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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 YEKATOM AND
PATRICE-ÉDOUARD NGAÏSSONA***

Public Redacted version of ICC-01/14-01/18-380-Conf

**Common Legal Representatives' Joint Observations on the Prosecution Response
to the Defence Confirmation Submissions**

Source: Common Legal Representatives of Victims

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr Kweku Vanderpuye

Counsel for the Defence

Ms Mylène Dimitri
Mr Peter Robinson

Mr Geert-Jan Alexander Knoops

Legal Representatives of the Victims

Mr Dmytro Suprun

Legal Representatives of the Applicants

Mr Abdou Dangabo Moussa
Ms Marie Édith Douzima Lawson
Mr Yaré Fall
Ms Paolina Massidda
Ms Elisabeth Rabesandratana

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda
Ms Anne Grabowski
Ms Carine Pineau

**The Office of Public Counsel for the
Defence**

Mr Dmytro Suprun
Ms Ludovica Vetrucchio

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Common Legal Representative of the Former Child Soldiers and the Common Legal Representatives of the Victims of Other Crimes (jointly the “Legal Representatives”)¹ hereby file their joint observations on the Prosecution’s submission on the Defence’s arguments raised at the confirmation of charges hearing.²

2. At the outset, the Legal Representatives recall that, in accordance with the constant jurisprudence of the Court, *“the personal interests of victims are affected by the outcome of the pre-trial stage of the case insofar as this is an essential stage of the proceedings which aims to determine whether there is sufficient evidence providing substantial grounds to believe that the suspect is responsible for the crimes with which he has been charged by the Prosecution”*.³

3. While victims’ interests are to some extent common with the ones of the Prosecutor, victims undoubtedly have an independent voice in the Court’s proceedings - including *vis-à-vis* the Prosecutor⁴ - and, accordingly, their role is unique.⁵

¹ See the “Decision on the Legal Representation of Victims” (Pre-Trial Chamber II), No. [ICC-01/14-01/18-205](#), 23 May 2019, p. 9 and the “Decision regarding the Registry’s First Assessment Report on Applications for Victim Participation, the Registry’s First Transmission of Group C Applications, the appointment of counsel for Victims of Other Crimes, and the victims’ procedural position” (Pre-Trial Chamber II), No. [ICC-01/14-01/18-227-Red](#), 21 June 2019, p. 14.

² See the “Prosecution Response to the Defence’s Confirmation Submissions” No. [ICC-01/14-01/18-376-Corr-Red](#), 8 October 2019 (the “Prosecution’s Response”).

³ See the “Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case” (Pre-Trial Chamber I, Single Judge), No. [ICC-02/05-02/09-121](#), 29 September 2009, para. 4. See also, the “Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case” (Pre-Trial Chamber I, Single Judge), No. [ICC-01/04-01/07-474](#), 13 May 2008, para. 45; the “Decision on the Prosecution, OPCD and OPCV Requests for Leave to Appeal the Decision on the Applications for Participation of Victims in the Proceedings in the Situation” (Pre-Trial Chamber I, Single Judge), No. [ICC-01/04-444](#), 6 February 2008, pp. 8 and 10; and the “Decision on the Requests for Leave to Appeal the Decision on the Application for Participation of Victims in the Proceedings in the Situation” (Pre-Trial Chamber I, Single Judge), No. [ICC-02/05-121](#), 6 February 2008, p. 6.

⁴ See the “Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6” (Pre-Trial Chamber I), No. [ICC-01/04-101-tEN-Corr](#), 17 January 2006,

4. The very interest of the Prosecutor in the proceedings is to bring evidence with the aim to prove that the suspect/accused is criminally responsible under the Statute for the crimes charged.⁶ In contrast, besides the interest to receive reparations⁷ - which is far from being the sole motivation for victims to participate⁸ - the core interest of victims in the proceedings is to effectively exercise their rights to truth and justice. These rights having been generally recognised by international human rights

para. 51; and the “Decision on “Prosecutor’s Application to attend 12 February hearing”” (Pre-Trial Chamber II, Single Judge), No. [ICC-02/04-01/05-155](#), 9 February 2007, p. 4.

⁵ See the “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’” (Appeals Chamber), No. [ICC-01/04-01/06-824 OA7](#), 13 February 2007, para. 55.

⁶ See the “Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008” (Appeals Chamber), No. [ICC-01/04-01/06-1432 OA9 OA10](#), 11 July 2008, para. 93.

⁷ In this sense, see AMBOS (K.), “El Marco Jurídico de la Justicia de Transición”, Tenus, Bogotá, 2008, notes 107-112. See also the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly of the United Nations in its resolution No. 60/147 in the 64th plenary meeting, UN Doc. A/RES/60/147, 16 December 2005, par. 21.

⁸ See the Note prepared by the former Special Rapporteur of the Sub-Commission, Mr. Theo van Boven, in accordance with paragraph 2 of Sub-Commission resolution 1996/28, UN Doc. E/CN.4/1997/104, 16 January 1997, pp. 2-5. See also the Final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, Question of the impunity of perpetrators of human rights violations (civil and political), UN Doc. E/CN.4/Sub.2/1997/20, 26 June 1997, pp. 3-31. See also the “Decision on victims’ participation” (Trial Chamber I), 18 January 2008, No. [ICC-01/04-01/06-1119](#), para. 98.

law,⁹ doctrine¹⁰ and the constant jurisprudence of the Court as essential for the persons directly affected by the crimes committed.¹¹

5. The participation of victims in the proceedings before the Court in an effective and efficient manner is therefore a necessary mechanism to implement their right to justice and is an essential tool for the full realisation of the other elements of that right, namely to know the truth and to obtain reparations.¹² Such participation can only be deemed meaningful, rather than purely symbolic, if victims are entitled to positively contribute to the search for the truth – which may, in turn, possibly lead to the punishment of the responsible individuals and the reparation of the harm they caused. In this respect, any form of positive contribution from victims appears indispensable for the accomplishment of the Court's function.¹³

6. In this perspective, the Legal Representatives will address in the present observations the issue of the existence of the common plan and the targeting of the Muslim civilian population; the legal interpretation of certain elements of the crimes

⁹ See IACHR, *La Cantuta v. Peru*, Judgment of 29 November 2006, Series C, No. 162, para. 222; *Vargas-Areco v. Paraguay*, Judgment of 26 September 2006, Series C, No. 155, paras. 153; *Almohacid-Arellano et al v. Chile*, Judgment of 26 September 2006, Series C, No. 154, para. 148; *Moiwana Community v. Suriname*, Judgment of 15 June 2005, Series C, No. 124, para. 204; and *Velasquez-Rodriguez v. Honduras*, Judgment of 29 July 1988, Series C, No. 7, paras. 162-166 and 174. See also ECHR, *Hugh Jordan v. UK*, Application No. 24746/94, 4 May 2001, paras. 16, 23, 157 and 160; *Selmouni v. France*, Application No. 25803/94, 28 July 1999, para. 79; *Kurt v. Turkey*, Application No. 24276/94, 25 May 1998, para. 140; *Selcuk and Asker v. Turkey*, Application No. 23184/94, 24 April 1998, para. 96; *Aydin v. Turkey*, Application No. 23178/94, 25 September 1997, para. 103; and *Aksoy v. Turkey*, Application No. 21987/93, 18 December 1996, para. 98.

¹⁰ See DONAT-CATTIN (D.), "Article 68", in TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 3rd Edition, C. H. Beck Verlag, 2016, pp. 1683-1695; NAQVI (Y.), "The Right to the Truth in International Law: Fact or Fiction?", in (2006) *ICRC International Review*, No. 88, pp. 267-268; MENDEZ (J.), "The Right to Truth", in JOYNER (Ch.) (ed.), *Reigning in Impunity for International Crimes and Serious Violations of Fundamental Human Rights' Proceedings of the Siracusa Conference*, 17-21 September 1998, Eres, Toulouse, 1998, pp. 257; and AMBOS (K.), "El Marco Jurídico de la Justicia de Transición", *op. cit. supra* note 7, pp. 42-44.

