

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **10 October 2019**

PRE-TRIAL CHAMBER II

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

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

Public

**Public Redacted Version of Yekatom Defence Reply to
Prosecution Response to Defence Confirmation Submissions**

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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I. INTRODUCTION

1. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence” and “Mr. Yekatom”, respectively) respectfully reply to the *Prosecution Response to Defence Confirmation Submissions* (“Response”).¹ This Reply aims to further assist Pre-Trial Chamber II (“Chamber”) in narrowing and focusing the matters in dispute so that it can resolve the issues in the best possible conditions.

II. DISPLACEMENT AND FORCIBLE TRANSFER – COUNTS 4 AND 5

A. The order to displace may be inferred, but there must be an order

2. The *Response* confuses the requirement of an order itself as an element of the offence and the evidence needed to prove the existence of the order.² Article 8(2)(e)(viii) requires that “the perpetrator ordered the displacement of the civilian population”.³ This requirement of an order forms part of the *actus reus* of the crime.⁴ If such order does not exist, the crime cannot be established regardless of which mode of liability the defendant is charged under. It is thus unlike other war crimes in that an order is part of the *actus reus*, rather than a mode of liability.

3. While the order can be proven circumstantially or even inferred,⁵ the Prosecution must prove the existence of an order specifically for the displacement of the civilian population. In the *Ntaganda* case, when finding the criminal responsibility of Ntaganda for indirect co-perpetration,⁶ the Trial Chamber held that:

¹ [ICC-01/14-01/18-376-Conf-Corr](#) (public redacted version filed on 8 October 2019 as [ICC-01/14-01/18-376-Corr-Red](#)). This reply is filed on a confidential basis as it refers to facts that may reveal the identities of Prosecution witnesses. A public redacted version is being filed contemporaneously.

² [ICC-01/14-01/18-376-Conf-Corr](#), para. 97.

³ ICC Elements of Crimes, Article 8(2)(e)(viii), element 1.

⁴ See also, ICC Elements of Crimes, Article 8(2)(e)(viii), elements 2 and 3.

⁵ *Contra*, [ICC-01/14-01/18-376-Conf-Corr](#), fn 231.

⁶ *Prosecutor v. Ntaganda*, [Judgment](#), ICC-01/04-02/06-2359, 8 July 2019, para. 810.

[T]he war crime of ordering the displacement of civilians, in contrast to the crime against humanity of forcible transfer of population [...], requires establishing the existence of an *order* to displace, and not of the resulting displacement as such.⁷

4. The Prosecution has offered no proof of the existence of such an order in this case.

B. The order must be to displace, not to commit other acts or crimes

5. As mentioned above, the Elements of Crimes unequivocally shows that the act criminalised by Article 8(2)(e)(viii) of the Statute is a crime of **ordering** the removal of the civilian population, rather than a crime of **otherwise** causing displacement to occur.⁸ This reflects the language of the 1977 Additional Protocol II that “[t]he displacement of the civilian population shall not be **ordered** for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand”.⁹ It is also echoed by the domestic legislations implementing the Rome Statute.¹⁰

⁷ *Prosecutor v. Ntaganda*, [Judgment](#), ICC-01/04-02/06-2359, 8 July 2019, para. 1080 (emphasis in original).

⁸ See Andreas Zimmermann & Robin Geiß, ‘Other serious violations of the laws and customs applicable in armed conflict not of an international character’ in Otto Triffterer & Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Beck Hart Nomos 2016), p. 566, mn 952, citing the rejected proposal submitted by New Zealand and Switzerland on 19 February 1997 (UN Doc A/AC.249/1997/WG.1/DP.2), para. 3(xi). See also Yekatom Defence submissions in [ICC-01/14-01/18-T-008-CONF-ENG ET 23-09-2019](#), p. 40, ln. 24 *et seq.*

⁹ [Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts \(Protocol II\)](#), 7 December 1978, 1125 UNTS 609, Article 17(1) (emphasis added).

¹⁰ See, e.g. **Democratic Republic of Congo**, [Loi Modifiant et Complétant Certaines Dispositions du Code Pénal, du Code de l’Organisation et de la Compétence Judiciaires, du Code Pénal Militaire et du Code Judiciaire Militaire, en Application du Statut de la Cour Pénal Internationale – 2005](#), Article 5 (“Les autres violations graves des lois et coutumes applicables aux conflits armés ne présentant pas un caractère international, dans le cadre établi du droit international, à savoir l’un quelconque des actes ci-après : [...] (h) **le fait d’ordonner** le déplacement de la population civile pour des raisons ayant trait au conflit, sauf dans les cas où la sécurité des civils ou des impératifs militaires l’exigent ; [...]”); **France**, [Loi n° 2010-930 du 9 août 2010 portant adaptation du droit pénal à l’institution de la Cour pénale internationale \(1\)](#), Section 4 (“Des crimes et délits de guerre propres aux conflits armés non internationaux « Art. 461-30.-A moins que la sécurité des personnes civiles ou des impératifs militaires ne l’exigent, **le fait d’ordonner** le déplacement de la population civile pour des raisons ayant trait au conflit est puni de la réclusion criminelle à perpétuité.”); **Luxembourg**, [Loi du 14 août 2000 portant approbation du Statut de Rome de la Cour Pénale Internationale, fait à Rome, le 17 juillet 1998](#), Article

6. Meanwhile, whereas this specific war crime is not provided for in the statutes of the *ad hoc* tribunals,¹¹ the Prosecution's reliance on their jurisprudence is misplaced.¹² These tribunals' application of a different set of elements of another crime, albeit similar, has no bearing on this Court's interpretation of the elements of its own Statute. In particular, the cited case law of the *ad hoc* tribunals by the Prosecution in its *Response* discusses "order" as a mode of liability or as the *mens rea* for crimes against humanity and, more importantly, not in the context of the war crime of unlawful deportation/forcible transfer of civilian population.¹³

7. In light of such fundamental differences, this comparison is inappropriate and therefore should be rejected as an impermissible analogy leading to the extension of the definition of the war crime of displacement.¹⁴ The interpretation of the term "ordering" under Article 8(2)(e)(viii) should return to the textual reading of the Statute and the Elements of Crimes themselves, as Article 21 of the Statute dictates. Namely, if there is no such order, a person's criminal responsibility cannot be engaged pursuant to Article 8(2)(e)(viii) of the Statute.

