35.

¹⁹ P-2843: T-074-CONF-ENG ET, p. 29, lines 11-25; CAR-OTP-2124-0774; CAR-OTP-2124-0777; CAR-OTP-2124-0779; CAR-OTP-2124-0781; Mr Ngaïssona: T-304-ENG CT, p. 24, lines 11-14. Mr Ngaïssona played an important role in this Cup as a committee member organizing it. P-2843: T-073-CONF-ENG ET, p. 84, lines 8-17.

²⁰ CAR-OTP-2124-0967; CAR-OTP-2124-0993; Mr Ngaïssona: T-304-ENG CT, p. 24, lines 11-14.

²¹ Ngaïssona Closing Brief, paras 540, 542, 547.

ii) Mr Ngaïssona’s contributions, if proven, only had a peripheral influence on the commission of the charged crimes

11. Mr Ngaïssona’s contributions, if proven, had only a peripheral influence on the commission of the charged crimes. Although some trial chambers have dispensed with the requirement to qualify the level of contribution under Article 25(3)(c) and (d),²² such considerations are critical for sentencing, as they measure the culpability of the accused under Rule 145(1) of the Rules. In *Katanga*, Trial Chamber II found that Mr Katanga had a significant influence on the crimes since “his involvement allowed the [Walendu-Bindi *collectivité*] militia to avail itself of the logistical resources which it did not possess and which were paramount for it to attack Bogoro”, the location where the crimes occurred.²³ Trial Chamber II went even further and found that without the strategic military alliance made by Mr Katanga and without the weapons and ammunitions he provided, the Ngiti combatants would not have been able to successfully carry out the attack.²⁴
12. Here, the facts are entirely distinct from *Katanga*. There is no evidence showing Mr Ngaïssona would have contributed to the logistical and organizational capacity of the Anti-Balaka such that without his assistance they would have not been able to attack on 5 December. The Anti-Balaka movement, if proven to be an organization, was not a well-structured militia. Mr Ngaïssona’s potential contributions would have been to the Anti-Balaka movement. Since the movement lacked a cohesive structure with a division of roles and responsibilities,²⁵ Mr Ngaïssona’s contribution to one group or set of individuals participating in the movement had, if any, a peripheral impact on Mr Yekatom’s alleged group and the Bossangoa group.²⁶
13. More generally, even if proven, the contribution Mr Ngaïssona made to the Anti-Balaka movement was of marginal significance,²⁷ which should be reflected in his potential sentence. In *Katanga*, Trial Chamber II specifically found that Mr Katanga’s contribution assured the

²² *The Prosecutor v. Bemba et al.*, Judgment pursuant to Article 74 of the Statute, [ICC-01/05-01/13-1989-Red](#), para. 93; *The Prosecutor v. Al Hassan*, Trial Judgment, [ICC-01/12-01/18-2594-Red](#), paras 1243-1244.

²³ Katanga Sentencing Decision, para. 65.

²⁴ Ibid.

²⁵ Ngaïssona Closing Brief, paras 228, 231-233.

²⁶ Ngaïssona Closing Brief, see section VI.D.2. Mr NGAÏSSONA did not provide equipment and transportation prior to 5 December 2013, section VI.D.3. Mr NGAÏSSONA did not provide money, weapons, ammunitions or any other material.

²⁷ Ibid. See also Ngaïssona Closing Brief, section V.I.E. The Prosecution failed to prove that Mr NGAÏSSONA issued military instructions to Anti-Balaka members, including regarding the 5 December 2013 attack and preceding attacks.

military superiority of the Ngiti combatants over their adversary the UPC, and that the weapons he provided were used in the attack.²⁸ Here, there is no evidence that Mr Ngaïssona's alleged financing or the supply of Thurayas, medicine, ammunitions, or weapons were: (1) used in the 5 December attacks and their aftermath in the four locations of the crimes charged, and (2) this supply gave the Anti-Balaka movement a military advantage such that it influenced the decision to conduct the 5 December attacks.²⁹

iii) The principle of gradation does not apply as Mr Ngaïssona held no authority over the alleged perpetrators

14. In addition to his very limited material assistance to the crimes, Mr Ngaïssona's influence on the crimes cannot be linked to any authority he would have had over either the alleged Yekatom group or Bossangoa group. The principle of gradation requires that sentences be graduated, "that is, that the most senior levels of the command structure should attract the severest sentences, with less severe sentences for those down the structure."³⁰
15. In *Katanga*, Mr Katanga was not only found to be the president of the Walandu-Bindi *collectivité*, he was also found to be the highest-ranking soldier with undeniable military authority within the organization. Here, Mr Ngaïssona was not the National Coordinator of the Anti-Balaka until 14 January 2014,³¹ weeks after the 5 December attack. It is also uncontested that Mr Ngaïssona was and always has been a civilian. Further, it is not even alleged that prior to the arrival of the Seleka, Mr Ngaïssona engaged in an armed conflict or military activities,³² or that he had any role in a military structure. For this reason, the Prosecution goes to great lengths to assert Mr Ngaïssona's supposed "fame" and "influence" over an elusive group it calls the "Youth", part of which allegedly became the Anti-Balaka, by mere virtue of his presiding role in the CAR Football Federation and brief term as Minister of Youth, Sports, Art, and Culture.³³ Such positions simply do not lead to a finding that Mr Ngaïssona held any authority over armed groups active in CAR during his exile.³⁴

²⁸ Katanga Sentencing Decision, para. 65.

²⁹ Ngaïssona Closing Brief, paras 219, 481-483, 485-490, 495-496, 499, 503, 506, footnote 1800.

³⁰ *The Prosecutor v. Bemba*, Decision on Sentence pursuant to Article 76 of the Statute, [ICC-01/05-01/08-3399](#) ('Bemba Sentencing Decision'), para. 17, footnote 55. Given Mr Bemba was acquitted on all accounts on appeal, Mr Bemba was immediately released from custody and did not serve the remainder of his sentence.

³¹ Both the Prosecution and the Defence agree on the date of Mr Ngaïssona's designation. *Compare* Prosecution Closing Brief, para. 274 *with* Ngaïssona Defence Closing Brief, para. 457.

³² See e.g. P-0808: T-070-ENG CT2, p. 24, lines 10-17.

³³ See e.g. Prosecution Closing Brief, para. 39.

³⁴ See e.g. Defence Closing Brief, paras 415-417.