¹¹ See, for instance, the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case", *supra* note 3, paras. 31-44.

¹² See DONAT-CATTIN (D.), "Article 68", in TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 3rd Edition, C. H. Beck Verlag, 2016, pp. 1696, 1697, and 1710.

¹³ *Idem*, p. 1280.

charged and the necessary threshold at this stage of the proceedings to confirm the charges.

7. The Legal Representatives posit that the evidence presented by the Prosecution establishes substantial grounds to believe that the Suspects committed each of the crimes charged and that they should thus be committed to trial. In particular, the Legal Representatives submit that the evidence establishes the existence of a common plan to take or re-take power in the Central African Republic (“CAR”) to which both Suspects made an essential contribution. In implementing said common plan, the Suspects knew that in the ordinary course of the events a widespread and systematic attack would take place against the Muslim civilian population considered to be accomplices or supporters of the Seleka by reason of their religion or ethnicity.

8. Lastly, the Legal Representatives note that, despite the Defence’s efforts to shield Mr Ngaïssona from liability presenting a handful of purportedly exculpatory elements, the evidence in the record of the case clearly supports the conclusion that the Suspect had a role in the common plan. Indeed, the potentially exculpatory elements presented by the Defence do not overcome the abundant and coherent incriminatory evidence. This is particularly true at this stage of the proceedings, where the Chamber has simply to assess whether the Prosecution has offered *“concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations”*.¹⁴

II. PROCEDURAL BACKGROUND

9. On 20 February 2019, Pre-Trial Chamber II (the “Chamber”) joined the case of Mr Yekatom with that of Mr Ngaïssona.¹⁵

¹⁴ See *infra* note 129.

¹⁵ See the “Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters” (Pre-Trial Chamber II), No. [ICC-01/14-01/18-87](#), 20 February 2019.

10. On 5 March 2019, the Chamber issued the “Decision Establishing the Principles Applicable to Victims’ Applications for Participation”.¹⁶

11. On 23 May 2019, the Chamber issued the “Decision on the Legal Representation of Victims” deciding, *inter alia*, to appoint a counsel from the OPCV to act as the Common Legal Representative of the Former Child Soldiers.¹⁷ On 21 June 2019, the Chamber appointed the Common Legal Representatives of Victims of Other Crimes than the former child soldiers and authorised the participation of 15 victims in the proceedings.¹⁸

12. On 9 July 2019, the Common Legal Representatives filed the Victims’ views and concerns in relation to [REDACTED].¹⁹

13. On 19 August 2019, the Prosecution filed the Document containing the charges.²⁰

14. On 13 September 2019, the Common Legal Representatives filed their submissions in accordance with rule 121(9) of the Rules of Procedure and Evidence.²¹

15. Between 19 and 24 September 2019, the Chamber held the confirmation of charges hearing. On 24 September 2019, the Chamber issued an oral decision instructing (i) the Prosecution to respond in writing to the arguments presented by

¹⁶ See the “Decision Establishing the Principles Applicable to Victims’ Applications for Participation” (Pre-Trial Chamber II), No. [ICC-01/14-01/18-141](#), 5 March 2019.

¹⁷ See the “Decision on the Legal Representation of Victims” (Pre-Trial Chamber II), No. [ICC-01/14-01/18-205](#), 23 May 2019, p. 9.

¹⁸ See the “Decision regarding the Registry’s First Assessment Report on Applications for Victim Participation, the Registry’s First Transmission of Group C Applications, the appointment of counsel for Victims of Other Crimes, and the victims’ procedural position” (Pre-Trial Chamber II), No. [ICC-01/14-01/18-227-Red](#), 21 June 2019.

¹⁹ See the “Victims’ Views and Concerns arising from the Prosecution’s Additional Observations on the Registry’s First Assessment Report on Applications for Victims’ Participation in Pre-Trial Proceedings”, No. ICC-01/14-01/18-239-Conf, 9 July 2019.

²⁰ See the “Prosecution’s Notification of Filing of the Document Containing the Charges and List of Evidence”, No. [ICC01/14-01/18-282-AnxB1-Red](#), 18 September 2019 (the “Document Containing the Charges”).

²¹ See the “Soumissions écrites des Représentants légaux communs des Victimes en vertu de la règle 121-9 du Règlement de procédure et de preuve”, No. ICC-01/14-01/18-336-Conf, 13 September 2019. A public redacted version was filed on 15 October 2019. See [ICC-01/14-01/18-336-Red](#).

the Defence of Mr Yekatom and the Defence of Mr Ngaïssona at said hearing by 3 October 2019; (ii) the Defence and the Common Legal Representatives to respond to the Prosecution's submissions by 10 October 2019, and (iii) reconvening the hearing for the closing statements of the parties and participants on 11 October 2019.

16. On 3 October 2019, the Prosecution filed its Response to the arguments raised by the Defence at the confirmation of charges hearing (the "Prosecution's Response").²²

III. CONFIDENTIALITY

17. Pursuant to regulations 23*bis*(1) and (2) of the Regulations of the Court, the present observations are filed confidential following the classification chosen by the Prosecution and because it refers to documents bearing the same level of classification. A public redacted version will be filed in due course.

IV. SUBMISSIONS

18. The Legal Representatives recall their previous submissions on matters related to the confirmation of charges²³ and support the arguments put forward by the Prosecution in its Response.

1. On the existence of a common plan and the role of Mr Ngaïssona

19. The Legal Representatives contend that there are substantial grounds to believe that Mr Ngaïssona is individually criminal responsible as indirect co-perpetrator under article 25(3)(a) of the Statute, as alleged by the Prosecution. Mr Ngaïssona entered into a common plan with the other co-perpetrators knowing that its implementation would, in the ordinary course of events, result in the violent targeting of the Muslim civilian population in western CAR and the commission of the crimes charged.

²² See the Prosecution's Response, *supra* note 2.

²³ See notes 19 and 21.

20. In the current case, the concept of indirect co-perpetration entails a form of liability where the common plan - or the common plans - is executed *“through other persons who function as tool of all of the co-perpetrators”*.²⁴ The Appeals Chamber has clarified that the commission ‘through another person’ entails *“the underlying assumption that the accused makes use of another person, who actually carries out the incriminated conduct, by virtue of the accused’s control over that person, and the latter’s conduct is therefore imputed on the former”*.²⁵ Thus, it is not required that a person carry out directly and personally the incriminated conduct in order to be a perpetrator.²⁶ The person though must have a control over the crime, by virtue of his or her essential contribution to it and the resulting power to frustrate its commission.²⁷

21. According to the analysis of the Appeals Chamber in the *Lubanga* and in other cases before the Court,²⁸ individual criminal responsibility for commission of a crime jointly with another person and/or through another person requires the following objective legal elements: *“(i) the existence of an agreement or common plan, between the accused and one [sic] of more other persons, to commit the crimes or to engage in a conduct which, in the ordinary course of events, would result in the commission of the crimes; and (ii) the control of the members of the common plan over a person or persons who execute the material elements of the crimes by subjugating the will of the direct perpetrators”*.²⁹

22. As regards the requirement of an agreement in order to establish that a suspect committed a crime under the jurisdiction of the Court, the Chambers found that the agreement *“can take the form of a common plan”*³⁰ and that it can be *“express or*

²⁴ See the “Judgment” (Trial Chamber VI), No. [ICC-01/04-02/06-2359](#), 8 July 2019, para. 772 (the “Ntaganda Trial Judgment”).

²⁵ See the “Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction” (Appeals Chamber), No. [ICC-01/04-01/06-3121-Red A5](#), 1 December 2014, para. 465 (the “Lubanga Appeal Judgment”).

²⁶ See the Ntaganda Trial Judgment, *supra* note 24, para. 773.