8(2)(e)(viii) ("Les autres violations graves des lois et coutumes applicables aux conflits armés ne présentant pas un caractère international, dans le cadre établi du droit international, à savoir l'un quelconque des actes ci-après: [...] (f) **Le fait d'ordonner** le déplacement de la population civile pour des raisons ayant trait au conflit, sauf dans les cas où la sécurité des civils ou des impératifs militaires l'exigent; [...]"); **United Kingdom, [The International Criminal Court Act 2001 \(Elements of Crimes\) Regulations 2004](#)**, 3 May 2004, Article 8(2)(e)(viii) ("War crime of displacing civilians Elements 1. The perpetrator **ordered** a displacement of a civilian population. [...]").

¹¹ Unlawful removal of civilian population in a non-international armed conflict is only contained in the articles governing crimes against humanity. See [ICTY Statute](#), Article 5(d) and [ICTR Statute](#), Article 3(d).

¹² [ICC-01/14-01/18-376-Conf-Corr](#), fns 230-232.

¹³ *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54A, [Judgement](#), 19 September 2005, para. 76 cited by [ICC-01/14-01/18-376-Conf-Corr](#), fns 230 and 231 pertains to ordering as part of superior responsibility under ICTR Statute, Article 6(3) in relation to genocide and crime against humanity of extermination ; *Prosecutor v. Boskoski & Tarculovski*, Case No. IT-04-82-A, [Judgement](#), para. 160 cited by [ICC-01/14-01/18-376-Conf-Corr](#), fns 230 and 231 also pertains to mode of liability of ordering under ICTY Statute, Article 7(1); *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-T, 26 February 2001, [Judgement](#), para. 186 cited by [ICC-01/14-01/18-376-Conf-Corr](#), fns 230 and 231 concerns "the requisite *mens rea* for crimes against humanity".

¹⁴ Statute, Article 22(2).

8. Therefore, Mr. Yekatom's alleged orders to shoot Muslims in the Boeing market, destroy the mosque and Muslim homes, and to torture and murder an individual perceived as a Muslim sympathiser,¹⁵ even if proven, do not constitute an order to displace the civilian population.

9. The Defence has acknowledged that in the *Ntaganda* Trial Judgment, the Trial Chamber held that the order under Article 8(2)(e)(viii) "needs only to instruct another person in any form to: (i) displace a civilian population; or (ii) perform an act or omission as a result of which such a displacement would occur."¹⁶ It considers this non-binding decision, which is being appealed, to have been wrongly decided on this point.

10. If followed to its logical extreme, every order to commit a serious crime could frighten others to flee. Orders to kill, assault, or even threaten, can have this result. The Defence contends that the *Ntaganda* decision watered down the requirement of an order to displace to the point where any order will suffice. Instead, the order should be directed at the displacement of the civilian population, and not some other crime that could scare people into fleeing.

11. Therefore, the Defence urges the Chamber not to follow the *Ntaganda* decision on this point and to require evidence of an order for displacement. There is none in this case.

12. Even if the Chamber were to follow the liberal definition of an order of displacement set forth in *Ntaganda*, that case is distinguishable on its facts. There, *Ntaganda* was found to have **ordered his troops to indiscriminately attack the Lendu present in Mongbwalu**, with the purpose of either eliminating them or

¹⁵ [ICC-01/14-01/18-376-Conf-Corr](#), para. 98.

¹⁶ *Prosecutor v. Ntaganda*, [Judgment](#), ICC-01/04-02/06-2359, 8 July 2019, para. 1081; [ICC-01/14-01/18-T-008-CONF-ENG ET 23-09-2019](#), p. 39, ln. 24-p. 40, ln. 2.

driving them out.¹⁷ In contrast, there was no order allegedly issued by Mr. Yekatom on or before 5 December 2013, to displace the population of BOEING and CATTIN. Therefore, the absence of an order for displacement is even more glaring in our case.

C. The mode of liability makes no difference

13. In its *Response*, the Prosecution suggests that it is not necessary that the order of displacement has been issued by Mr. Yekatom, but could have been issued by any perpetrator for whom he had responsibility or was part of the common plan.¹⁸ This is correct as a matter of law. However, the Prosecution adduced no evidence that anyone gave an order for displacement.

14. Because the prosecution has failed to prove the very first element required for a violation of Article 8(2)(e)(viii), the existence of an order for displacement, the Chamber should decline to confirm the charges in Count 5.

D. The Prosecution failed to prove the nexus between the acts of the suspect and the movement of the population

15. In its submissions on Counts 4 and 5, the Defence contended that the Prosecution had failed to establish the required nexus between the acts of Mr. Yekatom and the movement of the population.¹⁹ The Prosecution has failed to address this argument. Therefore, the Chamber should decline to confirm the charges in Counts 4 and 5 on this basis alone.

16. The references in the *Response* that supposedly prove that Mr. Yekatom is responsible for persons fleeing as a result of the 5 December attack²⁰ have nothing to do with that attack.

¹⁷ *Prosecutor v. Ntaganda*, [Judgment](#), ICC-01/04-02/06-2359, 8 July 2019, para. 1088.

¹⁸ [ICC-01/14-01/18-376-Conf-Corr](#), para. 99.

¹⁹ [ICC-01/14-01/18-T-008-CONF-ENG ET 23-09-2019](#), p. 39, lns 10-14 ; p. 42, ln. 24-p. 44, ln. 2.

²⁰ [ICC-01/14-01/18-376-Conf-Corr](#), fns 233-236.