16. Moreover, Pre-Trial Chamber II did not make any findings linking Mr Ngaïssona's contributions to the crimes with his role as National Coordinator of the Anti-Balaka.³⁵ While some of the crimes at PK9-Mbaïki axis occurred after Mr Ngaïssona was named National Coordinator, Pre-Trial Chamber II found that he incurred responsibility for them because they "were a continuation of the same course of action as the 5 December Attack."³⁶ Thus, the proposition that "high-level leaders, regardless of the mode of liability, generally bear heavier criminal responsibility than those further down the scale",³⁷ does not apply to Mr Ngaïssona's case. Mr Ngaïssona did not even nominally hold a position of authority over the Anti-Balaka until January 2014. Moreover, in his role as National Coordinator, Mr Ngaïssona used his newfound authority to try to stop the crimes and contribute to peace and social cohesion, as will be demonstrated in the section on mitigating factors below.

iv) Mr Ngaïssona did not have direct intent for the charged crimes

17. If convicted, Mr Ngaïssona's intent with respect to all counts is minimal. First, Mr Ngaïssona did not possess direct intent for any of the crimes charged. It is not alleged that Mr Ngaïssona was part of a common plan in which he intended for Muslim civilians to be subject to crimes. He never harboured or expressed anti-Muslim animus prior³⁸ and during³⁹ the Relevant Period.⁴⁰ Mr Ngaïssona's case is distinguishable from *Katanga* where Mr Katanga expressed personal hostility towards the Hema who were targeted during the attack.⁴¹ Mr Ngaïssona's intent to drive away the Seleka, if found, should not be conflated with an intent to commit

³⁵ See Confirmation Decision, para. 142.

³⁶ Ibid.

³⁷ Bemba Sentencing Decision, para. 17.

³⁸ D30-4504: T-283-ENG CT, p. 58, line 4 to page 59, line 11 (describing how several Muslim players played on the CAR team prior to the Seleka regime and how Mr Ngaïssona never discriminated against any players on the basis of religion). Mr Ngaïssona's speeches were never intended to target the Muslim population. Ngaïssona Defence Closing Brief, paras 148, 418-419, 573. Mr Ngaïssona's mobilization of the youth in January was for a peaceful demonstration. Ibid., para. 420; Mr Ngaïssona: T-304-ENG CT, p. 6, lines 16-22. Just as the Seleka regime was making its advance towards Bangui in December 2012, Islamic associations were reaching out to Mr Ngaïssona for financial assistance, hoping he would contribute to them financially, see CAR-D30-0001-0023. It would be inapposite for such groups to ask for contributions from an individual that was openly expressing anti-Muslim animus.

³⁹ The Prosecution is not able to point to a single email from Mr Ngaïssona where Mr Ngaïssona expresses or condones anti-Muslim animus. No witness testified to Mr Ngaïssona expressing such animus during any of the alleged meetings held in Cameroon or in France. Witness P-0287 who interviewed several Anti-Balaka leaders, testified that the Anti-Balaka leadership made it a point to not conflate Seleka and Muslims, stating that the group was targeting the Seleka and not their fellow Muslim citizens. P-0287: T-020-CONF-ENG CT, p. 27, lines 20-25; P-0475: T-091-CONF-ENG CT, p. 59, lines 13-23 (testifying that Mr Ngaïssona was among the Anti-Balaka who did not conflate Muslims with Seleka. Several witnesses also testified as to Mr Ngaïssona's good will towards Muslims and efforts to stop the crimes and foster social cohesion between various faith groups). See Section E.i. Mr Ngaïssona genuine and concrete actions to promote peace and reconciliation.

⁴⁰ The Relevant Period spans from September 2013 to December 2014. ICC-01/14-01/18-723-Conf, para. 5.

⁴¹ Katanga Sentencing Decision, para. 68.

crimes against civilians. The Seleka regime had wreaked havoc and devastation on CAR's citizens, including Mr Ngaïssona.⁴² As he described in vivid detail in his statement, Mr Ngaïssona was forced to flee with his family the Seleka regime for fear of death.⁴³ These fears were legitimate – Gbayas and individuals perceived to be supporting Bozizé were subject to the most serious crimes including murder.⁴⁴ While in Cameroon, Mr Ngaïssona's situation was dire. Two of his siblings died despite Mr Ngaïssona's best efforts to help them.⁴⁵ Additionally, Mr Ngaïssona's father, who he loved deeply, remained in CAR during the Seleka regime,⁴⁶ which was a great source of stress for him.⁴⁷

18. In *Ntaganda*, while the Chamber was sympathetic to Mr Ntaganda's suffering during the Rwandan genocide, it disregarded it because Mr Ntaganda agreed to a common plan that included the commission of the most serious crimes against the Lendu community.⁴⁸ Here, unlike in *Ntaganda*, Mr Ngaïssona is not alleged to have been part of such a plan. His contributions to the Anti-Balaka movement, if proven, were motivated by an intent to drive out the Seleka, composed of mostly foreign fighters, who were targeting civilians.⁴⁹
19. *Second*, Mr Ngaïssona had no actual or advanced awareness of the crimes.⁵⁰ He was not only geographically remote, but there is no testimonial evidence of him being kept abreast or preparing for the 5 December attack.⁵¹ There is also no evidence that Mr Ngaïssona had actual awareness that the Anti-Balaka were targeting Muslim civilians in their advance towards Bangui prior to the 5 December attack.⁵² Additionally, it is not alleged that Mr Ngaïssona approved of the crimes through celebrating the 5 December attacks by congratulating the

⁴² Ngaïssona Defence Closing Brief, para. 145(1), in particular, footnote 504.

⁴³ Mr Ngaïssona: T-304-ENG CT, pp. 9-13. Moreover, it is uncontested between the parties that Mr Ngaïssona was never in Bangui between 24 March 2013 and 13 January 2014.

⁴⁴ Ngaïssona Defence Closing Brief, para. 145(1), in particular footnote 504; P-0884: T-058-CONF-ENG CT, p. 80, line 23 to p. 81, line 3; P-0889: T-110-CONF-ENG CT, p. 74, line 8 to p. 75, line 12; P-0876: T-086-CONF-ENG CT, p. 28, lines 1-6.

⁴⁵ Ngaïssona Defence Closing Brief, para. 459; CAR-OTP-2130-3522, at 3522; CAR-OTP-2130-3568, at 3568-3569; CAR-OTP-2130-3537, at 3537; CAR-OTP-2130-3530; CAR-OTP-2130-3555, at 3555; Mr Ngaïssona: T-304-ENG-CT, p. 13, lines 2-6.

⁴⁶ Mr Ngaïssona: T-304-ENG-CT, p. 25, line 16 to p. 26, line 11.