²⁷ *Idem*, para. 774. See also the Lubanga Appeal Judgment, *supra* note 25, para. 7; and the “Judgment pursuant to article 74 of the Statute” (Trial Chamber II), No. [ICC-01/04-01/07-3436-tENG](#), 20 April 2015, para. 1396 (the “Katanga Trial Judgment”).

²⁸ See, *inter alia*, the Ntaganda Trial Judgment, *supra* note 24; the Lubanga Appeal Judgment, *supra* note 25; and the Katanga Trial Judgment, *supra* note 27.

²⁹ See the Ntaganda Trial Judgment, *supra* note 24, para. 774 (Emphasis added).

³⁰ *Idem*, para. 775. See also Lubanga Appeal Judgment, *supra* note 25, para. 445.

implied, previously arranged or materialising extemporaneously".³¹ The co-perpetrators are thus tied together and reciprocally imputable of their respective acts, no matter how the common plan was conceived or took otherwise form.³²

23. Accordingly, it has been argued that co-perpetration is "*characterized by a functional division of the criminal tasks between the different (at least two) perpetrators, who are normally interrelated by a common plan or agreement. Every co-perpetrator fulfils a certain task which contributes to the commission of the crime and without which the commission would not be possible. The common plan or agreement forms the basis of a reciprocal or mutual attribution of the different contributions holding every co-perpetrator responsible for the whole crime*".³³ Another commentator agreed that "*co-perpetration connotes two or more perpetrators who each contribute to the commission of the crime. Their co-operation must be close as their contribution are mutually attributed, holding each co-perpetrator responsible for the whole crime*".³⁴

24. Moreover, it is not required that the common plan be criminal in itself or *specifically directed* at the commission of a crime.³⁵ Instead, according to the relevant jurisprudence, it suffices that the common plan contains a critical element of criminality – *i.e.* a conduct that in the ordinary course of the events would lead to the commission of the crimes at issue.³⁶

25. Finally, as a last requirement for the commission of crimes through another person within the meaning of article 25(3)(a) of the Statute, it may be necessary to

³¹ *Ibid.*

³² *Ibid.* See AMBOS (K.), Article 25 – Individual Criminal Responsibility", in TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article*, 3rd Edition, C. H. Beck Verlag, 2016, p. 988. See SLIEDREGT (E.V.), *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, Asser Press, The Hague, 2003, p. 72.

³³ See AMBOS (K.), Article 25 – Individual Criminal Responsibility", in TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article*, 3rd Edition, C. H. Beck Verlag, 2016, p. 988.

³⁴ See SLIEDREGT (E.V.), *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, Asser Press, The Hague, 2003, p. 72.

³⁵ See the Ntaganda Trial Judgment, *supra* note 24, para. 776. See also the Lubanga Appeal Judgment, *supra* note 25, para. 446.

³⁶ See the Lubanga Appeal Judgment, *supra* note 25, paras. 446 and 452. See also the Ntaganda Trial Judgment, *supra* note 24, para. 776.

establish the existence of an organisation used to subjugate the will of the direct perpetrators.³⁷ In such a case, Chambers of this Court have found that “*the potential physical perpetrators are interchangeable within the organisation*”³⁸ and that the criterion of control means that the indirect perpetrator “*had control over the crime, [...] even if his essential contribution was not made at the execution stage of the crime*”.³⁹

26. Turning to the current case and to the allegations of the Defence for Mr Ngaïssona on the non-existence of a common plan, the Legal Representatives share the Prosecution’s narrative of the events and submit the following additional observations in the interest of the Victims.

27. First, the Defence’s argument that [REDACTED] would contradict the Prosecution’s theory is misleading and, indeed, misrepresents the charges against Mr Ngaïssona. The Suspect is not charged with having initiated those violent movements of armed defence, instead Mr Ngaïssona is alleged to have *instrumentalised* the pre-existing self-defence groups and to have *enhanced* and *promoted* their actions;⁴⁰ with the aim of claiming political power in CAR and with the knowledge that engaging in such conduct would, in the ordinary course of events, result in the violent targeting of the Muslim civilian population in western CAR and the commission of the crimes as charged.

28. The Defence’s argument regarding the ethnicity of the Anti-Balaka, and that many individuals within the ranks of the Anti-Balaka [REDACTED],⁴¹ has no substance. It ignores that it is the person(s) conceiving the common plan who matter in terms of ascribing article 25(3)(a) responsibility to Mr Ngaïssona. The Document Containing the Charges contains sufficient evidence showing that those key

³⁷ See the Ntaganda Trial Judgment, *supra* note 24, para. 778.

³⁸ *Idem*.

³⁹ See the Lubanga Appeal Judgment, *supra* note 25, para. 473. See also the Ntaganda Trial Judgment, *supra* note 24, para. 779.

⁴⁰ See the Document Containing the Charges, *supra* note 20, para. 3.

⁴¹ [REDACTED]

members were indeed mainly of [REDACTED] ethnicity.⁴² The ethnicity of the Anti-Balaka as such is secondary in this regard.

29. Furthermore, the Defence cites the statement of [REDACTED] in support of its contention that there were Muslims within the ranks of the Anti-Balaka. This citation is entirely taken out of context. The witness indeed [REDACTED].⁴³ He does not substantiate his opinion in any way. In any case, it is a fact that practically all victims - including organisations - of the other crimes participating in the proceedings are Muslims. The Legal Representative for Child Soldiers further notes that over 80% of the child soldiers participating in the proceedings that were enlisted in the ranks of the Anti-Balaka are of [REDACTED].

30. By the same token, the Defence's arguments on the existence of numerous self-organised defence groups,⁴⁴ or sub-groups, are immaterial and do not contradict the evidence that Mr Ngaïssona was among the founders of COCORA and COAC. Accordingly, and contrary to the Defence's allegations in this regard,⁴⁵ the Prosecution explains at length that the self-defence movements began as a response to the brutality of the Seleka forces and as such pre-dated the two KNK-based militias of COCORA and COAC.⁴⁶ The latter, however, are nothing more than an organised, well equipped and trained version of those spontaneous self-defence groups. Mr Ngaïssona essentially contributed to the process of founding and arming COCORA and COAC. Contrary to the Defence's allegations on the insufficiency of the evidence,⁴⁷ this finding is corroborated by direct witnesses [REDACTED]⁴⁸ and [REDACTED]⁴⁹ - UN,⁵⁰ NGOs⁵¹ and media reports.⁵²

⁴² See the Document Containing the Charges, para. 5 and footnotes cited therein. [REDACTED].

⁴³ [REDACTED].

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ See e.g. the Document Containing the Charges, *supra* note 20, paras. 3, 15 and 121.

⁴⁷ See the transcripts of the hearing held on 23 September 2019, No. [ICC-01/14-01/18-T-008-Red-ENG WT](#), page 80, lines 15-25.

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

31. In relation to the Defence's arguments on the use of UN and NGO reports as evidence,⁵³ the Legal Representative note that article 61(5) of the Statute expressly provides that the Prosecutor may, for the purpose of the confirmation hearing, *"rely on documentary or summary of evidence and need not to call the witnesses expected to testify at the trial"*.⁵⁴

32. The mentioned provision has found consistent application in the Court's jurisprudence relevant to the stage of the confirmation of the charges. In the *Katanga and Ngudjolo Chui* case, Pre-Trial Chamber I, in assessing whether the attack against the civilian population of Bogoro was part of a widespread campaign of military attacks against civilians in the large geographical area of Ituri, heavily relied on NGO and UN reports.⁵⁵ In particular, the Chamber defined the context surrounding the Bogoro attack on the basis of facts reported by Human Rights Watch⁵⁶ and the UN Security Council,⁵⁷ regarding previous killings of civilians throughout the region. Furthermore, it referred to killings that occurred in the same region during the month following the attack against Bogoro, as described in the above-mentioned documents, as well as in reports from the UN General Assembly and the DRC Panel on Exploitation of Natural Resources.⁵⁸ The Chamber also found that there were substantial grounds to believe that further killings were committed in the same region more than five months after the attack against Bogoro – *i.e.* until July 2003. In reaching this conclusion, once again the Chamber made explicit reference to (i) two

⁵² [REDACTED].