17. Some extracts of Witness [REDACTED] referred in the *Response* speaks of events well after the 5 December 2013 and to places miles away from CATTIN and BOEING, such as SEKIA and BANGUI-BOUCHIA.²¹

18. As for Witness [REDACTED], his evidence relates not to the 5 December attack but to the incident underpinning Counts 11 to 17, which is completely unrelated to the alleged displacement of the civilian population of BOEING and CATTIN to PK5.²²

19. Other witnesses relied upon by the Prosecution are not in a position to provide any evidence concerning the acts or conduct of Mr. Yekatom and his group during the 5 December attack: Witness [REDACTED] joined the Anti-Balaka after 5 December 2013;²³ Witness [REDACTED] never took part in the 5 December attack;²⁴ and Witness [REDACTED] first travelled to the Central African Republic only on 8 December 2013.²⁵

20. As for the extract used by the Prosecution that “the destruction of Muslims homes and mosques ‘so they will go back to their country’”,²⁶ it was not in relation to the civilians of BOEING and CATTIN.²⁷ The extract comes from the statement of Witness [REDACTED], and is not part of the section titled “The 5 December attack on BOEING by the Anti-Balaka”. Instead, this extract refers to an alleged attack in the

²¹ [REDACTED]: CAR-OTP-2110-0556 at 0579, paras, 156. For location of SEKIA, see [Annex F1 to the DCC](#). For location of BANGUI-BOUCHIA, see [Annex F10 to the DCC](#).

²² [REDACTED]: CAR-OTP-2054-1136 at 1143, paras 37-38.

²³ [REDACTED]: CAR-OTP-2072-0578 at 0586-0587, lns 271-304.

²⁴ [REDACTED]: CAR-OTP-2048-0171 at 0176, paras 32: “There was a big advance from different groups of ANTI-BALAKA on 5th December 2013. We could hear that but and it was also reported on the public radio and televisions. I was also informed by telephone by friends and family. I hadn’t been asked to participate in the attack.”

²⁵ [REDACTED]: CAR-OTP-2081-0072 at 0074, para.14.

²⁶ [ICC-01/14-01/18-376-Conf-Corr](#), para. 98, citing [REDACTED]: CAR-OTP-2041-0741 at 0748, para. 51.

²⁷ [REDACTED]: CAR-OTP-2041-0741 at 0748, para. 51.

PK5 area on 20 December 2013.²⁸ Tellingly, this extract was not relied on in the DCC to support Counts 5 and 6 pertaining to the 5 December attack.

21. Finally, Witness [REDACTED] provided a plethora of evidence that others were responsible for the movement of the population. He stated that specifically for 5 December 2013:

The Seleka arrived in vehicles to the market as the Red Cross was about to leave. The Seleka started shooting at the local population who fled towards the airport. They then started searching houses. I ran away and [REDACTED].²⁹

On 5 December, there was fighting all over CAR. I heard on the radio that there was fighting between the Seleka and Anti-Balaka everywhere.³⁰

22. Therefore, the Chamber should decline to confirm the charges in Counts 4 and 5 for failure of the Prosecution to prove the required nexus between the conduct of Mr. Yekatom and the movement of the population.

III. IMPRISONMENT – COUNT 14

A. Gravity of conduct is required for imprisonment as a crime against humanity

23. The Prosecution makes the rather startling claim that a suspect may be convicted of imprisonment as a crime against humanity under Article 7(1)(e) even if the conduct does not rise to the level of gravity for crimes against humanity, so long as the victim was deprived of due process of law.³¹

24. The Prosecution's position that proof of deprivation of liberty without due process of law suffices as "[s]uch deprivation of physical liberty is in violation of a

²⁸ This can be inferred from the context of the statement [REDACTED]: CAR-OTP-2041-0741 at 0748-0749, paras 51-53. The sequencing of those 3 paragraphs indicates that they all refer to one single event: the attack on Bangui 20 December 2013, which cannot be confused by the witness with the 5 December 2013 attack which he describes from paragraph 66 onward.

²⁹ [REDACTED]: CAR-OTP-2041-0741 at 0752, para. 77.

³⁰ [REDACTED]: CAR-OTP-2041-0741 at 0752, para. 79.

³¹ [ICC-01/14-01/18-376-Conf-Corr](#), para. 101.

fundamental rule of international law”³² is completely at odds with the jurisprudence for crimes against humanity.

25. In the *Ntagerura* case, the ICTR Trial Chamber held that:

It is not every minor infringement of liberty that forms the material element of imprisonment as a crime against humanity; the deprivation of liberty must be of similar gravity and seriousness as the other crimes enumerated as crimes against humanity [...].³³

26. This was cited with approval by the ECCC in the *Duch* Trial Judgment.³⁴

27. It is settled law that “not every denial of a human right is serious enough to constitute a crime against humanity”.³⁵ Under the Prosecution’s argument, every deprivation of liberty without due process during a widespread or systematic attack on the civilian population would constitute the crime of humanity of imprisonment.

28. The *Burundi* decision, cited by the Prosecution,³⁶ does not go so far. While it holds that the short duration of detention *per se* does not automatically disqualify as a crime against humanity, it examined a number of factors besides the length of detention. Notably, during a one-year period, between 5,881 and 8,000 victims were imprisoned.³⁷ The conditions of detention also involved beatings resulting in serious

³² [ICC-01/14-01/18-376-Conf-Corr](#), para. 101.

³³ *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-T, [Judgement and Sentence](#), 25 February 2004, para. 702.

³⁴ *Prosecutor v. Kaing Guek Eav (alias Duch)*, Case No. 001/18-07-2007/ECCC/TC, [Judgement](#), 26 July 2010, para. 349.

³⁵ *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, [Judgement](#) (volume 1), 10 June 2010, para. 966; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, [Judgement](#) (volume 1), 26 February 2009, para. 178; *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, [Judgement](#), 17 January 2005, para. 580; *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, [Judgement](#), 14 January 2000, para. 618; *Prosecutor v. Brđjanin*, Case No. IT-99-36-T, [Judgement](#), 1 September 2004, para. 995; *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, [Judgement](#), 28 November 2007, para. 985.

³⁶ [ICC-01/14-01/18-376-Conf-Corr](#), para. 101.