⁴⁷ Ngaïssona Defence Closing Brief, para. 145.

⁴⁸ Ntaganda Sentencing Decision, para. 210.

⁴⁹ See Ngaïssona Defence Closing Brief, para. 573.

⁵⁰ Actual and contemporary awareness should not be conflated with the general awareness that the 5 December attack would occur, see e.g. Defence Closing Brief, para. 551, with reference to P-0884's testimony that "[e]verybody was aware" and that it "wasn't something that was a secret", about the upcoming attacks, of which they were informed through the news.

⁵¹ Ibid., para. 574.

⁵² *Contra* Katanga Sentence Decision, para. 68 (finding that Mr Katanga's testimony about a prior massacre that occurred just a few months prior to Bogoro attack demonstrated his knowledge of the group's intent to commit crimes against the Hema).

fighters.⁵³ If the Chamber were to convict, it would be for the lowest level of intent possible under the Statute.

C. Mr Ngaïssona’s underlying acts and conduct are the same across all counts

20. Mr Ngaïssona’s responsibility for all 31 counts is based on the same underlying conduct.⁵⁴

Under Article 78(3) of the Statute, the total period of imprisonment “shall be no less than the highest individual sentenced pronounced...”. In the *Bemba* case, Trial Chamber III considered that the highest individual sentence it had pronounced reflected the totality of Mr Bemba’s culpability, despite Mr Bemba being convicted of crimes representing different protected interests, namely rape, murder, and pillage.⁵⁵ The Chamber reasoned that all the crimes were geographically and temporally connected, and Mr Bemba’s responsibility was based on the same conduct for all the crimes charged.⁵⁶ Similarly, in *Katanga*, while not expressly mentioning the overlap in Mr Katanga’s conduct, it also imposed a 12-year joint sentence.⁵⁷ This joint sentence was equal to the highest individual sentence it had imposed. In *Bemba et al.*, the Chamber reasoned that the same acts underlay the convictions for both the Article 70(1)(a) and (c) offenses. Out of fairness, the trial chamber set a joint sentence that was no higher than the highest individual sentence.⁵⁸ The same reasoning was adopted in the *Al Hassan* case.⁵⁹

21. Here, like in *Bemba*, Pre-Trial Chamber II determined that the alleged crimes were all geographically and temporally connected and Mr Ngaïssona’s responsibility is based on the same conduct for all 31 counts. In particular: Pre-Trial Chamber II found that the crimes committed in Bangui, Bossangoa, Yamwara, and the PK9-Mbaïki axis were part of the same “course of action”.⁶⁰ It was therefore a limited set of Mr Ngaïssona’s acts in relation to the 5 December attacks on Bangui and Bossangoa that led Pre-Trial Chamber II to find that he was responsible for all the crimes charged.⁶¹ Like in *Bemba*, *Katanga*, *Bemba et al.* and *Al Hassan*,

⁵³ *Contra* Ntaganda Sentencing Decision, para. 74.

⁵⁴ Confirmation Decision, paras 101, 112, 128, 142.

⁵⁵ Bemba Sentencing Decision, paras 94-95.

⁵⁶ *Ibid.*, para. 95.

⁵⁷ Katanga Sentencing Decision, paras 146-147.

⁵⁸ Ongwen Sentencing Decision, para. 132.

⁵⁹ Al Hassan Sentencing Decision, paras 132-134.

⁶⁰ Confirmation Decision, paras 101, 112, 128, 142.

⁶¹ *Ibid.*

the Chamber should pronounce a joint sentence pursuant to Article 78(3) that is equal to the highest individual sentence pronounced.⁶²

22. The facts and circumstances of this case are fundamentally different from those of *Ongwen*. In *The Prosecutor v. Ongwen*, Trial Chamber IX found that it could not impose a joint sentence corresponding to the highest individual sentence pronounced.⁶³ It determined that Mr Ongwen “was convicted for a large number of crimes, which he committed by way of a number of distinguishable criminal conducts”.⁶⁴ Unlike, Mr Ongwen, no single act by Mr Ngaïssona is alleged to have independently contributed to the realisation of any specific crime. Instead, it is the cumulative effect of all of Mr Ngaïssona’s acts that allegedly contributed to all 31 counts, without distinction.⁶⁵

D. The partial factual overlap underlying the realization of several crimes

23. In determining a joint sentence, chambers must consider the overlap in conduct underlying the crimes.⁶⁶ The 31 counts with which Mr Ngaïssona is charged do not all have distinct factual bases. There is significant factual overlap between them that must be considered in issuing a joint sentence.⁶⁷ Notably, this overlap occurs for crimes charged as war crime and a crime against humanity, such as murder,⁶⁸ displacement,⁶⁹ torture,⁷⁰ and rape.⁷¹ Annex 1 provides an overview of this overlap. The 31 counts with which Mr Ngaïssona is charged can be classified into 11 crimes occurring in four locations some of which did not have a multiplicity of alleged victims. For example, there is: (1) a single instance of murder occurring in two locations; (2) a single instance of rape in Bossangoa; and (3) a single instance of torture in Yamwara.⁷²

⁶² The ICTY has also adopted such an approach when the underlying conduct supporting a conviction the same across counts. See e.g. Kupreškić et al. Trial Judgment, [IT-95-16-T](#), para. 866.

⁶³ Ongwen Sentencing Decision, para. 379.

⁶⁴ Ibid., para. 381.

⁶⁵ Confirmation Decision, paras 101, 112, 128, 142.

⁶⁶ Ntaganda Sentencing Decision, paras 249-250; Ongwen Sentencing Decision, para. 393.

⁶⁷ Ongwen Sentencing Decision, para. 376.

⁶⁸ Murder is a crime against humanity under article 7(1)(a) of the Statute as a crime against humanity and a war crime under article 8(2)(c)(i) of the Statute.

⁶⁹ Deportation and forcible is a crime against humanity under article 7(1)(d) of the Statute and displacement is a war crime under article 8(2)(e)(viii) of the Statute. An important difference between the two crimes is that the actual displacement of the civilian population need not occur for the elements of the war crime of displacement to be met.

⁷⁰ Torture is a crime against humanity under article 7(1)(f) of the Statute and a war crime under article 8(2)(c)(i) of the Statute.

⁷¹ Rape is a crime against humanity under article 7(1)(g) of the Statute and a war crime under article 8(2)(e)(vi) of the Statute.

⁷² See Annex 1.