⁵³ See the transcripts of the hearing held on 23 September 2019, No. [ICC-01/14-01/18-T-008-Red-ENG WT](#), page 83, lines 9-18.

⁵⁴ Article 61(5) of the Statute.

⁵⁵ See the "Decision on the confirmation of charges" (Pre-Trial Chamber I), No. [ICC-01/04-01/07-717](#), 1 October 2008, paras. 409-411.

⁵⁶ *Idem*, para. 410; and footnote 535, referring to Human Rights Watch report: Ituri: "Covered in Blood" - Ethnically Targeted Violence in North-eastern DR Congo, vol. 15, No. 11 (A), New York, July 2003.

⁵⁷ *Ibid.*, para. 410, footnote 536, referring to UN Security Council, Special report on the events in Ituri, January 2002 - December 2003, UN doc. S/2004/573, 16 July 2004.

⁵⁸ *Ibid.*, para. 410, footnote 537, referring to UN General Assembly, *Rapport intérimaire de la Rapporteuse spéciale sur la situation des droits de l'homme en République démocratique du Congo*, UN doc. A/58/534, 24 October 2003; and the DRC Panel on Exploitation of Natural Resources, Ituri Province Follow Up, 28 July 2003.

reports from the UN Security Council;⁵⁹ (ii) two further reports from Human Rights Watch;⁶⁰ (iii) a report from the MONUC⁶¹; and (iv) a report from the UN General Assembly.⁶² Reference to other kind of evidence, *i.e.* witnesses statements and transcripts thereof, in establishing the context in which the attack against Bogoro took place, is very limited in that decision.

33. The reports mentioned were deemed to constitute sufficient proof of the necessary context to establish an “*attack against any civilian population*”. It is mainly through facts stemming from NGO reports and official UN documents that the Pre-Trial Chamber reached the conclusion in the *Katanga and Ngudjolo Chui* case that there was sufficient evidence to establish substantial grounds to believe that the attack against the civilian population of Bogoro was part of a systematic attack directed against the civilian population in the region of Ituri in the Democratic Republic of Congo.⁶³

34. Moreover, in the *Bemba* case, Pre-Trial Chamber II found that there was sufficient evidence with regard to the existence of an “*attack*” in the CAR territory from on or about 26 October 2002 to 15 March 2003.⁶⁴ In particular, the Chamber stated that “*the existence of an attack was demonstrated by the commission of many criminal acts referred to in article 7(1) of the Statute, [and] established by numerous reliable direct*

⁵⁹ *Ibid.*, para. 411; and footnote 539, referring to UN Security Council, *Troisième rapport spécial du Secrétaire général sur la Mission de l’Organisation des Nations Unies en République démocratique du Congo*, UN doc. S/2004/640, 16 August 2004; and UN Security Council, Special report on the events in Ituri, January 2002-December 2003, UN doc. S/2004/573, 16 July 2004.

⁶⁰ *Ibid.*, para. 411; and footnote 539, referring to Human Rights Watch, *Le Fléau de l’Or*, June 2005; and footnote 540, referring to Human Rights Watch report: Ituri: “Covered in Blood” - Ethnically Targeted Violence In North-eastern DR Congo, vol. 15, No. 11 (A), New York, July 2003.

⁶¹ *Ibid.*, para. 411; and footnote 540, referring to MONUC, Special investigations on Human Rights Situation in Ituri, June 2003.

⁶² *Ibid.*, para. 411; and footnotes 537 and 540, referring to UN General Assembly, *Rapport intérimaire de la Rapporteuse spéciale sur la situation des droits de l’homme en République démocratique du Congo*, UN doc. A/58/534, 24 October 2003.

⁶³ *Ibid.*, para. 411.

⁶⁴ See the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo” (Pre-Trial Chamber II), No. [ICC-01/05-01/08-424](#), para. 91.

and indirect pieces of evidence".⁶⁵ In making this determination, the Chamber examined the disclosed evidence relevant to the means and methods used in the course of the attack, the status of the victims, their number, the nature of the crimes committed and the resistance to the assailants at the time.⁶⁶ The Chamber further relied on witness statements, as well as on several reports, radio broadcasts and press articles.⁶⁷ In establishing the existence of a widespread attack against the civilian population, the Chamber also referred succinctly to attacks by the *Mouvement pour la Libération du Congo* in various locations reported by direct witnesses and corroborated by indirect evidence.⁶⁸

35. In the case of *The Prosecutor v. William Samoei Ruto, Henri Kiprono Kosgey and Joshua Arap Sang*, Pre-Trial Chamber II assessed the widespread nature of the attack against the civilian population by referring, *inter alia*, to the Final Report from the Commission of Inquiry into the Post-Election Violence (the "CIPEV")⁶⁹ to establish that there was a number of victims in the Nandi and Uasin Gishu Districts.⁷⁰ Moreover, the Chamber relied on the statements of two witnesses, the above-mentioned report from the CIPEV and one press article from the Daily Nation⁷¹ to establish further killings in Turbo Town and the Eldoret area.⁷² Pre-Trial Chamber II attributed sufficient probative value to NGOs reports and press articles to establish at least three "*incidents*", which took place in three different places, when assessing the

⁶⁵ *Idem*, para. 92.

⁶⁶ *Ibid.*, para. 95.

⁶⁷ *Ibid.*, para. 94, footnote 118, referring to the United Nations Development Programme project, United Nations Resident Coordinator weekly reports, AI and FIDH reports, BBC press articles, press articles of "*Le Quotidien*" and "*Jeune Afrique*", and Radio France International radio broadcasts, including, for instance, the *Federation Internationale des Liges des Droits de l'Homme*, "Central African Republic, Forgotten, stigmatised: the double suffering of victims of international crimes", 1 October 2006, available at <https://www.fidh.org/en/region/Africa/Forgotten-stigmatised-the-double>.

⁶⁸ *Idem*, para. 94, footnotes 117-118.

⁶⁹ See the CIPEV Report, 16 October 2008, available at <http://reliefweb.int/report/kenya/kenya-commission-inquiry-post-election-violence-cipev-final-report>.

⁷⁰ See the "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute" (Pre-Trial Chamber II), No. [ICC-01/09-01/11-373](https://www.icc-cpi.org/record/publications/11-373), 23 January 2012, para. 177 and in particular footnote 254.

⁷¹ *Idem*, par. 178, footnote 255, referring to Daily Nation, "Kenya: Darkest Day in History of a Humble Church", 26 October 2008, available at <http://www.nation.co.ke/News/politics/-/1064/484326/-/item/0/-/o12pc1/-/index.html>.

⁷² *Ibid.*, para. 178 and in particular footnote 255.

contextual elements of the crimes against humanity of which Mr Ruto and Mr Sang were suspected.⁷³

36. Furthermore, in the case of the *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Pre-Trial Chamber II referred to only two statements of two Prosecution witnesses, one non-ICC witness statement placed before it in form of a summary⁷⁴ and heavily relied on reports.⁷⁵ Once again, the Chamber attributed sufficient probative value to NGOs reports and press articles to establish substantial grounds to believe that the contextual elements common to all crimes against humanity were fulfilled.

37. The same approach has constantly been taken by the *ad hoc* tribunals. For instance, in the *Dragomir Milošević* case, the ICTY was satisfied that the requirement of an “*attack against a civilian population*” was met on the general basis of an “*abundance of evidence of attacks by SRK troops*”,⁷⁶ referring without evidentiary detail to several incidents of sniping and shelling.⁷⁷ In the *Lukić and Lukić* case, the ICTY determined that “*evidence on specific non-indicted crimes will be taken into account when determining whether the Prosecution has satisfied the general requirements of Article 5 of the Statute [crimes against humanity]*”.⁷⁸ Accordingly, relying on ICRC reports and the testimony of a demographic expert, the Trial Chamber concluded that an “*attack*”

⁷³ *Ibid.*, paras. 176-180; footnotes 254-256.