³⁷ *Situation in the Republic of Burundi*, [Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”](#), ICC-01/17-X-9-US-Exp, 25 October 2017, ICC-01/17-9-Red, 9 November 2017, para. 69.

injuries in some cases.³⁸ The Decision also seems to have taken into account the recurrent and systematic policy of arrests and arbitrary detentions.³⁹

29. To support its argument, the Prosecution refers to human rights instruments and cases cited in the Burundi decision.⁴⁰ Whilst this comparison can be made to assess the severity of the infringement of one's right within the meaning of the *first* element of crime of Article 7(1)(e), these cases do not address the gravity of the **conduct** as required by (i) any crime against humanity, and (ii) two of the elements of the crime against humanity of imprisonment or other severe deprivation of physical liberty.⁴¹

30. In the Elements of Crimes of Article 7, the term "gravity" appears twice for imprisonment. The Prosecution in its response might address the first limb of the element of crimes, *i.e.* the severity of the deprivation of physical liberty. However, it fails to assess, and more so isolates the second limb, *i.e.* the gravity of the conduct. The "**the gravity of the conduct** [must have been] such that it was in violation of fundamental rules of international law" (Element 2) and "the perpetrator [must have been] aware of the factual circumstances that established the **gravity** of the conduct" (Element 3).

³⁸ *Situation in the Republic of Burundi*, [Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi"](#), ICC-01/17-X-9-US-Exp, 25 October 2017, ICC-01/17-9-Red, 9 November 2017, para. 76.

³⁹ *Situation in the Republic of Burundi*, [Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi"](#), ICC-01/17-X-9-US-Exp, 25 October 2017, ICC-01/17-9-Red, 9 November 2017, para. 70 ("At first, persons who participated in or were suspected of having participated in the protests were targeted. It is reported that 800 persons were arrested between April and July."). See also, *ibid*, para. 71 ("Second, after the attempted coup of 13 May 2015, mass arrests were carried out in the course of cordon and search operations in neighborhoods of Bujumbura considered to be associated with the opposition."), para. 72 ("Third, after September 2015, the number of arrests decreased to an average of 200 to 400 arrests a month, but continued into 2016 and 2017.").

⁴⁰ [ICC-01/14-01/18-376-Conf-Corr](#), fn 244-245.

⁴¹ ICC Elements of Crimes, Article 7(1)(e), elements 2 and 3.

31. The gravity is therefore a specific and emphasized element of the crime of imprisonment, which the Prosecution failed to address and prove.

32. The *Burundi* decision is consistent with the approach taken by the Defence, in which the gravity of the imprisonment must be viewed as a whole, taking into consideration the length of the detention, the number of people detained, and the conditions of detention.⁴²

B. The imprisonment was of insufficient gravity

33. When compared to other cases of imprisonment brought as crimes against humanity at the ICTY,⁴³ the ECCC,⁴⁴ the East Timor Panels,⁴⁵ and the ICC's own *Burundi* decision,⁴⁶ the gravity of this event falls far short of that of a crime against humanity.

34. As Judge Patricia Wald observed:

The interpretation of the gravity and seriousness of a crime is important to preserve the original meaning of the category of crimes against humanity. Crimes against humanity were firstly conceptualized as "an offense against all humanity".⁴⁷

35. Given the Prosecution's ability to prosecute this event with charges of torture, mutilation, murder as a crime against humanity, murder as a war crime, and

⁴² [ICC-01/14-01/18-T-008-CONF-ENG ET 23-09-2019](#), p. 49, lns 8-12.

⁴³ *Prosecutor v. Martić*, Case No. IT-95-11-A, [Judgement](#), 8 October 2008 (imprisonment of many people for one year); *Prosecutor v. Stanišić & Zupljanin*, Case No. IT-08-91-T, *Judgement* (vols [1](#), [2](#) and [3](#)), 27 March 2013 (imprisonment of many people for seven months).

⁴⁴ *Prosecutor v. Nuon Chea & Khieu Samphân*, Case No. 002/19-09-2007/ECCC/TC, [Judgement](#), 16 November 2018 (imprisonment of more than 10,000 people for one year).

⁴⁵ *Prosecutor v. Cardoso*, Case No. 04a/2001, [Judgement](#), 5 April 2003 (six days imprisonment insufficient for crime against humanity).

⁴⁶ *Situation in the Republic of Burundi*, [Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi"](#), ICC-01/17-X-9-US-Exp, 25 October 2017, ICC-01/17-9-Red, 9 November 2017, para. 69. (between 5,881 and 8,000 people).

⁴⁷ Patricia Wald, "[Genocide and Crimes against humanity](#)", 6 *Washington University Global Studies Law Review*, (2007), p. 624.

persecution, there is little reason to stretch the gravity requirement for crimes against humanity to include a charge of imprisonment for the same event.

36. The Chamber should decline to confirm the charges of imprisonment in Count 14.

IV. OTHER INHUMANE ACTS – COUNT 11

A. There is no trace of alternative charging in the DCC

37. In its *Response*, the Prosecution makes the claim that “the crime of ‘other inhumane acts’ is clearly charged in the alternative **and** cumulatively with the crime of torture”.⁴⁸ The Defence sees no trace of this in the DCC, either as a whole or in its component parts. In fact, the Prosecution stated explicitly: “this DCC presents cumulative charges against the Suspects”.⁴⁹

38. Alternative charges are recognised by the use of the word “or”. The Prosecution has used this formulation in the *Gbagbo & Blé Goudé* and *Ongwen* cases when charging modes of liability in the alternative.⁵⁰ The Defence finds no use of this word for Counts 11 and 12 either in the text of the DCC or in the schedule of charges at the end of the DCC.

39. If the Prosecution intends to charge Count 11 alternatively with Count 12, it should move to amend its DCC. Otherwise, the Chamber should dismiss Count 11 as impermissibly cumulative to Count 12.

⁴⁸ [ICC-01/14-01/18-376-Conf-Corr](#), para. 106 (emphasis added).

⁴⁹ [ICC-01/14-01/18-282-Conf-Red-AnxB1](#), para. 627.