24. While the war crime of cruel treatment⁷³ and the crime against humanity of other inhumane acts⁷⁴ do not contain the same elements, here, the underlying factual basis for both crimes is the same.⁷⁵ Similarly, the factual basis for count 1, namely directing attacks against a civilian population⁷⁶ is derived from several counts with which Mr Ngaïssona is charged.⁷⁷ Lastly, count 14, namely imprisonment and other forms of severe deprivation of physical liberty under Article 7(1)(e) is completely absorbed in terms of its underlying criminal conduct by counts 11 and 13.⁷⁸ This should be reflected accordingly in the determination of the gravity of the crimes.
25. Additionally, for certain crimes, the factual basis underlying them is almost identical except for one additional element. Therefore, in determining the gravity of the crime the overlapping factual bases should only counted once. In *Ntaganda*, the trial chamber found that the coercive acts which caused the transfer of the population were the same acts on the basis of which Mr Ntaganda was convicted for other crimes.⁷⁹ Therefore, the only additional element the trial chamber took into account in its assessment of gravity was forcible transfer without grounds permitted under international law of one or more persons from the area in which they are lawfully present.⁸⁰ Here, the same situation arises as in *Ntaganda*: the acts which allegedly led to the transfer of the population are the same acts, which are the factual basis of the other charged crimes.⁸¹ Therefore, in its assessment of the gravity of displacement, only the additional element of the forcible transfer should be taken into account. Similarly, it is the conduct underlying the several other counts, which forms the evidentiary basis for the crime of persecution.⁸² The only additional element that must be considered in determining the individual sentence for persecution is the discriminatory nature of the underlying crimes.
26. The above exercise is necessary to ensure that the Chamber does not double count the same factual basis underlying several of the charges. Such double counting must be avoided such

⁷³ Prohibited by article 8(2)(c)(i) of the Statute.

⁷⁴ Prohibited by article 7(1)(k) of the Statute.

⁷⁵ Compare Count 11 with Count 13 in Annex 1.

⁷⁶ Prohibited by Article 8(2)(e)(i) of the Statute.

⁷⁷ The underlying conduct for this crime is contained in counts 2-3, 4, 6,- 31-32, 35, 37, 39- 42.

⁷⁸ Compare Counts 11 and 13 with Count 14 in Annex 1.

⁷⁹ Ntaganda Sentencing Decision, para. 159.

⁸⁰ Ibid.

⁸¹ Confirmation Decision, paras 92, 108-109.

⁸² The charge of persecution was confirmed based on the conduct pertaining to Counts 1-6, 11-16, 24-27, and 30-41. See Annex 1.

that Mr Ngaïssona is not punished more than once for the same underlying conduct and related consequences.⁸³

E. Mr Ngaïssona’s individual circumstances merit diminishing his potential sentence

27. If convicted, Mr Ngaïssona’s individual circumstances, in particular: the powerful mitigating circumstances in his case and the exceptionally positive prospects for rehabilitation merit significantly diminishing his sentence. Additionally, the impact of Mr Ngaïssona’s incarceration on his family, and more generally, his detention conditions should also be considered by the Chamber. Under Article 78(1) of the Statute, the Chamber is required to consider Mr Ngaïssona’s individual circumstances in determining a potential sentence. Such individual circumstances include mitigating factors, which under Rule 145(2)(a)(ii) of the Rules refer to *inter alia* “the convicted person’s conduct after the act...”. Rule 145(1)(c) further provides that the age, education, and social and economic condition of the convicted person must also be considered when imposing a sentence. The Court has considerable discretion in determining what constitutes mitigating circumstances. While they must relate directly to the convicted person, they need not directly relate to the charged crimes.⁸⁴ Finding whether such mitigating factors exist is based on a balance of probabilities,⁸⁵ and their existence is relevant for diminishing a potential sentence.⁸⁶

i) Mr Ngaïssona’s genuine and concrete actions to promote peace and reconciliation

28. Mr Ngaïssona’s concrete and genuine efforts to promote peace and reconciliation between Muslims and non-Muslims should be given significant weight as a mitigating factor. The Court has considered such peace and reconciliation efforts to be mitigating when they are palpable and genuine without the need to demand results.⁸⁷ Mr Ngaïssona undertook the following concrete actions to contribute to peace and protect the Muslim population.

29. First, as National Coordinator, Mr Ngaïssona continuously made public statements asking the Anti-Balaka to lay down their weapons. This includes a radio statement made in June 2014,

⁸³ Ongwen Sentencing Decision, para. 149.

⁸⁴ Ntaganda Sentencing Decision, para. 24; Ongwen Sentencing Decision, para. 54; Al Hassan Sentencing Decision, para. 28.

⁸⁵ Ibid.

⁸⁶ Katanga Sentencing Decision, para. 77; Ntaganda Sentencing Decision, para. 23; Bemba et al. Sentencing Decision, para. 24.

⁸⁷ Katanga Sentencing Decision, para. 91.

urging Anti-Balaka members to respect their Muslim fellow citizens as the month of Ramadan began – a time associated with forgiveness and reconciliation.⁸⁸ Such public statements for peace were accompanied by private meetings with Comzones where Mr Ngaïssona implored them to not commit crimes.⁸⁹

30. Second, Mr Ngaïssona issued several mission orders to restore peace and security,⁹⁰ some of which were successful, such as in Boda.⁹¹ These missions included orders and meetings with various stakeholders to dismantle roadblocks.⁹² The transitional President Catherine Samba-Panza testified that Mr Ngaïssona demonstrated a will to implement the Brazzaville agreement by trying to dismantle roadblocks including those in PK9.⁹³ She more generally confirmed that the efforts to bring social cohesion between Muslims and non-Muslims were “*tout à l’honneur de Monsieur Ngaïssona*”.⁹⁴
31. Third, Mr Ngaïssona provided the transitional government with a detailed plan for the billeting and inclusion of Anti-Balaka elements in a disarmament and demobilization program within the first months of becoming National Coordinator.⁹⁵ Samba-Panza acknowledged that such a program was essential for the peace process and for this reason it was part of the Brazzaville peace agreement.⁹⁶
32. Fourth, Mr Ngaïssona personally intervened to protect fellow Muslims in Bangui. He went beyond his responsibilities as National Coordinator to assist these individuals.⁹⁷ Specifically, Mr Ngaïssona housed them when they were captured by Anti-Balaka elements and secured their safe passage to PK5. He also would return their stolen property.⁹⁸ This assistance cannot be considered as “selective help”⁹⁹ since Mr Ngaïssona did not know these individuals or

⁸⁸ Ngaïssona Defence Closing Brief, paras 593-594.