⁷⁴ See the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” (Pre-Trial Chamber II), No. [ICC-01/09-02/11-382-Red](#), 26 January 2012, para. 120.

⁷⁵ *Idem*, paras. 120-122, referring to the National Security Intelligence Service Situation Report for 28 January 2008; the Kenya National Commission on Human Rights Final Report equally reports Mungiki involvement in a wave of violence which erupted on 25 January 2008; Human Rights Watch report entitled “*Ballots to Bullets*” refers to “*co-ordinated attacks of January 24-26*” in Nakuru, and attributes these attacks to the Mungiki, <http://www.hrw.org/reports/2008/03/16/ballots-bullets>, 17 March 2008; the United Nations Office of the High Commissioner for Human Rights report entitled “Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008”, http://www.ohchr.org/Documents/Press/OH_CHRKenyaareport.pdf; the International Crisis Group Report entitled “*Kenya in Crisis*”, 21 February 2008. Pre-Trial Chamber II relied on the same reports to establish the attacks in or around Naivasha, see the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, *supra* note 74, para. 136.

⁷⁶ See ICTY, *The Prosecutor v. Dragomir Milošević*, Case No. [IT-98-29/1-T](#), Judgement (Trial Chamber III), 12 December 2007, para. 917.

⁷⁷ *Idem*, paras. 927-928.

⁷⁸ See ICTY, *The Prosecutor v. Milan Lukić and Sredoje Lukić*, [IT-98-32/1-T](#), Judgement (Trial Chamber III), 20 July 2009, para. 890.

against the Muslim civilian population in Višegrad during June and July 1992 took place and that the crimes allegedly committed by the accused were part of.⁷⁹ In *Mrkšić, Radić and Šljivančanin*, an ICTY Chamber followed the same approach and referred to particular periods of time and particular locations to conclude that “*the Serb forces were, in part, directing their attack on Vukovar, which included much difficult building-by-building fighting, and the immediately surrounding villages (some in truth more like suburbs of the city of Vukovar), as well at the comparatively small and very poorly armed and organised Croatian forces that were against them*”.⁸⁰ The Chamber did not refer to specific “*incidents*” to analyse the contextual element of the alleged crime against humanity, after concluding that “*no exact count of the number of civilians or of the number of members of the opposing forces who were killed can be given*”.⁸¹ Instead, the Trial Chamber considered that “[t]he events, when viewed overall, disclose an attack [...] directed against the Croat and other non-Serb civilian population in the wider Vukovar area”.⁸² The ICTR adopted a similar approach in the *Bagosora et al.* case, where it “*considered the totality of the evidence, in particular concerning the ethnic composition of the individuals who sought refuge at various sites as well as the actual or perceived political leanings of many of those killed or singled out at roadblocks in the days after President Habyarimana’s death*” to conclude the existence of “*attacks against the civilian population on ethnic and political grounds between April and July 1994*”.⁸³

38. Turning to the Defence’s arguments on the lack of organisation for the purposes of the establishment of a common plan, the Legal Representatives wish to recall the following evidence in the record of the case supporting the charges.

⁷⁹ *Idem*, paras. 890-895.

⁸⁰ See ICTY, *The Prosecutor v. Mrkšić, Radić and Šljivančanin*, [IT-95-13/1-T](#), Judgement (Trial Chamber II), 27 September 2007, para. 470.

⁸¹ *Idem*, para. 469.

⁸² *Ibid.*, para. 470. (Emphasis added).

⁸³ See ICTR, *The Prosecutor v. Bagosora et al.*, [ICTR-98-41-T](#), Judgment and Sentence (Trial Chamber I), 18 December 2008, para. 2167. (Emphasis added). This approach was ratified by the Appeals Chamber. See *Bagosora and Nsengiyumva v. The Prosecutor*, [ICTR-98-41-A](#), Judgement (Appeals Chamber), 14 December 2011, para. 390.

COCORA and COAC together with other groups⁸⁴ were part of the larger Anti-Balaka movement that counted a well-defined political and military leadership and coordination.⁸⁵ Mr Ngaïssona - first as founder of COCORA and then as elected General Coordinator of the Anti-Balaka fighters ("*Coordinateur Général des Combattants Antibalaka*") - ⁸⁶ essentially contributed to mobilising and streamlining self-defence groups to forge varying and evolving military alliances.

39. Contrary to the preposterous submissions of the Defence for Mr Ngaïssona,⁸⁷ the Anti-Balaka group existed, was organised, equipped and well-coordinated. Mr Ngaïssona not only contributed through his role of General Coordinator but - also by virtue of his presidency of the football association - he had regular contacts and great influence on the youth leaders on the ground;⁸⁸ and he instructed them to mobilise and organise the youth into self-defence groups.⁸⁹

40. Moreover, Mr Ngaïssona financed the Anti-Balaka. He provided funds for [REDACTED]⁹⁰ He also provided funds for [REDACTED].⁹¹

41. After Mr Bozizé [REDACTED] Yaoundé from where he gave orders and mission plans to Anti-Balaka elements on the ground in CAR. He did so by telephone. Mr Ngaïssona also [REDACTED].⁹²

42. Mr Ngaïssona did so in order to claim political power by increasing the threat that those groups posed to the central government and strengthening his negotiation power. Mr Ngaïssona chose to ride the wave of anti-Muslim sentiments in the

⁸⁴ See, *inter alia*, four identified groups by the UN Panel of Experts on Central African Republic, [REDACTED]. See also the "Enough" Report of August 2017 on "Alliances, affiliations, and agendas of armed factions and politico-military groups in the Central African Republic", [REDACTED].

⁸⁵ [REDACTED] indicating names and functions of various political and military Anti-Balaka leaders.

⁸⁶ [REDACTED].

⁸⁷ See the transcripts of the hearing held on 23 September 2019, No. [ICC-01/14-01/18-T-008-Red-ENG WT](#), page 71, lines 14-18.

⁸⁸ [REDACTED].

⁸⁹ [REDACTED].

⁹⁰ [REDACTED].

⁹¹ [REDACTED].

⁹² [REDACTED].

society, justifying the existence of Anti-Balaka groups with the threat that Seleka factions represented for the non-Muslim community. Mr Ngaïssona knew that engaging in such a conduct would, in the ordinary course of the events, involve the commission of widespread atrocities against civilians of Muslim faith and fratricidal struggles.

43. In light of the above, the Legal Representatives contend that the potentially exculpatory elements brought forward by the Defence for Ngaïssona do not overcome the numerous coherent incriminatory elements in the record of the case, which show that the Suspect is individually criminal responsible as indirect co-perpetrator under article 25(3)(a) of the Statute, as alleged by the Prosecution.

2. On the legal matters raised by the Defence of Mr Yekatom

a) Displacement of civilians - article 8(2)(e)(viii)

44. The Defence for Mr Yekatom argues that the war crime of displacement of the civilian population under article 8(2)(e)(viii) of the Statute requires an explicit order and that an order to attack a location or pillage a village will not be sufficient for constituting the crime.⁹³

45. The Legal Representatives recall that in the *Ntaganda* case Trial Chamber VI found that: “[t]he issuance of an order within the political or military chain of command is sufficient and the order does not need to be made to the civilian population for the crime to be established. The order itself 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. The order need not necessarily be issued in writing and may be transmitted through a variety of means, to be determined on a case-by-case basis”.⁹⁴

⁹³ See the transcripts of the hearing held on 23 September 2019, No. [ICC-01/14-01/18-T-008-Red-ENG](#), page 39, lines 15 to 23.

⁹⁴ See the *Ntaganda* Trial Judgment, *supra* note 24, paras. 1081 and 1082.

46. The Defence does not provide any valid justification to depart from this interpretation.⁹⁵

47. The Legal Representatives contend that the restrictive interpretation advocated by the Defence runs contrary to the spirit of the Statute and that any order having the effect of forcing the civilian population to move is sufficient for the purpose of article 8(2)(e)(viii). In this regard, it is worth recalling that said provision has been transposed from article 17(1) of the Second Additional Protocol to the Geneva Conventions, which does not require an order.