⁵⁰ *Prosecutor v. Gbagbo & Blé Goudé*, [Corrigendum of Annex 1 to the Prosecution’s Submission of Document de notification des charges and l’Inventaire des éléments de preuve à charge](#), ICC-02/11-02/11-124-Anx1-Corr, 27 August 2014, para. 322; *Prosecutor v. Ongwen*, [Document Containing the Charges](#), ICC-02/04-01/15-375-AnxA-Red, 22 December 2015, para. 39.

B. Other inhumane acts and torture are impermissibly cumulative

40. While the Prosecution makes the bold statement that other inhumane acts contain a materially distinct element from torture,⁵¹ it cites no case in which a court held this to be so. It ignores the case cited by the Defence in which it was specifically held that other inhumane acts were subsumed by the crime of torture because it has no distinct legal element.⁵²

41. The elements of other inhumane acts are all included in the elements of torture, except for the element that the victim was in the custody or under the control of the perpetrator, which is a requirement for torture and not for other inhumane acts. Therefore the crime of inhumane acts is subsumed by the crime of torture when both are charged for the same event.

42. The Prosecution's use of the facts to construct a scenario where one could possibly be convicted of other inhumane acts and not torture⁵³ misses the point. The Appeals Chamber has made it clear that "it is the **legal elements** of each statutory provision and **not the specific facts** of the case that must be considered when applying the test for cumulative conviction".⁵⁴

43. The Prosecution has also ignored this jurisprudence in the *Katanga* case, where the Pre-Trial Chamber held that

[A]rticle 7(l)(k) of the Statute defines the conduct as 'other' inhumane acts, which indicates that none of the acts constituting crimes against humanity

⁵¹ [ICC-01/14-01/18-376-Conf-Corr](#), para. 107.

⁵² *Prosecution v. Martić*, Case No. IT-95-11-T, [Judgement](#), 12 June 2007, para. 477.

⁵³ [ICC-01/14-01/18-376-Conf-Corr](#), para. 107.

⁵⁴ *Prosecutor v. Bemba et al.*, [Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute"](#), ICC-01/05-01/13-2275-Red, 8 March 2008, para. 740 (emphasis added). See also, *Prosecutor v. Bemba et al.*, [Judgment pursuant to Article 74 of the Statute](#), ICC-01/05-01/13-1989-Red, 19 October 2016, para. 951.

according to article 7(1)(a) to (j) can be simultaneously considered as another inhumane act encompassed by article 7(l)(k) of the Statute.⁵⁵

44. The Prosecution has further ignored the jurisprudence in the *Muthaura* case, where the Pre-Trial Chamber finds that “other inhumane acts is a residual category within the system of article 7(1) of the Statute” therefore “if a conduct could be charged as another specific crime under this provision, its charging as other inhumane acts is impermissible”.⁵⁶

C. The nature of the confirmation proceedings does not require a different result

45. The *Chambers’ Practice Manual* specifically discusses the role of the Pre-Trial Chamber in confirming cumulative and alternative charges. It permits cumulative charging when the alleged crimes “although based on the same set of facts, are not alternative to each other, but may all, concurrently, lead to a conviction”.⁵⁷ The problem with the Prosecution’s argument is that the charges of torture and other inhumane acts cannot concurrently lead to a conviction because the legal elements of the latter are completely subsumed in the former.

46. Thus, this case falls within the narrow class of cases in which alternative, and not cumulative, charging is the method to give the proper flexibility to the Trial Chamber. Because the Prosecution failed to plead Count 11 in the alternative, it has forfeited the opportunity for flexibility provided in the *Practice Manual*.

47. The Chamber should, therefore, decline to confirm Count 11.

V. CHILD SOLDIERS – COUNT 29

⁵⁵ *Prosecutor v. Katanga*, [Decision on the Confirmation of Charges](#), ICC-01/04-01/07-717, 30 September 2008, para. 452.

⁵⁶ *Prosecutor v. Muthaura et al.*, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), ICC-01/09-02/11-382-Red, 23 January 2012, para. 269.

⁵⁷ [Chambers Practice Manual](#), p. 19.

A. The “sheer scale” exception to the notice requirement is inapplicable

48. The Prosecution seeks to avoid specifying the names of the child soldiers allegedly used and enlisted by Mr. Yekatom by relying on the “sheer scale” exception to the notice requirement authorised by the Appeals Chamber in the *Lubanga* case.⁵⁸

49. However, the facts in our case are distinguishable from the circumstances in *Lubanga* in several ways.

50. In *Lubanga*, between “2,451 and 5,938 children [were found to] have served in the UPC’s ranks in the relevant time frame”.⁵⁹ The recruited children “were brought to one of approximately 20 military training camps”.⁶⁰ The Prosecution alleged that one camp alone held about 2500 recruits,⁶¹ and that up to 40% of the UPC/FPLC forces were children.⁶²

51. By contrast, according to the Prosecution, there were [REDACTED] children, at least [REDACTED] of whom were under 15 years of age in the present case.⁶³

52. In addition, the lack of proximity Lubanga to the child soldiers was a factor allowing for the “sheer scale” exception. Lubanga was a political leader of a large force spread over a wide geographical area alleged to have put in place a policy of

⁵⁸ [ICC-01/14-01/18-376-Conf-Corr](#), paras 112-113.

⁵⁹ *Prosecutor v. Lubanga*, [Judgment on the appeals against Trial Chamber II’s ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’](#), 18 July 2019, para. 119. See also, *Prosecutor v. Lubanga*, [ICC-01/04-01/06-T-356-ENG ET WT 25-08-2011 1-90 PV T, 25 August 2011](#), p. 11, lns 10-16. See also *Prosecutor v. Lubanga*, [ICC-01/04-01/06-T-369-ENG ET WT 15-12-2017 1-19 NB T](#), p. 10, lns 10-14.

⁶⁰ *Prosecutor v. Lubanga*, [Prosecution’s Closing Brief](#), ICC-01/04-01/06-2748-Red, 1 June 2011, para. 17.