⁸⁹ Ngaïssona Defence Closing Brief, para. 591.

⁹⁰ Ibid. Witness P-0446 testified that as early as February 2014 Mr Ngaïssona gave him mission order CAR-OTP-2029-0175 so that he could track down people who were committing crimes against Christians and Muslims. P-0446: T-098-ENG ET, p. 4, lines 7-15.

⁹¹ P-0889: T-110-CONF-ENG CT, p. 12, line 18 to p. 13, line 18; P-0952: T-250-ENG CT, p. 40, lines 11-18.

⁹² Ngaïssona Defence Closing Brief, para. 563, footnote 2041.

⁹³ P-0952: T-251-ENG CT, p. 77, lines 9-14.

⁹⁴ P-0952: T-251-FRA CT, p. 61, lines 12-20. Several witnesses testified to Mr Ngaïssona’s genuine commitment to peace, see Ngaïssona Defence Closing Brief, para. 583, footnote 2082.

⁹⁵ Ngaïssona Defence Closing Brief, paras 595-597.

⁹⁶ Ngaïssona Defence Closing Brief, para. 596. See also CAR-OTP-2100-1743, which is a letter from the CAR government requesting information relevant for the DDR process in 2015 that Mr Ngaïssona had already provided in 2014 to the transitional government. Compare CAR-OTP-2100-1743 with CAR-OTP-2025-0362; CAR-OTP-2025-0372.

⁹⁷ *Contra* Al Hassan Sentencing Decision, para. 117 (finding that Mr Al Hassan’s interventions to protect the population including their property were expected of a police officer).

⁹⁸ Ngaïssona Closing Brief, para. 594, footnote 2115, para. 607, footnote 2150.

⁹⁹ Al Hassan Sentencing Decision, para. 115.

share any links with them. He also did not have a personal interest in helping them. By broadcasting the return of one such stolen vehicle and a Muslim family Mr Ngaïssona housed for four months,¹⁰⁰ Mr Ngaïssona was setting a good example for the Anti-Balaka. He wanted to show the new face of the Anti-Balaka-ex-combatants who had moved beyond the past and were seeking reconciliation with their Muslim brothers.¹⁰¹

33. Fifth, Mr Ngaïssona made concrete efforts to stop the Anti-Balaka from committing crimes. In particular, he oversaw an initiative identifying Anti-Balaka elements and providing them with badges.¹⁰² Additionally, he gave money to elements, as Samba-Panza would also do, to prevent the systematic looting of the civilian population.¹⁰³
34. Sixth, Mr Ngaïssona played a pivotal role in the Brazzaville forum in July 2014 by actively participating in the peace talks, and subsequently implementing them.¹⁰⁴ His goal was to unify Central Africans and restore peace.¹⁰⁵ This unity was demonstrated to all Central Africans when Samba-Panza, Mr Ngaïssona, and certain Seleka leaders returned to CAR from Brazzaville on the same plane.¹⁰⁶
35. Seventh, Mr Ngaïssona created the PCUD party, which welcomed individuals of all faiths, including Muslims.¹⁰⁷ This action was supported by the transitional government and the Sangaris as a step towards legality for the Anti-Balaka movement.¹⁰⁸
36. These concrete actions Mr Ngaïssona took to restore peace and social cohesion among non-Muslims and Muslim citizens of the CAR should be given significant weight in diminishing his sentence. It demonstrates his genuine will as a political leader to use his influence to calm the intercommunal violence that was pervasive during the Relevant Period. Mr Ngaïssona never personally gained from these actions, and undertook them at a great cost, sometimes

¹⁰⁰ CAR-OTP-2023-1597, CAR-OTP-2107-1499 (transcript).

¹⁰¹ Witnesses testified that Mr Ngaïssona did not just assist Muslims for public notoriety and that he also recovered stolen property and housed Muslims captured by Anti-Balaka when the cameras were not rolling. P-0889: T-110-CONF-ENG CT, p. 24, lines 20-24; P-0808: T-070-ENG CT2, p. 29, lines 17-25; T-071-ENG CT2, p. 54, line 18 to p. 55, line 20, p. 56, lines 2-14, p. 57, lines 3-8.

¹⁰² Ngaïssona Closing Brief, para. 585.

¹⁰³ Ibid., paras 586-587.

¹⁰⁴ Ibid., paras 598-601.

¹⁰⁵ Mr Ngaïssona: T-304-ENG CT, p. 51, line 25 to p. 52, line 13.

¹⁰⁶ P-0952: T-251-ENG CT, p. 72, lines 15-20, p. 73, lines 11-21.

¹⁰⁷ Ngaïssona Closing Brief, paras 602-604. *See also* CAR-D30-0029-0003 (inviting an imam to take part in the national assembly, which announced the creation of the PCUD).

¹⁰⁸ Ngaïssona Closing Brief, paras 602-604.

receiving death threats.¹⁰⁹ The limited success of these initiatives should not bear any weight in the Chamber's determination. Samba-Panza testified that it was impossible to quell the violence following the fall of the Seleka regime until the end of 2015, despite the transitional governments and the international community's best efforts.¹¹⁰ Moreover, Samba-Panza testified, along with other witnesses that the situation in CAR would have been worse without Mr Ngaïssona.¹¹¹

ii) Mr Ngaïssona's prospects for rehabilitation are exceptionally positive

37. If convicted, Mr Ngaïssona's prospects for rehabilitation and reintegration are exceptionally positive. He is 57 years old, highly educated and has the support of a very large extended family whose only wish is to have him return to them.¹¹² Evidence shows that Mr Ngaïssona is a family man and a community leader, with a natural propensity for helping others, including strangers.¹¹³

38. Mr Ngaïssona's release and return to France or CAR would not be destabilizing. To the contrary, Mr Ngaïssona has stated that he would like to continue contributing to peace and stability in CAR through the PCUD party.¹¹⁴ Following the creation of the PCUD in late 2014,¹¹⁵ Mr Ngaïssona gradually distanced himself from the Anti-Balaka movement. In 2015, when Mr Ngaïssona unsuccessfully ran for President, rather than trying to rally his supporters, including the former Anti-Balaka, to create instability and undermine the government, he publicly endorsed the current President Touadéra's candidacy and provided material support

¹⁰⁹ P-0808: T-071-ENG CT2, p. 62, lines 3-9; P-0889: T-110-CONF-ENG CT, p. 16, line 10 to p. 17, line 1; P-0954: T-169-CONF-ENG CT, p. 52 lines 14-20. *See also* P-0889: T-109-CONF-ENG CT2 p. 77, lines 17-21; P-1521: T-083-CONF-ENG CT, p. 36, lines 12-16.