48. In this regard, it has been argued that : “[...] *requiring an order to be addressed to the civilian population is neither an interpretation in good faith nor in accordance with the object and purpose of Additional Protocol II to ‘ensure a better protection for the victims of [...] armed conflicts’.* This is the case because such a requirement would encourage governments to use indirect means of coercion to displace the civilian population. Indeed, the travaux préparatoires support the view that displacement caused by indiscriminate military operations is prohibited too”.⁹⁶

49. The Legal Representatives submit that the same reasoning should apply *mutatis mutandis* to the interpretation of article 8(2)(e)(viii) by virtue of the obligation under international humanitarian law to protect the civilian population.

50. In this regard, the Legal Representatives underline that the accounts of the Victims they represent corroborate the evidence presented by the Prosecution on the displacement of Muslim civilians from their places of residence. Hundreds of participating victims recall that they were forced to flee abandoning their goods and sometimes their relatives to survive. Starting in December 2013, Muslims targeted by the Anti-Balaka – including by groups led or under the control of the Suspects – organised themselves to escape their systematic extermination. The exodus was

⁹⁵ See the transcript of the hearing held on 23 September 2019, No. [ICC-01/14-01/18-T-008-Red-ENG WT](#), page 41, lines 1-10.

⁹⁶ See WILLMS (J)., “Without order, anything goes? The prohibition of forced displacement in non-international armed conflict”, in 91 International Review of the Red Cross (2009), page 551.

organised into convoys headed north to Chad and, in small numbers, to Cameroon. These forced departures intensified through Chad's efforts to evacuate its nationals and convoys of refugees escorted by the Chadian army. In the months preceding their withdrawal from CAR – in May 2014 – the Chadian AFIMS-CAR contingent and the Chadian army escorted convoys of thousands of people fleeing CAR and were regularly engaged in armed clashes. These convoys faced numerous dangers; they were attacked in transit by Anti-Balaka and often lost passengers: Victims relate that where a lorry broke down, dozens of Anti-Balaka attacked it, killing all those unable to flee. Many others travelled to bordering countries on foot, walking for months.⁹⁷

51. The Muslims civilians did *“not have a free or genuine choice to remain in the territory where they were present”*.⁹⁸ This element has been considered by the jurisprudence of the *ad hoc* tribunals as integrating the crime of displacement, since the word ‘forcible’ has been interpreted to include threats or the use of the force, fear of violence and illegal detention.⁹⁹

52. Finally, the Legal Representatives note that there is evidence in the record of the case establishing that Mr Yekatom ordered to attack Muslims at the Boeing market and to destroy the mosque in Boeing. Said orders had the effect of forcing the civilian population to leave their locations.¹⁰⁰ Similarly, the Defence's argument according to which the presence of other groups would have broken the causal link¹⁰¹ is irrelevant in so far it is not necessary that the displacement of the civilian population be exclusively attributable to Mr Yekatom.

⁹⁷ See the transcripts of the hearing held on 23 September 2019, No. [ICC-01/14-01/18-T-008-Red-ENG WT](#), page 20, lines 11-12.

⁹⁸ See ICTY, *The Prosecutor v. Blagojević and Dragan Jokić*, Judgment (Trial Chamber), [IT-02-60-T](#), 17 January 2005, para. 596.

⁹⁹ *Idem*, paras. 596-598.

¹⁰⁰ See the Document Containing the Charges, *supra* note 20, para. 258: “Yekatom instructed his elements on the plan, telling them that they would attack Muslims and Seleka at the BOEING market”. Moreover, at para. 260 the Document indicates: “Yekatom gave specific instructions to his elements to ‘shoot the Muslims’ at the BOEING market and ordered them to destroy the BOEING mosque”.

¹⁰¹ See the transcript of the hearing held on 23 September 2019, No. [ICC-01/14-01/18-T-008-Red-ENG WT](#), page 43, lines 10-25.

b) *Imprisonment or other severe deprivation of physical liberty – article 7(1)(e)*

53. The Defence for Mr Yekatom contends that the incident related to [REDACTED]¹⁰² does not rise to the level of gravity required for crimes against humanity¹⁰³ - given [REDACTED].¹⁰⁴

54. The Legal Representatives contend that said interpretation of the elements of article 7(1)(e) of the Statute is erroneous. [REDACTED] to qualify such crime as crime against humanity. The Elements of Crimes do not contain any express indication on [REDACTED].¹⁰⁵

55. In this regard, Pre-Trial Chamber III already determined at the situation stage that [REDACTED].¹⁰⁶

56. With regard to the quantitative argument, the Legal Representatives posit that the Defence erred in law in arguing that [REDACTED]¹⁰⁷. The Elements of Crimes of article 7(1)(e) only requires that [REDACTED] (emphasis added). Furthermore, the severe deprivation of liberty or imprisonment in the present case was allegedly committed as part of a widespread or systematic attack directed against the civilian population,¹⁰⁸ which means that the Chamber will examine the contextual elements of crimes against humanity in light of the evidence and supporting material of the other crimes charged by the Prosecution under article 7 of the Statute. Therefore, one

¹⁰² [REDACTED].

¹⁰³ See the transcripts of the hearing held on 23 September 2019, No. [ICC-01/14-01/18-T-008-Red-ENG WT](#), page 44, lines 9-10.

¹⁰⁴ [REDACTED]

¹⁰⁵ See TRIFFTERER (O). and AMBOS (K). (eds.), *Commentary on the Rome Statute of the International Criminal Court*, 3rd Edition, Beck Publishing Munich, 2016 “[...] *One possibility could be something longer than short-term detentions, for a matter of days or « weeks », but recent history is rife with widespread or systematic short-term detentions where the conditions were severe, the detention secret or the short-term detentions repeated*”, p. 202.

¹⁰⁶ See the “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an investigation into the Situation in the Republic of Burundi” (Pre-Trial Chamber III), ICC-01/17-X-9-US-Exp, 25 October 2017, [No. ICC-01/17-9-Red](#), 9 November 2017, para[REDACTED] (the “Burundi Decision”).

¹⁰⁷ See the transcript of the hearing held on 23 September 2019, No. [ICC-01/14-01/18-T-008-Red-ENG WT](#), page 46, line 15.

¹⁰⁸ See the Document Containing the Charges, *supra* note 20, para. 240.

cannot reasonably conclude that the scale of the crimes on a specific incident is too insignificant to be qualified as crimes against humanity when looking at the other charges in the context of a widespread or systematic attack. This interpretation was also confirmed by the Appeals Chamber of the ICTR which determined that *“except for extermination, a crime need not be carried out against a multiplicity of victims in order to constitute a crime against humanity. Thus an act directed against a limited number of victims, or even against a single victim, can constitute a crime against humanity, provided it forms part of a widespread or systematic attack against a civilian population”*.¹⁰⁹

57. The Legal Representatives also recall that Trial Chamber VI found Mr Ntaganda guilty as a direct perpetrator under article 25(3)(a) of the Statute of the murder of one person¹¹⁰ as a crime against humanity under article 7(1)(a). Whereas the threshold of gravity is higher at the trial stage, the Judgement confirmed that the killing of only one person suffices to be qualified as crime against humanity, therefore contradicting *mutatis mutandis* the interpretation given by the Defence in this instance.

58. Moreover, as the plain wording of article 7(1)(e) suggests,[REDACTED]. In this regard, the Trial Chamber of the ICTY ruled that *“any form of arbitrary physical deprivation of liberty of an individual may constitute imprisonment [...] as long as the other requirements of the crime are fulfilled”*.¹¹¹

59. In the present case, the evidence supports the allegation that[REDACTED]. The Legal Representatives therefore submits that the *“gravity of the conduct was such that it was in violation of fundamental rules of international law”*.¹¹²

¹⁰⁹ See, ICTR, *The Prosecutor c. Nahimana and al*, Judgement (Appeals Chamber), [ICTR-99-52-A](#), 28 November 2007, para. 924.