⁶¹ *Prosecutor v. Lubanga*, [Prosecution’s Closing Brief](#), ICC-01/04-01/06-2748-Red, 1 June 2011, para. 156 (“W-016 testified that three quarters of the recruits at Mandro camp were children between the ages of 13 and 17 years old. Approximately 50% of these were under 14 years old. To give an idea of the scale of this figure, W-0038 stated that there were about 2500 recruits at the Mandro camp.”).

⁶² *Prosecutor v. Lubanga*, [Prosecution’s Closing Brief](#), ICC-01/04-01/06-2748-Red, 1 June 2011, para. 160.

⁶³ [ICC-01/14-01/18-376-Conf-Corr](#), para. 113, referring to [ICC-01/14-01/18-282-Conf-AnxB1](#), para. 360. See also [ICC-01/14-01/18-1-Conf-Exp](#), page 18.

enlistment of child soldiers.⁶⁴ To the contrary, it is alleged that Mr. Yekatom had direct contact with the “child soldiers” among his own elements in a limited geographical area.

53. For example, the DCC alleges that Mr. Yekatom was personally introduced to and saw the children;⁶⁵ that children below the age of 15 took part in guarding his house;⁶⁶ that he gave orders to the children in his group;⁶⁷ and that he was directly involved in negotiations with NGO’s for the demobilisation of the children.⁶⁸

54. In the *Blaškić* case, which has been endorsed by the ICC Appeals Chamber, the ICTY Appeals Chamber held that:

A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in an indictment is the nature of the alleged criminal conduct charged. The materiality of such facts as the identity of the victim, the place and date of the events for which the accused is alleged to be responsible, and the description of the events themselves, necessarily depends upon the alleged proximity of the accused to those events, that is, upon the type of responsibility alleged by the Prosecution.⁶⁹

55. Here, in contrast to the situation in *Lubanga*, the proximity of Mr. Yekatom to the alleged enlistment and use of child soldiers is very close.

56. Whilst the sheer scale of the use of child soldiers in *Lubanga* made it impracticable to provide details as to each victim’s identity, no such circumstances prevent the identification of alleged child soldiers amongst the [REDACTED] individuals in this case. The “greatest degree of specificity possible in the

⁶⁴ *Prosecutor v. Lubanga*, [Judgment pursuant to Article 74 of the Statute](#), 14 March 2012, paras. 759-916, 1224-1272.

⁶⁵ [ICC-01/14-01/18-282-Conf-AnxB1](#), para. 362.

⁶⁶ [ICC-01/14-01/18-282-Conf-AnxB1](#), para. 362.

⁶⁷ [ICC-01/14-01/18-282-Conf-AnxB1](#), para. 363.

⁶⁸ [ICC-01/14-01/18-282-Conf-AnxB1](#), para. 364.

⁶⁹ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, [Judgement](#), 29 July 2004, para. 210, cited with approval in *Prosecutor v. Lubanga*, [Public redacted Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction](#), ICC-01/04-01/06-3121-Red, 1 December 2014, para. 122.

circumstances” that the Prosecution must provide⁷⁰ should be applied in this very context.

57. Thus, the “sheer scale” of the alleged crime cannot provide an excuse in the circumstances of this case for infringing on Mr. Yekatom’s right to notice of the charges required by Article 67(1)(a) of the Statute, Rule 121(3) of the Rules of Procedure and Evidence and Regulation 52 (b) of the Regulations of the Court.

58. The Prosecution’s comparison to the *Lubanga* case is inapposite and should be rejected by the Chamber.

B. The DCC provides insufficient notice for a fair trial

59. The Prosecution contends that the Defence is sufficiently informed by the information in its DCC that Count 29 involves “[REDACTED] children in YEKATOM’s group, at least [REDACTED] under the age of 15”.⁷¹ It fails to explain why, when it is in the position to identify the children allegedly under the age of 15, it fails to do so. This state of affairs will leave the Defence guessing which of the [REDACTED] children the Prosecution is relying upon, resulting in a massive waste of resources and delay while the Defence investigates a pool of potential child soldiers that can be ten times what the Prosecution will rely on at trial.

60. The jurisprudence confirms that when Prosecution is in a position to provide the information as to the identities of victims, they are obligated to do so.⁷² Even in cases where a high degree of specificity is somewhat impractical, “since the identity of the victim is information that is valuable to the preparation of the defence case, if

⁷⁰ *Prosecutor v. Lubanga*, [Public redacted Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction](#), ICC-01/04-01/06-3121-Red, 1 December 2014, para. 123.

⁷¹ [ICC-01/14-01/18-376-Conf-Corr](#), para. 113.

⁷² *Prosecutor v. Ntakirutimana & Ntakirutimana*, Cases Nos. ICTR-96-10-A & 17-A, [Judgement](#), 13 December 2004, para. 25; *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, [Appeal Judgement](#), 23 October 2001, para. 90; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1, [Decision on Defence Preliminary Motions on the Form of the Indictment](#), 12 April 1999, para. 23.

the Prosecution is in a position to name the victims, it should do so”.⁷³ It is insufficient that the notice required be contained in “auxiliary documents”.⁷⁴

61. The prejudice also extends to the chamber. In the *Ntagerura* case, the ICTR Trial Chamber held:

The Trial Chamber and the accused should not be required to sift through voluminous disclosures, witness statements, and written or oral submissions in order to determine what facts may form the basis of the accused’s alleged crimes, in particular, because some of this material is not made available until the eve of trial.⁷⁵

62. In any event, the auxiliary document referred to by the Prosecution⁷⁶ is of no assistance. Providing a list of [REDACTED] children, out of which the Defence is supposed to speculate which of the “at least [REDACTED]” are under the age of 15 falls short of an adequate notice.

63. The Prosecution’s failure to identify the alleged victims of Count 29 is inexcusable and violates the right of Mr. Yekatom to adequate notice of what he is charged with. The Chamber should decline to confirm the charges in Count 29.

VI. DESTRUCTION OF ADVERSARY PROPERTY – COUNT 7

A. There is no question the Boeing Mosque was protected as a building dedicated to religion

64. Mr. Yekatom has never contended that the Boeing Mosque was not a “building dedicated to religion” within the meaning of Article 8(2)(e)(iv) as charged in Count 6.⁷⁷ It is the very applicability of that charge to the facts of this case that

⁷³ *Prosecutor v. Ntakirutimana & Ntakirutimana*, Cases Nos. ICTR-96-10-A & 17-A, [Judgement](#), 13 December 2004, para. 25.