¹¹⁰ Ngaïssona Closing Brief, para. 608.

¹¹¹ Ngaïssona Closing Brief, para. 607.

¹¹² Mr Ngaïssona: T-305-CONF-ENG CT, p. 38, lines 3-14. On Mr Ngaïssona's education as an engineer and professional career path, *see* T-304-ENG CT, p. 3, line 22 to p. 4, line 25; Mr Ngaïssona's close links to family are also demonstrated by: (1) his wife and daughter who live in France visiting him as often as their limited finances allow; (2) his constant phone contact with his several dozen relatives, and (3) his request for interim release when his father died (ICC-01/14-01/18-2366-Conf); *see below*, paras 39-40. Rehabilitation is a relevant consideration in sentencing, Katanga Sentencing Decision, para. 144; Ongwen Sentencing Decision, para. 60.

¹¹³ P-0808: T-070-ENG CT2, p. 24, lines 10-17, p. 43, lines 7-9; D30-4756: T-268-CONF-ENG CT, p. 47, lines 19-24, T-269-CONF-ENG CT, p. 9, lines 13-19; P-2027: T-040-CONF-ENG CT2, p. 23, lines 10-23; CAR-OTP-2078-0059-R03, at 0069-0070, paras 61-62; P-0446: T-096-CONF-ENG CT2, p. 17, lines 5-25; T-097-CONF-ENG CT2, p. 43, line 15 to p. 44, line 3; D30-4679: T-299-CONF-ENG CT2, p. 78, lines 2-8; D30-4504: CAR-D30-0023-0001-R02, at 0005, paras 32-33; D30-4777: CAR-D30-0019-0001, at 0004, para. 21 (showing how Mr Ngaïssona tasked D30-4777 with helping him find houses for his family in Douala during exile); CAR-OTP-2124-0929 (email showing that Mr Ngaïssona is concerned about his ability to pay for his son's school fees, and that his son risked being expelled if those fees remained unpaid).

¹¹⁴ Mr Ngaïssona: T-305-CONF-ENG CT, p. 40, line 23 to p. 41, line 15.

¹¹⁵ Mr Ngaïssona: T-305-CONF ENG CT, p. 9, line 18 to p. 10, line 21, p. 41, lines 2-17.

for his campaign.¹¹⁶ In July 2017, the United Nations took note of his shift away from the Anti-Balaka when it found that Mr Ngaïssona “has gradually removed himself from his Anti-Balaka base.”¹¹⁷ Until his arrest in December 2018, Mr Ngaïssona continued to devote himself to developing football in CAR and in the greater region, including women’s football, which he perceived as a vehicle for reconciliation.¹¹⁸ This devotion did not go unnoticed. In 2017, Mr Ngaïssona was elected as President of the UNIFAC,¹¹⁹ and in 2018 he was elected to be part of the executive committee of the Confederation of African Football.¹²⁰

iii) Mr Ngaïssona’s detention conditions and the impact his detention has had on his family

39. Mr Ngaïssona has been detained in pre-trial detention for six years. While this is not exceptional at the Court, this period was unduly prolonged by 1) the Covid-19 pandemic, and 2) the joinder of Mr Ngaïssona’s case with Mr Yekatom’s. First, the Covid-19 pandemic, entailing restrictions on travel and contacts, caused difficulties in securing the presence of Prosecution witnesses in the courtroom, and illness, delaying trial.¹²¹ Second, the two cases should have never been joined since by the Prosecution’s own admission the evidence underpinning the criminal responsibility of the two accused did not overlap.¹²² This stark difference between the two men’s cases was showcased at trial where of the 98 witnesses who appeared before the Chamber,¹²³ 27 had little or no relevance to the charges brought against Mr Ngaïssona.¹²⁴ The undue time Mr Ngaïssona had to spend waiting for a verdict in his case

¹¹⁶ Mr Ngaïssona: T-305-CONF-ENG CT, p. 14, line 11 to p. 15, line 16.

¹¹⁷ ICC-01/14-01/18-2676-Red, para 14 *citing* CAR-OTP-2058-0607, at 0625, paras 83-84 (citing meetings with members of Mr Ngaïssona’s Anti-Balaka branch as support for this finding).

¹¹⁸ CAR-D30-0029-0002 and transcript CAR-D30-0029-0007; CAR-D30-0029-0001 and transcript CAR-D30-0029-0004.

¹¹⁹ Union of Central African Football Federations which includes eight countries, namely CAR, the Democratic Republic of the Congo, Congo-Brazzaville, Cameroon, Gabon, Equatorial Guinea, Chad, and Sao-Tomé and Principe. Mr Ngaïssona: T-304-ENG CT, p. 4, lines 11-15; CAR-D30-0029-0002 and transcript CAR-D30-0029-0007; CAR-D30-0029-0001 and transcript CAR-D30-0029-0004.

¹²⁰ P-2843: T-074-CONF-ENG ET, p. 24, lines 7-18; Mr Ngaïssona: T-304-ENG CT, p. 4, line 15.

¹²¹ See e.g. Email from Trial Chamber V to parties and participants, 17 January 2021, at 12:25; Email from Trial Chamber V to parties and participants, 23 January 2022, at 12:42; Email from Trial Chamber V to parties and participants, 24 January 2022, at 12:15; Email from Trial Chamber V to parties and participants, 16 October, 14:06; Status conference: T-012-ENG ET, p. 8, line 12 to p. 13, line 16; P-1847: T-022-CONF-ENG CT, p. 4, line 23 to p. 6, line 6; Email from Trial Chamber V to the parties and participants, 2 June 2021, at 16:31.

¹²² ICC-01/14-01/18-2391, para. 17.

¹²³ The number reflects 75 Prosecution witnesses, 10 Defence witnesses, nine Yekatom Defence witnesses, one Chamber witness, two CLRV1 witnesses and one CLRV2 witness.