¹¹⁰ See the Ntaganda Trial Judgment, *supra* note 94, paras. 529-534.

¹¹¹ See ICTY, *The Prosecutor v. Krnojelac*, Judgement (Trial Chamber), [IT-97-25-T](#), 15 March 2002, para. 112.

¹¹² *Cfr.* Article 7(1)(e)(2) of the Elements of Crimes. See also ICTY, *The Prosecutor v. Kordic and Cerkez*, Judgment (Trial Chamber), [IT-95-14/2-T](#), 26 February 2001, paras. 302-303: *“The Trial Chamber concludes that the term imprisonment in Article 5(e) of the Statute should be understood as arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population. In that respect, the Trial Chamber will have to*

60. The Legal Representatives further argue that[REDACTED].¹¹³

61. Regarding the Defence's argument on the[REDACTED],¹¹⁴ the Legal Representatives submit that - apart for being misleading - it is based again on an erroneous interpretation of the constitutive elements of the crime. The requirements are clear and have already been determined before this Court as follows :

"The Chamber understands 'imprisonment' to encompass unlawful captivity of a person in an enclosed environment, such as a prison or psychiatric institution; 'other severe deprivation of physical liberty' denotes the unlawful restriction of the person's movements to a specific area, such as a ghetto, camp or a house. Importantly, it is required that such deprivation of physical liberty is in violation of fundamental rules of international law, i.e. the person must have been deprived of his or her physical liberty without due process of law".¹¹⁵

62. [REDACTED]¹¹⁶ [REDACTED]¹¹⁷ [REDACTED].¹¹⁸ In light of the above, the Legal Representatives posit that [REDACTED] severe enough to reach the required threshold of gravity for crime against humanity.

c) Cumulative charges of torture and other inhumane acts (counts 11 and 12)

63. Regarding counts 11 and 12, the Defence for Mr Yekatom requests the Chamber to dismiss the crime of other inhumane acts [REDACTED].¹¹⁹ The Defence

determine the legality of imprisonment as well as the procedural safeguards pertaining to the subsequent imprisonment of the person or group of persons in question, before determining whether or not they occurred as part of a widespread or systematic attack directed against a civilian population. Based on the aforementioned definition, the imprisonment of civilians will be unlawful where: - civilians have been detained in contravention of Article 42 of Geneva Convention IV, i.e., they are detained without reasonable grounds to believe that the security of the Detaining Power makes it absolutely necessary; - the procedural safeguards required by Article 43 of Geneva Convention IV are not complied with in respect of detained civilians, even where initial detention may have been justified; and - they occur as part of a widespread or systematic attack directed against a civilian population".

¹¹³ See AMBOS (K)., Treatise on International Criminal Law, Vol. II (2014): The Crimes and Sentencing Ambos,[REDACTED].

¹¹⁴ [REDACTED].

¹¹⁵ See the Burundi Decision, *supra* note 106, para. 68.

¹¹⁶ [REDACTED].

¹¹⁷ [REDACTED].

¹¹⁸ [REDACTED].

¹¹⁹ [REDACTED].

advances that [REDACTED]¹²⁰ [REDACTED].¹²¹ The Defence further contends that [REDACTED]¹²² [REDACTED].¹²³

64. The Legal Representatives submit that the interpretation of the Defence is misleading. Cumulative charging is a widely accepted practice before international criminal tribunals, even where one charge is fully subsumed in another charge. The ICTY, the ICTR, the SCSL, and the ECCC have each entertained multiple charges against a defendant based on the same underlying acts.¹²⁴

65. The Appeals Chamber at the ICTY ruled for example that :

*“Cumulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven. The Trial Chamber is better poised, after the parties’ presentation of the evidence, to evaluate which of the charges may be detained, based upon the sufficiency of the evidence. In addition, cumulative charging constitutes the usual practice of both this Tribunal and the ICTR”.*¹²⁵

66. Pre-Trial Chamber I of this Court allowed cumulative charging in the *Al Bashir* case, even where one charge was fully subsumed in another charge. In that case, the Chamber found reasonable grounds to believe that the crimes of murder and extermination were committed by the Government of Sudan forces against civilians on the basis of the same underlying acts.¹²⁶ As a result, the Chamber included both charges in its first arrest warrant despite the crime against humanity of murder being encompassed by the crime of extermination.

¹²⁰ [REDACTED].

¹²¹ [REDACTED].

¹²² [REDACTED].

¹²³ [REDACTED].

¹²⁴ See ICTY, *The Prosecutor v. Delalić et al.*, Judgement (Appeals Chamber), [IT-96-21-A](#), 20 February 2001, para. 400. See also, ICTR, *The Prosecutor v. Rutaganda*, Judgement and Sentence (Trial Chamber), [ICTR-96-3-T](#), 6 December 1999, paras. 108-119; ICTR, *The Prosecutor v. Musema*, Judgement and Sentence (Trial Chamber), [ICTR-96-13-T](#), 27 January 2000, paras. 1289-99; SCSL, *The Prosecutor v. Sesay et al.*, Judgement (Appeals Chamber), [SCSCL-04-15-A](#), 26 October 2009, para. 1192; ECCC, *The Prosecutor v. Nuon Chea et al.*, Closing Order, [002/19-09-2007](#), 15 September 2010.

¹²⁵ See ICTY, *The Prosecutor v. Čelebići* (Appeals Chamber), [IT-96-21-A](#), 20 February 2001, p. 400.

¹²⁶ See the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, No. [ICC-02/05-01/09-3](#), 4 March 2009, paras. 94-96.

67. Therefore, the Legal Representatives submit that the Defence's restrictive interpretation does not reflect the practice developed so far before the Court and other international tribunals. Moreover, at this early stage of the proceedings it would unduly limit the Prosecution's right to fully present its case.¹²⁷ Cumulative charges at the pre-trial stage will also allow the Chamber to assess and determine the adequate qualification of the crimes before moving to the trial phase.

68. Finally, the Legal Representative underline that it is in the interest of the Victims they represent that the charges reflect the extent of the events and of the victimisation they have suffered from. The confirmation of both charges at this stage of the proceedings will ensure that the overall impact of the criminal acts and conducts and the extent of the victimisation as described by the participating victims in their accounts is fully reflected in the record of the case.

3. On the evidentiary threshold required for the confirmation of the charges

69. The Legal Representatives submit that the arguments presented by the Defence for Mr Ngaïssona during the confirmation of charges hearing amount to an attempt to bring into the current stage of the proceedings the evidentiary threshold only applicable at trial - namely that the Chamber must be convinced of a defendant responsibility beyond reasonable doubt.¹²⁸

70. The Defence seems to contend that since some of the evidence tendered against the Suspect could be reasonably interpreted not only in an incriminatory manner, the charges should not be confirmed. However, the Pre-Trial Chambers of the Court have consistently understood the evidentiary threshold established by article 61(7) of the Statute as requiring the Prosecution to merely offer "*concrete and*

¹²⁷ See the "Judgment on the Prosecutor's Appeal against the Decision of Trial Chamber II entitled 'Judgment Pursuant to Article 74 of the Statute'", No. [ICC-01/04-02/12-271-Corr A](#), 7 April 2015, para. 256.

¹²⁸ See e.g. the transcript of the hearing held on 23 September 2019, No. [ICC-01/14-01/18-T-008-Red-ENG WT](#), page 75, lines 10-12.

tangible proof demonstrating a clear line of reasoning underpinning its specific allegations”.¹²⁹

71. The evidentiary threshold for the confirmation of the charges is admittedly higher than the one required for the issuance of a warrant of arrest or a summons to appear in order to protect the suspect against wrongful prosecution and ensure judicial economy.¹³⁰ Nonetheless, the Legal Representatives submit that the threshold for the confirmation of the charges cannot and should not be as demanding as the one applicable at trial.