⁷⁴ [ICC-01/14-01/18-376-Conf-Corr](#), fn. 278.

⁷⁵ *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, [Judgement](#), 7 July 2006, para. 64.

⁷⁶ [ICC-01/14-01/18-376-Conf-Corr](#), para. 114.

⁷⁷ *Contra*, [ICC-01/14-01/18-376-Conf-Corr](#), paras 116-118.

makes the charge in Count 7, labelling the mosque as “adversary property”, inappropriate and unnecessary.⁷⁸

B. The Adversary need not be a combatant

65. Mr. Yekatom agrees with the Prosecution that the property of an “adversary” within the meaning of Article 8(2)(e)(xii) need not belong to a combatant.⁷⁹

66. He disagrees, however, that the status of property can be defined by the mere belief of the suspect that the property belongs to the adversary.⁸⁰ If a suspect killed a person he mistakenly believed to be a civilian, but the victim was in fact an active combatant, the killing would not qualify as a war crime, which has as an element of the *actus reus* that the victim was protected by the Geneva Conventions.⁸¹ Here, Article 8(2)(e)(xii) has as an element of its *actus reus* that “such property was the property of an adversary”.⁸² The characteristic is not defined by what the suspect believes but by what it is.

C. The Boeing Mosque was not property of an “adversary”

67. The Prosecution produced no evidence that the Boeing Mosque, in particular, was the property of the Seleka or of any civilians supporting the Seleka. It offered no evidence, for example, that Seleka-related meetings were held there, that the mosque was used to harbour Seleka members during the attack, that the Seleka used it to store its property, or that the mosque personnel supported the Seleka in any way.

68. Given the specific provision in the Statute for buildings dedicated to religion, it is inappropriate for a house of worship to be labelled, *per se*, as property of the “adversary”. There is a long history of such places serving as sanctuaries for people of all religion during conflict. To label a house of worship as “adversary” property,

⁷⁸ See [ICC-01/14-01/18-T-008-CONF-ENG ET 23-09-2019](#), p. 57, lns 24-25.

⁷⁹ [ICC-01/14-01/18-376-Conf-Corr](#), para. 120.

⁸⁰ *Contra*, [ICC-01/14-01/18-376-Conf-Corr](#), para. 119.

⁸¹ ICC Elements of Crimes, Article 8(2)(a)(i), element 2.

⁸² ICC Elements of Crimes, Article 8(2)(e)(xii), element 2.

without evidence that it was used by the adversary, is to turn a blind eye to this history and associate, as a legal status, such places with parties to the conflict.

69. Were the Chamber to ask an Imam or Bishop whether they favored labeling their mosques and churches as property of the “adversary”, the answer would likely be a resounding “no”, particularly in light of the fact that their mosques and churches are already protected by Article 8(2)(e)(iv).

70. This Chamber should decline the Prosecution’s redundant effort to protect houses of worship by labelling them as property of the “adversary”. The charge in Count 7 should not be confirmed.

VII. CHARGES DEPENDENT ON WITNESS CREDIBILITY

A. Destruction of the Boeing Mosque—Counts 6 and 7

71. The Prosecution does not dispute that the Pre-Trial Chamber must ensure that cases do not proceed to trial if “the evidence is so riddled with ambiguities, inconsistencies, contradictions or doubts as to credibility that it is insufficient to establish substantial grounds to believe that the person committed the crimes charged”.⁸³ The Chamber must be “thoroughly satisfied that the Prosecutor’s allegations are sufficiently strong to commit the person for trial”.⁸⁴

72. The Chamber should not readily agree to the Prosecution’s entreaties that it set aside the inconsistencies, ambiguities and contradictions among the Prosecution witnesses to the Boeing mosque incident.

⁸³ *Prosecutor v. Mbarushimana*, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled “Decision on the confirmation of charges”](#), ICC-01/04-01/10-514, 30 May 2012, para. 46. See *Prosecutor v. Ongwen*, [Decision on the confirmation of charges against Dominic Ongwen](#), ICC-02/04-01/15-422-Red, 23 March 2016, paras 17-18; *Prosecutor v. Gbagbo*, [Decision on the confirmation of charges](#), ICC-02/11-01/11-656-Red, 12 June 2014, para. 21.

⁸⁴ *Prosecution v. Lubanga*, [Decision on the confirmation of charges](#), ICC-01/04-01/06-803-tEN, 29 January 2007, para. 39. See also, *Prosecutor v. Bemba et al.*, [Decision pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), ICC-01/05-01/13-749, 11 November 2014, para 25.

73. The accounts of the witnesses vary not only on the date of the destruction (5 December, 8 December, or 20 December 2013) but also on facts calling into question whether Mr. Yekatom was involved in any way. For example, the difference between the account of Witness [REDACTED], who alleges that the walls of the mosque were destroyed with rockets and grenades, and the account of Witnesses [REDACTED]⁸⁵ and [REDACTED],⁸⁶ who state that the doors and windows were physically removed by the Anti-Balaka, cannot be attributed to a lack of perspective as the Prosecution contends.⁸⁷ It is unconceivable that regardless of perspective, two alleged eyewitnesses would miss a rocket launch or a roof set on fire.⁸⁸

74. Nor does the Prosecution explain the evidence of Witness [REDACTED], who was an eyewitness of the destruction of the mosque, and claims that it was done by the Anti-Balaka of BOY-RABE led by Andjilo.⁸⁹

75. Given the inconsistencies in the date and manner of destruction of the Boeing mosque as well as the identities of the perpetrators, the Prosecution's evidence calls into question whether Mr. Yekatom had anything to do with this event. The evidence fails to provide substantial grounds to believe that Mr. Yekatom is responsible for the destruction of the mosque as charged in Counts 6 and 7.