¹²⁴ P-0967: T-200-CONF-ENG CT, p. 64, lines 7-9; P-1528: T-179-CONF-ENG CT, p. 77, lines 21-23; P-1666: T-232-CONF-ENG CT, p. 41, lines 10-12; P-1704: T-128-CONF-ENG CT, p. 65, lines 11-19; P-1716: T-147-CONF-ENG CT, p. 25, line 22 to p. 26, line 4; P-1811: T-115-CONF-ENG CT, p. 28, lines 2-8; P-1974: T-229-CONF-ENG ET, p. 59, line 7; P-1339: T-160-CONF-ENG ET, p. 52, lines 6-9; P-1705: T-211-CONF-ENG CT,

should be considered by the Chamber in imposing a potential sentence. In addition, Mr Ngaïssona has consistently shown good and respective behaviour in Court, as well as a good attendance record throughout the proceedings.¹²⁵

40. Mr Ngaïssona's hardship experienced in pre-trial custody, despite the presumption of innocence, further constitutes a mitigating factor in a potential sentence. First, Mr Ngaïssona has benefitted from very limited contact with his family, despite his guaranteed right to family life.¹²⁶ This is caused by: (1) restrictions on contact imposed for the majority of his detention,¹²⁷ (2) the geographic distance from CAR, (3) the financial burden on his family to travel to The Hague and pay for accommodation, and (4) visa-associated barriers significantly, all of which contributed to Mr Ngaïssona's isolation.¹²⁸ For instance, Mr Ngaïssona has never met his son's three daughters – aged 7 months, 3 and 5 years old – despite several attempts to organise their visit, due to the Detention Center's restrictive policy on family visits, limitations on funded family visits (which does not include grandchildren), financial costs, and visa-related obstacles. Moreover, the stringent Covid-19-related 'temporary measures' lasting 16 months prevented Mr Ngaïssona from physically seeing his family and his Defence team, furthering his isolation during a time of illness and anxiety.¹²⁹ During this time, most Detention Center activities, non-acute medical appointments, and the import of entertainment (such as books, mail, CDs and DVDs) were suspended, requiring the formal suspension of basic rights provided for in the Rules of the Court and Regulations of

p. 47, lines 18-22; P-2018: T-224-CONF-ENG CT, p. 34, lines 1-7; P-2353: T-161-CONF-ENG CT2, p. 49, lines 8-9; P-2475: T-133-CONF-ENG CT, p. 77, lines 12-17; P-2476: T-213-CONF-ENG CT, p. 18, lines 21-22; D29-3014: T-274-CONF-ENG CT, p. 3, lines 19-24, p. 40, lines 19-24; D29-5014: T-258-CONF-ENG CT, p. 59, lines 23-25; V45-0001: T-245-CONF-ENG CT, p. 44, line 24 to p. 45, line 4; no questions were also asked to witnesses P-2389, P-2041, P-2419, D29-4013, D29-5012, D29-5013, D29-5015, D29-6016, D29-6025, D29-6036 and V45-0002.

¹²⁵ Bemba et al. Sentencing Decision, para. 60.

¹²⁶ Article 21(3) of the Rome Statute; Presidency, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on "Mr Mathieu Ngudjolo's Complaint Under Regulation 221(1) of the *Regulations of the Registry* Against the Registrar's Decision of 18 November 2008", 10 March 2009, [ICCRoR-217-02/08-8](#), para. 38.

¹²⁷ Restrictions on contact pursuant to Regulation 101 were imposed on the same day as Mr Ngaïssona was transferred to the ICC Detention Centre, on 23 January 2019, ICC-01/14-01/18-98-Conf-Exp.

¹²⁸ Mr Ngaïssona has only benefitted from three funded visits of four family members, due to a lack of funding in the Trust Fund for Family Visits and the Covid-19 restrictions. He has only seen his son twice, and his father, once. Most of Mr Ngaïssona's family members have been unable to visit him because of a lack of financial means and difficulties in obtaining visas for The Netherlands. In a 22 May 2023 decision, the Presidency has acknowledged the "genuine difficulties in visiting Mr Ngaïssona at the Detention Centre" faced by Mr Ngaïssona's daughter and wife, given the distance from their residence and that their week during the weekday, ICC-ROR220-01/23-6-Conf-Exp, para. 29.

¹²⁹ The Covid-19 related measures were communicated to detainees and their counsel on 19 March 2020 (DS/2020/023/PC/mc). See also ICC-01/14-01/18-541-Conf.

the Registry.¹³⁰ The Defence has alerted the Chamber, the Registry, and the Presidency on several occasions of its serious concerns with Mr Ngaïssona’s deteriorating mental and physical health resulting from his detention conditions.¹³¹ Second, the Detention Center’s breaches of Mr Ngaïssona’s rights to receive nutritious and culturally appropriate food that is safe for consumption, as recognised by an independent investigation, have further inflicted physical and emotional distress on Mr Ngaïssona during his detention.¹³² Third, Mr Ngaïssona has endured profound personal loss during his incarceration, including the loss of his father, his only remaining parent, who died in February 2024 due to a lack of timely medical intervention, which affected him deeply.¹³³

41. Moreover, Mr Ngaïssona’s unique family circumstances warrant mitigation of a potential sentence.¹³⁴ Mr Ngaïssona is the *baoba* – the central figure and main provider – of his large family and community. He has a wife, nine children, including a 12-year old child, 13 grandchildren, and one great-grandchild under his care, with whom he is in constant contact.¹³⁵ In addition, Mr Ngaïssona has been the main provider for several close family members, including 8 siblings, 116 uncles, nephews and nieces (including the children and grandchildren of his deceased siblings), as well as 116 cousins and their children.¹³⁶ Mr

¹³⁰ URGENT New Detention Centre Temporary Measures Regarding Covid-19 DS/2020/023/PC/mc, 19 March 2020, suspending regulations 100 and 102 of the Rules of the Court and regulations 153, 177, 178, 179 and 180 of the Regulations of the Registry. A notice of extension of the measures were communicated to the detainees on 22 June 2021 (DS/2021/035/HT/mb). On 2 July 2021, visits resumed at the ICC Detention Center, in a limited way (for instance, with a plastic screen separating Defence team members and detainees) as communicated in memorandum DS/2021/037/HT/mc.

¹³¹ ICC-01/14-01/18-473-Conf, paras 39-42; ICC-01/14-01/18-541-Conf-Exp, Annexes 1-5.

¹³² Confidential Annex A to the “Fifth Decision to implement the Registrar’s Decision on Mr Ngaïssona’s initial complaint delivered on 20 September 2019”. The independent expert report noted *inter alia* food safety hazards, nutritional inadequacies, and a lack of transparency with respect to the availability and costs of foods at the Detention Center. The Defence can provide the expert report to the Chamber upon request. See also ICC-01/14-01/18-541-Conf-Exp-Anx1, ICC-01/14-01/18-541-Conf-Exp-Anx2, ICC-01/14-01/18-541-Conf-Exp-Anx3, ICC-01/14-01/18-541-Conf-Exp-Anx4 (in which the Defence raised the deterioration of Mr Ngaïssona’s mental and physical well-being in detention), ICC-01/14-01/18-541-Conf-Exp-Anx5.