72. In this regard, Pre-Trial Chamber III stated that “[t]he nature of these evidentiary thresholds depends on the different stages of the proceedings and is also consistent with the foreseeable impact of the relevant decisions on the fundamental human rights of the person charged”.¹³¹ Consistent with this approach, Pre-Trial Chamber I has determined that “[t]he evidentiary threshold to be met for the purposes of the confirmation hearing cannot exceed the standard of ‘substantial grounds to believe’, as provided for in article 61(7) of the Statute”,¹³² and that “at no point should Pre-Trial Chambers exceed their mandate by

¹²⁹ See the “Decision on the confirmation of charges” (Pre-Trial Chamber I), No. [ICC-01/04-01/06-803-tENG](#) (the “Lubanga Confirmation Decision”), para. 39; the “Decision on the confirmation of charges” (Pre-Trial Chamber I), No. [ICC-01/04-01/07-717](#), 30 September 2008 (the “Katanga and Ngudjolo Confirmation Decision”), para. 65; the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo” (Pre-Trial Chamber II), No. [ICC-01/05-01/08-424](#), 15 June 2009 (the “Bemba Confirmation Decision”), para. 29; the “Decision on the Confirmation of Charges” (Pre-Trial Chamber I), No. [ICC-02/05-02/09-243-Red](#), 8 February 2010 (“Abu Garda Confirmation Decision”), para. 37; the “Corrigendum to the ‘Decision on the Confirmation of Charges’” (Pre-Trial Chamber I), No. [ICC-02/05-03/09-121-Corr-Red](#) (“Banda and Jerbo Confirmation Decision”), 7 March 2011, para. 30; the “Decision on the confirmation of charges” (Pre-Trial Chamber I), No. [ICC-01/04-01/10-465-Red](#), 16 December 2011 (the “Mbarushimana Confirmation Decision”), para. 40; the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” (Pre-Trial Chamber II), No. [ICC-01/09-01/11-373](#), 23 January 2012 (the “Ruto et al. Confirmation Decision”), para. 40; and the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” (Pre-Trial Chamber II), No. [ICC-01/09-02/11-382-Red](#), 23 January 2012 (the “Muthaura et al. Confirmation Decision”), para. 52.

¹³⁰ See the “Lubanga Confirmation Decision”, *supra* note 129, para. 37; the “Katanga and Ngudjolo Confirmation Decision”, *supra* note 129, para. 63; the “Bemba Confirmation Decision”, *supra* note 129, para. 28; the “Banda and Jerbo Confirmation Decision”, *supra* note 129, par. 31; the “Mbarushimana Confirmation Decision”, *supra* note 129, para. 41; the “Ruto et al. Confirmation Decision”, *supra* note 129, par. 40; and the “Muthaura et al. Confirmation Decision”, *supra* note 129, para. 52.

¹³¹ See the “Bemba Confirmation Decision”, *supra* note 129, para. 27.

¹³² See the “Katanga and Ngudjolo Confirmation Decision”, *supra* note 129, para. 62.

*entering into a premature in-depth analysis of the guilt of the suspect. The Chamber, therefore, shall not evaluate whether the evidence is sufficient to sustain a future conviction. Such a high standard is not compatible with the standard under article 61(7) of the Statute”.*¹³³

73. The Legal Representatives note that the Appeals Chamber has confirmed the existence of different and progressively higher evidentiary thresholds applicable at successive stages of the proceedings, by clarifying that *“the evidentiary threshold of ‘reasonable grounds to believe’ for the issuance of a warrant of arrest must be distinguished from the threshold required for the confirmation of charges (‘substantial grounds to believe’, article 61(7) of the Statute) and the threshold for a conviction (‘beyond reasonable doubt’, article 66(3) of the Statute). It is evident from the wording of the provisions that the standards of ‘substantial grounds to believe’ and ‘beyond reasonable doubt’ are higher standards of proof than ‘reasonable grounds to believe’. [...] Certainty as to the commission of the crime is required only at the trial stage of the proceedings (see article 66(3) of the Statute), when the Prosecutor has had a chance to submit more evidence”.*¹³⁴

74. In light of the above jurisprudence, the Legal Representatives posit that, at the present stage of the proceedings, the Chamber is not meant to determine the suspects’ criminal responsibility or lack thereof. Instead, at this stage the Chamber is meant to assess, like in many national jurisdictions,¹³⁵ whether sufficient evidence has been put forward to commit Mr Yekatom and Mr Ngaïssona for trial. During the trial proceedings, all relevant evidence will be introduced and thoroughly considered, and the principle of *in dubio pro reo* will be fully applicable. Accordingly, allegations on the contradictory nature of *some* pieces of evidence and on the low probative

¹³³ See the “Abu Garda Confirmation Decision”, *supra* note 129, para. 40.

¹³⁴ See the “Judgment on the appeal of the Prosecutor against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’” (Appeals Chamber), No. [ICC-02/05-01/09-73](#), 3 February 2010, paras. 30-31. See also the “Bemba Confirmation Decision”, *supra* note 129, para. 27; the “Ruto *et al.* Confirmation Decision”, *supra* note 129, para. 40; and the “Muthaura *et al.* Confirmation Decision”, *supra* note 129, para. 52.

¹³⁵ See, for instance, the German Code of Criminal Procedure (*Strafprozeßordnung*), 1 February 1877, ss. 201 and 203; the Russian Criminal Procedure Code (*Ugolovno-protsessual’nyi kodeks Rossiiskoi Federatsii*), 18 December 2001, arts. 228 and 236; the Magistrates’ Courts Act 1980 (c. 43), 1 August 1980, ss. 4 and 6; and the US Federal Rules of Criminal Procedure, 21 March 1946, rule 5.1.

value of *some* others are not sufficient or relevant at the present stage to discontinue the proceedings against the Suspects. In this regard, the extensive reference by the Defence for Mr Ngaïssona to the threshold used in the *Gbagbo and Blé Goudé* case in relation to the existence of the common plan¹³⁶ is misleading because it refers to a situation which reached the end of the presentation of evidence by the Prosecution at trial, a stage at which a different threshold for the evaluation of the evidence is applicable.

75. Moreover, the Legal Representatives wish to highlight that while the Defence alleges that some of the evidence relied upon by the Prosecution has a low probative value because of its very nature,¹³⁷ the Defence itself often relied on materials of the same kind, such as public reports by non-governmental organisations in order to sustain its alternative hypotheses.¹³⁸

V. CONCLUSION

76. Considering the evidence presented by the Prosecution and the corroboration thereof by the accounts of the participating victims, the Legal Representatives submit that there is sufficient evidence to establish substantial grounds to believe that Mr Yekatom and Mr Ngaïssona committed the crimes alleged against them, reaching the standard of proof required by article 61(5) of the Rome Statute. As such, all charges brought against both Suspects shall be confirmed by the Chamber and the Suspects committed to trial.

¹³⁶ See e.g. the transcript of the hearing held on 23 September 2019, No. [ICC-01/14-01/18-T-008-Red-ENG WT](#), page 70, lines 11-24.

¹³⁷ See e.g. the transcript of the hearing held on 23 September 2019, No. [ICC-01/14-01/18-T-008-Red-ENG WT](#), page 83, lines 9-18.

¹³⁸ See e.g. the transcript of the hearing held on 23 September 2019, No. [ICC-01/14-01/18-T-008-Red-ENG WT](#), page 68, lines 20-24; page 69, lines 8-11, and page 70, lines 5-10.

Dmytro Suprun
Common Legal Representative
of the Former Child Soldiers



Abdou Dangabo Moussa



Marie Édith Douzima Lawson



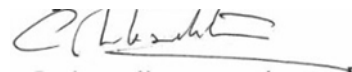
Yaré Fall



Paolina Massidda



Elizabeth Rabesandratana



Common Legal Representatives
of the Victims of other crimes

Dated this 16th day of October 2019
At The Hague (The Netherlands)