76. In the *Madacumura* case, where the evidence was based on the account of one witness and a United Nations report, the Chamber considered the evidence insufficient to find "reasonable grounds to believe" that the responsibility of the

⁸⁵ [REDACTED]: CAR-OTP-2047-0257 at 0267, para. 74: « Le 05 décembre 2013, ils ont enlevé les portes et les fenêtres de la mosquée du quartier ».

⁸⁶ [REDACTED]: CAR-OTP-2082-0299 at 0317, para. 103: "They took everything, removed the roofs, doors and even the wall of the mosque."

⁸⁷ [ICC-01/14-01/18-376-Conf-Corr](#), para. 123.

⁸⁸ [REDACTED]: CAR-OTP-2041-0741 at 0749, para. 53; [REDACTED]: CAR-OTP-2047-0257 at 0267, paras 73-74; [REDACTED]: CAR-OTP-2082-0299 at 0317, paras 102-103.

⁸⁹ [REDACTED]: CAR-OTP-2082-0299 at 0317, para. 102.

suspect for the incident had been established.⁹⁰ The burden applied in that decision, which was an application for a warrant of arrest, is lower than the “substantial grounds to believe” burden for confirmation of charges.

77. The destruction of the Boeing Mosque is an example of an incident for which the Chamber must “filter [...] the charges for which the evidence is insufficient to justify a trial”.⁹¹ The Chamber should decline to confirm the charges in Counts 6 and 7.

B. Murder of Djido Saleh—Counts 26 and 27

78. The Prosecution relies on two pieces of evidence to support its contention that it was the elements of Mr. Yekatom who committed the murder of Djido Saleh.⁹²

79. *First*, it relies on the statement of [REDACTED] who “explains that Yekatom came to see him the day after the incident and told him ‘the killing was an accident’”.⁹³ This is not an admission that the killing was done by one of Mr. Yekatom’s elements. It is equally plausible that Mr. Yekatom inquired of the circumstances of Mr. Saleh’s murder and was told that it was an accident. It is completely possible that the “accident” was at the hands of members of the population, rather than one of Mr. Yekatom’s elements.

80. *Second*, the Prosecution relies on an OHCHR report. This report is an interview with a “DRC agent” whose identity is redacted, and is therefore anonymous. The interview took place on 27 May 2014, almost three months after the event. The anonymous person provides the double hearsay that Mr. Yekatom stated

⁹⁰ *Prosecutor v. Mudacumura*, [Decision on the Prosecutor’s Application under Article 58](#), ICC-01/04-01/12-1-Red, 13 July 2012, para. 41.

⁹¹ *Prosecutor v. Mbarushimana*, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled “Decision on the confirmation of charges”](#), ICC-01/04-01/10-514, 30 May 2012, para. 47.

⁹² [ICC-01/14-01/18-376-Conf-Corr](#), para. 125.

⁹³ [ICC-01/14-01/18-376-Conf-Corr](#), para. 125 quoting [REDACTED]: CAR-OTP-2100-0252 at 0270-0271, paras 99 and 104.

on 2 March 2014 that he had sanctioned the party responsible for Mr. Saleh's murder.⁹⁴

81. Even if the Chamber were to rely on this anonymous double-hearsay, the fact that Mr. Yekatom had found out who was responsible for the murder and sanctioned them does not prove that the responsible parties were his elements. Mr. Yekatom could equally have sanctioned members of the population who he found out was responsible.

82. The evidence presented by the Prosecution failed to identify the offenders and their alleged subordination relationship with Mr. Yekatom. The Prosecution has a video of the murder, but has failed to identify any of the perpetrators as elements of Mr. Yekatom.⁹⁵ It has evidence that:

[T]he MISCA contingent apprehended 22 suspects, including a man with a blood stained machete and a women holding Mr. Djido's genitals in her hands. Once MISCA finalized the arrest, they handed them over to the Gendarmerie but due to the absence of detention facilities in Mbaiki, the gendarmerie released all suspects as their identities and places of residence had been established.⁹⁶

None of these persons has been identified as an element of Mr. Yekatom.

83. The Prosecution's claim that "Saleh's murder was a direct and a sufficiently foreseeable consequence of the implementation of the Operational Common Plan by Yekatom's Group to target Muslim civilians, even assuming an accessorial involvement in the crime"⁹⁷ ignores the fact that for all modes of liability, they must establish that the murder of Mr. Saleh was perpetrated by a member of the common plan or a person used as a tool. The Prosecution's failure to prove that the

⁹⁴ [ICC-01/14-01/18-376-Conf-Corr](#), para. 125, quoting CAR-OTP-2053-0576 at 0577.

⁹⁵ CAR-OTP-2059-0384.

⁹⁶ CAR-OTP-2001-0463 at 0464 (item 227 on the Prosecution's [List of Evidence](#)).

⁹⁷ [ICC-01/14-01/18-376-Conf-Corr](#), para. 125.

perpetrator was an element of Mr. Yekatom dooms any effort at accessorial or superior responsibility.

84. Therefore, the Prosecution has failed to offer “concrete and tangible proof demonstrating a clear line of reasoning underpinning”⁹⁸ the allegation that Mr. Yekatom’s is responsible for the murder of Mr. Saleh. The Chamber should decline to confirm the charges in Counts 26 and 27.

VIII. CONCLUSION

85. The Defence appreciates the opportunity to fully brief the issues it has identified in the Prosecution’s case. It respectfully requests that the Chamber decline to confirm those charges that are not appropriate under the law or where the Prosecution has failed to meet its burden of proof.

RESPECTFULLY SUBMITTED ON THIS 10th DAY OF OCTOBER 2019



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⁹⁸ *Prosecutor v. Mbarushimana*, [Decision on the confirmation of charges](#), ICC-01/04-01/10-465-Red, 16 December 2011, para. 40; *Prosecutor v. Ongwen*, [Decision on the confirmation of charges](#), ICC-02/04-01/15-422-Red, 23 March 2016, paras 17-18, fn 4; *Prosecutor v. Blé Goudé*, [Decision on the confirmation of charges against Charles Blé Goudé](#), ICC-02/11-02/11-186, 11 December 2014, para. 12.