¹³³ ICC-01/14-01/18-2366-Conf; Annex 3, which is a list handwritten by Mr Ngaïssona of persons close to him who died during his detention at the Court.

¹³⁴ Katanga Sentencing Decision, para. 88.

¹³⁵ See Annex 2 for an *ex parte* list of Mr Ngaïssona’s relatives under his care.

¹³⁶ See Annex 2. In Central African culture, relatives such as aunts, uncles, cousins, and their children are considered ‘core’ family members under one’s care, similar to one’s own children, siblings, and parents. The European Commission on Human Rights has found that the relationship between an uncle or aunt and their nephew or niece amount to family life for the purpose of Article 8 of the European Convention on Human Rights (Application no. 16580/90, *Boyle v. the United Kingdom*. European Commission on Human Rights, 9 February 1993, para. 38). The African Commission’s understanding of family for the purpose of article 18 of the African Charter on Human and Peoples’ Rights suggests that the concept is even broader, including individuals with whom someone lives in terms of their “home” (Communication 279/03-296/05, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, 27 May 2009, para. 216.) According to the UN Human Rights Committee, “the concept of family may differ in some respects from State to State, and even from

Ngaïssona takes a great interest in his family's well-being and education. His family and community, including his church, have been profoundly impacted, both financially and morally, by Mr Ngaïssona's detention. Mr Ngaïssona's wife and children in particular have experienced significant hardship, including emotional and severe financial distress.¹³⁷

F. The lack of aggravating factors in Mr Ngaïssona's case

42. There are no aggravating factors regarding Mr Ngaïssona that warrant increasing his potential sentence. Aggravating factors are not limited to those enumerated in Rule 145(2)(b) of the Rules. However, such unlisted aggravating factors must be similar in nature to those listed in Rule 145(2)(b) and have a sufficient proximate link to the charged crime(s).¹³⁸ This proximate link must be construed narrowly to avoid sentencing an individual for uncharged crimes.¹³⁹ Unlike mitigating circumstances, aggravating circumstances must be proven beyond a reasonable doubt.
43. Here, Mr Ngaïssona does not have any prior criminal convictions for crimes under the jurisdiction of the Court or crimes of a similar nature.¹⁴⁰ Indeed, the evidence shows that Mr Ngaïssona has no criminal record.¹⁴¹ Mr Ngaïssona also did not abuse his power or official capacity.¹⁴² The Appeals Chamber has found "[a] high rank in the military or political field does not, in itself, merit a harsher sentence... Consequently, what matters is not the position of authority taken alone, but that position coupled with the manner in which the authority is exercised."¹⁴³ Here, Mr Ngaïssona did not have a special lawful relationship with the alleged victims such that he owed them a special duty of care.¹⁴⁴ Lastly, the Prosecution has presented

region to region within a State", and that is therefore "not possible to give the concept a standard definition." (ICCPR, General comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses Adopted at the Thirty-ninth session of the Human Rights Committee, on 27 July 1990, para. 2).

¹³⁷ Before his arrest, Mr Ngaïssona's wife was a homemaker. After Mr Ngaïssona's arrest, she was forced to find work and has been working full time for less than minimum wage to support her children and herself. Mr Ngaïssona's children could no longer continue at their school given their parents' inability to pay the school fees. At the moment of his arrest, Mr Ngaïssona and his wife housed in their home in France one daughter, two sons, Mr Ngaïssona's brother and Mr Ngaïssona's cousin.

¹³⁸ Ntaganda Sentencing Decision, para. 18.

¹³⁹ Ibid., para. 129.

¹⁴⁰ Rule 145(2)(b)(i).

¹⁴¹ CAR-D30-0007-0672.

¹⁴² Rule 145(2)(b)(ii).

¹⁴³ *The Prosecutor v. Lubanga*, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the 'Decision on Sentence pursuant to Article 76 of the Statute', [ICC-01/04-01/06-3122](#), para. 82 *quoting* Babić Sentencing Appeal Judgment, [IT-03-72-A](#), para. 80. *See also* Ndindabahizi Appeal Judgment, [ICTR-01-71-A](#), para. 136; Deronjić Sentencing Appeal Judgment, [IT-02-61-A](#), para. 67.

¹⁴⁴ Ongwen Sentencing Decision, para. 134; *see also* Katanga Sentencing Decision, para. 74 (highlighting that despite the important influence Mr Katanga had on the Ngiti militia the Chamber could not find he abused his authority).

no evidence that Mr Ngaïssona acted pursuant to any discriminatory intent or feelings of revenge,¹⁴⁵ or that he derived any “pleasure” from the crimes.¹⁴⁶ On the contrary, an abundance of evidence points to Mr Ngaïssona being known for his good character, particularly his generosity.¹⁴⁷

IV. RELIEF SOUGHT

44. For the foregoing reasons, the Defence respectfully requests the Chamber to

- **IMPOSE** a custodial sentence not exceeding the time Mr Ngaïssona has already served in detention, if convicted.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 13 December 2024

At The Hague, the Netherlands.

¹⁴⁵ *The Prosecutor v. Vasiljević*, Trial Judgment, 29 November 2002, [IT-98-32-T](#), para. 278.

¹⁴⁶ *The Prosecutor v. Lukić and Lukić*, Trial Judgment, 20 July 2009, [IT-98-32/1-T](#), para. 1087.

¹⁴⁷ P-2232: T-076-CONF-ENG ET, p. 50, lines 19-20; P-1521: T-083-CONF-ENG CT, p. 17, lines 9-10, p. 43, line 23 to p. 44, line 3; P-2843: T-074-CONF-ENG ET, p. 36, lines 16-21; P-2027: T-040-CONF-ENG CT2, p. 18, lines 13-25; CAR-OTP-2078-0059, at 0069-0070, para. 62; P-0966: T-118-CONF-ENG CT, p. 51, lines 16-17; P-0889: T-109-CONF-ENG CT2, p. 32, line 24 to p. 33, line 6; P-0808: T-071-ENG CT2, p. 44, lines 14-24; D30-4197: T-278-CONF-ENG ET, p. 20, line 10 to p. 21, line 18; D30-4756: T-269-CONF-ENG CT, p. 18, line 22 to p. 19, line 3; D30-4720: T-279-CONF-ENG ET, p. 21, lines 16-24.